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 PETITIONERS

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QUESTIONS PRESENTED

The Fair Housing Act makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer . . . 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). Respondents are owners of rental properties who argue that Petitioners violated the Fair Housing Act by "aggressively" enforcing the City of Saint Paul's housing code. According to Respondents, because a disproportionate number of renters are African-American, and Respondents rent to many African-Americans, requiring them to meet the housing code will increase their costs and decrease the number of units they make available to rent to African-American tenants. Reversing the district court's grant of summary judgment for Petitioners, the Eighth Circuit held that Respondents should be allowed to proceed to trial because they presented sufficient evidence of a "disparate impact" on African-Americans.

The following are the questions presented:

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?

LIST OF PARTIES AND CORPORATIONS

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, LISA MARTIN, individually and as a code enforcement officer of the City of St. Paul's Department of Neighborhood Housing and Property Improvement, STEVE MAGNER, individually and as a supervisor 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, 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, LAW ENFORCEMENT OFFICERS OR OTHER OFFICIALS OR EMPLOYEES of the City of St. Paul, individually, jointly and severally, and the CITY OF ST. PAUL, a municipal corporation, Petitioners.

FRANK J. STEINHAUSER, III, MARK E. MEYSEMBOURG, KELLY G. BRISSON, Respondents.

STEVE MAGNER, individually and as a supervisor of the City of St. Paul's Department of Neighborhood Housing and Property Improvement, MICHAEL KALIS, DICK LIPPERT, KELLY BOOKER, JACK REARDON, PAULA SEELEY, LISA MARTIN, individually and as code enforcement officers of the City of St. Paul, DEAN KOEHNEN, individually and as a law enforcement officer 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, RANDY KELLY, individually and as Mayor of the City of St. Paul, 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, LAW ENFORCEMENT OFFICERS OR OTHER OFFICIALS OR EMPLOYEES of the City of St. Paul, individually, jointly and severally, and the CITY OF ST. PAUL, a municipal corporation, Petitioners.

SANDRA HARRILAL, BEE VUE, LAMENA VUE, STEVEN R. JOHNSON, d/b/a Market Group and Properties, Respondents.

STEVE MAGNER, individually and as a supervisor of the City of St. Paul's Department of Neighborhood Housing and Property Improvement, MICHAEL CASSIDY, JOEL ESSLING, STEVE SCHILLER, JOE YANNARELLY, DENNIS SENTY, RICH SINGERHOUSE, KELLY BOOKER, individually and as code enforcement officers of the City of St. Paul, MICHAEL URMANN, individually and as a fire inspector 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, RANDY KELLY, individually and as Mayor of the City of St. Paul, 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, LAW ENFORCEMENT OFFICERS OR OTHER OFFICIALS OR EMPLOYEES of the City of

St. Paul, individually, jointly and severally, and the CITY OF ST. PAUL, Petitioners.

THOMAS J. GALLAGHER, JOSEPH J. COLLINS, SR., DADDER'S PROPERTIES, LLC, DADDER'S ESTATES, LLC, DADDER'S ENTERPRISES, LLC, DADDER'S HOLDINGS, LLC, TROY ALLISON, JEFF KUBITSCHEK and SARA KUBITSCHEK, Respondents.

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The district court's December 18, 2008, decision is reported at 595 F. Supp. 2d 987 (D. Minn. 2008) and is set forth at pages 48a through 115a of the Petition Appendix. The panel decision of the Eighth Circuit Court of Appeals is reported at 619 F.3d 823 (8th Cir. 2010) and is set forth at pages 1a through 42a of the Petition Appendix. The Eighth Circuit Court of Appeals' decision denying rehearing en banc, with five judges dissenting, is reported at 636 F.3d 380 (8th Cir. 2010), and is set forth at pages 116a through 125a of the Petition Appendix.

JURISDICTION

The Eighth Circuit Court of Appeals issued its decision on September 1, 2010. The circuit court denied a timely petition for rehearing en banc on November 15, 2010. The Petition for Writ of Certiorari was filed on February 14, 2011. The Court granted certiorari on November 7, 2011. The jurisdiction of the Court rests on 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Fair Housing Act (hereinafter FHA) provides in relevant part:

> [I]t 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.

42 U.S.C. § 3604(a).

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND.

A. Housing Codes.

The first modern housing code in America was adopted in New York City during the late 19th century. *See* Samuel B. Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration*, 56 B.U. L. Rev. 1, 41-42 (1976). Prompted by an outbreak of cholera and at the behest of the New York Metropolitan Board of Health, the state legislature adopted the Tenement Housing Act of 1867, which mandated, among other requirements, that dwellings contain fire escapes, bathroom facilities, and water-tight roofs. *Id.*

By 1920, twelve states and forty municipalities had enacted housing codes to protect the health, safety, and welfare of their inhabitants. *Id.* at 42. By 1968, that number had grown to nearly 5,000 American municipalities. *See* Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 Cornell L. Rev. 517, 551 (1984). Today, housing codes are ubiquitous, having been enacted in every state at either a state-wide or local level. *See* Int'l Code Council, *Int'l Code Adoptions*, http://www.iccsafe.org/gr/pages/adoptions.aspx (last visited Dec. 20, 2011).

The federal government has long had a policy of supporting housing codes. The Housing Act of 1949, for instance, declared that "the general welfare and security of the Nation and the health and living standards of its people require . . . a decent home and suitable environment for every American family." 42 U.S.C. § 1441. Similarly, the Housing Act of 1954 required, as a condition of receiving federal housing funds, that the municipality enforce a "workable program for community improvement," such as a housing code. Abbott, *supra*, at 43.

Organizations such as the American Public Health Association Committee on the Hygiene of Housing, often in conjunction with federal government agencies like the Center for Disease Control, have published model ordinances recommending minimum housing standards. *See, e.g.*, Am. Pub. Health Ass'n, 41 Am. J. of Pub. Health 577, 578 (1951). The Center for Disease Control and the U.S. Department of Housing and Urban Development (HUD) published the Healthy Housing Reference Manual, a document that advises communities on the adoption of housing codes for the purpose of eliminating substandard conditions. *See Healthy Housing Reference Manual* (rev. 2006). The Manual recognizes that housing code standards are important to protect the health and well-being of inhabitants. *Id.* at 2-1.

B. City Of Saint Paul Housing Code.

The City of Saint Paul has a long history dating back to at least 1918 of enforcing housing codes and general sanitary laws designed to keep dwellings healthy and safe. St. Paul, Minn., Ordinance 4028 (Mar. 28, 1918). In 1993, the City adopted a new

housing code, which remains in effect today. Pet. App. 6a. The City adopted this housing code based on determinations by the Saint Paul City Council that "[t]here exist in the city structures which are now or which may in the future become substandard with respect to structure, equipment, maintenance or energy efficiency" and that "these conditions, together with inadequate provision of light and air, insufficient protection against fire hazards, lack of proper heating, unsanitary conditions and overcrowding, constitute a menace to public health, safety and welfare." St. Paul, Minn., Legislative Code § 34.02.

To address these problems, the City Council established "minimum maintenance standards for all structures and premises for basic equipment and facilities for light, ventilation, heating and sanitation; for safety from fire; for crime prevention; for space, use and location; and for safe and sanitary maintenance of all structures and premises." St. Paul, Minn., Legislative Code § 34.01(1).

From approximately 2002 to 2008, the City's Department of Neighborhood Housing and Property Improvement (NHPI) was charged with the administration and enforcement of Saint Paul's housing code. Pet. App. 6a. NHPI was authorized to inspect all one- and two-family homes and impose civil and criminal penalties, in coordination with local law enforcement and the City Attorney. *Id.* at 6a-7a. NHPI's mission was "to keep the city clean, keep its housing habitable, and make neighborhoods the safest and most livable anywhere in Minnesota." *Id.* at 52a-53a. To achieve this goal, the agency responded to citizen complaints about problem properties and

conducted "proactive 'sweeps' to detect Housing Code violations." *Id.* at 6a.

Prior to the creation of NHPI, the City instituted a limited-scale housing code enforcement program called Problem Properties 2000 (PP2000). Pet. App. 24a-25a. The program, which began in late 1999 and ended in 2001, targeted for inspection properties with a history of unresolved or repeated housing code violations. Defs.' Ex. 9, Doc. 201-10, at 212; Pls.' Ex. 113, Doc. 247-4, at 3-4.[1] Approximately fifteen property owners participated in PP2000. Defs.' Ex. 9, Doc. 201-10, at 214. Collectively, they owned and rented only a fraction of the City's 115,713 total housing units. Pls.' Ex. 263, Doc. 254-30, at 8. Under the program, compliance with the housing code remained mandatory, but each property owner was monitored by one of two inspectors in the hope that working with a dedicated inspector would result in prompt compliance with the housing code, albeit at the same cost that any non-PP2000 participant would incur.

