No. 10-1032

IN THE

# Supreme Court of the United States

STEVE MAGNER ET AL.,

*Petitioners*,

v.

THOMAS J. GALLAGHER ET AL.,

*Respondents.*

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

## BRIEF FOR THE RESPONDENTS


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## QUESTIONS PRESENTED

The Questions Presented in the petition for certiorari, which this Court granted without modification, are:

1. Are disparate impact claims cognizable under the Fair Housing Act?

2. If such claims are cognizable, should they be analyzed under the burden shifting approach used by three circuits, under the balancing test used by four circuits, under a hybrid approach used by two circuits, or by some other test?

## PARTIES TO THE PROCEEDINGS BELOW

Petitioners are defendants Steve Magner, individually and as a supervisor of the City of St. Paul's Department of Neighborhood Housing and Property Improvement; Randy Kelly, individually and as Mayor of the City of St. Paul; Andy Dawkins, individually and as Director of the City of St. Paul's Department of Neighborhood Housing and Property Improvement; Dean Koehnen, individually and as a law enforcement officer of the City of St. Paul; Michael Urmann, individually and as a fire inspector of the City of St. Paul; the City of St. Paul, a municipal corporation; and Michael Kalis, Dick Lippert, Kelly Booker, Jack Reardon, Paula Seeley, Lisa Martin, Michael Cassidy, Joel Essling, Steve Schiller, Joe Yannarelly, Dennis Senty, and Rich Singerhouse, individually and as code enforcement officers of the City of St. Paul. Also sued were certain unnamed parties: John Doe and Jane Doe, individually and in their official capacities as code enforcement officers of the City of St. Paul's Department of Neighborhood Housing and Property Improvement; and Law Enforcement Officers or Other Officials or Employees of the City of St. Paul, individually, joint and severally.

Respondents are plaintiffs Thomas J. Gallagher, Frank J. Steinhauser, III, Mark E. Meysembourg, Kelly G. Brisson, Sandra Harrilal, Bee Vue, Lamena Vue, Steven R. Johnson, d/b/a Market Group and Properties, Joseph J. Collins, Sr., Dadder's Properties, LLC, Dadder's Estates, Dadder's Enterprises, LLC, Dadder's Holdings, LLC, Troy Allison, Jeff Kubitschek, and Sara Kubitschek.

**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

### Cases

**Statutes**

**Regulatory Materials**



**Other Authorities**

## BRIEF FOR THE RESPONDENTS

Respondents Thomas J. Gallagher et al. respectfully request that this Court dismiss the writ of certiorari as improvidently granted or alternatively affirm the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

## OPINIONS BELOW

The court of appeals' decision (Pet. App. 1a-42a) is reported at 619 F.2d 823. The district court's decision (Pet. App. 48a-115a) is reported at 595 F. Supp. 2d 987.

## JURISDICTION

The Eighth Circuit denied rehearing en banc on November 15, 2010. The Petition for a Writ of Certiorari was timely filed on February 14, 2011, and granted on November 7, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

The relevant statutory provisions are reproduced as an Appendix to this brief.

## STATEMENT OF THE CASE

### I. Statutory Background

a. In 1968, Congress enacted the Fair Housing Act ("FHA" or "the Act") as one of three civil rights statutes designed both to combat purposeful discrimination and also to eradicate the sorry legacy of the nation's long and pernicious history of discrimination in employment, education, and housing. The first of those measures in time, the Civil Rights Act of 1964, addressed racial

discrimination and segregation in education, employment, public services, and places of public accommodation. Pub. L. No. 88-352. Title VII of that Act, which addresses discrimination in employment, served as the model for Congress's enactment of two other civil rights statutes just a few years later: the Age Discrimination in Employment Act ("ADEA") in 1967, Pub. L. No. 90-202; and the Fair Housing Act in 1968, Pub. L. No. 90-284, tit. VIII.[1]

This Court unanimously held that Section 703(a)(2) of Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (citing 42 U.S.C. § 2000e-2(a)(2)). Relying heavily on that ruling and on the parallel between the language and structure of Title VII and the ADEA, the Court similarly held that Section 4(a)(2) of the ADEA recognizes such "disparate impact" claims. *Smith v. City of Jackson*, 544 U.S. 228 (2005).

b. Congress enacted the third leg of this stool of formative civil rights legislation, the Fair Housing Act, as "a detailed housing law, applicable to a broad range of discriminatory practices and enforceable by a complete arsenal of federal authority." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 417 (1968). The FHA was a central component of Congress's

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[1] *See, e.g.*, *Lorillard v. Pons*, 434 U.S. 575, 584 (1978) ("[T]he prohibitions of the ADEA were derived *in haec verba* from Title VII."); *Larkin v. Mich. Dep't of Soc. Servs.*, 89 F.3d 285, 289 (6th Cir. 1996) (describing the parallel between the FHA and Title VII).

comprehensive effort to address the pervasive web of discrimination denying minorities equal access to employment, education, housing, and public services. *See generally* Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 Washburn L.J. 149 (1969). In the words of its principal sponsor, Senator Walter Mondale, the purpose of the FHA was to replace ghettos with "truly integrated and balanced living patterns." 114 Cong. Rec. 3422 (1968).

In language that directly parallels both Section 703(a)(2) of Title VII and Section 402(a) of the ADEA, Section 804(a) of the FHA makes 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(a).

Local communities that "receiv[e] Federal funds" from the HUD-administered Community Development Block Grant ("CDBG") program are also required to "certify that they will *affirmatively* further fair housing." U.S. Dep't of Housing and Urban Dev., Fair Housing Planning Guide, Vol. 1, at i (1996) (emphasis added). The agency's regulations specifically require those jurisdictions to "take appropriate actions to overcome the effects" of impediments to fair housing, without regard to whether those impediments directly result from purposeful discrimination. U.S. Dep't of Housing and Urban Dev., Memorandum, *Fair Housing Agencies*

*eligible for Community Development Block Grant (CDBG) and other HUD Program funding* 1 (Jan. 11, 2008); *see* 24 C.F.R. §§ 91.200-.230.

Between 1968 and 1988, nine courts of appeals considered whether disparate-impact claims were cognizable under the FHA; all nine squarely held that they were. Against that backdrop, Congress rejected an amendment that would have overturned those decisions and instead adopted three targeted defenses to disparate-impact claims under the Act. 42 U.S.C. §§ 3605(c), 3607(b)(1), 3607(b)(4); 133 Cong. Rec. S4088 (daily ed. Mar. 27, 1987).

The amendments also authorized HUD to conduct formal adjudications of alleged violations of the Act, *see* 42 U.S.C. §§ 3610, 3612, and to issue regulations implementing the Act, *see id.* § 3614. HUD, in turn, has long construed the statute to encompass disparate-impact claims in formal adjudications, policy statements, and briefs filed in court. *See* U.S. Br. 22. Most recently, HUD has published a Notice of Proposed Rulemaking ("NPRM"), reiterating its settled interpretation of the Act as "prohibit[ing] housing practices with a discriminatory effect, even where there has been no intent to discriminate." 76 Fed. Reg. 70,921. But noting that the precise test for adjudicating disparate-impact claims required clarification, the agency solicited public comments on that question. *Id.* at 70,923. The comment period closed on January 17, 2012. *Id.* at 70,921. The agency is expected to issue final regulations that account for those comments in the coming months.

## II. Factual Background

The City of St. Paul, Minnesota ("the City") is both subject to the FHA and, as a recipient of federal assistance, under a federal obligation to affirmatively further fair housing. This case arises from the City's adoption of a policy to nonetheless limit its stock of private low-income housing, including by forcing respondents to abandon or sell the housing they provided, in favor of owner-occupied housing. The City pursued that specific policy through the selective and often illegal application of its housing code in a manner designed to produce the closure or abandonment of private low-income rental properties either directly, through condemnation, or indirectly, by rendering the maintenance of the properties uneconomical. The City's actions included targeting respondents' properties for "code to the max" and "forced sale" treatment, falsely labeling those properties as "problem" and "distressed" housing, charging those properties with false code violations, failing to provide respondents with timely notice of claimed code violations, and condemning the properties without a sufficient basis. The City's policy predictably had a disparate impact on the disproportionately minority population who lived in that housing. *See, e.g.*, Pls.' Ex. 145, Pt. 3, at 8 (expert report of state building official Don Hedquist); Pls.' Ex. 79, Pt. 2, at 10-13 (deposition of tenant LaChaka Cousette); Pls.' Ex. 80, at 6-7 (Cousette affidavit).

a. The demand for affordable housing in St. Paul far outstrips supply. As of 2005, over six thousand people were on the City's waiting list for publicly owned low-income housing, resulting in a two- to

four-year wait for those joining the list. Pls.' Ex. 268, Pt. 2, at 23. As a result, many low-income residents of St. Paul must pursue private rental options. The City's inner "core" neighborhoods have a concentration of older, affordable low-income rental housing stock, where residents seeking affordable housing often live. Defs.' Ex. 268, Pt. 3, at 1.

St. Paul's shortage of affordable housing is felt most acutely by racial and ethnic minorities. Of those seeking City-owned low-income housing in 2005, fully sixty-one percent were African Americans, Pls.' Ex. 268, Pt. 2, at 23, notwithstanding that African Americans make up only 11.7 percent of the City's population, Pet. 18a. African Americans are also dramatically overrepresented in emergency shelters. Pls.' Ex. 237, Pt. 1, at 35. Minority renters in the City are overall more likely to have problems obtaining housing than white renters. Pls.' Ex. 262 (data from HUD's 2000 Comprehensive Housing Affordability Strategy).

b. Beginning in 2000, the City decided to change its previously confrontational code enforcement approach to a cooperative policy under which city officials and inspectors would work with owners of problem properties to reduce complaints, improve housing stock, and reduce the displacement of tenants. Pls.' Ex. 303, at 2. The new program, "Problem Properties 2000" ("PP2000"), did not apply to all rental homes, but rather focused on homes that were claimed to have had tenant behavior issues and housing code violations. *Id.*

Collaboration, rather than hostility, was the City's strategy under PP2000. In the words of PP2000 Inspector Jeffrey Hawkins, the program's

goal was to "communicate with the landlords and see what problems they were having so that [the City] could formulate a better plan for compliance instead of just punishment." Pls.' Ex. 113, Pt. 1, at 5. Accordingly, inspectors did not itemize every potential violation at a property, nor did they seek opportunities to condemn properties, force tenants out of their homes, and drive landlords out of business. Instead, inspectors exercised discretion to prioritize problems and provide landlords with sufficient opportunity to bring their properties into compliance, working with owners to ensure improvement in the housing stock and tenants' comfort and safety. *Id.* at 4-7.

