13-1371

IN THE

Supreme Court of the United States

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, *et al.*,

Petitioners,

—v.—

THE INCLUSIVE COMMUNITIES PROJECT, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AMICI CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE NATIONAL CONSUMER LAW CENTER, AND LEGAL MOMENTUM, *ET AL.*, IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST[1]

Amici curiae are organizations that provide representation, advocacy, and services on behalf of victims of housing discrimination, as well as victims of domestic and sexual violence. In furtherance of their respective missions, each organization has direct experience with the importance of maintaining disparate impact claims under the Fair Housing Act, and thus each organization has a direct interest in the proper resolution of the question presented in this case. A full statement of interest for each of the *amici* is set forth in an appendix to this brief.

SUMMARY OF ARGUMENT

The Fair Housing Act (FHA), interpreted for forty years by federal appellate courts to authorize disparate impact claims, has proven transformative in combating housing discrimination. Nonetheless, discriminatory barriers to equal housing opportunity remain deeply entrenched. This brief focuses on two contemporary forms of housing discrimination that have had particularly devastating consequences: race discrimination in subprime mortgage lending and sex discrimination against victims of domestic and sexual violence. For the same reasons that disparate impact analysis has been a critical weapon in the statute's anti-discrimination arsenal for over forty years, it remains indispensable today in fulfilling

[1] The parties have submitted blanket letters of consent to the filing of *amicus curiae* briefs. This brief was not authored in whole or in part by counsel for any party, and no party paid for the preparation or submission of this brief other than *amici*, their members, or their counsel.

Congress' promise to eradicate discrimination in housing.

1. The foreclosure crisis, which continues to batter communities across the country, was precipitated and exacerbated by widespread abuses on the part of subprime lenders. These abuses were inextricably linked to racial discrimination. A history of lending discrimination created lasting disparities in access to credit opportunities, leaving a vacuum in predominantly African American and Latino communities that was filled by subprime specialists who operated without competition. Subprime lenders set up alternative business channels, through which minority communities had access only to the riskiest and most expensive loan products. Recipients of those products, in turn, faced a severely increased risk of foreclosure. Rigorous economic and statistical analyses have repeatedly shown that racial disparities appear even when holding income and creditworthiness constant – in other words, minority borrowers received riskier loan products than similarly situated whites, leaving minority communities with significantly higher rates of foreclosure.

Disparate impact analysis provides an essential tool for remedying the widespread discrimination that defined the subprime lending boom. Courts considering disparate impact claims examine aggregate data collected by lenders, allowing them to uncover disparities and determine whether or not those disparities can be justified by credit risk or any other legitimate business considerations. Indeed, discriminatory mortgage lending is particularly susceptible to disparate

impact analysis, because lenders collect extensive financial data from borrowers. Lending decisions typically reflect algorithmic analysis of objective financial information, so disparities that persist when controlling for legitimate factors expose unlawful discrimination. Disparate impact analysis is thus uniquely powerful as a means to smoke out illegitimate discrimination that would otherwise remain unredressed.

2. Disparate impact analysis has also been critical in addressing housing discrimination against women who have been victims of domestic and sexual violence. The problem arises in a number of contexts, including zero tolerance policies that subject every member of a household to eviction if any member of the household has committed a crime, and municipal nuisance ordinances that subject tenants to eviction if they call the police too frequently. Although neutral on their face, these policies have a disproportionate impact on women, who are substantially more likely than men to suffer from domestic and sexual violence, and thus are substantially more likely to be evicted from their homes because of the violence committed against them.

In addition to being transparently unfair, such policies undermine law enforcement by deterring victims of domestic and sexual violence from reporting crimes, often leaving them trapped in violent situations that they cannot escape. By recognizing disparate impact claims, the FHA has offered legal redress to women in these circumstances so that they are not faced with the impossible choice of risking eviction for themselves

and their children, or remaining silent in the face of potentially life-threatening violence.

ARGUMENT

I. DISPARATE IMPACT IS A VITAL TOOL FOR REMEDYING THE DISCRIMINATORY LENDING PRACTICES THAT FUELED THE SUBPRIME LENDING BUBBLE AND CONTRIBUTED TO THE CURRENT FORECLOSURE CRISIS

A. Discriminatory Subprime Lending Was a Major Cause of the Foreclosure Crisis

1. *Roots of Subprime Lending*

Over the last two decades, many subprime lenders engaged in predatory practices, charging excessive fees, imposing overly risky terms, and frequently layering multiple risks in a single transaction. The impact of these practices has fallen disproportionately on minority borrowers. Subprime lenders marketing to minority communities exploited the absence of conventional lending institutions, which was the product of a history of housing discrimination. *See, e.g.*, U.S. Dep't of Hous. & Urban Dev. & U.S. Dep't of the Treasury, Curbing Predatory Home Mortgage Lending 18, 47-49 (2000) [hereinafter Curbing Predatory Home Mortgage Lending]; Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 Am. Soc. Rev. 629, 630-31 (2010).

The historical roots of contemporary disparities in access to credit can be traced to the 1930s, when the federal government developed a

rating system purporting to assess risks associated with lending in specific neighborhoods. On rating system maps, integrated or predominately black neighborhoods were marked in red. *See* Alys Cohen, Credit Discrimination (5th ed. 2009); Douglas S. Massey, *Origins of Economic Disparities: The Historical Role of Housing Segregation*, *in* Segregation: The Rising Cost for Americans 40, 69-73 (James H. Carr & Nandinee K. Kutty, eds., 2008). Loans were virtually never made in these "redlined" communities. Massey, *Origins of Economic Disparities*, *supra*, at 69. Federal courts have long recognized that the practice of redlining – *i.e.*, basing refusals to extend credit on the racial composition of neighborhoods – violates the Fair Housing Act. *See, e.g.*, *Nationwide Mutual Ins. Co. v. Cisneros*, 52 F.3d 1351, 1359-60 (6th Cir. 1995); *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489, 493 (S.D. Ohio 1976).

Even though redlining was found to be illegal, credit opportunities remained scarce in African American and Latino communities throughout the 1970s and 80s. *See* Kathleen C. Engel & Patricia A. McCoy, *From Credit Denial to Predatory Lending: The Challenge of Sustaining Minority Homeownership*, *in* Segregation: The Rising Costs for Americans, *supra*, at 81, 85. A series of Pulitzer Prize-winning newspaper articles examining lending practices in Atlanta during the 1980s illustrated the persistence of neighborhood-based racial discrimination. The investigation found that "[r]ace – not home value or household income – consistently determine[d] the lending patterns of metro Atlanta's largest financial institutions," and that "[a]mong stable neighborhoods of the same income, white

neighborhoods always received the most bank loans per 1,000 single family homes," while black neighborhoods "always received the fewest." Bill Dedman, *Atlanta Blacks Losing in Home Loans Scramble*, Atlanta Journal-Constitution, May 1, 1988, at A1. Similarly, a study by the Federal Reserve Bank of Boston found that, even after controlling for creditworthiness, blacks and Hispanics were more likely than whites to be turned down for credit. Alicia H. Munnell et al., *Mortgage Lending in Boston: Interpreting HMDA Data*, 86 Amer. Econ. Rev. 25, 26 (1996).

Redlining, and the disparities in access to credit it created, set the stage for new forms of discriminatory lending arising in the 1990s and cresting in the years leading up to the 2008 financial crisis. As the 1990s progressed, the advent of subprime lending and mortgage securitization created the tools and incentives that led subprime specialists to focus on communities previously denied access to conventional credit. Subprime products "originally were extended to customers primarily as a temporary credit accommodation in anticipation of early sale of the property or in expectation of future earnings growth." Statement on Subprime Mortgage Lending, 72 Fed. Reg. 37569-01 (Dep't of the Treas. et al. June 28, 2007). However, lenders also extended these high-cost loans to people who qualified for prime loans and to credit-impaired borrowers who could not afford the loans. *See, e.g.*, Curbing Predatory Home Mortgage Lending, *supra*, 2; Ira Goldstein with Dan Urevick-Ackelsberg, The Reinvestment Fund, Subprime Lending, Mortgage Foreclosures and Race: How Far Have We Come and How Far Have We To Go? 10 (2008). Indeed, an

analysis conducted for the *Wall Street Journal* found that, in 2005, 55 percent of subprime borrowers had sufficiently high credit scores to qualify for prime loans. Rick Brooks & Ruth Simon, *Subprime Debacle Traps Even Very Credit-Worthy*, Wall St. J., Dec. 3, 2007, at A1.