C. Landlords.

Respondents are current or former owners of residential rental property in the City. These sixteen landlords, who collectively own approximately 120 rental property units, brought three separate lawsuits against Petitioners alleging FHA violations based on the City's consistent and race-neutral housing code enforcement. Respondents admit many of the code

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[1] Citations to the record are to the U.S. District Court District of Minnesota Civil Docket for Case # 0:04-cv-02632, *Steinhauser, et al. v. City of St. Paul, et al.*

violations were valid.[2] Respondents also at times blame their tenants for the damage and claim that their tenants should be held responsible for bringing the properties up to code.[3] Respondents admit that their complaints regarding illegal code enforcement apply to only a portion of their collective 120 properties.[4] They admit that some of their properties with African-American tenants were not subject to what they considered illegal code enforcement, and that some of their properties which were subject to code enforcement were either vacant or occupied by white tenants.[5]

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[2] Defs.' Ex. 19, Doc. 201-24, at 186-88, 206-212; Defs.' Ex. 19, Doc. 201-25, at 45, 67, 69, 149-52, 237-38; Defs.' Ex. 22, Doc. 201-27, at 123-29, 156-58; Defs.' Ex. 23, Doc. 201-28, at 75-81, 94-95, 101, 119-125; Defs.' Ex. 24, Doc. 201-29, at 26; Defs.' Ex. 25, Doc. 201-33, at 123-127; Defs.' Ex. 27, Doc. 201-38, at 40, 121-122; Defs.' Ex. 34, Doc. 201-45, at 104-106.

[3] Defs.' Ex. 19, Doc. 201-24, at 186-88, 206-212; Defs.' Ex. 19, Doc. 201-25, at 45-48, 149-52; Defs.' Ex. 23, Doc. 201-28, at 112-16; Defs.' Ex. 25, Doc. 201-33, at 125-27; Defs.' Ex. 30, Doc. 201-41, at 188-192; 2d Am. Compl., Case No. 05-1348, Doc. 59, at 25 ¶ 103.

[4] Defs.' Ex. 19, Doc. 201-24, at 112-13, 157; Defs.' Ex. 22, Doc. 201-27, at 53, 62-84; Defs.' Ex. 25, Doc. 201-32, at 32-26, 130-32, 197-98; Defs.' Ex. 27, Doc. 201-38, at 32-37, 119, 125, 130-139, 225-226; Defs.' Ex. 28, Doc. 201-39, at 1-3; Defs.' Ex. 31, Doc. 201-42; Defs.' Ex. 32, Doc. 201-43, at 17, 24, 134-38, 166-67; Defs. Ex. 33, Doc. 201-44; Defs.' Ex. 34, Doc. 201-45, at 108-09, 127.

[5] Defs.' Ex. 19, Doc. 201-24, at 112-13, 157; Defs.' Ex. 22, Doc. 201-72, at 62-84; Defs.' Ex. 25, Doc. 201-33, at 44-47; Defs.' Ex. 30, Doc. 201-41, at 81-84; Defs.' Ex. 31, Doc. 201-42; Defs.' Ex. 32, Doc. 201-43, at 24; Defs.' Ex. 34, Doc. 201-45, at 89-92, 108-09, 127.

D. City Of Saint Paul Census Data.

Saint Paul, while predominantly white, is a city of diverse races and national origins. The most recent census data available at the time these lawsuits were filed, reported that the City had 287,151 residents of which 67% identified as white, 17.4% identified as a minority group other than black or African-American, 11.7% identified as black or African-American, and 3.9% identified as a member of two or more races. Pls.' Ex. 263, Doc. 254-30, at 8-9. All parties concede that African-Americans make up a disproportionate percentage of low-income tenants. Pet. App. 63a n.7. The 2000 census data reported that there were 50,645 renter-occupied housing units in the City making up 33.8% of the total housing units. Pls.' Ex. 263, Doc. 254-30, at 8-9. Respondents' properties amount to merely 0.24% of the renter-occupied housing units in the City.

E. Condition Of Rental Units.

The public health, safety, and welfare in Saint Paul depend on effective enforcement of its health and safety ordinances. Enforcement is especially crucial because in Saint Paul single-family and duplex rental stock is predominately pre-WWI housing that requires consistent and proactive maintenance to keep the properties safe and habitable. Compl. Nos. 04-2632, 05-461, 05-1348 (see *Tax & Prop. Info.*, Ramsey Cnty., *available at* http://www.co.ramsey.mn.us/prr (last visited Dec. 20, 2011), to determine years Respondents' houses were built); City of St. Paul, Comprehensive Plan: Housing 3 (2010), *available at* http://www.stpaul.gov/DocumentView.aspx?DID=11879 (last visited Dec. 21, 2011).

Between 2002 and 2005, Respondents received many enforcement orders from NHPI based on code violations found at their properties. The NHPI inspectors regularly found these units to be in serious disrepair or to pose significant health risks to their inhabitants, in violation of the housing code. Respondents "received code enforcement orders that, in many cases, cited between ten and twenty-five violations per property for conditions including rodent infestation, missing dead-bolt locks, inadequate sanitation facilities, inadequate heat, inoperable smoke detectors, broken or missing doors and screens, and broken or missing guardrails or handrails." Pet. App. 8a. "In some cases [Respondents'] properties were condemned as unfit for habitation." *Id.* at 50a. One of Respondents' properties "lacked adequate heat and did not have a door between the apartment and a common hallway. The stove and refrigerator did not work. There were holes in the wall, and [the witness] saw two mice while she was present." *Id.* at 79a n.13. One landlord admitted a stove was leaking gas but denied it was his responsibility to fix the leak. Defs.' Ex. 19, Doc. 201-24, at 206, 207.

At yet another property, a duplex owned by Respondent Steinhauser, one of the tenants called the police to report that Steinhauser, using racial- and gender-motivated epithets, threatened her for calling code enforcement. Defs.' Ex. 40, Doc. 201-52, at 1-2. When police responded, they reported that the downstairs unit had no heat, no smoke detector, rotting floors, continuous running water in the bathroom, water damage, and holes in the walls throughout the house where rats were accessing the interior. *Id*. The tenant who lived upstairs also reported that a space heater was the only available

heat source for her unit. *Id.* at 2. Most disturbing, the same tenant reported to police that just that morning, she found a rat on the bed where her two-month-old baby was sleeping. *Id*.

Caty Royce is the head of the Community Stabilization Project, a local non-profit organization that assists low-income residents in securing livable housing. She identified Respondent Steinhauser's properties as properties that tenants would come to her organization complaining about the conditions. Pls.' Ex. 128, Doc. 247-28, at 20. Royce testified that if there was not code enforcement that required landlords to maintain their properties to minimal health and safety standards, families who lived in these homes would be at great risk. *Id.* at 20-21.

II. PROCEEDINGS BELOW.

A. Summary Judgment In The District Court.

In 2004 and 2005, Respondents filed three related suits, subsequently consolidated, against Petitioners in the District of Minnesota. The suits pled a wide variety of claims, including violations of the FHA under disparate-treatment, disparate-impact, and retaliation theories. Pet. App. 51a. Respondents also asserted equal protection and substantive due process claims under 42 U.S.C. § 1983, and claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), federal antitrust laws, and Minnesota state law. *Id.* These claims were based on NHPI's inspections of Respondents' units beginning in 2002.

After extensive discovery, the district court granted the City's motion for summary judgment on all claims.

Id. Many of Respondents' claims were based on their allegations that the City intentionally discriminated against them by enforcing the City's housing code at their properties. According to Respondents, the City's actions were based on discriminatory motives because Respondents' tenants were predominately African-American. *Id.* at 59a. The district court granted summary judgment for the City on these claims because Respondents lacked sufficient evidence to prove that the City engaged in racial discrimination. *Id.* at 67a-82a.

With respect to the claim of disparate impact under the FHA, Respondents did not need to show a discriminatory motive, but they did need to identify a facially neutral practice or policy that caused a disparate impact on a protected class. *Id.* at 61a. Respondents failed to identify the facially neutral policy at issue in their summary judgment briefs. When pressed by the district court at oral argument, Respondents pointed to the "enforcement of the City's housing code instead of the federal [Housing Quality Standards]." *Id.* at 61a-62a.[6]

The district court granted summary judgment on Respondents' disparate-impact claim because they failed to present evidence that the enforcement of the City's housing code resulted in a disparate impact to members of a protected class. *Id.* at 62a-63a. For example, no evidence demonstrated that enforcement of the housing code, which was arguably stricter in

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[6] The federal Housing Quality Standards (HQS) is the housing code applicable to properties that house participants in the federal Section 8/Housing Choice Voucher program.

substance than the federal HQS, would increase the cost of low-income housing disproportionately rented by African-Americans. *Id.*

The district court also held that, even if Respondents could make out a prima facie case of disparate impact, their claims would still fail because they had not identified a viable alternative that would achieve the City's legitimate objectives. No party disputed that the City's enforcement of the housing code furthered the legitimate objectives of providing minimum property maintenance standards, keeping the City clean and its housing habitable. The district court rejected Respondents' argument that the enforcement of the HQS was a viable, non-discriminatory alternative to the housing code because the content of the two standards differed materially and there was no evidence that the adoption of the HQS would decrease rents. *Id.* at 66a.

The district court also rejected the contention that PP2000 was a viable alternative to city-wide code enforcement. *Id.* at 67a n.9. The court held that Respondents abandoned this position at oral argument by relying only on the federal HQS as a possible alternative. *Id.* In addition, even if Respondents had not abandoned this argument, Respondents "offered no evidence showing that the PP2000 program would achieve the [NHPI's] objectives without discriminatory effect." *Id.*

B. Court Of Appeals' Decision.

Respondents appealed the district court's ruling to the Eighth Circuit Court of Appeals. The circuit court agreed that Respondents failed to present sufficient

evidence that the City had acted with discriminatory intent. Pet. App. 10a-16a. The circuit court thus affirmed the summary judgment decision on all claims except for the disparate-impact claim under the FHA. *Id.* at 5a-6a.