PP2000 was a success by all measures. Inspectors and City officials alike lauded the program as a way to obtain compliance and improve the housing stock while maintaining a positive working relationship with landlords of private, low-income housing. *Id.* at 7. The City's PP2000 Progress Report concluded that "the program ha[d] been effective in eliminating complaints against the participating owners"; moreover, it "also opened lines of communication and [created] a spirit of cooperation with the owners." Pls.' Ex. 303, at 4. Landlords observed that complaints against their properties "dropped off considerably" because of their collaboration with inspectors. Pls.' Ex. 140, Pt. 1, at 8; *see also* Pls.' Ex. 145, Pt. 3, at 8. The St. Paul City Council recognized PP2000's success, expressing the view that "[t]here are also other problem properties that should be included" and that "the program could be expanded to include those." Pls.' Ex. 257, at 5.

c. This case arises from the City's abrupt termination of PP2000, much to the detriment of both landlords and their tenants, in 2002 in favor of an aggressive policy to convert its stock of privately owned low-income housing to owner-occupied homes. The St. Paul Department of Neighborhood Housing and Property Improvement ("NHPI"), headed by Andrew Dawkins, took responsibility for enforcing the housing code. Pet. App. 6a. Reflecting that agency's mission to "improve[]" the City's "neighborhood['s]," Dawkins and other officials "favored owner-occupied housing over rental housing 'for the sake of the neighborhood.'" *Id.* NHPI thus embarked on a policy designed to prompt a "[c]hange in ownership" of private low-income rental properties. Pls.' Ex. 8, Pt. 1, at 12. It pursued that policy by raising building standards in violation of the state building code, dramatically increasing code enforcement, and targeting and discouraging private, low-income rental properties. *Id.*

The City specifically sought to maximize opportunities to enter low-income rental units to identify code violations, which were then invoked to close the units, displace tenants, and deny the landlords rental income. A police training bulletin co-written by Dawkins instructed officers to be on the lookout for any and all code violations, emphasizing that "THIS INFORMATION IS ESPECIALLY IMPORTANT IF YOU GET INSIDE THE PREMISES because this will allow Code Enforcement to get an administration search warrant that could lead to condemnation of the property, eviction of the occupants and boarding-up the property." Pls.' Ex. 47, at 20.

Once inside, inspectors were instructed to "code to the max," Pls.' Ex. 8, Pt. 4, at 6; Pls.' Ex. 24, at 6, by citing landlords for interior and exterior violations that would be overlooked in more affluent neighborhoods or for less disfavored owners, Pls.' Ex. 8, Pt. 4, at 6; Pls.' Ex. 24 at 6; Pls.' Ex. 145, Pt. 1, at 9.

As confirmed by third parties, inspectors would fabricate claimed violations. *See e.g.*, Pls.' Ex. 145, Pt. 1, at 11-13. Examples include false citations for rodent infestation, non-working heating systems, and the lack of a pressure relief valve on a boiler. *Id.*

Once a property was targeted, the City no longer made any attempt to work with landlords to remedy the violations by, for example, providing adequate time to bring their properties into compliance. In fact, in many cases, the City did not even provide the notice and opportunity to comply required by the housing code. *See, e.g.*, Pls.' Ex. 143, Pt. 1, at 6-8. For instance, the City mailed notices of violations only after the deadline to correct them had passed; to respondents' further prejudice, notices were sent to old and incorrect addresses. *See, e.g.*, *id.* at 4, 6-8.

d. The City went to even greater lengths to force closure or changes in ownership for units designated as "problem properties." The City's definition of a "problem property" was malleable: Buildings were labeled problem properties if they had "both building maintenance issues and nuisance behavior issues," Pls.' Ex. 119, at 5, but the City also stated on its public website that "a problem property is best defined by simply saying: if you live next door to a problem property you know it!," Defs.' Ex. 6, at 1.

The malleable definition of a "problem property" gave the City a ready tool to apply a heavy-handed, "code-to-the-max" policy when it wanted to shut down low-income rental homes. For example, one of the City's most senior inspectors testified that the practical definition of a problem property varied from neighborhood to neighborhood. Pls.' Ex. 107, Pt. 3, at 17, Dep. of Patricia Fish, City Fire Inspector (agreeing that a "property defined as a chronic problem property in one neighborhood may not be a problem in another").

At "problem properties," unlike at other rental properties, the City issued landlords criminal citations for any and all code violations, "regardless of past history or compliance." Pls.' Ex. 119, at 5. A police training bulletin observed that "[a] single nuisance incident . . . is enough to revoke a landlord's rental registration certificate; enough to start an eviction . . . and a third nuisance incident . . . gets the property boarded up for a year." Pls.' Ex. 47, at 21. Once a property was flagged as a problem property, *other* rental properties owned by the same landlord were automatically deemed targeted problem properties. Pls.' Ex. 119, at 5 (NHPI document stating that "when the subject property *or another property of your's* [sic] has been determined to be a 'problem property' we will issue tags regardless of past history or compliance" (emphasis added)).

e. The predictable result of the City's policy to replace low-income rental housing with owner-occupied housing was to diminish the housing available to racial and ethnic minorities. As the City was aware, landowners and landlords such as respondents faced tenuous economic circumstances in

providing low-income rental housing. *E.g.*, Pls.' Ex. 9, Pt. 3, at 11. While such properties are almost always older homes with greater maintenance needs than newer, more expensive homes, landlords' ability to generate the revenue necessary for repairs is significantly constrained by the low rents they can charge their poor tenants. *See, e.g*, Pls.' Ex. 169 ("Most rental properties in the Twin Cities have very slim profit margins and have incomes that barely allow for repair of tenant-caused damage and basic maintenance . . . ."). The City acknowledged that, when faced with stricter standards and more rigorous enforcement, small landlords would need additional resources from the City to maintain their homes in an economically viable manner. Pls.' Ex. 128, Pt. 1, at 18-21 (deposition of Cathleen Royce). But those resources were never forthcoming.

As the City and others have recognized, in such circumstances, code enforcement activities may increase costs "to a point where due to economics, the abandonment of the rental properties would occur." Pls.' Ex. 145, Pt. 3, at 9; *see also* Pls.' Ex. 9, Pt. 3, at 11 (Dawkins recognized that aggressive code enforcement could reach a "tipping point" at which rental housing was no longer economically viable); Pls.' Ex. 113, Pt. 2, at 1 (acknowledgement by Inspector Hawkins that landlords informed him that abandonment of low-income rental properties would occur if housing standards were raised); Kristopher M. Rengert, *Why Is Affordable Rental Housing Being Lost?*, 4 Housing Facts & Findings, Issue 4 (2002) (owners of "aging properties in financially and socially distressed neighborhoods" cannot "rais[e] rents to improve their financial balance sheets and

enable proper maintenance," ultimately resulting in "property abandonment").

As HUD has similarly explained in its *Fair Housing Planning Guide*, U.S. Dep't of Housing and Urban Dev., *Fair Housing Planning Guide*, Vol. 1, at 5-6 (1996)), "[b]uilding codes which require certain amenities or setbacks also affect the feasibility of providing low- and moderate-income housing development." *See also id.* at 2-18 (recognizing that "[b]arriers to affordable housing" can "include," *inter alia*, "building codes").

Similarly, HUD required St. Paul as a recipient of federal fair housing assistance to conduct an analysis that addressed whether various City policies, including the city's "building codes," have an adverse effect on fair housing. 24 C.F.R. § 91.210. The City was required to produce an "action plan" designed "to remove or ameliorate the negative effects of public policies that serve as barriers to affordable housing," including specifically "building codes." *Id.* § 91.220*; see also Fair Housing Planning Guide*, *supra,* at 4-5 (grant recipient should assess "[l]ocal building, occupancy, and health and safety codes that may affect the availability of housing for minorities, families with children, and persons with disabilities").

Predictably, the multitude of improvements demanded by the City imposed substantial financial costs on landlords and caused the properties to be withdrawn from the rental market, making them unavailable to current tenants and those waiting for housing. But the City frequently went even further, condemning properties and immediately displacing the current tenants. Even worse, rather than simply

condemning the particular unit that allegedly fell below acceptable levels, the City would condemn both units in a duplex, displacing a second family from safe, affordable housing that did not warrant condemnation. Pls.' Ex. 107, Pt. 2, at 9.

Once a home was condemned, the City evicted the tenants through orders to vacate, declared the home "vacant," and without authorization under the state building code required extensive renovations before rental occupancy would be reauthorized. *See* Defs.' Ex. 11, Pt. 1, at 20-22, 25-31. This "code compliance certification inspection" involved undertaking a comprehensive review of virtually every aspect of the property, demanding that the landlord's units comply with the code in every respect prior to reentering the low-income rental market. In addition, inspectors applied current, stricter standards "to older properties that were exempt from current building codes under state law." Pet. App. 8a; *see also* Minn. R. 1300.0220, subpt. 2 (2011) (permitting continued legal occupancy of structures built before the 1972 adoption of the state building code); *City of Morris v. SAX Invs., Inc.*, 749 N.W.2d 1 (Minn. 2008) (holding that the state building code preempts a city's stricter code requirements for rental properties). Notably, the City has not applied its "code compliance certification process" to its own stock of over four hundred older homes. *E.g.*, Pls.' Ex. 145, Pt. 3, at 6.

This selective and unlawful over-enforcement burdened not only landlords, who "suffered increased maintenance costs, fees, condemnations, and were forced to sell properties in some instances," Pet. App. 8a, but also tenants who were forced out of their

homes and had nowhere else to go. The case of LaChaka Cousette, an African-American mother of two minor children who had to live in more than ten different places (including shelters) after losing her rental home, is illustrative. Pls.' Ex. 79, Pt. 2, at 10-13; Pls.' Ex. 80, at 6-7. Ms. Cousette appropriately described the experience as "a nightmare." Pls.' Ex. 80, at 7.

**III. Procedural History**

In 2004 and 2005, respondents filed three now-consolidated suits against petitioners St. Paul and various municipal officials (collectively, "petitioners" or "the City") in federal district court. Respondents do not allege that the City merely engaged in "aggressive" code enforcement. *Contra* Pet. Br. i, 12, 18, 44. Rather, they contend that the City engaged in a selective and unlawful policy of code enforcement that had the purpose and effect of substantially limiting the stock of low-income rental property, with a disparate impact on racial and ethnic minorities.

Only respondents' disparate-impact claim under the Fair Housing Act is before this Court. The Eighth Circuit held that petitioners were not entitled to summary judgment on that claim.

a. In the district court, petitioners sought summary judgment. Respondents' opposition included an expert report by Don Hedquist, a Certified Minnesota Building Official with over thirty years of experience. Hedquist's review of housing enforcement records revealed that the City was selectively enforcing its code against private low-income landlords, citing them for violations it routinely overlooked at similar properties owned by

the City, City employees, or the local housing authority. Pls.' Ex. 145, Pt. 1, at 5-9. Hedquist found that many of the code violations alleged by the City were unfounded. *Id.* at 12-13.