Lenders intensified these unscrupulous practices in response to explosive demand from financial firms that bundled subprime mortgages into securities products. *See, e.g.*, *Adkins v. Morgan Stanley*, -- F.3d --, 2013 WL 3835198, at *2 (S.D.N.Y. July 25, 2013); *see also* Kathleen C. Engel & Patricia A. McCoy, The Subprime Virus: Reckless Credit, Regulatory Failure, and Next Steps 56-58 (2011). In contrast to traditional lending – where banks held onto mortgages, bearing the risk and reward of payment obligations for the life of the loan – securitization allowed lenders to quickly dispose of loans, selling them to investment banks (which, in turn, sold investment interests in large pools of loans). Engel & McCoy, Subprime Virus, *supra,* at 40-41; *see also* William Apgar & Allegra Calder, *The Dual Mortgage Market: The Persistence of Discrimination in Mortgage Lending*, *in* The Geography of Opportunity: Race and Housing Choice in Metropolitan America 101, 104 (Xavier De Souza Briggs, ed., 2005). This process allowed lenders to rapidly replenish their funds, enabling a cycle of origination, sale, and securitization. Because these loans could be quickly sold, and because the secondary market incentivized origination of loans with the riskiest terms over prime loans, lenders changed their focus from quality to quantity, emphasizing volume in risky loans that generated the largest profits. Engel & McCoy, The Subprime

Virus, *supra*, at 28-29, 32-33. "Rather than simply search for the best loan product for the customer," the secondary market created incentives to "'push market' particular products to the extent that the market [would] bear." Ren S. Essene & William Apgar, Joint Ctr. for Hous. Studies, Harvard Univ., Understanding Mortgage Market Behavior: Creating Good Mortgage Options for All Americans 8 (2007) (citation omitted). For these reasons, the "invention of securitized mortgages . . . changed the calculus of mortgage lending and made minority households very desirable as clients." Rugh & Massey, *supra*, at 631.

2. *Subprime Lending Practices Resulted in Widespread Racial Disparities*

The subprime lending boom and race were inextricably linked from the outset. A joint report from the U.S. Department of Housing and Urban Development (HUD) and the U.S. Department of the Treasury found that as of 2000, "borrowers in black neighborhoods [were] five times as likely to refinance in the subprime market than borrowers in white neighborhoods," even when controlling for income. Curbing Predatory Home Mortgage Lending, *supra*, 47-48. Moreover, "[b]orrowers in *upper-income* black neighborhoods were twice as likely as homeowners in *low-income* white neighborhoods to refinance with a subprime loan." *Id.* at 48; *see also* Stephen L. Ross & John Yinger, The Color of Credit: Mortgage Discrimination, Research Methodology, and Fair-Lending Enforcement 24-25 (2002) (summarizing research on minority access to credit). In effect, a dual mortgage market took root, such that different

communities were offered "a different mix of products and by different types of lenders," and subprime lenders "disproportionately target[ed] minority, especially African American, borrowers and communities, resulting in a noticeable lack of prime loans among even the highest-income minority borrowers." Apgar & Calder, *supra*, at 102.

Other studies uncovered stark racial disparities as subprime lending expanded. One study found that, within the subprime market, "borrowers of color . . . were more than 30 percent more likely to receive a higher-rate loan than white borrowers, even after accounting for differences in risk." Debbie Gruenstein Bocian et al., Ctr. for Responsible Lending, Unfair Lending: The Effect of Race and Ethnicity on the Price of Subprime Mortgages 3 (2006). Another study found that African Americans and Latinos were much more likely to receive subprime loans, and that "the disparities were especially pronounced for borrowers with higher credit scores." Debbie Gruenstein Bocian et al., Ctr. for Responsible Lending, Lost Ground, 2011: Disparities in Mortgage Lending and Foreclosures 5 (2011). That study also found "evidence that higher-rate loans were often inappropriately targeted: as many as 61 percent of borrowers who received subprime loans had credit scores that would have enabled them to qualify for a prime loan." *Id.* at 17 (citation omitted). These practices also meant that "borrowers in minority groups were much more likely to receive loans with product features associated with higher rates of foreclosure," i.e., loans with higher interests rates or with risky terms, like ballooning interest rates. *Id.* at 21. These high

disparities persisted even after controlling for credit score. *Id.*

Disparities in subprime lending have led to high levels of foreclosure among borrowers of color, devastating black and Latino communities. As of 2010, "African Americans and Latinos [were], respectively, 47% and 45% more likely to be facing foreclosure than whites." Debbie Gruenstein Bocian et al., Ctr. for Responsible Lending, Foreclosure by Race and Ethnicity 10 (2010). These disparities persist even within income categories. *Id.* at 9-10. The Center for Responsible Lending estimates that "the spillover wealth lost to African-American and Latino communities between 2009 and 2012 as a result of depreciated property values alone will be $194 billion and $177 billion, respectively." *Id.* at 11; *see also* James H. Carr et al., Nat'l Community Reinvestment Coal., The Foreclosure Crisis and Its Impact on Communities of Color: Research and Solutions 31 (Sept. 2011) (discussing the racial wealth gap).

Examined in the aggregate, the connection between race, subprime lending, and foreclosures is starkly apparent. Researchers at Princeton University, for example, studied the relationship between neighborhood racial composition, subprime lending, and foreclosure rates, and found strong statistical links. *See* Rugh & Massey, *supra*, at 644. "Simply put, the greater the degree of Hispanic and especially black segregation a metropolitan area exhibits, the higher the number and rate of foreclosures it experiences." *Id.*; *see also* Peter Dreier et al., Haas Institute for a Fair and Inclusive Soc'y, Underwater America: How the So-Called Housing

"Recovery" is Bypassing Many American Communities 6 (May 2014) (finding African Americans and Latinos are disproportionately represented in communities still struggling with foreclosure crisis).

B. Disparate Impact Analysis Plays a Vital Role in Combating Lending Discrimination

Disparate impact analysis provides an indispensable framework for remedying discriminatory lending practices. When focusing on individual lending transactions, disparities in the availability and terms of credit are easily masked by the complexity of the loan process.[2] Yet lenders collect highly detailed data relevant to the creditworthiness of individual loan applicants. Disparate impact doctrine sets out a method for

[2] This was particularly true in the years leading up to the housing market collapse. For borrowers offered prime loans, published rates and terms were readily available, lenders gave free quotes, and lock-in commitments were common, enabling borrowers to shop for the best deal. Patricia A. McCoy, *Rethinking Disclosure in a World of Risk-Based Pricing*, 44 Harv. J. on Legis. 123, 124 (2007). In contrast, although subprime lenders had the technology and information needed to provide firm price quotes to customers at minimal cost, these lenders typically "entice[d] customers with rosy prices that [were] not available to weaker borrowers, hike[d] the price after customers [paid] a hefty application fee, then raise[d] the price again at closing, often with no advance notice." *Id.* at 124. "[P]rices in the subprime market [were] only partly based on differences in borrowers' risk. Other factors, including mortgage broker compensation, discrimination, and rent-seeking, [could] and [did] push up subprime prices." *Id.* at 127.

examining that data on a large scale and determining whether racial disparities exist that cannot be accounted for by credit risk or any other legitimate business considerations. For that reason, disparate impact analysis can root out harmful patterns of discrimination that might otherwise remain invisible and go unredressed.