On the disparate-impact claim, the circuit court did not discuss whether Respondents had presented sufficient evidence to show that enforcement of the City's housing code instead of the federal HQS resulted in a disparate impact on a protected class. *Id.* at 16a. Instead, the Eighth Circuit deemed "aggressive enforcement of the Housing Code" to be the relevant facially neutral policy. *Id.*

Having framed the challenged practice in this manner, the Eighth Circuit applied a three-step burden-shifting analysis to Respondents' claim. *Id.* at 17a-26a. At the first step, the circuit court acknowledged "there is not a single document that connects the dots of [Respondents'] disparate-impact claim." *Id.* at 20a. The court nevertheless concluded that Respondents had carried their burden at this first step because they had offered evidence supporting four conclusions: (1) "The City experienced a shortage of affordable housing."; (2) "Racial minorities, especially African-Americans, made up a disproportionate percentage of lower-income households in the City that rely on low-income housing."; (3) "The City's aggressive enforcement practices increased costs for property owners that rent to low-income tenants."; and (4) "The increased burden on rental-property owners from aggressive code enforcement resulted in less affordable housing in the City." *Id.* at 17a-19a.

According to the Eighth Circuit, "[t]hese premises, together, reasonably demonstrate that the City's aggressive enforcement of the housing code resulted in a disproportionate adverse effect on racial minorities, particularly African-Americans." *Id.* at 19a. As applied to Respondents, the evidence showed that "the City's Housing Code enforcement, temporarily, if not permanently, burdened [Respondents'] rental business, which indirectly burdened their tenants," who were predominantly African-American, by decreasing the availability of affordable housing. *Id.* at 20a.

Turning to the second step of the analysis, the Eighth Circuit agreed that the enforcement of the housing code was manifestly related to the legitimate non-discriminatory objectives of providing minimum property maintenance standards, keeping the City clean and its housing habitable, and making the City's neighborhoods safe and livable. *Id.* at 24a. As a result, the circuit court shifted the burden back to Respondents to identify a viable alternative to the City's "aggressive" enforcement of the housing code. *Id.*

Although the district court held that Respondents abandoned the position that PP2000 was a viable alternative to city-wide housing code enforcement, the Eighth Circuit revived this argument and determined that PP2000 could accomplish the objectives of housing code enforcement without discriminatory effect. *Id.* at 24a-26a. The Eighth Circuit reasoned that the program's cooperative approach would achieve greater rates of compliance at lower cost, thereby "significantly reduc[ing] the impact on protected class members." *Id.* at 26a.

Based on this analysis, the Eighth Circuit reversed the district court's grant of summary judgment on the disparate-impact claim.

C. Denial Of Rehearing En Banc With Five Judges Dissenting.

The City petitioned for rehearing en banc. Although the circuit court denied the petition, five judges dissented from the denial. The dissent noted that the case raises "important questions concerning whether 'aggressive' enforcement of a housing code is the sort of facially neutral policy that can trigger disparate-impact analysis under the FHA." Pet. App. 118a. In the dissent's view, the panel relied on an "expansive rationale [that] raises significant threshold issues concerning the application of disparate-impact analysis." *Id.* at 119a.

The dissent first questioned whether longstanding circuit precedent recognizing disparate-impact claims under the FHA remains viable. Although the Court declined to resolve the issue in *Town of Huntington, N.Y. v. Huntington Branch, NAACP*, 488 U.S. 15, 18 (1988) (per curiam), the Court's more recent decisions construing analogous statutes—in particular, *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 233-36 (2005)—suggest that the FHA's text should not be interpreted to impose disparate-impact liability. Pet. App. 120a-122a.

The dissent also questioned whether disparate-impact analysis of "aggressive" enforcement of a housing code is consistent with the purpose of the FHA, assuming such a claim is cognizable. *Id.* at 124a. Although the Eighth Circuit has applied disparate-

impact analysis in various cases arising under the FHA, "whether the panel's application of disparate-impact analysis to a city's aggressive housing code enforcement is dictated by the purpose of the FHA is an important question of first impression." *Id.* at 125a.

D. Issuance Of Writ Of Certiorari.

On November 7, 2011, the Court granted the Petition for Writ of Certiorari. *Gallagher v. Magner*, 619 F.3d 823 (8th Cir. 2010), *cert. granted*, 79 U.S.L.W. 3494 (U.S. Nov. 7, 2011) (No. 10-1032).

SUMMARY OF THE ARGUMENT

The FHA imposes liability for disparate treatment, not disparate impact. Under a disparate-impact theory, a defendant can be held liable if its actions disproportionately affect members of a protected class. Under this theory, whether a defendant acted entirely in good faith and without any discriminatory motive is irrelevant. This theory finds no support in the text of the FHA, which prohibits certain conduct taken "because of" a protected trait such a race.

In interpreting other anti-discrimination provisions, the Court has relied on the statutory text to distinguish between provisions that impose disparate-impact liability and those that do not. The Court has concluded that disparate-impact claims are cognizable when the statutory provision imposes liability on conduct that "adversely affect[s]" a member of a protected class. *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 235 (2005) (quoting 42 U.S.C. § 2000e-2(a)(2)).

In contrast, the Court has concluded that anti-discrimination provisions like the FHA's do not impose disparate-impact liability. The FHA prohibits a defendant from making housing "unavailable . . . to any person *because of* race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a) (emphasis added). This provision does not address the effect of the conduct on the plaintiff, but instead focuses on the defendant's motivation for the challenged conduct. *See Smith*, 544 U.S. at 235-36 & n.6; *see also Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2350 (2009) (based on the plain meaning of "because of," challenged conduct must be taken "by reason of" or "on account of" the protected trait). Because the FHA imposes liability only when a defendant has acted "because of" a person's race or other protected trait, an FHA violation cannot be established without evidence of a discriminatory motive. A showing of disparate impact alone will not suffice.

The legislative history does not support imposing disparate-impact liability under the FHA. When the statute was enacted in 1968, no member of Congress expressed the view that disparate-impact claims were cognizable under the statute. Some Senators suggested that the FHA required proof of discriminatory motive. Nor does the legislative history of the Fair Housing Amendments Act of 1988 establish that Congress intended for the FHA to impose disparate-impact liability. This legislative history demonstrates that there was no consensus as to whether disparate-impact claims were cognizable under the FHA. Not only did the Court leave open that question in *Town of Huntington, N.Y. v. Huntington Branch, NAACP*, 488 U.S. at 18 (per

curiam), but the United States filed a brief in that case urging the Court to hold that disparate-impact claims are not cognizable.

HUD has proposed regulations that would interpret the FHA to permit disparate-impact claims, but those proposed regulations do not affect the outcome of this case. Because the proposed regulations have not been finalized, they lack the force of law. Moreover, the regulations are contrary to the plain language of the statute. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 841 (1984).

Even if the FHA permits disparate-impact claims, Respondents' claims still fail as a matter of law. The courts that have recognized disparate-impact claims under the FHA have analogized the FHA to Title VII. If the FHA's provisions are interpreted based on Title VII, then disparate-impact claims under the FHA should be governed by *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989), which sets forth the test for proving a disparate-impact claim under Title VII. The Court followed this approach in *Smith*, in which it held that disparate-impact claims under the Age Discrimination in Employment Act (ADEA) were governed by *Wards Cove*.

Respondents' claims fail under this test. Under *Wards Cove*, Respondents must first make out a prima facie case of disparate impact by identifying a specific practice that allegedly caused a disparate impact on a protected group. *See* 490 U.S. at 656-57. Respondents failed to present sufficient evidence to make this showing.

Respondents did not establish that a *specific* practice had a disparate impact. Instead, Respondents raised numerous objections to the City's enforcement of its housing code. Rather than analyzing whether any of the specific practices at issue had a disparate impact, the court of appeals combined the different practices and characterized them as "aggressive" enforcement practices.

Respondents also failed to present statistical evidence showing that the City's "aggressive" enforcement of the housing code caused a disparate impact on a protected class. The court of appeals relied on evidence showing that, as a general matter, racial minorities disproportionately rely on low-income housing. But there is no allegation—much less evidence—that all owners of low-income housing were subject to "aggressive" enforcement of the housing code. To the contrary, Respondents presented evidence that only a very small percentage of low-income housing was subject to "aggressive" enforcement.

Respondents failed to present evidence that "aggressive" enforcement resulted in less affordable housing—a critical link in the chain of inferences on which the court of appeals relied. The court concluded that a jury could infer that "aggressive" enforcement resulted in a decrease in affordable housing based on the Vacant Buildings Report and on three affidavits describing hardships suffered by Respondents' tenants. This evidence is insufficient. The Vacant Buildings Report showed an increase in vacant buildings between 2003 and 2007, but it did not attribute the increase to enforcement of the City's housing code.

Even if Respondents could make out a prima facie case, their claims would still fail because they have not identified an equally effective alternative practice that would serve the City's legitimate interests with less racial impact. *See Wards Cove*, 490 U.S. at 656-57. The court of appeals concluded that Respondents presented sufficient evidence that PP2000 was a viable alternative, but the court erred in reaching this result. Respondents presented no evidence regarding the cost of PP2000—a relevant factor in considering whether PP2000 would be equally effective. Given that PP2000 was a limited program in which two inspectors worked with approximately fifteen landlords, that program is not a viable alternative for enforcement of the housing code at more than 115,713 properties.

Finally, regardless of the governing standard for disparate-impact claims, Respondents' claims of "aggressive" enforcement of the City's housing code—without evidence that the City's actions were motivated at all by race—does not satisfy the standard. If the City's race-neutral enforcement of its housing code could subject it to FHA liability under a disparate-impact theory, it would be forced to take race into consideration in deciding whether to enforce its code. Such a result would raise serious concerns under the Equal Protection Clause and would be contrary to the purpose of the FHA, which was intended to remove race as a consideration in housing decisions.

