No. 10-1032

In the Supreme Court of the United States

STEVE MAGNER, ET AL., PETITIONERS

v.

THOMAS J. GALLAGHER, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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QUESTIONS PRESENTED

1. Whether disparate-impact claims are cognizable under Section 804(a) of the Fair Housing Act, 42 U.S.C. 3604(a).

2. Whether the court of appeals correctly applied a burden-shifting framework in analyzing respondents' disparate-impact claims.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Statutes and regulations:

Statutes and regulations: Page

Miscellaneous:

Miscellaneous—Continued: Page

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INTEREST OF THE UNITED STATES

This case presents important questions concerning the existence of, and standards for resolving, disparate-impact claims under Section 804(a) of the Fair Housing Act (FHA or Act), 42 U.S.C. 3604(a). The FHA prohibits discrimination on various bases in the sale or rental of housing and in related services. See 42 U.S.C. 3604, 3605. The Act gives the Secretary of the Department of Housing and Urban Development (HUD) "authority and responsibility for administering [the FHA]." 42 U.S.C. 3608(a). In exercising its adjudicatory authority under the statute, HUD has long interpreted the Act to permit disparate-impact claims, *e.g.*, *Mountain Side Mobile Estates P'ship* v. *HUD*, 56 F.3d 1243, 1251 (10th Cir. 1995), and it recently issued a proposed rule reinforcing

its recognition of disparate-impact liability and prescribing standards for addressing disparate-impact claims, 76 Fed. Reg. 70,921-70,927 (Nov. 16, 2011). In addition, the Department of Justice has authority to enforce the FHA, see 42 U.S.C. 3612(*o*), 3614(a)-(d), and has brought disparate-impact claims in its enforcement actions. See, *e.g.*, *United States* v. *City of Black Jack*, 508 F.2d 1179, 1186 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the FHA, 42 U.S.C. 3601 *et seq.*, and select other statutory provisions are set forth in an appendix to this brief. App., *infra*.

STATEMENT

1. a. Beginning in 2003, the city of St. Paul, Minnesota (City), established a new executive agency to administer the City's housing code. Pet. App. 52a. One priority was to remedy "problem properties," including by performing proactive inspection sweeps in addition to conducting inspections in response to citizen complaints, and by citing every identified violation of the code rather than only those violations reported in a complaint. *Id.* at 6a-7a, 52a-53a. The City employed various practices to compel owners of renter-occupied dwellings to take more responsibility for their properties or to force a change in ownership. Such practices included issuing orders to correct violations of the housing code, condemning buildings, evicting tenants, seizing real estate, and revoking rental registrations. *Id.* at 7a. Correction of noncomplying conditions sometimes required expensive renovations. *Id.* at 8a.

b. Respondents are current and former owners of rental properties subject to the City's housing-code en-

forcement practices. Pet. App. 5a, 8a. Respondents rented their units primarily to low-income households. *Id.* at 8a. The parties agree that, at the relevant time, African-Americans made up a disproportionate share of low-income tenants in the City's private housing. Respondents contend that African-Americans were 60% to 70% of their tenant base. *Id.* at 8a, 57a.

The City issued a number of housing-code enforcement orders to respondents for conditions such as rodent infestation, missing dead-bolt locks, inoperable smoke detectors, poor sanitation, and inadequate heat. Pet. App. 8a. As a result of having to comply with such orders, respondents contend that they experienced increased maintenance costs, fees, and condemnations, and that they were compelled to sell certain properties. *Ibid.*

2. Respondents sued the City and various municipal officials (collectively petitioners), asserting a variety of challenges to the City's enforcement measures. Pet. App. 9a; see Pet. ii-iv. Of particular salience, respondents alleged violations of the FHA, including claims of disparate impact, disparate treatment, and retaliation. *Id.* at 10a-28a.

The district court granted petitioners' motion for summary judgment on all claims. Pet. App. 48a-115a. The court applied a three-step framework to evaluate respondents' FHA disparate-impact claim. First, respondents must establish a prima facie case by showing "that a facially neutral policy results in * * * a disparate impact on protected classes." *Id.* at 61a. Second, petitioners must demonstrate that the challenged policy has a manifest relationship to legitimate, nondiscriminatory objectives and is necessary to attaining those objectives. *Ibid.* Finally, respondents must identify viable

alternative means of achieving the legitimate objectives without discriminatory effects. *Ibid.*

The district court concluded that respondents had failed to establish a prima facie case. Pet. App. 61a-67a. The court noted that respondents had identified the neutral policy they challenged as the City's decision to enforce its own housing code rather than the less stringent federal Housing Quality Standards (HQS) applicable to federally subsidized rental properties. See *id.* at 56a, 61a-62a. The City's enforcement of its stricter housing code, respondents claimed, produced a disparate impact on African-Americans by increasing the costs of low-income housing, the tenants of which were disproportionately African-American. *Id.* at 62a-63a. The court found that allegation to be insufficient because respondents had offered no evidence establishing the difference in rents from enforcement of HQS instead of the City's code, or that any such difference disparately affected the ability of African-Americans to afford rents. *Id.* at 63a. The court also found that respondents failed to produce evidence of a causal connection between petitioners' enforcement of the City's housing code and the City's shortage of affordable housing. *Id.* at 64a-65a.