Moreover, in contrast to its inflexible treatment of private landlords, the City gave other similar properties "extra time" to "take care of code issues." *Id*. at 7. Likewise, although the City took advantage of every opportunity to declare private low-income rental properties vacant (consequently subjecting them to the rigors of code compliance certification), inspectors frequently declined to declare vacant public housing units that met "the definitions in the City code for a vacant building" or were noted in inspection records as being vacant. *Id*. at 7-8.

Precise statistical data on the effects of the City's policy on the minority population are unavailable because the City has never produced the data from the assessment of impediments to fair housing (including specifically "building codes") that it was required to create under federal law. 24 C.F.R. § 91.210. Hedquist nonetheless determined that the City's discriminatory and often illegal code enforcement practices placed harsh financial burdens on landlords of low-income rental properties, making their rental businesses unprofitable and forcing them to refinance or sell their properties. Pls.' Ex. 145, Pt. 1, at 5, 14. Targeted landlords' "revenues were cut by condemnations" while, at the same time, their "business expenses increased dramatically," forcing many to withdraw from the low-income rental market. *Id.* at 14. Discriminatory condemnations "required the removal of . . . tenants," whereas even-handed code enforcement throughout the City "would

have preserved the City's housing stock and adequately met the health and safety concerns of the public and the City"; it also "would have avoided the displacement of the lower income renters and the financial burdens placed upon the Plaintiffs and other landlords." *Id.* Hedquist explained, based on his extensive experience, that the City's actions exacerbated an already severe housing shortage by displacing tenants, *see id.* at 5, 14, with disproportionate effects on racial and ethnic minorities and other protected classes in need of affordable housing, *see* Pls.' Ex. 268 Pt. 1, at 30-31, Pt. 2, at 23.

Respondents also demonstrated that the non-discriminatory PP2000 program and the City's measured approach to addressing code violations in its own public housing were viable alternatives to the City's policy. Hedquist explained that "PP2000 actually improved the quality of the housing stock and successfully addressed the concerns of the City, neighbors, tenants, and landlords," Pls.' Ex. 145, Pt. 3, at 6: it was "an alternative code enforcement policy and practice that was available for implementation in 2002 through 2006, to meet the City's legitimate code enforcement needs," *id.* at 8.

Petitioners offered no substantial rebuttal to the Hedquist report. The district court nonetheless granted the City's motion for summary judgment without addressing Hedquist's findings. *See* Pet. App. 51a.

b. On appeal, the Eighth Circuit reversed and held that the City was not entitled to summary judgment. The court began from the unchallenged premises that Section 804(a) of the FHA recognizes

disparate-impact liability and that code enforcement activities are subject to disparate-impact scrutiny. Further, the court recognized that under settled Eighth Circuit precedent, such claims are subject to a three-stage burden-shifting regime. The plaintiff must establish a prima facie case that the challenged policy caused a disparate impact upon a protected population; the defendant then must demonstrate that the policy is necessary to achieve a non-discriminatory objective; and, if the defendant satisfies that burden, the plaintiff must prove that an alternative policy would achieve the same end without causing the disparate impact. Pet. App. 16a-17a.

Applying that framework, the court held that genuine issues of material fact precluded summary judgment in the City's favor. With respect to the first step, the Eighth Circuit held that the district court had misapprehended the policy challenged by respondents as merely the City's decision to apply its own housing code rather than the federal government's. In fact, the policy identified by respondents was very different: "The common denominator in Appellants' affidavits, allegations, and briefs is that the City issued false Housing Code violations and punished property owners without prior notification, invitations to cooperate with DNHPI, or adequate time to remedy Housing Code violations." *Id.* 17a.

The court next concluded that respondents had "reasonably demonstrate[d] that the City's aggressive enforcement of the Housing Code resulted in a disproportionate adverse effect on racial minorities."

*Id.* 19a. This, the court held, followed from evidence establishing four propositions:

(a) The City experienced a shortage of affordable housing; indeed, the City itself had reported that more than a quarter of the City's "lower income residents cannot find adequate affordable housing." *Id.* 17a-18a.

(b) "Racial minorities, especially African-Americans, made up a disproportionate percentage of lower-income households in the City that rely on low-income housing." *Id*. The City's own data showed that although African Americans make up only 11.7 percent of the City's population, they make up more than 60 percent of those on waiting lists for public or subsidized housing. The data also showed that minority renters in the City are substantially more likely to be poor. *Id*.

(c) The challenged "Housing Code enforcement practices increased costs for property owners that rent to low-income tenants." *Id.*

(d) "The increased burden on rental-property owners from aggressive code enforcement resulted in less affordable housing in the City." *Id.* 19a.

The Eighth Circuit explained that a "particular statistical comparison" is "not the *only* way" to make out a prima facie case of disparate impact. *Id.* 23a-24a (citing *Teamsters v. United States*, 431 U.S. 324,

340 (1977)). Reasonable logical inferences from the data could suffice to "connect[] the dots" between the undisputed effect of a challenged practice on low-income renters and the statistical disproportion of minorities within that group. *Id.* 20a. The court of appeals thus noted that "[w]here a plaintiff demonstrates that a protected group depends on low-income housing to a greater extent than the non-protected population, other courts have found it reasonable to infer that the protected group will experience a disproportionate adverse effect from a policy or decision that reduces low-income housing." *Id.* (collecting cases). And in this case, "[v]iewed most favorably to Appellants, the evidence demonstrates that there is a shortage of affordable housing and that the City's aggressive code enforcement exacerbated that shortage." *Id.* 22a. That fact, combined with the acknowledged disproportionate representation of protected class members in the low-income rental market, sufficed to establish a prima facie case for summary judgment purposes. *Id.* 20a-22a.

The Eighth Circuit then explained that no issue relating to the second step of the burden-shifting regime was contested. In the view of the court of appeals, respondents had "concede[d] that enforcement of the Housing Code has a manifest relationship to legitimate, non-discriminatory objectives." *Id.* 24a.

The court therefore turned to the third step: the availability of a less discriminatory, equally effective alternative to the City's challenged policy. *Id.* The court again found that the district court had erred in recharacterizing respondents' claims. *Id.* 25a n.6.

Rather than casting enforcement of federal housing standards as the relevant alternative, the Eighth Circuit recognized that respondents had consistently asserted that the continuation and expansion of the predecessor PP2000 program would have achieved the City's objectives with less discriminatory impact. *Id.* 24a-25a.

The court of appeals pointedly noted that "the City has *not* argued that PP2000 would be more costly or would fail to accomplish the objectives of Housing Code enforcement." *Id.* 26a (emphasis added). "Rather, the City asserts that PP2000 would not reduce the alleged impact on protected class tenants." *Id.* The court of appeals disagreed, reasoning that respondents' evidence showed that by generating "a cooperative relationship with property owners," PP2000 had "achieved greater code compliance" while "result[ing] in less financial burdens." *Id.* Accordingly, it was reasonable to infer that "PP2000 would significantly reduce the impact on protected class members." *Id.*

Because the City did not "advance any other basis for dismissing the FHA disparate impact claim," the court reversed and remanded for further proceedings. *Id*.

c. Petitioners filed a petition for a writ of certiorari in this Court, raising what they described as two "purely legal questions" to which "[t]he specific facts involved here are immaterial": whether disparate-impact claims are cognizable under the FHA; and if so, which of three specific legal standards governs the adjudication of those claims. Pet. i; 21-22. This Court granted the petition. 132 S. Ct. 548 (2011).

## SUMMARY OF THE ARGUMENT

I. Much has changed since this Court granted the petition for certiorari. There is no longer either a live controversy between the parties relating to the second question presented, or a need for the Court to decide that question in any event. Petitioners' merits brief reverses their position at the certiorari stage and now argues that in every material respect the Eighth Circuit applied the correct test for adjudicating disparate-impact claims. Petitioners instead attempt to recharacterize the second question as addressing whether the court of appeals misapplied its own rule to the summary judgment record in this individual case. In now arguing that they were entitled to summary judgment under the agreed-upon legal standard, petitioners advance several arguments they did not make below or even in the petition for certiorari.

The circuit conflict raised by the second question presented will soon be resolved without this Court's intervention in any event. HUD has issued a Notice of Proposed Rulemaking to address the proper standard for deciding disparate-impact claims under the FHA. Given the agency's delegated interpretive authority over the statute, HUD's rule, not this Court's decision in this case, will govern in later litigation and enforcement actions that raise claims of disparate impact.

The petition should therefore be dismissed as improvidently granted. Because a ruling on the second question presented will have no importance beyond this one case, and because petitioners' argument would require the Court to invest its limited resources in a fact-bound assessment of this

summary judgment record, that question no longer merits this Court's attention. To be sure, the Court could decide the case limited to the first question presented: whether disparate impact claims are cognizable *vel non*. But that question was neither pressed below by petitioners nor passed upon by the court of appeals. Given that the issue is no longer "logically antecedent" to any question to be decided by the Court, the appropriate course is to dismiss the petition outright.

II. If the Court does decide the first question presented, it should hold that disparate-impact claims are cognizable under the FHA. In *Smith v. City of Jackson*, 544 U.S. 228 (2005), this Court reached that conclusion with respect to the parallel terms of Section 4(a)(2) of the ADEA, relying in turn on the Court's construction of Section 703(a)(2) of Title VII. The same conclusion follows by the same logic with respect to Section 804(a) of the FHA. All three provisions have the same operative language, structure, and purpose. Just as important, as in *Smith*, the agency with interpretive responsibility for the Act has determined that it permits disparate-impact claims.

Indeed, the case for recognizing disparate-impact liability under the FHA is more persuasive than with respect to the ADEA or Title VII. After nine circuit courts interpreted the FHA to permit such claims, Congress not only rejected a proposal to reverse those decisions, but adopted three defenses to disparate-impact liability.

III. If the Court goes still further and reaches the second question presented, it should adopt the burden-shifting regime supported by petitioners,

respondents, and their *amici*. That framework has significant administrability advantages over a balancing test. The Court has already adopted that rule under Title VII and ADEA. The lower courts have found the burden-shifting framework workable, and given the common purpose and many similarities between the statutory schemes, the FHA should be interpreted in the same way.

## ARGUMENT

### I. The Court Should Dismiss The Writ Of Certiorari, Or At Least Should Not Decide The Second Question Presented As Now Recharacterized By Petitioners In Their Brief On The Merits.

There is no reasonable prospect that this Court would have granted certiorari if it knew then what it knows now. The case is no longer a vehicle to resolve the circuit conflict described by the petition for certiorari, and that conflict will soon be resolved in any event by agency rulemaking. Petitioners instead now attempt to recharacterize the question on which certiorari was granted as if this Court agreed to decide whether the court of appeals misapplied its own legal standard to the summary judgment record in this single case. That is neither a question that this Court agreed to consider nor one that it would have agreed to review if it had been asked.