ARGUMENT

I. DISPARATE-IMPACT CLAIMS ARE NOT COGNIZABLE UNDER THE FAIR HOUSING ACT.

A. The Text Of The Fair Housing Act Does Not Support Disparate-Impact Liability.

Under section 804(a) of the FHA, it is unlawful to make housing "unavailable" if the defendant's actions were taken "because of" a protected trait, such as race. 42 U.S.C. § 3604(a). The Eighth Circuit held that Respondents could prove that the City acted "because of" race without offering any evidence that the City's actions were motivated by race. This ruling, which relied on a disparate-impact theory of liability, cannot be squared with the FHA's requirement that the challenged actions were "because of" race.

In interpreting anti-discrimination statutes, the Court distinguishes between practices involving "disparate treatment" and those that result in a "disparate impact." "Disparate-treatment cases present the most easily understood type of discrimination, and occur where an employer has treated [a] particular person less favorably than others because of a protected trait." *Ricci v. DeStefano*, 129 S. Ct. 2658, 2672 (2009) (internal quotation marks and citations omitted). To prove a disparate-treatment claim, a plaintiff must "establish that the defendant had a discriminatory intent or motive." *Id.* (internal quotation marks and citation omitted). In contrast, a disparate-impact claim does not require any proof of discriminatory intent. *Id.* Instead, disparate-impact liability may arise from "practices that are not

intended to discriminate but in fact have a disproportionately adverse effect on minorities." *Id.*

The Court looks to the statutory text of an anti-discrimination provision to determine whether it imposes liability only for disparate treatment or whether it also permits a disparate-impact claim. *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 233-36 (2005). The Court's interpretations of Title VII and the ADEA are instructive because these statutes contain some provisions that impose liability only for disparate treatment and other provisions that impose disparate-impact liability. *Id.*

Section 703(a)(1) of Title VII makes it unlawful for an employer "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." 42 U.S.C. § 2000e-2(a)(1). The Court has made clear that this provision holds "employers liable only for disparate treatment." *Ricci*, 129 S. Ct. at 2672.

Section 4(a)(1) of the ADEA contains the same language, except that it prohibits discrimination "because of . . . age." 29 U.S.C. § 623(a)(1). In *Smith*, the eight Justices who took part in the decision unanimously concluded that this provision does not impose disparate-impact liability. *See* 544 U.S. at 236 n.6 (plurality opinion of four justices); *id.* at 246 (Scalia, J., concurring in part); *id.* at 249 (O'Connor, J., concurring with three other justices). Justice O'Connor, in her concurrence, noted:

> Neither petitioners nor the plurality contend that the first paragraph, § 4(a)(1), authorizes disparate impact claims, and I think it obvious that it does not. That provision plainly requires discriminatory intent, for 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)).

As the Court recently explained in *Gross v. FBL Financial Services, Inc.*, "[t]he words 'because of' mean 'by reason of: on account of.'" 129 S. Ct. 2343, 2350 (2009) (quoting Webster's Third New International Dictionary 194 (1966)). Based on the ordinary meaning of "because of," the Court interpreted the ADEA to require a plaintiff to "prove that age was the 'but-for' cause of the employer's adverse decision." *Id.* Although the dissenting Justices disagreed with interpreting "because of" to require "but for" causation, they would have required a causal link between the challenged action and the protected trait. *Id.* at 2353 (Stevens, J., dissenting). Under the dissent's view, "the most natural reading of this statutory text prohibits adverse employment actions motivated in whole or in part by the age of the employee." *Id.* Thus, even under the dissent's approach, the "because of" language forecloses disparate-impact liability, which extends to actions that are not motivated at all by a protected trait.

Title VII and the ADEA also contain provisions that the Court has interpreted as imposing disparate-impact liability. *See Smith*, 544 U.S. at 236-40

(plurality opinion). Section 703(a)(2) of Title VII makes it unlawful for an employer "to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities *or otherwise adversely affect* his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(2) (emphasis added). Section 4(a)(2) of the ADEA contains the same language, except that it prohibits conduct that affects an individual "because of such individual's age." 29 U.S.C. § 623(a)(2). These provisions differ from section 703(a)(1) of Title VII and section 4(a)(1) of the ADEA because they address not only the employer's actions but also the effects that those actions have on employees.

In *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971), the Court held that an employee could establish a violation of Title VII without any evidence that the employer acted with discriminatory intent. The Court explained that "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." *Id.* As a result, an employee could prevail on a Title VII claim under a disparate-impact theory even when the evidence established the employer's "good intent or absence of discriminatory intent." *Id.*

Although *Griggs* focused on the purpose of Title VII in interpreting the statute to impose disparate-impact liability, the Court has "subsequently noted that [its] holding represented the better reading of the statutory text as well." *Smith*, 544 U.S. at 235 (plurality opinion). The text of section 703(a)(2) of Title VII supports a disparate-impact claim because it "focuses on the *effects* on the employee rather than the

motivation for the action of the employer." *Id.* at 236. The statutory text is directed at the discriminatory effects because it does not "simply prohibit[] actions that 'limit, segregate, or classify' persons; rather the language prohibits such actions that 'deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's' race or age." *Id.* at 235.

The *Smith* plurality also identified another "key textual difference[]" between section 4(a)(1) and section 4(a)(2) of the ADEA. 544 U.S. at 236 n.6. Section 4(a)(1) focuses "on the employer's actions with respect to the targeted individual." *Id.* In contrast, under section 4(a)(2), there is "an incongruity between the employer's actions—which are focused on his employees generally—and the individual employee who adversely suffers because of those actions." *Id.* As the plurality explained, "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.*

Other anti-discrimination provisions, in addition to Title VII and the ADEA, reinforce the dividing line between the disparate-treatment and disparate-impact standards. Section 5 of the Voting Rights Act, which was enacted three years before the FHA, expressly focused on the effects of discrimination. 42 U.S.C. § 1973c(b). Under this provision, certain political subdivisions must obtain preclearance before changing their voting systems in order to prevent them from adopting "[a]ny voting qualification . . . that has the purpose of *or will have the effect of* diminishing the

ability of any citizens of the United States on account of race or color . . . to elect their preferred candidates of choice." *Id.* (emphasis added).

In contrast, section 2 of the Voting Rights Act originally lacked any reference to the "effect" of discrimination. Section 2 provided: "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color. . . ." 42 U.S.C. § 1973 (1980). In *City of Mobile v. Bolden*, the Court interpreted this provision to require proof that the state action was motivated by a discriminatory purpose. 446 U.S. 55, 60-64 (1980) (plurality opinion); *id.* at 80 (Blackmun, J., concurring); *id.* at 85-86 (Stevens, J., concurring); *id.* at 94-95 (White, J., dissenting).

In response to the Court's decision in *City of Mobile*, Congress amended section 2 to provide that it did not require proof of discriminatory intent. *See Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 482 (1997) ("When Congress amended § 2 in 1982, it clearly expressed its desire that § 2 *not* have an intent component . . . ." (citation omitted)). As amended, "§ 2 bars *all* States and their political subdivisions from maintaining any voting 'standard, practice, or procedure' that 'results in a denial or abridgement of the right . . . to vote on account of race or color.'" *Id.* at 479.

Likewise, the Court has interpreted Title VI to prohibit only disparate treatment. *See Alexander v. Sandoval*, 532 U.S. 275, 280-81 (2001). In contrast to section 703(a)(2) of Title VII and section 4(a)(2) of the

ADEA, section 601 of Title VI does not proscribe activities that would "adversely affect" a person because of a protected trait. Instead, it provides only that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. In *Alexander*, the Court stated that it is "beyond dispute—and no party disagrees—that § 601 prohibits only intentional discrimination." 532 U.S. at 280.

In light of this body of case law, the language of the FHA does not impose disparate-impact liability. Section 804(a) of the FHA provides that "it shall be 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). The language of the FHA thus requires a plaintiff to show that the challenged conduct was taken "because of" a protected trait. *Id.* Such a showing requires evidence of discriminatory intent.

Circuit courts have held that disparate-impact claims are cognizable under the FHA by analogizing the FHA to Title VII. *See, e.g.*, *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 147 (3d Cir. 1977); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1288-89 (7th Cir. 1977). This approach, however, begs the question of whether the FHA is analogous to section 4(a)(2) of Title VII, which permits disparate-impact claims, or to section 4(a)(1), which does not.

See supra pp. 21-24. By relying on the Court's Title VII precedent without addressing that question, the circuit courts have violated the Court's admonition "not to apply rules applicable under one statute to a different statute without careful and critical examination." *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2349 (2009) (internal quotation marks omitted).

Based on its text, section 803(a) of the FHA should be interpreted in the same way the Court has interpreted section 703(a)(1) of Title VII and section 4(a)(1) of the ADEA. The Court has interpreted other anti-discrimination provisions as imposing disparate-impact liability when Congress has expressly prohibited actions that "adversely affect" an individual, and where the statute text exhibits an "incongruity" between the challenged action—which targets a group of employees—and the effect that the action has on an individual employee. *See Smith*, 544 U.S. at 235-36 & n.6. Section 804(a) of the FHA cannot be interpreted to impose disparate-impact liability because it lacks both of these textual features.