Since it was first articulated by this Court in the employment context, disparate impact analysis has provided a means to combat "practices that are fair in form, but discriminatory in operation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). In effectuating that standard, this Court has explained that the evidence in disparate impact cases "usually focuses on statistical disparities, rather than specific incidents, and on competing explanations for those disparities" because this mode of analysis exposes practices that, while "adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988). Aggregate analysis is at times necessary to achieve the purpose of the civil rights laws, which are directed foremost at "the consequences of [ ] practices, not simply the motivation." *Griggs*, 401 U.S. at 432. As Congress found and this Court has recognized, discrimination is a "complex and pervasive phenomenon" most accurately described "in terms of 'systems' and 'effects' rather than simply intentional wrongs." *Connecticut v. Teal*, 457 U.S. 440, 447 n.8 (1982) (quoting S. Rep. No. 92-415, at 5 (1971)).

In the mortgage lending context, the key question is whether the availability or terms of credit

vary according to race in a manner that cannot be justified by credit risk or any other legitimate business consideration. *See* 24 C.F.R. 100.500 (providing that disparities are not unlawful if a legally sufficient justification is demonstrated). Typically, this inquiry proceeds by applying statistical regression analysis to a large sample of a defendant's loans, comparing the availability or terms of credit to borrowers of different races while controlling for factors that would legitimately affect lending outcomes. The critical ingredient in making this analysis probative of discrimination is selecting the right control variables. "[L]egitimate controls are those associated with a person's qualifications to rent or buy a house." John Yinger, *Evidence of Discrimination in Consumer Markets*, 12 J. of Econ. Persp. 23, 27 (1998). Regression analysis of aggregate data allows a court to discern pricing disparities between white and minority borrowers that cannot be justified by legitimate factors, a situation that one district court referred to as "a classic case of disparate impact," *Miller v. Countrywide Bank, N.A.*, 571 F.Supp. 2d 251, 254 (D. Mass. 2008) ("If the facts alleged in the complaint are to be believed – which they must at this point in the litigation – the net effect of Countrywide's pricing policy is a classic case of disparate impact: White homeowners with identical or similar credit scores pay different rates and charges than African American homeowners . . . .").[3]

[3] *Amici* are not aware of any court that has yet adjudicated the merits in a case alleging unjustified statistical disparities in subprime lending. Several cases pressing such allegations are

Indeed, disparate impact analysis is particularly well suited for the mortgage lending context, because allegations of mortgage discrimination can be tested in a highly sophisticated manner. Raw disparities in loan terms can be rigorously examined to determine whether they reflect objective factors related to creditworthiness –

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currently pending or have closed prior to adjudication on the merits. *See, e.g.*, *Saint-Jean v. Emigrant Mortgage Co.*, No. 11 CV 2122 SJ, 2014 WL 4803933 (E.D.N.Y. Sept. 25, 2014) (denying defendants' motion to dismiss; pending); *City of Los Angeles v. Citigroup Inc.,* No. 2:13-CV-9009-ODW RZX, 2014 WL 2571558 (C.D. Cal. June 9, 2014) (denying defendants' motion to dismiss; pending); *Adkins*, -- F.3d --, 2013 WL 3835198, *2 (denying motion to dismiss; pending); *City of Memphis v. Wells Fargo Bank, N.A.*, No. 09-2857, 2011 WL 1706756 (W.D. Tenn. May 4, 2011) (denying motion to dismiss; subsequently settled); *In re Wells Fargo Mortg. Lending Practices Litig.*, No. 3:08-md-01930 (N.D. Cal. Apr. 10, 2008) (dismissed pursuant to settlement); *Mayor of Baltimore v. Wells Fargo Bank, N.A.*, No. 1:08-CV-00062, 2011 WL 1557759 (D. Md. Apr. 22, 2011) (denying defendants' motion to dismiss; subsequently settled); Final Approval Order, *Ramirez v. Greenpoint Mortg. Funding, Inc.*, No. 3:08-cv-00369 (N.D. Cal. Apr. 12, 2011) (approving class settlement); *Guerra v. GMAC, LLC*, No. 2:08-cv-01297, 2009 WL 449153 (E.D. Pa. Feb. 20, 2009) (denying motion to dismiss; subsequently voluntarily dismissed); *Barrett v. H&R Block, Inc.*, 652 F.Supp. 2d 104 (D. Mass. 2009) (granting defendant parent company's motion to dismiss for lack of personal jurisdiction and denying subsidiaries' motion to dismiss; subsequently dismissed by stipulation); *Garcia v. Countrywide Fin. Corp.,* No. 5:07-cv-1161, 2008 WL 7842104 (C.D. Cal. Jan. 17, 2008) (denying motion to dismiss as to plaintiffs' disparate impact claims; subsequently consolidated into multi-district litigation and settled); Memorandum and Order, *Hargraves v. Capital City Mortg. Corp.*, No. 1:98-cv-01021 (D.D.C. Mar. 27, 2002) (dismissing in light of settlement).

e.g., credit score, the ratio of a loan to a home's value, an applicant's total debt obligations, etc. *See generally* Class Certification Report of Howell E. Jackson at ¶ 36, *In re Wells Fargo Mort. Lending Practices Litig.*, No. 08-CV-01930 (N.D. Cal. Sept. 1, 2010) ("Loan pricing decisions are made en masse by automated systems of regularly updated rate sheets" and are "based on the formulaic application of objective, statistically-validated criteria."). If a lending policy leads to disparities even after controlling for legitimate factors, and if the policy cannot otherwise be justified as a business necessity, those disparities reveal illicit discrimination.

This mode of analysis is uniquely effective in uncovering unjustified disparities. One recent HUD study focused specifically on whether racial disparities in rates of subprime lending could be explained by factors related to creditworthiness, concluding that "the inclusion of credit score measures did not explain away the troubling finding that even after years of public policy efforts, race and ethnicity remain important determinants of the allocation of mortgage credit in both home purchase and home refinance markets." William Apgar et al., U.S. Dep't of Hous. & Urban Dev., Risk or Race: An Assessment of Subprime Lending Patterns in Nine Metropolitan Areas 45 (2009); *see also* Complaint at ¶ 3, *United States v. Countrywide Fin. Corp.,* No. CV11 10540 (C.D. Cal. Dec. 21, 2011) ("As a result of Countrywide's policies and practices, more than 200,000 Hispanic and African-American borrowers paid Countrywide higher loan fees and costs for their home mortgages than non-Hispanic White borrowers, not based on their creditworthiness or other objective criteria related to borrower risk, but because of their

race or national origin."); Apgar & Calder, *supra*, at 111-15 (summarizing research of subprime lending designed to "control[] for neighborhood and borrower characteristics, including several measures of risk" and concluding that those studies "confirm[] that race remains a factor").

Expert witness analysis in several recent lawsuits demonstrates that, when subject to regression analyses designed to account for legitimate markers of creditworthiness, the practices of many leading subprime lenders reveal significant unjustified racial disparities. *E.g.*, Class Certification Report of Ian Ayres at ¶ 12, *Adkins v. Morgan Stanley*, No. 12-cv-7667 (June 27, 2014) ("even after controlling for more than 15 categories of non-race factors . . . the odds that an African-American borrower would receive a Combined-Risk Loan from New Century was 1.231 times greater than that of a similarly situated non-Hispanic white borrower nationwide"); Class Certification Report of Howell E. Jackson at ¶ 53, *In re Wells Fargo Mort. Lending Practices Litig.*, No. 08-CV-01930 (N.D. Cal. Sept. 1, 2010) ("even when a comprehensive list of risk-based characteristics are controlled for, African Americans' APRs are 10.1 basis points greater than whites' APRs, and Hispanics' APRs are 6.4 basis points greater than whites' APRs"); Class Certification Report of Ian Ayres at ¶ 69, *Barrett v. Option One Mortg., Corp.*, No. 08-10157 (D. Mass. Sept. 24, 2010) ("even when a comprehensive list of risk-based characteristics are controlled for, African Americans' APRs are 8.6 basis points greater than whites' APRs"); Class Certification Report of Howell E. Jackson at ¶ 52, *Ramirez v. Greenpoint Mortg. Funding, Inc.*, No. 3:08-cv-00369 (N.D. Cal. Apr. 1,