The other question on which this Court granted certiorari – whether disparate-impact claims are cognizable under the FHA at all – is not the subject of a circuit conflict (eleven courts of appeals agree on that question, *see* U.S. Br. 17-18 & n.5) and was neither pressed in nor passed upon by the Eighth

Circuit. It therefore does not warrant this Court's review standing alone. The case is now fact-bound and does not present any question of ongoing significance that merits this Court's attention.

How this Court addresses these circumstances is likely to be this case's lasting legacy. The Court should not encourage parties to secure review on one ground, then dramatically shift their position to pursue a favorable result on a different basis that does not merit the Court's time and attention. Rewarding petitioners' change in position would encourage litigants to game the certiorari process. "Only the questions set out in the petition, or fairly included therein, will be considered by the Court." S. Ct. R. 14.1(a). The Court has previously admonished litigants against "smuggl[ing] additional questions into a case before [the Court] after the grant of certiorari." *Norfolk So. Ry. Co. v. Sorrell*, 549 U.S. 158, 164 (2007). Those statements by the Court receive very careful attention from the bar – as would a decision deviating from the Court's clear direction. This is just such a case. The petition should accordingly be dismissed.

### A. Petitioners Secured Review By Representing To This Court That This Case Would Resolve An Important Conflict Over The Purely Legal Question Of The Standard For Deciding Disparate-Impact Claims Under The FHA.

The petition for certiorari principally presented a circuit conflict over the proper standard for adjudicating disparate-impact claims under the FHA.

That is the second question presented by the petition. Petitioners described the courts of appeals as irreconcilably divided three ways. Pet. 15-21. Required by this Court's rules to identify "[t]he questions presented for review, expressed concisely in relation to the circumstances of the case," S. Ct. R. 14.1(a), petitioners asked this Court to resolve whether disparate-impact claims should be decided "under the balancing test used by three circuits, under the balancing approach used by four circuits, under a hybrid approach used by two circuits, or by some other test." Pet. i.

Petitioners assured this Court that their petition was a vehicle to resolve that conflict. Petitioners rejected a burden-shifting standard, which they contended gives rise to disparate-impact liability in "[e]very municipality . . . with a racially diverse population," Pet. 25, and "allows neglectful landlords to skirt th[e] cities' minimum maintenance standards by bringing a FHA claim based on disparate impact," Cert. Reply 5. The Eighth Circuit's erroneous burden-shifting regime, according to petitioners at the certiorari stage, turns the FHA into "a vehicle to allow landlords to rent dilapidated and unsafe housing to minorities." *Id.*

By contrast, petitioners explained that they had endorsed "hybrid burden shifting and balancing test cases," *id.* 3, the latter of which assertedly avoided "such a draconian" result and permitted "the city's code enforcement . . . to function." Pet. 26. Petitioners highlighted the parties' conflicting perspectives: "Respondents have defined their case and their success at the Eighth Circuit by challenging the balancing factors approach case law

and seeking the more restrictive approach adopted by the Eighth Circuit." Cert. Reply 4.

The petition also asked this Court to decide an additional, threshold issue: "Are disparate impact claims cognizable under the Fair Housing Act?" Pet. i. Because that issue is logically antecedent to the standard for assessing disparate-impact liability, it is the first question presented by the petition. Petitioners acknowledged that question was neither pressed by them in the Eighth Circuit nor decided by the court of appeals. *Id.* 23-24. But they characterized "that threshold issue" as nonetheless properly before this Court because it was merely a new argument in support of their basic position that respondents had failed to state a valid disparate-impact claim. *Id.* 22-24.

Petitioners stressed that the two questions presented by the petition raised only issues of law: "The specific facts involved here are immaterial to the resolution of the questions presented and therefore the issues presented are appropriate for this Court's review." *Id.* 22. Specifically pressed by respondents' contention in their brief in opposition to certiorari that the case would devolve into nothing more than a "fact-bound assessment of the sufficiency of respondents' evidence," BIO 2-3, petitioners categorically asserted in their reply brief that their arguments were "not fact bound at all": "There are no facts specific to this case necessary to answer the question: does disparate impact analysis apply to the FHA? If it does, which of the various tests that are employed should be applied nationwide?" Cert. Reply 10.

As presented to this Court at the certiorari stage, the case thus directly presented an important and recurring legal question on which the circuits were irreconcilably divided and on which the parties took conflicting positions, as well as an additional important antecedent question. This Court granted the petition. 132 S. Ct. 548 (2011).

### B. The Premises On Which This Court Granted Certiorari Are No Longer True.

#### *1. Petitioners no longer contest the legal standard applied by the Eighth Circuit.*

a. This case is no longer a vehicle to decide the second question presented. There is now no material controversy between the parties with respect to the proper test for adjudicating disparate-impact claims, because petitioners now endorse the Eighth Circuit's standard in every material respect. Petitioners no longer urge the Court to adopt a balancing test rather than a burden-shifting regime. In fact, they do the opposite. Completely reversing their position from the certiorari stage (without acknowledgement or explanation), petitioners urge this Court to "*not* adopt" the "balancing test" they previously endorsed, Pet. Br. 41 (emphasis added), which they now argue "finds no support either in the text of the FHA or in the Court's decisions," *id.* 43. Moreover, they contend, the balancing test fails to "further the purposes of the FHA" and instead too easily invites a court to "second guess[] a city's method for enforcing its housing code." *Id.* Petitioners now affirmatively urge the adoption of a burden-shifting regime, which is the framework applied by the Eighth Circuit. *Id.* 38. So

do respondents and the United States. *See infra* Part III; U.S. Br. 26.

The legal question on which the circuits are divided is accordingly no longer the subject of a controversy in this case. At the certiorari stage, this Court pays careful attention to whether the case is a vehicle to resolve a particular circuit conflict. The Court's consistent practice has been to deny petitions for certiorari that seek to "back into" review in this Court by securing review on a question that is the subject of a circuit conflict but on which the petitioner prevailed in the court of appeals, only to urge the Court to reverse the judgment below on a ground that is not otherwise cert.-worthy. *Cf. Camreta v. Greene*, 131 S. Ct. 2020, 2032 (2011) (petitioner can petition for review from a judgment in which he prevails only in the extremely limited circumstance that he can establish that he faces ongoing injury as a result of the ground of the court of appeals' decision).

Nor generally may a party secure review of a question on which all the litigants agree with the ruling below. That principle reflects both prudential and constitutional concerns.

When the parties are in agreement, the Court will not receive the benefit of the adversarial presentation that is essential to the process of adjudication. In this case, for example, several circuits resolve disparate-impact claims through a balancing inquiry. This Court granted certiorari to decide whether that rule is correct. But now, because of petitioners' change in their litigating position, neither any party before the Court nor any *amicus curiae* defends it. The Court conceivably could have

appointed an *amicus* to advocate that rule, *cf.*, *Nat'l Fed'n of Indep. Business v. Sebelius*, No. 11-393, 2011 WL 5607401 (U.S. Nov. 18, 2011), but it has been deprived of even that opportunity by petitioners' late change in position. So this Court is at a substantial disadvantage in deciding the issue.

Just as important, Article III of the Constitution permits a federal court to decide only those questions that arise in a particular ongoing controversy, which exists only when there is a genuine dispute between the parties that is capable of judicial resolution. *See, e.g.*, *Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972). Other issues – here, what standard governs the proper disposition of disparate-impact claims – are beyond this Court's power; they may not be the subject of an advisory opinion, no matter how important.

b. To be sure, there is one minor difference between the legal rule endorsed by petitioners in their brief on the merits and the standard applied in past Eighth Circuit cases regarding the second stage of the burden-shifting framework. But that difference has no relevance to this case, and respondents take no position with respect to it; there accordingly is no controversy for this Court to resolve. As petitioners explained at the certiorari stage (but omit from their merits brief), the court of appeals found that the entire second step of the burden-shifting analysis was completely irrelevant in this case because "[r]espondents *conceded* that the City's housing code enforcement has a manifest relationship to legitimate, non-discriminatory objectives." Pet. 6 (citing Pet. App. 24a) (emphasis added).

Petitioners' position on the correct legal standard is now that "[i]f disparate-impact claims are cognizable, the *Wards Cove* test should apply." Pet. Br. 38 (major heading II-A; capitalization omitted). *Wards Cove* – like the Eighth Circuit's rule – is a three-stage burden-shifting regime. *See Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 658 (1989) ("If . . . [respondents] establish a prima facie case of disparate impact . . . the case will shift to any business justification petitioners offer . . . . This phase of the disparate-impact case contains two components: first, a consideration of the justifications an employer offers for his use of these practices; and second, the availability of alternative practices to achieve the same business ends, with less racial impact."). Petitioners' statement that the *Wards Cove* standard is "similar to" the burden-shifting standard endorsed in the Eighth Circuit's case law, Pet. Br. 42, is a very significant understatement. There is only one distinction: in the second stage, both standards place the "burden of production" on the defendant; the Eighth Circuit has also required the defendant to bear the "burden of persuasion." *Id.* 39-42.

So there is that one minor difference, but the petition for certiorari conspicuously did not ask this Court to resolve it. In fact, neither the petition nor the certiorari reply brief even *cited* this Court's decision in *Wards Cove*. Nor, tellingly, do petitioners ever assert in their merits brief that anything in this case turns on the issue. That is not surprising, because in fact it is completely irrelevant. Petitioners' arguments regarding the supposed failure of respondents' proof, *see infra*, all relate to

the first and third steps of the burden-shifting framework, under which the Eighth Circuit's decision is identical to the *Wards Cove* inquiry. The question of which party bears the burden of persuasion at the second stage thus has no consequence in this case, and respondents accordingly take no position on how to decide it.

*2. Petitioners now principally argue that the court of appeals adopted the right legal standard but misapplied that standard to the summary judgment record in this case.*

a. In place of their challenge to the Eighth Circuit's legal standard (*see supra*), petitioners' merits brief substitutes the fact-bound claim that "enforcement of St. Paul's housing code does not violate the Fair Housing Act even if the Act imposes disparate-impact liability." Pet. Br. 38 (major heading II; capitalization omitted). Petitioners submit – in an argument occupying half of their summary of argument and then fourteen pages of their brief (the longest major argument, by far) – that on the record in this case "the city was entitled to summary judgment under the *Wards Cove* test." *Id.* 44 (major heading II-B; capitalization omitted). Petitioners then include a still further argument that on this record they should prevail "[r]egardless of the governing standard." *Id.* 54.