In opposing certiorari, Respondents argued that section 804(a) should be interpreted to impose disparate-impact liability because the provision is structured like section 703(a)(2) of Title VII. Resp'ts' Br. in Opp'n 14. Respondents base this argument on the fact that section 804(a) of the FHA includes a "catch-all[]" provision that prohibits actions that "otherwise make unavailable or deny" housing because of a protected trait. *Id.* In Respondents' view, this catch-all provision serves the same function as section 703(a)(2)'s catch-all provision, which addresses actions that "otherwise adversely affect" an employee. *Id.*

Respondents' argument lacks merit. The Court did not interpret section 703(a)(2) of Title VII to impose disparate-impact liability simply because it includes a catch-all provision. In fact, all of the relevant provisions in both Title VII and the ADEA have catch-all provisions.[7] The significance of section 703(a)(2)'s catch-all provision is that it shifts the focus from the defendant's actions to the effect that those actions have on the employee. Thus, this provision is considerably different than the catch-all provision in section 703(a)(1)—which makes it unlawful for an employer "otherwise to discriminate"—because that phrase simply broadens the scope of the proscribed actions, rather than shifting the focus to the effect on the employee. The catch-all provision in section 804(a) of the FHA serves the same purpose of the catch-all in section 703(a)(1) of Title VII: it makes clear that the

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[7] *See* 29 U.S.C. § 623(a)(1) (making it unlawful for an employer "to fail or refuse to hire or to discharge any individual, *or otherwise to discriminate* against any individual . . . because of such individual's age") (emphasis added); *id.* § 623(a)(2) (making it unlawful for an employer "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 age") (emphasis added); 42 U.S.C. § 2000e-2(a)(1) (making it unlawful for an employer "to fail or refuse to hire or to discharge any individual, *or otherwise to discriminate* against any individual . . . because of such individual's race, color, religion, sex, or national origin") (emphasis added); *id.* § 2000e-2(a)(2) (making it unlawful for an employer "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") (emphasis added).

provision prohibits all actions that make housing unavailable, not just those actions that are expressly prohibited. Unlike section 703(a)(2) of Title VII, nothing in the FHA's catch-all phrase shifts the focus to the effects that the defendant's actions have on the plaintiff.

Although the Court has said that the FHA should be interpreted broadly, *see Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 212 (1972), nothing in *Trafficante*—or any other decision of the Court—justifies giving the FHA a broader interpretation than the text of the statute can support. Under a disparate-impact theory, a defendant may be held liable for conduct that is not motivated at all by race so long as it has a disparate effect on a protected class of individuals. The FHA cannot be read to impose liability under this theory because it is contrary to the statutory requirement that the plaintiff prove that the defendant's actions were "because of" a prohibited factor such as race.

B. The Legislative History Of The Fair Housing Act Does Not Establish That Congress Intended To Impose Disparate-Impact Liability.

The legislative history of the FHA provides limited insight into whether Congress intended to impose disparate-impact liability. The FHA was introduced as a floor amendment to the Civil Rights Act. *See* 114 Cong. Rec. 2270-74 (1968). As a result, there are no committee reports discussing what Congress intended. *See, e.g.*, *Trafficante*, 409 U.S. at 210 ("The legislative history of the Act is not too helpful."); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 147 & n.29 (3d

Cir. 1977) (characterizing the FHA's legislative history as "somewhat sketchy" because "committee reports and other documents usually accompanying congressional enactments are missing here").

To the extent that the floor statements are relevant, no member of Congress explicitly stated that the FHA imposed disparate-impact liability. To the contrary, members of Congress made statements suggesting that the FHA required proof of discriminatory motive. For example, when asked whether FHA plaintiffs "would have to prove discrimination," Senator Mondale, the FHA's principal sponsor, answered: "Yes, and the burden is on the complainant." 114 Cong. Rec. 4974 (1968). Senator Mondale also stated that the FHA would simply allow an owner "to do everything that he could do anyhow with his property . . . except refuse to sell it to a person solely on the basis of his color. . . . That is all it does." *Id.* at 5643; *see also id.* at 2283 (Sen. Brooke) ("A person can sell his property to anyone he chooses as long as it is by personal choice and not because of motivations of discrimination."). Nor is there a basis for inferring that Congress intended to impose disparate-impact liability by analogy to Title VII, because Congress enacted the FHA three years *before* the Court held in *Griggs* that Title VII provides for disparate-impact liability.

Some courts have inferred that Congress intended for the FHA to allow disparate-impact claims based on the Senate's rejection of the "Baker amendment." *See, e.g.*, *Rizzo*, 564 F.2d at 147-48; *Huntington Branch, NAACP v. Town of Huntington, N.Y.*, 844 F.2d 926, 934-35 (2d Cir. 1988). That inference is unwarranted.

Under Senator Mondale's original proposal, the FHA would have applied to all homeowners. *See* 114 Cong. Rec. 2270 (1968). When this provision met opposition, Senator Dirksen proposed a substitute that would exempt single-family houses that were being sold or rented by their owners so long as the owners (1) sell or rent their houses without using a real estate agent, and (2) do not advertise their intent to give racial preference or to discriminate. *Id.* at 4975. During the debate on the Dirksen substitute, Senator Baker offered an amendment to Dirksen's proposal. *Id.* at 5214-22. Under the Baker amendment, a homeowner could use a real estate agent and still be exempt from the FHA's requirements so long as the homeowner did not either instruct the real estate agent to discriminate against potential buyers or otherwise express to the agent his or her intent to discriminate. *Id.* at 5214. The Baker amendment was rejected, and Congress enacted the Dirksen substitute, which remains part of the FHA today. *See* 42 U.S.C. § 3603(b).

The Senate's rejection of the Baker amendment does not support the inference that Congress intended the FHA to impose disparate-impact liability because the debate over that amendment had nothing to do with disparate-impact liability. The debate centered on the circumstances in which an owner of a single family home could act with a discriminatory motive without violating the FHA. Indeed, it is unclear whether it would even be possible to prove disparate impact based on the sale of a single home.

The statements by Senator Percy, the most outspoken opponent of the Baker amendment, do not suggest that he was concerned about imposing liability

on homeowners who acted in good faith but whose actions nevertheless had a disparate impact on protected classes. Instead, Senator Percy's statements made clear that he understood the Dirksen substitute to have the effect of allowing homeowners to engage in intentional discrimination based on race so long as they did so without using a real estate agent. 114 Cong. Rec. 5216 (1968). Although Senator Percy would have liked for the FHA to go further in eliminating discrimination, he viewed the Dirksen substitute as a "reasonable compromise," and opposed the Baker amendment's attempt to expand the scope of the exemption. *Id.* at 5216-17.

In opposing certiorari, Respondents argued that Congress's enactment of the Fair Housing Amendments Act of 1988 (FHAA) demonstrates that Congress intended for the FHA to impose disparate-impact liability. Resp'ts' Br. in Opp. 15-16. That argument fails.

Contrary to Respondents' assertion, the Court should not presume that Congress, in enacting the FHAA, implicitly ratified the courts of appeals' interpretations of the FHA. For such a presumption to apply, "the supposed judicial consensus [must be] so broad and unquestioned that [the Court] must presume Congress knew of and endorsed it." *Jama v. ICE*, 543 U.S. 335, 349 (2005). That standard is not met here.

The Court has declined to presume that Congress intended to adopt the circuit courts' interpretation of a statute even when eleven circuits had all interpreted a statute in the same way. *See Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 186

(1994); *id.* at 192 (Stevens, J. dissenting). Despite the unanimity in the circuits that had considered the question at issue, the judicial consensus was not sufficiently broad and unquestioned because the Court had previously reserved ruling on the question at issue. *Id.* at 186.

Here, as in *Central Bank of Denver*, the Court has explicitly left open the question of whether a plaintiff can establish a violation of the FHA based solely on a showing of discriminatory effect. *See Town of Huntington, N.Y. v. Huntington Branch, NAACP*, 488 U.S. 15, 18 (1988) (per curiam) ("Since appellants conceded the applicability of the disparate-impact test for evaluating the zoning ordinance under Title VIII, we do not reach the question whether that test is the appropriate one."); *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270-71 (1977) (remanding the case to allow the circuit court to decide whether FHA imposed disparate-impact liability).

The views of the Executive Branch during 1988—the year that the FHAA was enacted—reinforce the lack of a broad and unquestioned consensus on the issue. In *Town of Huntington*, the United States filed a brief noting that the Court had not decided whether a plaintiff must prove discriminatory intent under the FHA and urging the Court to hold that the FHA does *not* impose disparate-impact liability. Brief for United States as Amicus Curiae Supporting Appellants at 12 n.15, Town of Huntington, N.Y. v. Huntington Branch, NAACP, 488 U.S. 15 (1988) (No. 87-1961). The Solicitor General explained:

> Although proscribing a broad range of conduct, Congress limited [§ 804(a)] to action taken

> "because of race." The words "because of" plainly connote a causal connection between the housing-related action and the person's race or color. The proscribed action must have been caused, at least in part, by the individual's race, which strongly suggests a requirement of discriminatory motivation. An action taken because of some factor other than race, i.e., financial means, even if it causes a discriminatory effect, is not an example of the intentional discrimination outlawed by the statute.

Id. at 14-15 (citation omitted).

In addition to making this textual argument, the Solicitor General argued that "[t]he legislative history reinforces the understanding that Congress intended to require a showing of intentional discrimination." *Id.* at 16 & n.20. According to the Solicitor General, "[n]either supporters nor opponents suggested that the legislation would ban local zoning regulations merely because they had a racial effect, without any showing that the local government intended to discriminate." *Id.* at 16-17.