2010) ("even when a comprehensive list of risk-based characteristics are controlled for, African Americans' APRs are 9.4 basis points greater than whites' APRs, and Hispanics' APRs are 7.6 basis points greater than whites' APRs").[4]

Given the effectiveness of disparate impact analysis in identifying unjustified disparities, it is unsurprising that the federal agencies charged with enforcing the Fair Housing Act have embraced the disparate impact standard in combating discriminatory lending. Most recently, HUD promulgated a rule codifying the disparate impact standard. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013). In instituting that rule, the agency explicitly contemplated its application to facially neutral lending practices that resulted in an unjustified disparate impact. *Id.* at 11,475-76. This understanding, moreover, long predated the recent HUD rule. A 1994 interagency Policy Statement on Discrimination in Lending explains that the "existence of disparate impact" is frequently established "through a quantitative or statistical analysis" that may focus on a challenged practice's "effect on an applicant pool." Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18266-01,

[4] In light of the analysis actually employed in disparate impact cases – regression analysis which controls for legitimate credit considerations in locating disparities – it is misleading for *amici* representing the lending industry to suggest that the disparate impact standard is somehow at odds with traditional underwriting criteria. *See* Br. for Am. Fin. Servs. Ass'n et al. as *Amici Curiae* in Supp. of Pet'r at 24-28.

18,269 (Dep't of Hous. & Urban Dev. et al. Apr. 15, 1994).

An *amicus* brief filed by the lending industry asserts that the disparate impact standard impedes legitimate business practices, but those arguments ignore the fact that disparate impact liability will not attach to policies that are shown to be legitimate and necessary to originate safe loans.[5] For example, those *amici* point to government data showing that, in 2013, "African-American applicants for conventional home-purchase loans were rejected at a rate more than twice the rate at which white applicants were rejected . . . . [and] Hispanic applicants were rejected at a rate more than 1.7 times the rate at which white applicants were rejected." Br. for Am. Fin. Servs. Ass'n et al. as *Amici Curiae* in Supp. of Pet'r at 28 n.19. But if such disparities arise from facially neutral policies that are legitimate and necessary to originate safe loans, there is no threat of disparate impact liability. Conversely, in the absence of such justification, it is hard to see how the disparities cited by *amici* operate as an argument *against* the disparate impact standard – to the contrary, they

[5] Petitioners similarly invoke the application of the FHA to the lending industry. *See* Pet'r Br. at 15 ("If a mortgage lender establishes borrowing standards that some racial groups are less likely to meet than others, the lender has not discriminated 'because of race,' but because of some factor that happens to correlate with race."). This argument simply ignores the disparate impact burden-shifting scheme. Under a disparate impact analysis, a lender has discriminated "because of race" (or any other protected characteristic) not when its practice results in a disparity, but when it causes a disparity that cannot be explained by a legitimate business justification.

provide evidence of the problem that the disparate impact standard is designed to address.[6] Those *amici* also argue that disparate impact "engenders a 'Catch-22' paradigm" in which lenders must "affirmatively consider[] race in lending decisions" in a manner that constitutes intentional discrimination. *Id.* at 34. But that risk is illusory. Disparate impact claims against lenders have targeted policies that create different outcomes for similarly situated borrowers – *i.e.*, borrowers with equivalent creditworthiness. *See supra* at 13 n.5, 16-17. It is farfetched for *amici* to suggest that avoiding such unjustified disparities, and treating similarly situated borrowers equally, could constitute unlawful intentional discrimination.

Finally, the industry's suggestion that the disparate impact standard undermines sound

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[6] *Amici* concede that, under HUD's regulations, lenders have an opportunity to avoid disparate impact liability by demonstrating a legitimate business interest. Br. for Am. Fin. Servs. Ass'n et al. as *Amici Curiae* in Supp. of Pet'r at 29. But they respond with the unsupported assertion that "virtually every lender in the United States could be sued for using non-discriminatory credit standards simply because variations in economic and credit characteristics produce different credit outcomes among racial and ethnic groups." *Id.* That conclusory assertion should not obscure the actual operation of the disparate impact standard, which carefully distinguishes disparities rooted in legitimate business practices from those resulting in unjustified disparities. It is telling that the industry's argument hinges on a hypothetical floodgate effect that has not materialized, even though the FHA's disparate impact standard has applied to lenders for decades. *See, supra,* Policy Statement on Discrimination in Lending, 59 Fed. Reg. at 18,269.

lending practices is contradicted by its own description of how the lending market operates. Its brief emphasizes that lenders "sell the great majority of loans that they originate to secondary-market investors, including private investors and the government-sponsored enterprises ('GSEs'), Fannie Mae and Freddie Mac." *Id.* at 24. Fannie Mae and Freddie Mac impose underwriting guidelines, which the industry's brief presents as the basic parameters for sound lending. *Id.* at 24-26. But federal law has long required HUD to promulgate regulations ensuring that those entities do not purchase loans "in a manner that has a discriminatory effect." 12 U.S.C. § 4545(1). Longstanding practice, in other words, confirms that the industry's underwriting gold standard is totally consistent with the discriminatory effects standard.

* * *

The cascading effects of the foreclosure crisis touch every community in America. But African American and Latino communities disproportionately suffered the consequences of abusive lending practices. In light of those disparities, there remains an urgent need for effective means to address past abuses and deter future ones. For the reasons explained above, disparities in lending outcomes can be rigorously analyzed to control for legitimate factors related to a lender's business necessity. It is hard to fathom any argument in favor of insulating lenders from liability when they systematically provide credit on less favorable terms because of race in the absence of any legitimate justification. Disparate impact analysis is the principal tool for policing these abuses.

II. DISPARATE IMPACT ANALYSIS IS A CRUCIAL TOOL FOR ADDRESSING HOUSING DISCRIMINATION AGAINST DOMESTIC AND SEXUAL VIOLENCE VICTIMS

Disparate impact analysis under the FHA offers crucial legal protection to women who face eviction or housing denials based on domestic and sexual violence perpetrated against them. Domestic and sexual violence is a primary cause, and consequence, of homelessness and housing instability for women and girls. *See, e.g.*, 42 U.S.C. § 14043e (congressional finding that domestic violence causes homelessness and that an estimate of 92 percent of homeless mothers have experienced severe physical and/or sexual assault at some time, 60 percent of all homeless women and children have been abused by age 12, and 63 percent have been victims of intimate partner violence as adults); U.S. Conf. of Mayors, Hunger and Homelessness Survey 31 (Dec. 2013)(reporting that cities surveyed in 2012-2013 stated that 16% of homeless adults were victims of domestic violence); Callie Marie Rennison & Sarah Welchans, U.S. Dep't of Justice, Special Report: Intimate Partner Violence 5 (revised Jan 31, 2002) (finding the intimate partner victimization rate among women in rental housing to be "more than 3 times the rate of women living in owned housing").

Discriminatory housing policies contribute to and exacerbate the housing crises faced by victims. 42 U.S.C. § 14043e(3) (congressional finding that "[w]omen and families across the country are being discriminated against, denied access to, and even evicted from public and subsidized housing because

of their status as victims of domestic violence"). However, many of the housing policies that can punish victims – such as zero tolerance-for-crime policies (sometimes referred to as one-strike policies), or policies that explicitly target victims of domestic and sexual violence – are facially neutral. Disparate impact analysis reveals how these policies adversely affect women and girls, who make up the vast majority of victims of domestic and sexual violence. It also allows survivors to challenge housing policies that, when enforced against them, eliminate housing options and endanger their safety.