In the course of this argument, petitioners provide a detailed discussion of how they would characterize the summary judgment record. So, for example, petitioners assert that some fraction of respondents' properties had vacancies or were rented

by tenants from non-protected classes, Pet. Br. 47-48 ("[S]ome of Respondents' allegations of 'aggressive' enforcement relate to properties that were rented by non-protected tenants or were vacant at the time of enforcement.") (citing Defs.' Ex 30, Doc. 201-41, at 147); that respondents erroneously relied on statistics in St. Paul's 2007 Vacant Buildings Report, Pet. Br. 49 n.10 ("The vacant building statistics are also insufficient because they are not limited to vacancies in low-income housing.") (citing Pls.' Ex. 253, Doc. 254-23, at 1-43; Pls.' Ex. 246, Doc. 254-15, at 1-10; Doc. 254-16, at 1-7; Doc. 254-17, at 1-11; Doc. 254-18, at 1-12; Doc. 254-19, at 1-11; Doc. 254-20, at 1-11); that respondents failed to account for increasing interest rates and local unemployment statistics on foreclosures in St. Paul, Pet. Br. 49 ("[T]he report attributes the increase to . . . increasing interest rates and unemployment levels as causes of foreclosures.") (internal quotation marks and citation omitted); and that respondents' evidence did not address the ratio of inspectors to landlords in the PP2000 pilot initiative, Pet. Br. 53 ("PP2000 operated with a ratio of roughly one inspector for every seven landlords."). Indeed, on just one page of petitioners' brief, they include (and apparently expect this Court to interpret) fifty-seven inscrutable citations to their exhibits in the summary judgment record. *See* Pet. Br. 6.

Equally important, many of petitioners' fact-bound arguments for reversal are entirely new. Although this Court is somewhat flexible in permitting parties to advance new legal arguments in support of their legal theories in order to permit this Court to properly resolve the legal questions it agrees

to decide, that principle is no aid to petitioners here. They offer entirely fact-bound arguments about the supposed flaws in the application of an agreed-upon legal standard to the summary judgment record in a single case, a question that they disclaimed at the certiorari stage. For example, petitioners now argue for the first time that "aggressive" housing code enforcement benefits low-income tenants, Pet. Br. 50; that respondents' supposed challenge to "aggressive" enforcement practice must be subdivided, with a disparate impact shown with respect to each aspect of the City's policy, *id.* 46; and that the PP2000 program is not an equally effective alternative because it would be costly to implement on a larger scale, *id.* 52-53.

Petitioners did not raise these arguments in the court of appeals, or even in the petition for certiorari. They appear for the first time in petitioners' brief on the merits. But petitioners identify no justification for departing from ordinary principles of waiver. *See, e.g.*, *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002). To the extent that petitioners have properly preserved them, these novel, fact-bound arguments are better addressed to a lower federal court in the first instance.

b. Deciding the second question presented as reframed by petitioners in their brief on the merits – *i.e.*, determining whether, despite applying the correct legal rule, the court of appeals nonetheless erred in its assessment of the summary judgment record in this case – would be a particularly poor use of this Court's limited resources. These are the kind of disputes that a federal district judge would often refer to a magistrate for resolution; they are not the

stuff of Supreme Court decision making. No principle of this Court's discretionary jurisdiction is more settled than that the Court decides questions of law, not fact. Fact-bound cases lack the broader importance that justifies this Court's intervention. The Court also is institutionally unsuited to factfinding and is generally separated from the trial court by two levels of appellate review and many years of intervening developments.

Respondents would be unfairly prejudiced as well if this Court were to engage in an assessment of the summary judgment record, because petitioners are attempting to change not just the game (the question presented) but also the rules by which it is played (respondents' opportunity to advocate their case under this Court's procedures). Among many other things, petitioners inappropriately construe the record in their favor notwithstanding that they moved for summary judgment (*but see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)), and argue from the false premise that respondents merely present a challenge to the City's supposed "aggressive" enforcement of its housing code. In fact, the record demonstrates that the City adopted – and petitioners challenged in this case – a policy of enforcing the code in a discriminatory manner that has the purpose and effect of substantially reducing the stock of low-income housing. Nor are these "many distinct grounds," *contra* Br. 45; each is a means to implement a common policy. That policy included both illegal acts (enforcing provisions of the code that were preempted by state law) and false allegations of code violations. The policy's intended and predictable effect was to materially reduce the

availability of housing for minorities. *See supra* at 8-16. Respondents have also denied and rebutted the City's inflammatory and unsubstantiated hearsay allegations, Br. 8, that respondents' properties were unsafe or that in one instance one respondent insulted a tenant.[2]

But respondents' ability to challenge petitioners' characterization of the record, and this Court's capacity to resolve those disputes efficiently if it chooses to engage the issue, are significantly impeded by the absence of a Joint Appendix in this case. That absence is attributable entirely to petitioners, who – after certiorari was granted – filed a motion to dispense with the Joint Appendix on the ground that "[t]his Court has granted certiorari on two purely legal questions." Joint Mot. to Dispense With J.A. at 1. The motion further explained that "Petitioners and Respondents do not believe that any portions of the record have any bearing on either question of statutory interpretation or that an appendix would materially assist the Court in its consideration of this case." *Id.* at 1-2. Respondents joined in that motion *only* because of petitioners' categorical position at the certiorari stage that the case presents only legal questions under which the summary judgment record is irrelevant.

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[2] Although the Eighth Circuit interpreted respondents' argument that the City's actions violated state law as a free-standing preemption claim, Pet. App. 36a-37a, respondents in fact presented that argument as an element of their FHA disparate-impact claim, *see* Steinhauser Reply Br. 1, 9, 30.

The essential record material that would otherwise now be before the Court in a concise and accessible form is accordingly now unavailable. Of note, petitioners submitted the motion to dispense with the joint appendix only roughly one week before submitting their brief on the merits, which in fact presents a lengthy and detailed argument based on the summary judgment record.

Acting in reliance on the principle that this Court decides questions of law rather than fact, as well as petitioners' specific representations that this case satisfies those criteria, respondents' brief on the merits is limited to the two *legal* questions on which certiorari was granted. Respondents' argument, *see infra*, does not delve into the facts of the underlying case, including the factual claims raised by petitioners' attempt to recharacterize the second question presented (to the extent it would even be practicable to do so in the absence of a Joint Appendix).

In past cases presenting similar circumstances, this Court has previously dismissed the writ of certiorari. In *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 107 (2001), the Court granted review in part because "[i]t appeared at the certiorari stage that [the] petitioner was indeed challenging [certain] statutes and regulations." However, once the case reached the merits stage, the petitioners changed their position, dropping their statutory and regulatory challenges to the court of appeals' decision. *See id.* ("Petitioner now asserts, however, that it is not challenging any part of DOT's . . . program."). The Court's reaction to this tactic was to dismiss the writ as improvidently granted, pointing

to the importance of "adhering scrupulously to the customary limitations on [the Court's] discretion regardless of the significance of the underlying issue." *Id.* at 110. That reasoning is directly applicable to this case. Here, as in *Adarand*, "since certiorari was granted there has been a shift in the posture of the case that precludes [further] review." *Id.* at 107.

*3. This Court's decision is unnecessary and will have no ongoing significance in light of the intervening agency rulemaking.*

The second question presented will in any event soon be resolved without regard to this Court's decision. HUD has issued a Notice of Proposed Rulemaking that will establish uniform standards for deciding disparate-impact claims under the FHA. *See* 76 Fed. Reg. 70,925 (Nov. 16, 2011). Petitioners' attempt to suggest that the agency issued its rule in response to the grant of certiorari, Br. 36, fails to recognize that the rulemaking process was well underway at that time, *see* U.S. Br. 23-24 n.8. The NPRM has been published and the comment period has closed. HUD is likely to issue final regulations in the coming months.

HUD's NPRM proposes to create a new regulation (24 C.F.R. § 100.500(c)) that codifies the burden-shifting framework applied by the Eighth Circuit. 76 Fed. Reg. 70,925. But even if this Court adopted a different test in this case before the regulations became final, HUD will remain free to issue a regulation (whether applying the standard proposed by the NPRM or instead another rule) that will govern in all later cases (and indeed in any later

proceedings in this case) because the FHA does not itself resolve this question. *See Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843 (1984). Thus, even if this Court were to decide this case first, that would be irrelevant; the agency's subsequent construction would still control. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

Petitioners argue to the contrary that "HUD's proposed regulations do not affect this case because they do not apply retroactively." Pet. Br. 37. But even if that were correct, this Court's decision would apply only to this one case, while the regulations would govern all later enforcement actions and litigation – a poor allocation of the Court's time indeed. But in any event, HUD's regulation will apply to pending cases, because the agency is merely interpreting the FHA, just as a decision of this Court resolving the same statutory ambiguity would apply to pending cases.[3]

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[3] *See, e.g.*, *Barnhart v. Walton*, 535 U.S. 212, 221 (2002) (deferring under *Chevron* to a regulation issued in 2001, in a case initially filed in 1996); *Smiley v. Citibank (South Dakota), NA*, 517 U.S. 735, 741 (1996) ("Nor does it matter that the regulation was prompted by litigation, including this very suit."); *United States v. Morton*, 467 U.S. 822, 835 n.21 (1984) (finding it "of no consequence" that regulation was "not promulgated . . . until after th[e] suit was brought"); *Manhattan Gen. Equip. Co. v. Comm'r of Internal Revenue*, 297 U.S. 129, 135 (1936) ("The regulation . . . does not, and could not, alter the statute. It is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand.").

This Court's decision on the second question presented thus will likely have no significance beyond this one case, at most. It makes no sense for this Court to decide a question with such limited applicability. In this Court's certiorari practice, if there is a substantial prospect that a question will be resolved through the efforts of some other actor – perhaps because one outlier circuit will grant *en banc* review, because a statutory amendment will take effect, or because the agency charged with administering the statute will issue a new interpretation – then there is no reason for this Court to use its limited resources to achieve the same end.

At the very least, the Court will benefit substantially from awaiting the outcome of the rulemaking. Among other things, HUD's extensive experience in adjudicating disparate-impact claims combined with the comments submitted in the rulemaking process will give the agency substantial insight towards adopting a manageable framework for implementing the disparate-impact standard. Representatives of the civil rights community, housing officials, and numerous other entities involved in housing-related industries have now had the opportunity to address those important questions in the rulemaking process. In light of the comments, HUD will have the opportunity to address the appropriate burdens on all the parties to the litigation, including the rigor with which any defenses must be reviewed. The briefing in this case, by contrast, addresses those concerns only in passing.