In signing the FHAA, President Reagan expressed the same view. He explicitly stated that "this bill does not represent any congressional or executive branch endorsement of the notion, expressed in some judicial opinions, that Title 8 violations may be established by a showing of disparate impact or discriminatory effects of a practice that is taken without discriminatory intent. Title 8 speaks only to intentional discrimination." Presidential Statement on Signing

the Fair Housing Amendments Act of 1988, 24 Weekly Comp. Pres. Doc. 1141 (Sept. 13, 1988).

Nor would it be appropriate to presume that Congress viewed the issue of whether the FHA imposed disparate-impact liability to be settled when the legislative history demonstrates that no such consensus existed. For example, Senator Hatch repeatedly expressed his view that the FHA requires proof of discriminatory intent. *See, e.g.*, 133 Cong. Rec. S4088 (daily ed. Mar. 27, 1987) (statement of Sen. Hatch) (arguing in support of a bill "that would clarify that the standard of proof in identifying discrimination under Title VIII is an intent standard" and that "the present language of [Title VIII], as well as its legislative history, indicate clearly that this is already the appropriate standard"). Senator Hatch also stated: "According to my Webster's dictionary, the phrase 'because of' means 'by reason of' or 'on account of.' There is, in other words, a nexus or a relationship between the activity and the proscribed motivation." 126 Cong. Rec. 15,192 (1980).

In short, the legislative history demonstrates that neither the members of Congress who enacted the FHA in 1968 nor those who amended it in 1988 shared a common view as to whether the statute imposed disparate-impact liability. Moreover, the text that Congress enacted establishes that a violation of the FHA cannot be proven without evidence of discriminatory intent. *See supra* Part I.A.

C. Deference To HUD's Proposed Regulation Is Not Required.

Nine days after the Court granted certiorari in this case, HUD issued a notice of proposed rulemaking to "establish uniform standards for determining when a housing practice with a discriminatory effect violates" the FHA. *Implementation of the Fair Housing Act's Discriminatory Effects Standard*, 76 Fed. Reg. 70,921 (Nov. 16, 2011). The proposed rule would interpret the FHA as permitting disparate-impact claims, and would establish a burden-shifting approach to resolving those claims. *Id.* at 70,924-25. The agency set a deadline of January 17, 2012, for comments on the proposed regulations. *Id.* at 70,921.

HUD's proposed regulations do not affect this case because they have not been adopted, and therefore do not have the force of law. Moreover, even if HUD were to issue final regulations before the Court decides this case, those regulations would not affect the Court's decision for at least two reasons.

First, the regulations, if adopted, would not be entitled to deference because they are contrary to the plain language of the statute. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 841 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). As discussed above, the

statutory text cannot be interpreted to permit disparate-impact claims. *See supra* Part I.A.[8]

Second, HUD's proposed regulations do not affect this case because they do not apply retroactively. The regulations do not rebut the "deeply rooted" presumption against retroactivity. *See, e.g., Landgraf v. USI Film Prod.*, 511 U.S. 244, 265-66 (1994) (concluding that provisions of the Civil Rights Act of 1991 do not retroactively apply to actions pending when the legislation was enacted). An agency may engage in retroactive rulemaking only if Congress has clearly authorized it to do so. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Nothing in the FHA provides HUD with retroactive rulemaking authority. *See* 42 U.S.C. § 3614A. As a result, HUD's regulations would affect only future cases. The claims in this case must be resolved based solely on the statutory text.

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[8] In its notice of proposed rulemaking, HUD asserts that it has had a longstanding policy of interpreting the FHA as permitting disparate impact claims. 76 Fed. Reg. at 70,922. HUD does not assert that any of these prior statements is entitled to deference from the Court. *See United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) (*Chevron* deference is reserved for administrative action "carrying the force of law," such as notice-and-comment rulemaking); *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.").

II. ENFORCEMENT OF SAINT PAUL'S HOUSING CODE DOES NOT VIOLATE THE FAIR HOUSING ACT EVEN IF THE ACT IMPOSES DISPARATE-IMPACT LIABILITY.

A. If Disparate-Impact Claims Are Cognizable, The *Wards Cove* Test Should Apply.

1. *Wards Cove* is the correct test.

The Court in *Smith* applied the test in *Wards Cove* when it analyzed disparate impact under the ADEA. The *Smith* Court reasoned that the Civil Rights Act of 1991, which modified the *Wards Cove* analysis, applied expressly and only to Title VII. Hence it did not apply to the ADEA. The same reasoning applies to the FHA and the same test should be applied here.

In *Wards Cove*, the Court laid out a three phase analysis for disparate-impact claims. 490 U.S. at 656-58. Under *Wards Cove*, "'the ultimate burden of proving that discrimination against a protected group has been caused by a specific . . . practice remains with the plaintiff *at all times*.'" *Id.* at 659 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 997 (1988) (plurality opinion)). In phase one, the plaintiff must first make out a prima facie case of disparate impact by identifying the specific practice that caused the alleged disparate impact on a protected group. *See id.* at 657; *see also Watson*, 487 U.S. at 994.

Once the plaintiff has established its prima facie case, the defendant must produce evidence of a "business justification" for the challenged employment practice. *Wards Cove*, 490 U.S. at 659. Phase two of

the inquiry has two steps: (1) defendant must produce evidence of a business justification; and (2) plaintiff must persuade the factfinder that this justification is not legitimate. *Id*. at 658-60. Although the defendant has the burden of production with regard to its reasons for adopting the challenged practice, "the burden of persuasion . . . remains with the disparate-impact plaintiff." *Id.* at 659. "A mere insubstantial justification in this regard will not suffice . . . . At the same time, though, there is no requirement that the challenged practice be 'essential' or 'indispensible' to the employer's business for it to pass muster . . . ." *Id.*

Once the defendant has discharged its burden of production, the plaintiff must at phase three "persuade the factfinder that 'other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate . . . interests'; by so demonstrating, [the plaintiff] would prove that '[the defendant was] using [its] tests merely as a "pretext" for discrimination.'" *Id.* at 660 (citing, inter alia, *Watson*, 487 U.S. at 998 (plurality opinion) & 1005-06 (concurrence)). Any alternative practices, though, must be "equally effective." *Id.* at 661 (noting factors such as cost and other burdens are relevant considerations).

In light of *Wards Cove*'s reliance on *Watson*'s plurality opinion in laying out its disparate-impact standard, it is important to consider *Watson* as well. *Watson*'s majority wrote that "the necessary premise of the disparate impact approach is that some . . . practices, adopted without a deliberately discriminatory motive, may in operation be *functionally equivalent* to intentional discrimination." 487 U.S. at 987 (emphasis added). The Court

explained that, as between disparate treatment and disparate impact, the "ultimate legal issue" was the same—i.e., discrimination "because of" a protected trait—and thus it was wholly inappropriate "to hold a defendant liable for unintentional discrimination on the basis of *less evidence* than is required to prove intentional discrimination." *Id.* (emphasis added).

The Court in *Wards Cove* gave three additional reasons for the approach that it adopted. First, liberal civil discovery rules aid all plaintiffs in "meet[ing] their burden of showing a causal link between challenged . . . practices" and disparate impacts. 490 U.S. at 657-58. Second, making the plaintiff carry the burden of persuasion at each phase "conforms with the usual method for allocating persuasion and production burdens in the federal courts, . . . and more specifically, it conforms to the rule in disparate-treatment cases." *Id.* at 659-60. Lastly, regarding the last phase, the Court noted that "[c]ourts are generally less competent than employers to restructure business practices," and that "consequently, the judiciary should proceed with care before mandating that an employer must adopt a plaintiff's alternative . . . practice." *Id.* at 661 (internal quotation marks omitted).

These points are each applicable and relevant in the FHA context, including this case: Respondents had the benefit of liberal discovery; Respondents brought (and lost) a disparate-treatment claim and therein had to carry the burden of persuasion all the way through, just as in any other claim; and Petitioners, *not* the district court or the Eighth Circuit, were more competent and in the best position to decide how to effectively enforce Saint Paul's housing code. *Wards Cove* is clearly the best standard to apply in

this case and to disparate-impact claims under the FHA as a whole.

Parts of *Wards Cove* were superseded by the Civil Rights Act of 1991. *See* 42 U.S.C. § 2000e-2(k); *see also Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2555 (2011) (noting this fact, but then citing *Wards Cove* for a non-superseded proposition). This superseding legislation, however, is only relevant in the Title VII context, not the Title VIII context. In *Smith*, the Court thought it significant that Congress had not similarly amended the ADEA. 544 U.S. at 240. The Court concluded that, because the Civil Rights Act of 1991 did not amend the burden of proof applicable to claims under the ADEA, *Wards Cove's* pre-1991 interpretation of Title VII remained applicable to disparate-impact claims brought under the ADEA. *Id*. Likewise, Congress has not amended the burden of proof for FHA claims, and thus the *Wards Cove* test should be given deference and should be applied in this case.