The legal protection offered to survivors by disparate impact analysis under the FHA was first established in 2001, after Tiffani Ann Alvera sought redress when she faced eviction from her Seaside, Oregon apartment pursuant to a zero tolerance policy. *See* Determination of Reasonable Cause, *Alvera v. Creekside Village Apartments*, No. 10-99-0538-8 (Dep't of Hous. & Urban Dev. Apr. 13, 2001).[7] After she was assaulted by her husband and he was imprisoned, Ms. Alvera provided a copy of the restraining order she obtained to her property manager. *Id.* at 1-2. She was then served with a 24-hour eviction notice based on the incident of domestic violence she had experienced. It stated: "You, someone in your control, or your pet, has seriously threatened to immediately inflict personal injury, or has inflicted personal injury upon the landlord or other tenants." *Id.*

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[7] HUD's Determination of Reasonable Cause is available at http://www.nhlp.org/files/6a.%20Alvera%20reasonable%20cause%20finding_0.pdf.

Ms. Alvera filed a complaint with HUD, which found that taking action against all members of a household after an incident of domestic violence "has an adverse impact based on sex, because of the disproportionate number of women victims of domestic violence." *Id.* at 4. After reviewing the available statistics on intimate partner violence and gender and the arguments presented by the management company, HUD concluded that discrimination had occurred: "The evidence taken as a whole establishes that a policy of evicting innocent victims of domestic violence because of that violence has a disproportionate adverse impact on women and is not supported by a valid business or health or safety reason." *Id.* at 6. The Department of Justice subsequently filed suit, leading to a consent decree that mandated the adoption of a housing policy prohibiting discrimination against victims of violence. Consent Decree, *United States ex rel. Alvera v. The C.B.M. Group, Inc.*, No. 01-857-PA (D. Or. Nov. 5, 2001).

Since *Alvera*, other women facing eviction following a domestic violence incident and the abuser's arrest or removal from the home have invoked disparate impact analysis under the FHA. For example, in 2003, Quinn Bouley and her two children faced eviction from their St. Albans, Vermont home. After her husband physically attacked her, Ms. Bouley called the police and fled. *Bouley v. Young-Sabourin*, 394 F. Supp. 2d 675, 677 (D. Vt. 2005). St. Albans police arrested her husband, who pled guilty to several criminal charges related to the incident, and Ms. Bouley obtained a restraining order. *Id.* Three days later, her landlord gave Ms. Bouley a 30-day notice to vacate, quoting a

provision in the lease that stated: "Tenant will not use or allow said premises or any part thereof to be used for unlawful purposes, in any noisy, boisterous or any other manner offensive to any other occupant of the building." *Id.* In other words, violence directed *against* Ms. Bouley was cited as a predicate for evicting her pursuant to a facially neutral policy. Ms. Bouley filed a federal lawsuit, including allegations that the landlord's policy of evicting the victims of domestic violence had an adverse, disparate impact on women. Complaint at ¶¶ 26-28, *Bouley v. Young-Sabourin*, 394 F. Supp. 2d 675 (D. Vt. Nov. 24, 2003) (No. 1:03-cv-320). The case settled after the court denied the defendants' motion for summary judgment. *Bouley*, 394 F. Supp. 2d at 678.

In 2006, Tanica Lewis and her two daughters were evicted from their Detroit home after her abusive ex-partner, who had never lived at the residence, broke through the windows, kicked in her door, and was arrested for home invasion. Complaint, *Lewis v. North End Village*, No. 2:07-cv-10757 (E.D. Mich. Feb. 21, 2007). Although Ms. Lewis previously had provided a copy of a current protection order to her management company, she received a 30-day notice of eviction, stating that she had violated the portion of her lease that held her liable for any damage resulting from lack of proper supervision of her guests. *Id.* at ¶¶ 22, 32. As a result, Ms. Lewis was forced to remain in a shelter with her daughters, although it was safe to return to their home given her ex-partner's incarceration. Santiago Esparza, *Landlord, Victim Settle*, Detroit News, Feb. 27, 2008. She subsequently filed a federal lawsuit that included disparate impact claims. Ultimately, she obtained a settlement that

required the management company to adopt a policy prohibiting discrimination based on domestic and sexual violence and compensated her for the financial losses she had suffered. Stipulated Order of Dismissal as to Tanica Lewis, *Lewis v. North End Village*, No. 2:07-cv-10757 (E.D. Mich. Feb. 26, 2008).

In 2007, Kathy Cleaves-Milan was evicted from her Elmhurst, Illinois apartment complex after calling the police to remove her fiancé, who was threatening to shoot her and himself with a gun. Complaint, *Cleaves-Milan v. AIMCO Elm Creek LP*, No. 1:09-cv-06143 (N.D. Ill. Oct. 1, 2009). She explained the circumstances and provided her protective order to the management company, yet was told that "anytime there is a crime in an apartment the household must be evicted." *Id.* at ¶ 31. She was compelled to move, forcing her daughter to transfer to a substandard school, and was charged a $3180 lease termination fee by the management company. *Id.* at ¶¶ 34-35, 37; *see also* Sara Olkon, *Tenant Reported Abuse – Then Suffered Eviction*, Chi. Trib., Oct. 13, 2009 (quoting Cleaves-Milan as stating, "I was punished for protecting myself and my daughter").

In 2012, after police arrested the ex-boyfriend of Lakisha Briggs for physically assaulting her, an officer warned that she could be evicted for more calls to police. Second Am. Compl. ¶¶ 51-56, *Briggs v. Borough of Norristown*, No. 2:13-cv-02191-ER (E.D. Pa. Oct. 10, 2013). Under a local ordinance adopted in Norristown, PA, police response to a property three times in four months, including for domestic disturbances, would result in revocation of the landlord's license unless the landlord evicted the

tenants. Norristown, Pa., Municipal Code § 245-3 (Jan. 5, 2009) (repealed Nov. 7, 2012). This law applied even to tenants who legitimately sought police assistance as victims of crime.[8] Ms. Briggs was left vulnerable to escalating violence – including a near-fatal stabbing to her neck – because she could no longer call the police without risking the loss of her home. Erik Eckholm, *Victims' Dilemma: 911*

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[8] Norristown is not alone. Local governments across the country are increasingly passing similar ordinances, often known as chronic nuisance ordinances, that penalize landlords based on a tenant's repeated calls to the police. Cari Fais, Note, *Denying Access to Justice: The Cost of Applying Chronic Nuisance Laws to Domestic Violence*, 108 Colum. L. Rev. 1181, 1187-95 (2008).

Many landlords seek to avoid these sanctions and eliminate the "nuisance" by evicting the unit's tenants, including victims of domestic violence who may need to reach out to police repeatedly due to the conduct of their abusers. *See* Emily Werth, Sargent Shriver Nat'l Ctr. on Poverty Law, The Cost of Being "Crime Free": Legal and Political Consequences of Crime Free Rental Housing and Nuisance Property Ordinances 8-9 (2013); Andrew Klein, Nat'l Inst. of Justice, Practical Implications of Current Domestic Violence research: For Law Enforcement, Prosecutors and Judges 1 (2009) (calls related to domestic violence are "the single largest category of calls received by police"). Indeed, a study by scholars from Harvard and Columbia established that survivors of domestic violence are regularly evicted under this type of ordinance, forcing victims to choose between calling the police and maintaining their home. Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 Am. Soc. Rev. 117, 125-127, 130, 137 (2012) (reporting that domestic violence was the third most cited nuisance activity under a Milwaukee ordinance, that properties in black neighborhoods were more than twice as likely to be cited, and surveying 58 other ordinances).