*4. The petition for certiorari should be dismissed, or the Court should at least not decide the second question presented.*

a. For the foregoing reasons, the Court should not decide the second question presented. Because there is neither a basis nor a need for this Court to decide that question, so too the Court should not resolve the first question – whether disparate-impact claims are cognizable under the FHA at all. Although that question was neither pressed in nor passed upon by the court of appeals, it was fairly regarded as within the Court's certiorari jurisdiction when the petition was granted because it was "logically antecedent" to the question of what standard governs such claims. *See Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73, 77 (1990) (addressing argument that was "antecedent" to questions that were raised below, and was "ultimately dispositive of the present dispute"). As this case has since developed, however, the first question is no longer antecedent to any other issue that merits this Court's attention.

Nor is there otherwise any urgency to decide these questions or this particular case. The Eighth Circuit's decision is interlocutory; the court of appeals merely ruled that, on the record as it stands, petitioners are not entitled to summary judgment. The interlocutory nature of the decision below is "itself alone . . . sufficient ground for the denial" of further review. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

Any aggrieved party (including petitioners) will also have the right to challenge HUD's forthcoming regulation. *See* 5 U.S.C. § 702. Petitioners have

every right to pursue any genuine objections to respondents' legal theory in further appeals of either the rulemaking or a decision of the district court in this case that accounts for HUD's rulemaking. If the appellate rulings in either of those matters merit this Court's review, certiorari can be granted then. In these circumstances, the writ is appropriately dismissed. *Cf.*, *Medellin v. Dretke*, 544 U.S. 660, 666-67 (2005) (dismissing writ as improvidently granted because of "the possibility" that petitioner could get relief from state courts, "and the potential for review" in the Supreme Court of a subsequent adverse state court judgment).

b. For its part, the United States has filed an *amicus curiae* brief that, while formally supporting neither party, agrees entirely with respondents on both of the legal questions on which this Court actually granted certiorari. *See* U.S. Br. 6 (explaining that the FHA "supports liability on a disparate-impact theory" and that "the court of appeals articulated the proper framework for addressing disparate-impact claims under Section 804(a)"). The United States does not entirely support respondents only because, in its view, "[a]lthough the court of appeals correctly recognized that disparate-impact claims are cognizable under Section 804(a) of the FHA, and correctly articulated the burden-shifting framework that governs consideration of disparate-impact claims, the court erred in applying that framework to the claim in this case." *Id.* 29 (citation omitted).

Of note, the government does not urge this Court to decide that entirely fact-bound issue, or indeed offer any reason to believe that it is encompassed

within the questions presented. Presumably for that reason, the Solicitor General has not filed a brief designated as "supporting petitioners" or "supporting reversal." *Cf.* Br. of U.S. as *Amicus Curiae* Supporting Reversal, No. 10-10, *Turner v. Rogers*. In fact, the government joins in respondents' suggestion that HUD's pending rulemaking counsels against deciding the second question presented at all. *See* U.S. Br. 28-29 ("[I]f the Court concludes that Section 804(a) of the FHA encompasses disparate-impact claims, it may wish to defer decision on the precise standards governing resolution of those claims until HUD's final rule—to which *Chevron* deference would be owed—is issued.").

The government's discussion of the facts of this case instead simply follows the Solicitor General's near-uniform practice of articulating the views of the United States regarding how a particular legal rule should operate in the case before the Court, even when that is not the question presented. The government's determination that it does not ultimately support respondents' claim on the merits because the court of appeals supposedly erred "in concluding that *respondents presented adequate evidence* to survive summary judgment," *id.* at 33 n.11 (emphasis added), is not the same as advocating that this Court deviate from its ordinary practice and decide a fact-bound issue that neither is encompassed within the questions presented nor otherwise merits this Court's review. Thus, nothing in the Brief of the United States supports petitioners' attempted recharacterization of the second question presented.

## II. If The Court Does Not Dismiss the Petition, It Should Answer The First Question Presented By Holding That Disparate-Impact Claims Are Cognizable Under The Fair Housing Act.

In *Smith v. City of Jackson*, 544 U.S. 228 (2005), this Court held that disparate-impact claims are cognizable under Section 4(a)(2) of the Age Discrimination in Employment Act, relying substantially on its prior construction of Section 703(a)(2) of Title VII of the Civil Rights Act of 1964 in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The Court's ruling in *Smith* compels the same conclusion in this case.

### A. This Case Is Controlled By *Smith v. City of Jackson.*

1. Both the ADEA and Title VII have two adjoining operative provisions. One broadly makes unlawful practices that "deprive any individual of employment opportunities or *otherwise adversely affect his status as an employee*, because of" a protected characteristic. 29 U.S.C. § 623(a)(2) & 42 U.S.C. § 2000e-2(a)(2) (emphasis added). In *Griggs*, this Court concluded that this provision is not limited to intentional discrimination; instead, it also recognizes disparate-impact claims because it is directed at "the *consequences* of employment practices, not simply the motivation." 401 U.S. at 432. "Thus the text focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer." *Smith*, 544 U.S. at 236. In the context of this provision, the phrase "because of" refers to the nature of the adverse effect, rather

than the employer's motivation. "Thus, an employer who classifies his employees without respect to age may still be liable under the terms of this paragraph if such classification adversely affects the employee because of that employee's age—the very definition of disparate impact." *Id.* at 236 n.6.

By contrast, the other operative provision of the ADEA and Title VII more narrowly makes it unlawful to "*discriminate* against any individual . . ., because of" a protected characteristic. 29 U.S.C. § 623(a)(1) & 42 U.S.C. § 2000e-2(a)(1) (emphasis added). This clause, the Court reasoned in *Smith*, prohibits only intentional discrimination. "The focus of the paragraph is on the employer's actions with respect to the targeted individual." *Smith*, 544 U.S. at 236 n.6.

Given the parallel between Title VII and the ADEA, it was not surprising that "for over two decades after [the Court's] decision in *Griggs*, the Courts of Appeals uniformly interpreted [Section 4(a)(2)] of the ADEA as authorizing recovery on a 'disparate-impact' theory in appropriate cases." *Smith*, 544 U.S. at 236-37. The Court in *Smith* found that conclusion was confirmed by two other important considerations.

First, the ADEA contains an explicit defense that is principally applicable to disparate-impact claims. The statute's exemption for employer actions based on "reasonable factors other than age" (RFOA), 29 U.S.C. § 623(f)(1), "is simply unnecessary to avoid liability" in a disparate-treatment case because, "[i]n most disparate-treatment cases, if an employer in fact acted on a factor other than age, the action would

not be prohibited under subsection (a) in the first place." *Smith*, 544 U.S. at 238.

Second (as in *Griggs* as well), the federal agency with enforcement authority over the statute "had issued guidelines that accorded with [the] view" that disparate-impact claims are cognizable. *Id.* at 235 (citing *Griggs*, 401 U.S. at 433-34); *see also id.* at 239-40.

Based on those considerations, a four-Justice plurality concluded in *Smith* that disparate-impact claims are cognizable under Section 4(a)(2) of the ADEA. Justice Scalia concurred in part and concurred in the judgment in *Smith*, providing the fifth vote for the Court's decision. Justice Scalia explained that he "agree[d] with all of the Court's reasoning, but would find it a basis, not for independent determination of the disparate-impact question, but for deferral to the reasonable views of the" agency. *Id.* at 243. He viewed *Smith* "as an absolutely classic case for deference to agency interpretation" because Congress had directed the agency to issue rules and regulations to "carry[] out" the ADEA. *Id.* (citing 29 U.S.C. § 628).

The dissent in *Smith*, by contrast, would have held that Section 4(a)(2) of the ADEA does not recognize disparate-impact claims because "to take an action against an individual '*because of* such individual's age' is to do so 'by reason of' or 'on account of' her age." *Id.* at 249 (quoting Webster's Third New International Dictionary 194 (1961)). The dissent believed that conclusion was reinforced by two further points. First, it was inappropriate to "giv[e] the phrase 'because of such individual's age' a different meaning in each of the two paragraphs." *Id.*

at 250. Second, in both provisions, there is "a comma separating the 'because of . . . age' clause from the preceding language," which "make[s] clear that it modifies the *entirety* of the preceding paragraph." *Id.*

The dissent noted that that the parallel between Title VII and the ADEA "would be a great deal more convincing had *Griggs* been decided *before* the ADEA was enacted. In that case, we could safely assume that Congress had notice (and therefore intended) that the language at issue here would be read to authorize disparate impact claims." *Id.* at 260.

2. This is an *a fortiori* case under the majority's interpretation of the ADEA in *Smith*. The structure and text of the FHA parallel those of Title VII and the ADEA. Like those statutes, Section 804 of the FHA has two adjoining operative provisions. The provision at issue in this case broadly makes it unlawful to decline to sell or rent or negotiate to sell or rent "or *otherwise make unavailable or deny*" housing "because of" a protected characteristic. 42 U.S.C. § 3604(a) (emphasis added). This provision recognizes disparate-impact liability because it is directed at "the *consequences* of" of the defendant's action, *Griggs*, 401 U.S. at 432, by "focus[ing] on the *effects* of the action," *Smith*, 544 U.S. at 236.

The other provision of the FHA, by contrast, echoes Section 4(a)(1) of the ADEA and Section 703(a)(1) of Title VII by more narrowly making it unlawful to "*discriminate* against any person" regarding the sale or rental of housing "because of" a protected characteristic. *Id.* § 3604(b) (emphasis added). That provision of the FHA is addressed to the defendant's "actions with respect to the targeted individual." *Smith*, 544 U.S. at 236 n.6.

Petitioners' position that Sections 804(a) and (b) both address only purposeful housing discrimination fails to account for their distinct language. The "usual rule" is "that 'when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.'" *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004). Petitioners read Section 804(a) as if it made it unlawful to "discriminate against any person in refusing to sell or rent after the making of a bona fide offer, or to discriminate in refusing to negotiate for the sale or rental of, or in otherwise making unavailable or denying, a dwelling to any person because of" a protected characteristic. But Congress utilized the "discriminate . . . because of" formulation only in Section 804(b). Also, the fact that in Section 804(a) (unlike Title VII and the ADEA, as well as Section 804(b)) there is *no* "comma separating the 'because of . . . .' clause from the preceding language," further reduces any suggestion that the phrase "modifies the *entirety* of the preceding paragraph." *Smith*, 544 U.S. at 249 (opinion of O'Connor, J.).