2. The circuit courts' analyses are incorrect.

Rather than applying *Wards Cove*, circuit courts of appeals have generally applied either a burden-shifting test or a balancing test. The Court should not adopt either approach.[9]

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[9] Other circuit courts have adopted aspects of both the burden-shifting test and the balancing test. *See, e.g.*, *Huntington Branch, NAACP v. Town of Huntington, N.Y.*, 844 F.2d 926, 934-35 (2d Cir. 1988). This approach should be rejected both because it is unsupported by the statutory text and the Court's precedents and

First, the circuit courts that use a burden-shifting test typically consider factors similar to those applied in *Wards Cove*. *See, e.g.*, *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 148-49 (3d Cir. 1977). Unlike in *Wards Cove*, however, these courts shift the burden of persuasion to the defendants to justify the necessity of the challenged practice. *See, e.g.*, *id.* If the defendant successfully shows that the practice is necessary, some courts shift the burden of persuasion back to the plaintiff to show the availability of equally effective alternatives, while other courts assign the burden of persuasion to the defendants. *Compare Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth.*, 417 F.3d 898, 902-03 (8th Cir. 2005) (shifting the burden back to the plaintiff to show that a viable alternative practice is available that would achieve the defendant's policy objectives without discriminatory effects), *with Rizzo*, 564 F.2d at 149 (requiring a Title VIII defendant to show that no equally effective but less discriminatory alternative practice could have been adopted).

The burden-shifting approach is contrary to the general presumption that a plaintiff must prove each element of his or her claim. The Court has made clear that "[w]here the statutory text is 'silent on the allocation of the burden of persuasion,' [it] 'begin[s] with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims.'" *Gross v. FBL Fin. Servs., Inc.,* 129 S. Ct. 2343, 2351 (2009) (quoting, *Schaffer v. Weast*, 546 U.S. 49, 56 (2005)). The text of the FHA provides no basis for shifting the burden of

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because it raises the same concerns that result from applying either test individually.

persuasion to the defendant for any part of the plaintiff's claim.

Second, other courts of appeals have adopted multifactor balancing tests to decide disparate-impact claims under the FHA. *See, e.g.*, *Arthur v. City of Toledo, Ohio*, 782 F.2d 565, 574-75 (6th Cir. 1986); *Smith v. Town of Clarkton, N.C.*, 682 F.2d 1055, 1065 (4th Cir. 1982); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290-92 (7th Cir. 1977). This approach finds no support in either the text of the FHA or in the Court's decisions. Nor does the balancing approach further the purposes of the FHA. In *Wards Cove*, the Court required a plaintiff to make out a prima facie case of disparate impact before it would consider the defendant's justifications for the challenged practice because "[c]ourts are generally less competent than employers to restructure business practices," 490 U.S. at 661 (internal quotation marks omitted), and to avoid holding employers liable for "the myriad of innocent causes that may lead to statistical imbalances in the composition of workforces." *Id.* at 657 (internal quotation marks omitted).

The Court's reasoning is equally applicable in this case. Before a court second guesses a city's method for enforcing its housing code, it should ensure that the plaintiff has made out a prima facie case of disparate impact. Yet, under a balancing test, a court must consider all factors in each case, and thus must pass judgment on the city's decisions even when evidence of disparate impact is lacking. In short, if the Court concludes that disparate-impact claims are cognizable under the FHA, then it should apply the disparate-impact test in *Wards Cove* that it has previously

applied to Title VII and the ADEA. *See Wards Cove*, 490 U.S. at 656-60; *Smith*, 544 U.S. at 240.

B. The City Was Entitled To Summary Judgment Under The *Wards Cove* Test.

Applying *Wards Cove*, Respondents are first required to make out a prima facie case of disparate impact. 490 U.S. at 656-58. Respondents would then need to persuade the factfinder that either the City lacked a legitimate reason for enforcing its housing code, or that the City could have adopted a different policy that would have been equally effective in achieving the City's objectives while having less impact on a protected class of tenants. *Id*. at 658-61. Respondents' claims fail as a matter of law at each phase of such an analysis.

1. Respondents failed to make out a prima facie case of disparate impact.

The Eighth Circuit held that Respondents presented sufficient evidence to make out a prima facie case based on the theory that the City's "aggressive" enforcement of its housing code had a disparate impact on Respondents' minority tenants. Pet. App. 16a-26a. Although it acknowledged that Respondents lacked any evidence that "connect[ed] the dots" of their claim, the court of appeals concluded that a jury could connect the dots based on the following chain of inferences: (1) "aggressive" enforcement of the housing code increased costs for landlords; (2) the increased costs for landlords resulted in less affordable housing; and (3) the reduction in affordable housing disproportionately affected racial minorities because the City had a shortage of affordable housing and

racial minorities made up a disproportionate percentage of low-income residents. *Id.* at 17a-19a.

Respondents' evidence is insufficient to survive summary judgment under *Wards Cove*. To make out a prima facie case of disparate impact, it is not enough for plaintiffs to establish that a racial imbalance exists. *Wards Cove*, 490 U.S. at 657. Instead, plaintiffs must meet a "specific causation requirement," by identifying the *specific* practice that he or she is challenging and demonstrating that this practice "has created the disparate impact under attack." *Id.* Respondents failed to present sufficient evidence to meet this standard.

The circuit court erred by not addressing whether any specific practice identified by Respondents resulted in a disparate impact on a protected class. *See id.* Respondents challenged the City's enforcement of its housing code on many distinct grounds, including "that the City issued false Housing Code violations and punished property owners without prior notification, invitations to cooperate with [NHPI], or adequate time to remedy Housing Code violations." Pet. App. 17a. Rather than addressing whether any of these specific practices resulted in a disparate impact, the circuit court broadly characterized them all as "aggressive" enforcement practices, and considered only whether "aggressive" enforcement caused a disparate impact. *Id.*

This approach cannot be squared with *Wards Cove*. There, plaintiffs also challenged "several" of the defendant's practices. 490 U.S. at 657. The Court made clear that plaintiffs could not make out a prima facie case by showing that the employers' practices,

considered as a whole, disparately impacted members of a protected class. *Id.* Instead, the plaintiffs were required "to demonstrate that the disparity they complain of is the result of one or more of the employment practices that they are attacking here, specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites." *Id.*

Respondents should have been required to make the same showing here. Rather than grouping all of the challenged actions together and calling them "aggressive" enforcement practices, the circuit court should have considered whether Respondents had any evidence to link a specific practice to a disparate impact on a protected class. This is especially true given the broad range of allegations that have been subsumed in "aggressive" enforcement. For example, allegations that the City issued false code violations are considerably different from allegations that the city issued valid violations without first extending an "invitation[] to cooperate with [NHPI]," and thus acted too aggressively. Pet. App. 17a.

The circuit court erred in holding that Respondents made out a prima facie case of disparate impact based on statistics showing that, as a general matter, racial minorities in Saint Paul disproportionately rely on low-income housing. *Id.* at 20a-24a. In *Wards Cove*, the Court made clear that the statistics used to show a racial disparity must permit an inference that the challenged practice led to that disparity. *See* 490 U.S. 650-52. Thus, in *Wards Cove*, it was insufficient for the plaintiffs to show that a disproportionately large number of minorities were employed as cannery workers as compared to non-cannery workers, because

that comparison did not suggest that the employers' hiring practices for either type of worker caused a disparate impact. *Id.* at 651-55. Instead, plaintiffs needed to show, for example, a disparity between the applicant pool for non-cannery jobs and those hired for the jobs because that statistic would permit an inference related to the effect of the employer's hiring practices. *Id.*

The circuit court erred in relying on general statistics related to the percentage of minorities in low-income housing as compared to the percentage of minorities in Saint Paul as a whole. These general statistics cannot be used to make out a prima facie case because they fail to isolate the alleged effects of the challenged actions. *See id.* at 655. Respondents do not allege—much less present sufficient evidence to survive summary judgment—that the City engaged in "aggressive" enforcement with respect to all low-income housing. To the contrary, Respondents based their disparate *treatment* claims on allegations that their properties were targeted for "aggressive" enforcement, while other landlords who owned low-income housing were not subject to "aggressive" enforcement. Both lower courts concluded that Respondents lacked evidence to support this allegation. Pet. App. 10a-16a, 67a-81a.

Respondents presented no evidence that the alleged "aggressive" enforcement impacted any properties within the City other than their own. Even with respect to their own properties, Respondents do not allege that the City practiced "aggressive" enforcement at all of their properties. Moreover, some of Respondents' allegations of "aggressive" enforcement relate to properties that were rented by non-protected

tenants or were vacant at the time of enforcement. *See, e.g.*, Defs.' Ex. 30, Doc. 201-41, at 147. Thus, Respondents' evidence, at best, showed that the City aggressively enforced its housing code at less than 120 of the City's more than 100,000 properties, including properties that were not inhabited by members of a protected class.

Under *Wards Cove*, Respondents were required to present evidence that could isolate the effect of "aggressive" enforcement on those tenants who were subject to "aggressive" enforcement. Without such evidence, there is no way to determine whether any observed statistical disparity is causally linked to the challenged actions. Because Respondents presented evidence of "aggressive" enforcement at only a tiny fraction of the housing units in Saint Paul, the circuit court erred in concluding that a jury could draw inferences regarding the effect of "aggressive" enforcement on these few tenants based on statistics involving all of Saint Paul.

The circuit court also erred in holding that a jury could infer that the City's enforcement of its housing code resulted in less affordable housing in the City. Pet. App. 19a. The court based this conclusion on (1) the City's Vacant Buildings Report, which showed an increase in vacant homes from 367 in March 2003, to 1,466 in November 2007; and (2) affidavits from three tenants who alleged that their homes were condemned for minimal or false housing code violations. *Id.* This evidence does not support an inference that "aggressive" enforcement disproportionately harmed minority tenants by reducing the amount of affordable housing.