Calls Can Bring Eviction, N.Y. Times, Aug. 17, 2013, at A1. While Norristown officials were well aware that Ms. Briggs was the victim of severe domestic abuse, they nonetheless pressured her landlord to evict her after the stabbing. Second Am. Compl. ¶¶ 104-106, *Briggs*, No. 2:13-cv-02191-ER (E.D. Pa. Oct. 10, 2013). She filed suit, citing disparate impact of the ordinance on women among other claims; the Secretary of HUD also initiated his own disparate impact complaint against Norristown. *Id.* at ¶¶ 45, 136(d), 218, 222, 226, 228; Housing Discrimination Compl., *Assistant Secretary for Fair Housing & Equal Opportunity v. Borough of Norristown, PA*, No. 03-13-0277-8 (Dep't of Hous. & Urban Dev. June 5, 2013).[9] Both complaints settled, with the complete repeal of the ordinance and compensation for Ms. Briggs. Release and Settlement Agreement, *Briggs*, No. 2:13-cv-02191-ER (signed Sept. 18, 2014);[10] Conciliation Agreement between Assistant Secretary of the Office of Fair Housing and Equal Opportunity and Municipality of Norristown, Nos. 03-13-0277-8 and 03-13-0277-9 (Dep't of Hous. & Urban Dev. Sept. 17, 2014).[11]

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[9] HUD's Housing Discrimination Complaint No. 03-13-0277-8 is available at https://www.aclu.org/sites/default/files/assets/hud_complaint.pdf.

[10] The settlement agreement in *Briggs* is available at https://www.aclu.org/sites/default/files/assets/2014.09.18_-_release_and_settlement_agreement_-_fully_executed.pdf.

[11] HUD's Conciliation Agreement is available at http://portal.hud.gov/hudportal/documents/huddoc?id=HUDSecvMunicipality.pdf.

This recurring fact-pattern places the importance of the disparate impact standard in stark relief. As in *Alvera*, the seminal challenge to a zero tolerance policy disproportionately affecting women, the lawsuits discussed above have challenged facially neutral policies that are applied overwhelmingly against women. Without disparate impact analysis, even the most extreme disparities in the effect of policies that punish survivors for the violence perpetrated against them would likely lie beyond the reach of anti-discrimination law, and survivors of domestic and sexual violence deprived of housing would lack legal redress.

HUD embraced the reasoning asserted in these cases in guidance issued to all fair housing staff addressing the applicability of disparate impact analysis in situations involving domestic violence. *See* Sara K. Pratt, U.S. Dep't of Hous. & Urban Dev., Office of Fair Hous. & Equal Opportunity, Assessing Claims of Housing Discrimination Against Victims of Domestic Violence under the Fair Housing Act and the Violence Against Women Act (2011) [hereinafter HUD Memo]. The guidance notes that an estimated 1.3 million women are the victims of assault by an intimate partner each year, that about one in four women will experience intimate partner violence in her lifetime, and that 85 percent of victims of domestic violence are women. *Id.* at 2 (citing U.S. Dep't of Health & Human Services, Costs of Intimate Partner Violence Against Women in the United States (2003); Callie Marie Rennison, U.S. Dep't of Justice, Crime Data Brief: Intimate Partner

Violence, 1993-2001 (2003)).[12] Because "statistics show that discrimination against victims of domestic

[12] More recent statistics confirm that although the prevalence of domestic violence against men has increased, women still experience extremely high, and disproportionate, rates of domestic and sexual violence. M.C. Black et al., Centers for Disease Control and Prevention, National Intimate Partner and Sexual Violence Survey: 2010 Summary Report 18, 38-39, 54-55 (2011) (reporting that more than one in three women has experienced rape, physical violence, and/or stalking by an intimate partner in her lifetime, that nearly five times more women, compared to men, need medical care from domestic violence, and that thirteen times more women than men have been raped). Intimate partner violence, rape, and stalking are even more prevalent among African American women, American Indian women, and multiracial women. *Id.* at 20, 31.

While the HUD Memo focused on domestic violence, studies document the devastating impact of both domestic and sexual violence on women. The most recent Department of Justice study examining intimate partner violence found that, in 2010, 39% of female homicides were committed by a known intimate, compared to 3% of male homicides, differentials in percentages that have remained relatively constant over time. Shannan Catalano, U.S. Dep't of Justice, Special Report Intimate Partner Violence: Attributes of Victimization, 1993-2011 3 (2013). A related study found that, from 1994 to 2010, about 4 in 5 victims of intimate partner violence were female. Shannan Catalano, U.S. Dep't of Justice, Special Report Intimate Partner Violence, 1993-2010 3 (2012). Likewise, women are far more likely to be victimized by rape, sexual assault, and stalking, whether or not they know the perpetrator. Jennifer L. Truman, U.S. Dep't of Justice, Criminal Victimization, 2010 9 (2011) (finding that women experienced over 169,000 rapes and sexual assaults, compared to approximately 15,000 experienced by men); Shannan Catalano, U.S. Dep't of Justice, Special Report Stalking Victims in the United States - Revised 4 (2012) (finding that women are stalked at nearly three times the rate of men).

violence is almost always discrimination against women," the HUD Memo stated that a disparate impact analysis is appropriate when a facially neutral housing policy disproportionately affects victims. *Id.* at 2, 5. According to the guidance: "Disparate impact cases often arise in the context of 'zero tolerance' policies, under which the entire household is evicted for the criminal activity of one household member. . . . [A]s the overwhelming majority of domestic violence victims, women are often evicted as a result of the violence of their abusers." [13] *Id.* at 5.

Other laws do not provide comprehensive protection against housing discrimination. The federal Violence Against Women Act ("VAWA"), which contains targeted housing protections for victims of domestic violence, sexual assault, dating violence, and stalking, applies only to specific federally-funded housing programs and does not provide victims with an explicit administrative or judicial remedy.[14] 42 U.S.C. § 14043e-11 (2013); HUD Memo, *supra*, at 4.

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[13] In the memo, HUD stated that the application of zero tolerance policies to domestic violence victims, while not per se unlawful, may be illegal and is subject to a disparate impact analysis. HUD Memo, *supra*, at 2, 5.

[14] Contrary to the suggestion of *amici* National Leased Housing Association et al., Br. Amici Curiae of Nat'l Leased Housing Ass'n, et al. 17-18, fair housing obligations are consistent with VAWA and HUD policy. While HUD authorizes evictions from public housing based on criminal activity, VAWA prohibits application of such policies when the tenant is subjected to domestic violence, dating violence, sexual assault, and stalking. 42 U.S.C. § 14043e-11(b) (2013). Interpreting the FHA to

Only a handful of states have enacted laws specifically prohibiting discrimination against victims of domestic or sexual violence when they both apply for and live in rental housing. *See* Nat'l Housing Law Project, Housing Rights of Domestic Violence Survivors: A State and Local Law Compendium (May 2014) (including Arkansas, District of Columbia, Indiana, North Carolina, Oregon, Rhode Island, Washington, Wisconsin); Nat'l Law Ctr. on Homelessness & Poverty, There's No Place Like Home: State Laws That Protect Housing Rights for Survivors of Domestic and Sexual Violence 18-20 (2012); Legal Momentum, State Law Guide: Housing Protections for Victims of Domestic and Sexual Violence (2013). Moreover, the few states that have interpreted how their state fair housing laws apply when victims face housing discrimination have relied, in part, on their understanding that the federal FHA allows for disparate impact claims. 1985 N.Y. Op. Att'y Gen. 45 (1985), 1985 WL 194069 at *3-4 (citing the FHA in finding that the practice of denying housing to domestic violence victims has a disparate impact on women in violation of state human rights law); *Winsor v. Regency Prop. Mgmt., Inc.*, No. 94 CV 2349 (Wis. Cir. Ct. Oct. 2, 1995) (holding that the state fair housing law, which is modeled on the federal FHA, prohibits housing discrimination against victims, using a disparate impact theory). A ruling that disparate impact

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prohibit evictions of victims based on the violence perpetrated against them is consistent with HUD's requirements for public housing authorities, which must comply with VAWA's protections for victims of violence.

claims are foreclosed under the FHA would mean that most survivors of domestic and sexual violence would have severely limited recourse when subjected to eviction or housing denials simply because they were victimized by violence.