The linguistic parallel between the three civil rights statutes is no surprise, as they were the centerpieces of the transformative "coordinated scheme of federal civil rights laws enacted to end discrimination," *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 935 (2d Cir. 1988), *aff'd*, 488 U.S. 15 (1988), in the brief period between 1964 and 1968. *See* Civil Rights Act of 1968 § 801 *et seq*., Pub. L. No. 90-284, 82 Stat. 73, 83 (FHA); Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (ADEA); Civil Rights Act of

1964 § 701 *et seq.*, Pub. L. No. 88-352, 78 Stat. 241, 243 (Title VII).[4]

If anything, there is a substantially greater reason to conclude that Congress would have intended to recognize disparate-impact claims in the context of the FHA than under a statute such as the ADEA. Congress naturally would have been more concerned with addressing racially and ethnically segregated housing patterns – which can inhibit access to both education and employment – than with the prospect that a neutral policy would adversely affect workers over the age of forty. In debates over the FHA, members of Congress drew a direct parallel between housing and employment, including particularly with respect to Congress's intent to eliminate the effects of segregated housing patterns. Senator Mondale, the principal sponsor of the FHA, framed the pending fair housing legislation in the context of Congress's enactment of Title VII: "Congress and the courts have acted to eliminate practices separating Negroes from whites in education, voting, public accommodations and

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[4] *See also, e.g.*, *Graoch Associates #33, L.P. v. Louisville/Jefferson Country Metro Human Relations Comm'n*, 508 F.3d 366, 374 (6th Cir. 2007) (because the FHA uses "similar language" to Title VII, the *Griggs* Court's analysis likewise "justifies the existence of disparate-impact liability under the FHA"); *Larkin v. State of Mich. Dep't of Soc. Servs.*, 89 F.3d 285, 289 (6th Cir. 1996) ("Most courts applying the FHA . . . have analogized it to Title VII."); *Smith v. Town of Clarkton, N.C.*, 682 F.2d 1055, 1065 (4th Cir. 1982) ("[T]he anti-discrimination objectives of Title VIII are parallel to the goals of Title VII.").

employment, but a Negro is not free to live where he chooses." 114 Cong. Rec. 3421.

Lawmakers in both chambers recognized that the legislative efforts to achieve a desegregated workforce and school system would be futile as long as different races lived in different places. Representative Ryan, for example, noted that the "de facto separation of races" in housing resulted in a similar separation in education and "job opportunities." 114 Cong. Rec. 9591. Thus, Congress sought not simply to stamp out a particular *motivation* in the FHA, but to secure a *result* that would safeguard its efforts in employment – *i.e.*, "to replace the ghettos 'by truly integrated and balanced living patterns.'" *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972) (quoting 114 Cong. Rec. 3422 (statement of Sen. Mondale)).

The FHA also has both of the features that this Court in *Smith* found reinforced the conclusion that Section 4(a)(2) of the ADEA recognizes disparate-impact liability. First, the FHA contains exemptions that only apply as defenses to disparate-impact claims. On petitioners' reading, they are surplusage. *Cf. Bd. of Trustees of Leland Stanford Jr. Univ. v. Roche Molecular Systems*, 131 S. Ct. 2188, 2196 (2011) (noting reluctance to adopt a statutory construction that would eliminate the purpose of a provision).

In the 1988 FHA Amendments, Congress added three such provisions. The authorization for appraisers to consider "factors other than race, color, religion, national origin, sex, handicap, or familial status," 42 U.S.C. § 3605(c), directly parallels the "reasonable factors other than age" provision that

this Court found so instructive in *Smith*, *supra*. This provision necessarily contemplates that, absent the exemption, appraisers could be held liable for decisions they made other than on the basis of race or any other protected characteristic.

Congress also carved out two additional exemptions to the FHA, for reasonable governmental "restrictions regarding the maximum number of occupants permitted to occupy a dwelling," 42 U.S.C. § 3607(b)(1), and for a decision to deny housing to a person convicted of "controlled substance" offenses, *id.* § 3607(b)(4). None of those provisions plays any role if (as petitioners contend) the statute only creates liability for purposeful discrimination on the basis of a prohibited characteristic; each is a defense to disparate-impact liability.

The amendments' relevance is amplified by the fact that Congress enacted them in the wake of an uninterrupted line of *nine* federal appellate rulings finding disparate impact liability under the FHA. *See* U.S. Br. 17-18 & n.5. This is thus the case that even the *Smith* dissenters recognized would be more compelling, because the case law was "decided *before* [the relevant statutory language] was enacted"; here, the Court can "safely assume that Congress had notice (and therefore intended) that the language at issue here would be read to authorize disparate impact claims." 544 U.S. at 260 (O'Connor, J., dissenting in relevant part); *see also Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial

interpretation of a statute."). But that is no mere assumption. A statement by a leading member of Congress,[5] hearing testimony,[6] failed bills and amendments,[7] and the sources cited by petitioners[8] all demonstrate that Congress was well aware that the FHA had been uniformly interpreted to recognize disparate-impact claims. Also significant, in the run-up to the Amendments, Senator Hatch proposed legislation to overturn the appellate decisions recognizing disparate-impact claims under the FHA; it failed. *See* 133 Cong. Rec. S4088 (daily ed. Mar. 27, 1987). When Congress not only fails to overturn a uniform line of authority in a significant body of

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[5] 134 Cong. Rec. 23,711 (1988) (Statement of Sen. Kennedy) (noting that Congress was well aware of unanimous construction of FHA prior to adoption of the 1988 Act).

[6] *Fair Hous. Amendments Act of 1987: Hearings Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 100th Cong., 1st Sess. 529-57 (1987) (testimony of Prof. Robert Schwemm, Univ. of Ky. Law Sch.) (describing the consensus interpretation).

[7] During the debates over the 1988 Amendments, Congress considered and rejected an amendment that would have eliminated disparate impact liability for zoning decisions. *See* H.R. Rep. No. 711, 100th Cong., 2d Sess. 89-91 (1988) (dissenting views of Rep. Swindall).

[8] *Remarks on Signing the Fair Hous. Amendments Act of 1988*, 24 Weekly Comp. Pres. Doc. 1140, 1141 (Sept. 13, 1988) (statement by President Reagan disavowing the "judicial opinions" that had supported the disparate impact theory); 133 Cong. Rec. S4088 (daily ed. Mar. 27, 1987) (statement of Sen. Hatch) (stating that some of the federal circuits "ha[d] substituted an 'effects' or 'disparate impact' standard" for the intent standard he believed appropriate).

amendments, but instead adopts multiple provisions based on the very premise that the line of authority is correct, the only fair conclusion is that it has endorsed that settled interpretation of the statute.

Second, like *Smith*, this is an "absolutely classic case for deference" to the agency charged by Congress with interpreting and administering the statute. *Smith*, 544 U.S. at 243 (Scalia, J., concurring). The FHA confers on the Secretary of HUD "authority and responsibility for administering" the statute. 42 U.S.C. § 3608(a). Among other things, since the statute's amendment in 1988, HUD has been empowered to formally adjudicate complaints, *id.* §§ 3610, 3612, and its rulings become final agency decisions after an opportunity for review by the Secretary, *id.* § 3612(g); 24 C.F.R. § 180.675. Through that process, the agency has uniformly interpreted the FHA to recognize disparate-impact claims.[9] An agency's formal adjudications are

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[9] *See, e.g.*, *HUD v. Twinbrook Vill. Apartments*, No. 02-00-0256-8, 2001 WL 1632533, at *17 (HUD ALJ Nov. 9, 2001) ("A violation of the FHA may be premised on a theory of disparate impact."); *HUD v. Pfaff*, No. 10-93-0084-8, 1994 WL 592199, at *8 (HUD ALJ Oct. 27, 1994) (explaining that "where a housing provider employs a facially-neutral practice which has an adverse impact on a protected class of people . . . a violation of the Act is presumed to have occurred"), *rev'd on other grounds*, 88 F.3d 739 (9th Cir. 1996); *HUD v. Ross*, No. 01-92-0466-8, 1994 WL 326437, at *5 (HUD ALJ July 7, 1994) (stating that "facially neutral policies which have a discriminatory impact on a protected class violate the Act"); *HUD v. Carter*, No. 03-90-0058-1, 1992 WL 406520, at *5 (HUD ALJ May 1, 1992) ("The application of the discriminatory effects standard in cases under the Fair Housing Act is well established.").

entitled to no less deference than the formal rulemakings at issue in *Griggs* and *Smith*. *See United States v. Mead Corp.*, 533 U.S. 218, 230 & n.12 (2001) (citing *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984)).

HUD notably has also adopted the same interpretation outside the adjudicative process. The agency's pending Notice of Proposed Rulemaking unequivocally adheres to HUD's longstanding position that the "Act provides for liability based on discriminatory effects without the need for a finding of intentional discrimination," 76 Fed. Reg. at 70,922, and notably does not indicate that the agency is open to reconsidering that position (as opposed to the precise standard for adjudicating such claims). HUD has consistently adopted and applied the same interpretation in articulating "fair-lending standards," in its "original . . . enforcement handbook," and in "appellate briefs." U.S. Br. 22 (collecting cases).

The conclusion that disparate-impact claims are cognizable under the FHA is also reinforced by the duty of federal grant recipients (including petitioner City of St. Paul) to "affirmatively further fair housing." 24 C.F.R. § 91.225(a)(1). This obligation includes a responsibility to go beyond avoiding intentional discrimination to "identify impediments to fair housing choice" and "take appropriate actions to overcome the effects of any impediments identified." *Id.* Jurisdictions that receive funding are also required to consider the impact of their policies on affordable housing. This requirement expressly applies to "building codes." *Id.* § 91.210(e). By accepting federal housing funds, petitioners thus

chose to agree to minimize the disparate impact of their otherwise-nondiscriminatory policies. That free choice belies their alarmism that disparate-impact liability will impose an unreasonable and unworkable burden.

### B. Petitioners' Arguments To The Contrary Are Unpersuasive.

1. Petitioners principally argue that the phrase "because of" limits the FHA to claims of purposeful discrimination, precluding disparate-impact liability. Pet. Br. 16, 20-22, 26. But of course, the identical language appears in the provisions of Title VII and the ADEA that this Court squarely held in *Griggs* and *Smith* recognize disparate-impact claims. Petitioners' argument essentially reprises the argument of the dissent in *Smith*, which a majority of the Court rejected. Petitioners' citation of *Smith* for the proposition that the parallel language in the FHA and ADEA "does not address the effect of the conduct on the plaintiff, but instead focuses on the defendant's motivation," Pet. Br. 16, thus has it precisely backwards. (Petitioners' discussion of *Smith*'s analysis of ADEA Section 4(a)(1), Br. 22, principally relies on Justice O'Connor's opinion, which for all intents and purposes was a dissent.)

Petitioners next attempt to distinguish *Smith* on the ground that Title VII and the ADEA do not use the *exact* same language as the FHA. But that is the inevitable consequence of the fact that the former statutes relate to employment, while the latter addresses housing. It would make no sense for the employment-related provisions of Title VII and the ADEA to make unlawful actions that "otherwise

make unavailable" the plaintiff's housing. 42 U.S.C. § 3604(a). So too, it would have been illogical for Congress in the FHA to make actionable housing-related policies that have an "adverse[] affect" on the plaintiff's "status as an employee." 29 U.S.C. § 623(a)(2).