First, although the Vacant Buildings Report shows an increase in vacant homes, it does not support the inference that this increase was caused by "aggressive" enforcement of the housing code. *See Wards Cove*, 490 U.S. at 656 (discussing causation). To the contrary, as the district court explained, the report attributes the increase to mortgage foreclosures, and it "identifies equity stripping, predatory lending practices, sub-prime lending, unforeseen life events such as loss of income and health issues, increasing interest rates, and unemployment levels as causes of foreclosures." Pet. App. 65a. As the district court explained, "[t]he Vacant Buildings report does not identify enforcement of the City's housing code as a cause of increased vacancies or foreclosures." *Id.* Thus, the circuit court erred in holding that a jury could infer that "aggressive" enforcement caused an increase in vacant housing when the evidence does not support that causal link.[10]

Second, affidavits from three tenants cannot establish that "aggressive" enforcement resulted in a disparate impact on members of a protected class. To show that members of a protected class were disproportionately affected by "aggressive" enforcement of the housing code, Respondents would need to quantify the total number of tenants who were

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[10] The vacant building statistics are also insufficient because they are not limited to vacancies in low-income housing, much less to vacancies in properties that were allegedly subject to aggressive enforcement. Instead, the statistics include all vacant homes throughout the City. 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; and Doc. 254-20, at 1-11.

harmed by "aggressive" enforcement. *See Wards Cove*, 490 U.S. at 653-54 (discussing the need to identify an appropriate comparator group for purposes of determining disparate impact). If the majority of those individuals are not members of a protected class, then the evidence would fail to show a disparate impact.

Affidavits from three individuals are also insufficient because they do not establish that "aggressive" enforcement of the housing code generally had a negative effect on members of a protected class. There is no evidence that tenants had their rent increased as a result of their landlord's need to spend money to bring their residence up to code. To the contrary, "aggressive" enforcement benefited all of the tenants whose residences were repaired rather than condemned. Those tenants may greatly outnumber the tenants whose residences were condemned.

In short, the City was entitled to summary judgment because Respondents failed to present evidence of a *specific* practice that resulted in a disparate impact on a protected class. The circuit court's attempt to create a chain of inferences to support Respondents' claims fails under the *Wards Cove* test.

2. Petitioners have a legitimate business justification.

If Respondents could make out a prima facie case of disparate impact, the inquiry would shift to (1) the City's justifications for the challenged practice, and (2) the availability of equally effective alternative practices that serve the City's legitimate interests with less disparate impact. *Wards Cove*, 490 U.S. at 658-60.

Because Respondents failed to create a genuine issue of material fact on these issues, Respondents' claims fail even if they had sufficient evidence that "aggressive" code enforcement caused a disparate impact.

There is no dispute that Respondents cannot prevail on the first phase of the inquiry. At this phase, the focus is on the City's justification for the challenged practice, and the dispositive issue is whether the practice serves the City's legitimate interests. *See id.* at 659. The City's efforts to enforce its housing code clearly serve the legitimate goal of ensuring that all City residents have housing that is habitable and safe. Neither the circuit court nor Respondents dispute this point. Pet. App. 24a.

3. Respondents lack evidence of an equally effective alternative practice.

Because Respondents have not challenged the legitimacy of the City's enforcement of its housing code, they can prevail only if they prove that a viable alternative practice exists. The circuit court held that the case could go to trial on the theory that the City's PP2000 program is a viable alternative to the City's alleged "aggressive" enforcement of its housing code. Pet. App. 25a-26a. The evidence regarding PP2000 was insufficient as a matter of law.

Under *Wards Cove*, Respondents are required to identify an "equally effective" alternative practice that serves the City's legitimate interests without the alleged undesirable racial effect before they can succeed on their disparate-impact claim. 490 U.S. at 660. To determine whether a proposed alternative is

"equally effective," a court must consider "factors such as the cost or other burdens of [the] proposed alternative." *Id*. at 661 (internal quotation omitted).

Respondents failed to present evidence that PP2000 satisfies this standard. PP2000 was a program that started in 1999 and ended in 2001 before Petitioner Dawkins was chosen as the Director of NHPI. Defs.' Ex. 9, Doc. 201-10, at 212. As part of this program, the City identified approximately fifteen landlords whose properties had a history of unresolved or repeat housing code violations. Defs.' Ex. 9, Doc. 201-10, at 214. While PP2000 was in effect, two City inspectors worked with the landlords to find ways to improve their compliance with the housing code. Pls.' Ex 113, Doc 247-4, at 4; Defs.' Ex 9, Doc. 201-10, at 211-12; Pet. App. 66a n.9. At all times during the program, the landlords bore the costs of improving their properties; the City did not subsidize any of the remedial costs. PP2000 was successful in improving living conditions at most, but not all, properties involved in the program. As City inspector Hawkins acknowledged, PP2000 was successful with regard to approximately 70% of the program's landlords. Pls.' Ex. 113, Doc. 247-4, at 9.

Contrary to the circuit court's ruling, the success of this limited program fails to create a genuine issue as to whether it would be as "equally effective" as the challenged practice. The Court's decision in *Wards Cove* makes clear that costs or other burdens imposed by the proposed alternative must be considered in determining whether the alternative is "equally effective." 490 U.S. at 661. Respondents presented no evidence to show that PP2000 could be implemented city-wide without imposing prohibitive costs on the

City. Nor could they. PP2000 operated with a ratio of roughly one inspector for every seven landlords. The City would need to hire hundreds, if not thousands, of inspectors to expand the program to include the landlords or owners for all 115,713 housing units in the City.[11]

Had the Eighth Circuit properly applied the *Wards Cove* test, it would have affirmed the district court's ruling that Respondents lacked sufficient evidence to show that PP2000 is a viable alternative to the challenged practice. Because the Court of Appeals applied the wrong test and reached the wrong result, its decision should be reversed.

C. Even If The Court Does Not Adopt The *Wards Cove* Test, Respondents' Claims Should Still Fail.

Respondents' claims should fail regardless of the test adopted by the Court. As discussed above, the summary judgment record lacks sufficient evidence to show that the alleged "aggressive" enforcement of the

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[11] The district court concluded that Respondents had abandoned PP2000 as a viable alternative, and that, in any event, they had offered "no evidence" to establish that PP2000 was a viable alternative. Pet. App. 66a n.9. On appeal, Respondents did not argue that PP2000 would be equally (or less) costly than "aggressive" enforcement, and thus the City had no reason to argue to the contrary. The Eighth Circuit stated that the *City* had not argued that PP2000 would be more costly. Pet. App. 26a. Under *Wards Cove*, however, Respondents have the burden of showing that expanding PP2000 city-wide would not be so costly as to prevent the program from being "equally effective." Since Respondents made no attempt to satisfy this burden, summary judgment should have been affirmed.

housing code caused a disparate impact on a protected class. *See supra* Part II.B.1. That alone should be sufficient to warrant summary judgment for the City under any test that the Court would adopt.

Regardless of the governing standard, plaintiffs should not be able to challenge a city's enforcement of its housing code where they cannot show that the city's actions were motivated by race or any other protected trait. Allowing such claims to proceed would be contrary to the FHA's purpose and would raise equal protection concerns.

Congress enacted the FHA to provide for fair housing throughout the United States. 42 U.S.C. § 3601. Congress sought to achieve this goal by prohibiting housing decisions that are based on factors such as race. *See* 42 U.S.C. § 3604(2). Yet, if a city is subject to disparate-impact claims for enforcing its housing code, it will be required to consider race as a factor in its enforcement decisions. For example, if a city discovers that a building has such serious structural problems that it should be condemned, the city will need to consider whether the occupants who would be displaced are disproportionately from protected classes. If they are, the city will face a Hobson's choice. If it condemns the building, it could be sued under the FHA on a disparate-impact theory. If the city decides not to enforce the housing code and this decision is made based on the race of the building's occupants, it could also be sued under the FHA on a disparate-treatment theory. Its decision would also potentially violate the Equal Protection Clause. *See Washington v. Davis*, 426 U.S. 229, 242 (1976).

The Court has recognized that the disparate-impact theory, if misapplied, could result in the unintended consequence of requiring race-based decision making. For example, in *Watson*, the plurality opinion noted:

> [E]xtending disparate impact analysis to subjective employment practices [under Title VII] has the potential to create a Hobson's choice for employers and thus to lead in practice to perverse results. If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. . . . Allowing the evolution of disparate impact analysis to lead to this result would be contrary to Congress' clearly expressed intent, and it should not be the effect of our decision today.

487 U.S. at 993.

If a city must enforce its housing code selectively to avoid disparately impacting minorities under the FHA, it will be required to consider the racial significance of its facially neutral policy and to make decisions based on race. Yet selectively enforcing its laws based on race raises significant equal protection concerns. *See Ricci*, 129 S. Ct. at 2673-74. In *Ricci*, the Court addressed only whether the city's race-based preferential treatment of certain employees was justified under Title VII by its avoidance of a disparate-impact suit by different employees, leaving for another day whether this action is permitted by the Equal Protection Clause of the Fourteenth Amendment. *See id.* at 2676. Nonetheless, as a concurring opinion noted, resolving the case solely on

statutory grounds "merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII . . . consistent with the Constitution's guarantee of equal protection?" *Id.* at 2682 (Scalia, J., concurring).

In short, regardless of which test is adopted for disparate-impact claims, the Court should hold that the test is not satisfied by allegations involving a city's enforcement of its housing code without evidence of a discriminatory motive, because allowing such claims would frustrate the FHA's objectives and would raise serious constitutional concerns.

CONCLUSION

The judgment of the Eighth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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