The persistence of housing discrimination against victims of domestic and sexual violence only reinforces the importance of disparate impact analysis as a legal tool. The practice of evicting victims based on their abusers' criminal activity, or the noise disturbance and property damage they cause, is widespread.[15] *See* Nat'l Law Ctr. on Homelessness & Poverty & Nat'l Network to End Domestic Violence, Lost Housing, Lost Safety: Survivors of Domestic Violence Experience Housing Denials and Evictions Across the Country 7-9 (2007) [hereinafter Lost Housing, Lost Safety]; Nat'l Sexual Violence Resource Ctr., National Survey of Advocates on Sexual Violence, Housing & Violence Against Women Act 17-18 (2011). A national survey of service providers showed that approximately 30 percent had represented domestic violence victims who were either threatened with eviction or evicted due to the violence or noise, calls to the police, or physical damage directly resulting from the violence. Nat'l Law Ctr. on Homelessness & Poverty, Domestic Violence Program, Insult to Injury: Violations of the Violence Against Women Act, at v, 12 (2009)

[15] Landlords are especially likely to become aware of these crimes because such a significant percentage occurs at home. *See, e.g.*, Shannan Catalano, U.S. Dep't of Justice, Crime Data Brief: Intimate Partner Violence in the United States 24 (revised Dec. 19, 2007).

[hereinafter Insult to Injury]; Lost Housing, Lost Safety, *supra*, at 2-4, 7-9.

Domestic and sexual violence survivors are also frequently subjected to discrimination when they apply for housing, simply because they have experienced violence. This can occur when, for example, their past history of victimization may become known to landlords because they are applying for housing while residing in domestic violence or emergency shelters. *See* Equal Rights Ctr., No Vacancy: Housing Discrimination Against Survivors of Domestic Violence in the District of Columbia (2008) (finding significant discrimination against victims applying for housing, despite the District's anti-discrimination law); Lost Housing, Lost Safety, *supra*, at 3, 5, 9-10; Anti-Discrimination Ctr. of Metro NY, Adding Insult to Injury: Housing Discrimination Against Survivors of Domestic Violence (2005); s*ee also* Insult to Injury, *supra*, at iv, 10 (reporting that more than a third of surveyed advocates had worked with victims who were denied housing for reasons directly related to domestic violence, dating violence, or stalking).

Discriminatory evictions and denials thus give rise to a double victimization, imperiling the housing options and safety of a victim when she is most in need of secure housing.[16] Housing discrimination

[16] Many victims already lose their homes due to violence. *See, e.g.*, Katrina Baum et al., U.S. Dep't of Justice, Bureau of Justice Statistices Special Report Stalking Victimization in the United States 6 (2009) (stating that one in seven stalking victims reported they moved as a result of stalking); Jana L. Jasinski et al., The Experience of Violence in the Lives of Homeless Women: A Research Report 2, 65 (2005) (finding that

based on violence compounds the safety risks because it can further trap victims, who often have few resources due to their abuse and isolation, in dangerous situations. Mary A. Dutton et al., U.S. Dep't of Justice, Development and Validation of a Coercive Control Measure for Intimate Partner Violence Final Technical Report 1, 3-6 (2005) (including batterers' control over victims' material resources in the list of coercive behaviors that frequently characterize intimate partner abuse); Kerry Healey et al., U.S. Dep't of Justice, Batterer Intervention: Program Approaches and Criminal Justice Strategies 1 (1998) (listing "total economic control" as one of the strategies comprising domestic violence).

Congress has recognized that "[v]ictims of domestic violence often return to abusive partners because they cannot find long-term housing." 42 U.S.C. § 14043e(7); *see also* Wilder Research, 2012 Minnesota Homeless Study Fact Sheet Initial Findings: Characteristics and Trends, People Experiencing Homelessness in Minnesota 2 (2013) (48 percent of homeless women reported staying in an abusive situation due to lack of housing alternatives); TK Logan et al., *Barriers to Services for*

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one out of every four homeless women is homeless because of violence committed against her); Wilder Research, Homeless Adults and Their Children in Fargo, North Dakota, and Moorhead, Minnesota Regional Survey of Persons Without Permanent Shelter 39 (2010) (similar); Ctr. for Impact Research, Pathways to and from Homelessness: Women and Children in Chicago Shelters 3 (2004) (similar).

Rural and Urban Survivors of Rape, 20 J. Interpersonal Violence 591, 600, 611 (2005) (rural women who had been sexually assaulted stated that, without housing, other services were not likely to be helpful); Am. Bar Assoc., Comm'n on Domestic Violence Young Lawyers Div., Report to the House of Delegates 2 (2003); Amy Correia & Jen Rubin, VAWnet Applied Research Forum, Housing and Battered Women 1-3 (2001); Joan Zorza, *Woman Battering: A Major Cause of Homelessness*, 25 Clearinghouse Rev. 420 (1991). Tragically, the shortage of housing alternatives has been found to be a major contributing factor to fatalities. *See, e.g.*, Jake Fawcett, Washington State Coalition Against Domestic Violence, Up to Us: Lessons learned and goals for change after thirteen years of the Washington State Domestic Violence Fatality Review 44-45 (2010).

Disparate impact analysis is therefore a crucial tool for preserving the housing and enhancing the safety of survivors of domestic and sexual violence that would otherwise be jeopardized by facially neutral policies that discriminate against victims. The eradication of that legal remedy would escalate both the risk of homelessness for victims and their children and the likelihood that they are forced to remain in dangerous living situations.

CONCLUSION

Amici respectfully urge this Court to hold that disparate impact claims can be brought under the Fair Housing Act.

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APPENDIX

INTEREST OF AMICI CURIAE

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. **The American Civil Liberties Union of Texas** is one of its statewide affiliates. Since its founding in 1920, the ACLU has appeared before this Court in numerous cases, both as direct counsel and *amicus curiae*. Of particular relevance to this case, the ACLU's Racial Justice Program engages in a nationwide program of litigation and advocacy on behalf of people who have been historically denied their constitutional and civil rights on the basis of race in housing and other areas. The ACLU's Women's Rights Project has, among other things, worked to improve access to housing for survivors of domestic and sexual violence and their children, including litigating cases on behalf of battered women who faced eviction based on the abuse they experienced**.**

Americans for Financial Reform (AFR) is a nonpartisan and nonprofit coalition of more than 200 civil rights, consumer, labor, business, investor, faith-based, and civic and community groups. Formed in the wake of the 2008 crisis, AFR works to lay the foundation for a strong, stable, and ethical financial system – one that serves the economy and the nation as a whole. Through policy analysis, education, and outreach to our members and others, AFR seeks to build public will for substantial reform of the American financial system.

The Center for Responsible Lending is a nonprofit, non-partisan research and policy advocacy organization that works to protect homeownership and family wealth by fighting predatory lending practices. Since we began in 2002, we have witnessed, studied, and fought against outrageous lending abuses that strip billions of dollars from American families. CRL strives to advance financial opportunity, security, and wealth for families and communities. We are particularly focused on promoting fair and sustainable lending practices and ending abusive financial practices that have a disproportionate impact on people of color, low- and moderate income families, and other populations including immigrants, students, seniors, women, and military personnel. These populations have too often received reduced access to responsible products and are intentionally targeted for predatory lending. Our affiliation with Self-Help, Inc., a lender to traditionally underserved borrowers, confirms that fairness and opportunity can be at the center of a thriving financial marketplace for all.

Futures Without Violence is a national nonprofit organization that has worked for over thirty years to prevent and end violence against women and children around the world. Futures Without Violence mobilizes concerned individuals, children's groups, allied professionals, women's rights, civil rights, and other social justice organizations to join the campaign to end violence through public education/prevention campaigns, public policy reform, model training, advocacy programs, and organizing. Futures Without Violence has a particular interest in supporting the economic security of victims of domestic and sexual violence.

For more than ten years, Futures Without Violence has worked with employers and unions to proactively address the workplace effects of violence and the resultant safety and economic costs. Access to employment and safe housing are critical to helping victims and their families stay safe and holding offenders accountable, and Futures Without Violence joins with *amici* in supporting the continued viability of disparate impact claims under the Fair Housing Act as an indispensable means of uncovering and redressing discrimination against victims of domestic and sexual violence.