Petitioners also err in the contrast they would draw between the statutes. They incorrectly describe Section 4(a)(2) of the ADEA and Section 703(a)(2) of Title VII as generically referring to action that "otherwise adversely affects" an employee. Pet. Br. 27-28. In fact, those provisions of Title VII and the ADEA more narrowly make unlawful policies that "deprive any individual of employment opportunities or otherwise adversely affect *his status as an employee*, because of" a protected characteristic. 29 U.S.C. § 623(a)(2) & 42 U.S.C. § 2000e-2(a)(2) (emphasis added). Section 804(a) of the FHA is indistinguishable, except that its language is addressed to effects on housing: the statute renders unlawful a policy that "make[s] unavailable or den[ies], a dwelling to any person because of" a protected characteristic. 42 U.S.C. § 3604(a). The statutory structure – a clause introduced by "otherwise" that references such an effect in relatively general terms – is identical in all three provisions. In each, the clause "shifts the focus from the defendant's actions to the effect that those actions have" on members of the protected class. Pet. Br. 28.

Petitioners equally err in their reliance, Br. 22, on *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343, 2350 (2009). Petitioners fail to recognize that *Gross* recites *Smith*'s holding that the ADEA parallels "Title VII with respect to disparate-impact

claims"; it certainly never calls *Smith* into question. *Id.* at 2351 n.5.

*Gross* instead read the phrase "because of" to require "but for" causation in a disparate-*treatment* case. *Gross* thus interpreted that phrase not to require motivation, but rather to require a certain form of causation. Petitioners' attempt to recharacterize *Gross* as reading "because of" to require proof of discriminatory motivation in the context of disparate-impact claims is, once again, precisely the argument that the dissent unsuccessfully made in *Smith*.

Petitioners also fail to recognize that the Court closed the door on the dispute over whether "because of" always requires proof of intentional discrimination in *Meacham v. Knolls Atomic Power Co.*, 554 U.S. 84 (2008). There, this Court concluded – over the dissent of only Justice Thomas – that, in the wake of *Smith*, "in the typical disparate-impact case, the employer's practice is 'without respect to age' and its adverse impact (though 'because of age') is 'attributable to a nonage factor.'" *Id.* at 96. As in *Smith*, Justice Scalia again concurred in the judgment, deferring to the agency's position, which paralleled the Court's reasoning. *Id.* at 102-03.

But in any event, even assuming that petitioners' textual arguments have some force, they are not strong enough to forbid the agency charged by Congress with administering the FHA from concluding that the statute recognizes disparate-impact claims. At the very least, given the multiple provisions of the 1988 FHA Amendments premised on the existence of disparate-impact liability, the

statute on the whole is ambiguous. HUD was entitled to resolve that ambiguity as it has.

2. Petitioners' remaining arguments require only brief discussion. They note that a quarter-century ago, the Solicitor General filed one brief expressing the view that the FHA does not recognize disparate-impact liability. *See* Pet. Br. 33-34 (citing U.S. Br., No. 87-1961, *Town of Huntington v. Huntington Branch, NAACP* 13-18). But HUD did not sign that brief, and the Department of Justice does not have the delegated authority to interpret the statute. After the Solicitor General's brief, Congress in 1988 amended the FHA both to add exemptions that necessarily presume the availability of disparate-impact claims and to give HUD interpretive authority under the statute. HUD's position has been unwavering. *See supra* at 52-53.

In any event, to the extent the Department of Justice's views matter, like any agency it is entitled to change its position, *see FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810-11 (2009), and petitioners fail to recognize that it has consistently endorsed HUD's interpretation for the past twenty years. *See* U.S. Br. 22-23. For example, in a case remarkably similar to this one, the Department of Justice filed an *amicus* brief in support of a disparate-impact claim against code enforcement activities of the District of Columbia, arguing that selective exercise of municipal housing code enforcement authority can violate the FHA. Br. of U.S. as *Amicus Curiae* in *2922 Sherman Ave. Tenants' Ass'n v. District of Columbia* (D.D.C. 2004) (No. 1:00cv00862), *available at* http://www.justice.gov/crt/about/hce/documents/amic

us_sherman.php; *see also, e.g.*, Br. of U.S. as *Amicus Curiae* at 1, 14, *Mt. Holly Gardens Citizens In Action Inc. v. Twp. of Mt. Holly*, No. 11-1159, 2011 WL 2322224 (3d Cir. 2011) (explaining that a *prima facie* case of disparate impact can be shown under the FHA "where the plaintiff establishes that there is a shortage of housing accessible to a protected group, and that shortage is causally linked to the challenged policy"). The Solicitor General has also filed a brief in this case (signed by HUD) endorsing HUD's views, whereas in *Smith* the Solicitor General did not participate in the case notwithstanding the agency's settled position.

Petitioners also note that President Reagan's statement upon signing the 1988 FHA amendments expressed the view that disparate-impact liability was not available. Pet. Br. 34 (citing *Remarks on Signing the Fair Hous. Amendments Act of 1988*, 24 Weekly Comp. Pres. Doc. 1140, 1141 (Sept. 13, 1988)). Assuming the reasonableness of that position, the straightforward answer is that the Executive Branch has subsequently changed its views, as expressed in the consistent position of the expert, cabinet-level agency charged by Congress with administering the statute.

Finally, petitioners contrast the FHA with other statutes such as Section 2 of the Voting Rights Act, Pet. Br. 25, which recognizes disparate-impact liability by prohibiting voting requirements that "result[] in a denial or abridgement of the right . . . to vote on account of race or color." 42 U.S.C. § 1973. This is nothing more than an argument that *Griggs* and *Smith* are wrongly decided, given that neither Title VII nor the ADEA uses that formulation. The

argument is also misguided, because it is common for Congress to achieve the same end with different words in unrelated statutes.

## III. If The Court Decides To Reach The Second Question Presented By The Petition For Certiorari, It Should Adopt The Burden-Shifting Framework Endorsed By The Parties And The United States.

If the Court reaches the second question presented, it should adopt a burden-shifting framework for resolving disparate-impact claims. As discussed, all the parties and *amici* are now in agreement on this score. Respondents agree with petitioners' statement in their merits brief (albeit contradicting their position in the petition for certiorari) that the balancing "approach finds no support in either the text of the FHA or in the Court's decisions." Pet. Br. 43. With respect to the narrow sub-issue of which party has the burden of persuasion at step two of the burden-shifting inquiry, respondents take no position because that issue makes no difference in this case. *See supra* at 29-31.[10]

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[10] At the very end of their brief, petitioners toss in the passing constitutional claim that recognizing disparate-impact liability under the FHA would "raise[] significant equal protection concerns." Pet. Br. 55. Petitioners did not preserve that argument in the lower courts or raise it in the petition for certiorari. In any event, it is a bad argument. A municipality deciding whether to "condemn[] [a] building," *id.* 55, obviously can decline to do so on the ground that it would harm racial and ethnic minorities. There is no parallel between that decision

## CONCLUSION

For the foregoing reasons, the writ of certiorari should be dismissed or alternatively the judgment of the court of appeals should be affirmed.

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and an employer's choice whether to fire an employee of one race in order to retain an employee of another. *Contra id.* 54. Race consciousness does not equate to race discrimination.

## APPENDIX

### Relevant Statutory and Regulatory Material

1. 42 U.S.C. § 3604 provides in relevant part:

> **Discrimination in the sale or rental of housing and other prohibited practices.**
>
> As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful –
>
> (a) To 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.
>
> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

2. 42 U.S.C. § 3605 provides in relevant part:

> **Discrimination in residential real estate-related transactions**
>
> * * *
>
> (c) Appraisal exemption
>
> Nothing in this subchapter prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status.

3. 42 U.S.C. § 3607 provides in relevant part:

> **Religious organization or private club exemption**
>
> * * *
>
> (b)(1) Nothing in this subchapter limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling. Nor does any provision in this subchapter regarding familial status apply with respect to housing for older persons.
>
> * * *
>
> (b)(4) Nothing in this subchapter prohibits conduct against a person because such person has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance as defined in section 802 of Title 21.

4. 42 U.S.C. § 3608 provides in relevant part:

> **Administration**
>
> **(a) Authority and responsibility**
>
> The authority and responsibility for administering this Act shall be in the Secretary of Housing and Urban Development.

5. 42 U.S.C. § 3612 provides:

> **(b) Administrative law judge hearing in absence of election**
>
> If an election is not made under subsection (a) of this subsection with respect to a charge filed under section 3610 of this title, the Secretary shall provide an opportunity for a hearing on the record with respect to a charge issued under section 3610 of this title. . . .

6. 42 U.S.C. § 3614a provides:

> The Secretary may make rules (including rules for the collection, maintenance, and analysis of appropriate data) to carry out this subchapter. The Secretary shall give public notice and opportunity for comment with respect to all rules made under this section.

7. 42 U.S.C. 2000e-2 provides in relevant part:

> **Unlawful employment practices**
>
> (a) Employer practices
>
> It shall be unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment 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 race, color, religion, sex, or national origin.

8. 29 U.S.C. 623 provides in relevant part:

**Prohibition of age discrimination**

(a) Employer practices

It shall be unlawful for an employer –

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) 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; or . . .

9. HUD's notice of proposed rulemaking, published at 76 Fed. Reg. 70,921 reads in relevant part:

> "HUD to which Congress gave the authority and responsibility for administering the Fair Housing Act and the power to make rules implementing the Act, has long interpreted the Act to prohibit housing practices with a discriminatory effect, even where there has been no intent to discriminate."
>
> * * *
>
> "Although there has been some variation in the application of the discriminatory effects standard, neither HUD nor any Federal court has ever determined that liability under the Act requires a finding of discriminatory intent. The purpose of this proposed rule, therefore, is to establish uniform standards for determining when a housing practice with a discriminatory effect violates the Fair Housing Act."
>
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>
> " § 100.500 Discriminatory Effect Prohibited
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>
> "(c) *Burdens of proof in discriminatory effects cases.*
>
> "(1) A complainant, with respect to claims brought under 42 U.S.C. 3610, or a plaintiff, with respect to claims brought under 42 U.S.C. 3613 or 3614, has the burden of proving that a challenged practice causes a *discriminatory effect*.
>
> "(2) Once a complainant or plaintiff satisfies the burden of proof set forth in paragraph (c)(1) of this section, the respondent or defendant has the

burden of proving that the challenged practice has a necessary and manifest relationship to one or more legitimate, nondiscriminatory interests of the respondent or defendant.

"(3) If the respondent or defendant satisfies the burden of proof set forth in paragraph (c)(2) of this section, the complainant or plaintiff may still prevail upon demonstrating that the legitimate, nondiscriminatory interests supporting the challenged practice can be served by another practice that has a less *discriminatory effect*."

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