Legal Momentum, the nation's oldest legal advocacy organization for women, advances the rights of all women and girls by using the power of the law and creating innovative public policy. Founded in 1970, Legal Momentum was one of the leading advocates for passage in 1994 of the landmark Violence Against Women Act, as well as for its subsequent reauthorizations, all of which have sought to redress the historical inadequacy of the justice system's response to domestic and sexual violence. Legal Momentum has represented survivors of domestic and sexual violence in housing and employment discrimination-related cases, and provided technical assistance materials to the public on responding to such discrimination against victims. Legal Momentum is a partner in the National Resource Center on Workplace Responses to Domestic and Sexual Violence, a consortium funded by the U.S. Justice Department in order to help employers proactively adopt workplace violence-related policies and support employees who are experiencing domestic or sexual violence.

MFY Legal Services, Inc. (MFY), a nonprofit organization, envisions a society in which no one is denied justice because he or she cannot afford an attorney. To make this vision a reality, for 50 years MFY has provided free legal assistance to residents of New York City on a wide range of civil legal issues, prioritizing services to vulnerable and underserved populations, while simultaneously working to end the root causes of inequities through impact litigation, law reform and policy advocacy. MFY provides advice and representation to more than 8,500 New Yorkers each year. In September 2008, with the implosion of the housing market, MFY created its Foreclosure Prevention Project. Over the past five years, MFY has been on the frontlines of the foreclosure crisis, providing services to more than 2,700 individuals, saving hundreds of homes from unnecessary foreclosures. MFY attorneys have witnessed first-hand the devastating and discriminatory impact of predatory mortgage lending, and, through both defensive and affirmative litigation, MFY has sought to combat its effects and preserve homeownership in New York City. MFY's Mental Health Law Project and Disability and Aging Rights Project also regularly litigates Fair Housing Act claims on behalf of people with disabilities who live in private apartments, public housing, and facilities such as adult homes**.**

The National Coalition Against Domestic Violence (NCADV), based in Colorado since 1992, was formed in 1978 to create a national network of programs serving victims of domestic violence. There are over 2,000 domestic violence programs currently in the United States. NCADV provides technical assistance, general information and referrals, and

community awareness campaigns, and does public policy work at the national level. NCADV has participated in many *amicus* briefs over the years on issues relating to domestic violence victims, for whom obtaining and keeping safe housing is a major and pressing concern. It is critical that survivors have access to legal remedies through the Fair Housing Act when they experience housing discrimination based on the violence perpetrated against them.

The National Community Reinvestment Coalition (NCRC) is a nonprofit public interest organization founded in 1990. NCRC, both directly and through its network of six hundred community-based member organizations, works to increase access to basic banking services including credit and savings, and to create and sustain affordable housing, job development and vibrant communities for America's working families. NCRC, through its National Neighbors civil rights program, seeks to advance fair lending and open housing practices nationwide and actively assists in efforts to affirmatively further fair housing and eliminate discrimination that is detrimental to the economic growth of low to moderate income and traditionally underserved communities.

The National Consumer Law Center (NCLC) is a national research and advocacy organization focusing on justice in consumer financial transactions, especially for low income and elderly consumers. Since its founding as a nonprofit corporation in 1969, NCLC has been a resource center addressing numerous consumer finance issues affecting equal access to fair credit in the

marketplace. NCLC publishes a 20-volume Consumer Credit and Sales Legal Practice Series, including Credit Discrimination, Sixth Ed., and has served on the Federal Reserve System Consumer-Industry Advisory Committee and committees of the National Conference of Commissioners on Uniform State Laws. NCLC has also acted as the Federal Trade Commission's designated consumer representative in promulgating important consumer-protection regulations.

The National Law Center on Homelessness & Poverty (the "Law Center") was founded in 1989. The mission of the Law Center is to prevent and end homelessness by serving as the legal arm of the nationwide movement to end homelessness. To achieve its mission, the organization pursues three main strategies: impact litigation, policy advocacy, and public education. Over more than a decade, the Law Center has devoted significant attention to protecting the housing rights of victims of domestic violence, thereby preventing them and their family members from becoming homeless. The Law Center has done this work through legislation such as the Violence Against Women Act, administrative advocacy with agencies such as HUD and the U.S. Department of Justice, and litigation. The Law Center joins this brief in order to emphasize the importance of disparate impact analysis in the ability of survivors to vindicate these important rights.

The National Network to End Domestic Violence (NNEDV), a 501(c)(3) organization, is the leading voice for domestic violence victims and their allies. NNEDV members include all 56 of the state

and territorial coalitions against domestic violence, including over 2,000 local programs. NNEDV has been a premiere national organization advancing the movement against domestic violence for over 20 years, having led efforts among domestic violence advocates and survivors in urging Congress to pass the landmark Violence Against Women Act (VAWA) of 1994 and subsequent reauthorizations. NNEDV has expertise in the nature and dynamics of domestic violence and its impact on victims; in issues of financial abuse and economic security for survivors of domestic violence; and in the intersection of housing policy and domestic violence. In particular, NNEDV has substantial expertise in the VAWA housing protections, the McKinney-Vento homelessness program (HEARTH Act), implementation of housing programs through the U.S. Department of Housing and Urban Development, the Office on Violence Against Women transitional housing program, and other housing rights and protections for domestic violence survivors. Its member programs consistently report that a lack of housing options is one of the most pressing problems faced by survivors and that housing discrimination against victims contributes to their inability to escape abusive situations. For that reason, NNEDV strongly advocates to improve housing opportunities for victims and to ensure that the law protects them against discrimination.

The National Organization for Women Foundation (NOW) is a 501(c)(3) organization devoted to furthering women's rights through advocacy, litigation and education. NOW Foundation's litigation activities have centered on initiatives to stop sex-based and race-based

discrimination against women – in education, employment, housing and other areas. The Foundation has also undertaken multiple efforts to end violence against women. Created in 1986, NOW Foundation is affiliated with the National Organization for Women, the largest feminist activist organization in the United States, with hundreds of thousands of members and contributing supporters with chapters in every state and the District of Columbia.

The National Resource Center on Domestic Violence (NRCDV) has been a comprehensive source of information for those wanting to educate themselves and help others on the many issues related to domestic violence since its founding in 1993. Through its key initiatives such as VAWnet (www.vawnet.org), the Domestic Violence Awareness Project (www.nrcdv.org/dvam), the Building Comprehensive Solutions to Domestic Violence Project (www.bcsdv.org), and the Domestic Violence Evidence Project (www.dvevidence project.org), NRCDV works to improve community responses to domestic violence and, ultimately, prevent its occurrence. NRCDV has a particular interest in ensuring that the judicial system adequately protects the rights of victims of sexual and domestic violence and their children. NRCDV works to advance laws and policies that recognize the special barriers faced by many domestic violence victims, and that increase access to resources that are so important for these victims to escape domestic violence.

The National Women's Law Center is a nonprofit legal advocacy organization dedicated to

the advancement and protection of women's legal rights and opportunities since its founding in 1972. The Center focuses on issues of key importance to women and their families, including economic security, employment, education, health, and reproductive rights, with special attention to the needs of low-income women, and has participated as counsel or *amicus curiae* in a range of cases before this Court to secure the equal treatment of women under the law, including cases challenging practices that have a discriminatory impact on women, even in the absence of proof of discriminatory animus. The Center has long sought to ensure that rights and opportunities are not restricted for women based on arbitrary practices or policies not justified by compelling interests.

The Sargent Shriver National Center on Poverty Law (Shriver Center) is a national non-profit that advocates on behalf of low-income families and individuals, representing them in a wide range of policy and legal matters including housing, domestic violence and sexual assault, employment, public benefits, community and criminal justice, education, health care, and the manner in which these issues impact individuals' and groups' civil rights. The Shriver Center's Safe Homes Initiative advocates for and protects the housing rights of survivors of domestic violence and sexual assault. The Shriver Center is committed to ensuring that the Fair Housing Act's intent and purpose are preserved and the rights of individuals with respect to housing are protected.