The district court further held that, even if respondents had made out a prima facie case of disparate-impact discrimination, petitioners were still entitled to summary judgment because their enforcement policy "has a manifest relationship to legitimate, nondiscriminatory policy objectives and is necessary to attain those objectives." Pet. App. 65a. The court observed that petitioners' objectives included "providing minimum property maintenance standards, keeping the City clean and housing habitable, and making the City's neighborhoods the safest and most livable of any in Minnesota." *Ibid.*

Because respondents did not dispute that petitioners satisfied their burden at the second step, respondents could survive summary judgment only by producing evidence that petitioners could achieve their legitimate goals through alternative, less discriminatory means. *Id.* at 65a-66a. The court rejected HQS as a viable alternative, concluding that respondents had produced no evidence that reliance on the less-stringent HQS either would enable petitioners to achieve their objectives or would lower rents or ameliorate the shortage of affordable housing. *Ibid.*

3. The court of appeals affirmed the grant of summary judgment to petitioners on all counts except respondents' disparate-impact FHA claim. Pet. App. 1a-47a. With respect to that claim, the court of appeals first concluded that the district court erred in finding that respondents had failed to establish a prima facie case. *Id.* at 17a-24a. The court believed that the district court had "too narrow[ly]" characterized the challenged neutral practice as the City's enforcement of its own housing code rather than HQS. *Id.* at 17a. In the court of appeals' view, respondents generally challenged petitioners' "aggressive Housing Code enforcement practices," including the issuance of false citations and the imposition of sanctions without proper notification, invitations to cooperate, or adequate time to remedy violations. *Ibid.*

The court concluded that respondents had proffered sufficient evidence "that the City's aggressive enforcement of the Housing Code resulted in a disproportionate adverse effect on racial minorities, particularly African-Americans." Pet. App. 19a. In the court's view, respondents adequately showed "that the City's Housing Code enforcement temporarily, if not permanently, burdened

[their] businesses, which indirectly burdened their tenants." *Id.* at 17a-20a. The court further reasoned that, "[g]iven the existing shortage of affordable housing in the City, it is reasonable to infer that the overall amount of affordable housing decreased as a result," and that, "taking into account the demographic evidence in the record, * * * racial minorities, particularly African-Americans, were disproportionately affected by these events." *Id.* at 20a.

Turning to the second step of the analysis, the court noted that respondents had conceded that petitioners' enforcement of the City's housing code "has a manifest relationship to legitimate, non-discriminatory objectives." Pet. App. 24a. As to the third step, the court believed that respondents "identif[ied] as a viable alternative the City's former program for Housing Code enforcement called 'Problem Properties 2000'" (PP2000), which respondents contended "embodied a flexible and cooperative approach to code enforcement, [and] which achieved the goals of code enforcement while maintaining a consistent supply of affordable housing." *Id.* at 24a-25a. The court concluded that "there is a genuine dispute of fact regarding whether PP2000 was a viable alternative." *Id.* at 26a. The court thus reversed the district court's grant of summary judgment to petitioners on respondents' disparate-impact claim. *Ibid.*

SUMMARY OF ARGUMENT

Respondents allege that the City's aggressive practices in enforcing its housing code had a disparate and adverse impact on African-American residents in violation of Section 804(a) of the FHA. The courts of appeals for decades have uniformly and correctly concluded that the statute supports liability on a disparate-impact theory. Here, the court of appeals articulated the proper

framework for addressing disparate-impact claims under Section 804(a), but erred in its application of that framework to respondents' claim.

I. The terms of Section 804(a), when considered in light of the structure and history of the FHA, support the recognition of disparate-impact claims. Even if there were any ambiguity on the matter, the agency charged with responsibility for administering and enforcing the statute has authoritatively construed it to encompass disparate-impact liability.

A. Section 804(a) makes it unlawful to "refuse to sell or rent" or "otherwise make unavailable or deny" housing to a person "because of" a protected characteristic, including race. That language supports liability based on the disparate effects caused by a challenged action because it focuses on the consequences of the action rather than the motivation of the actor. This Court, for the same reason, has held that Section 703(a)(2) of Title VII, 42 U.S.C. 2000e-2(a)(2), and Section 4(a)(2) of the ADEA, 29 U.S.C. 623(a)(2), encompass disparate-impact claims. Those provisions make it unlawful to "deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of," *inter alia*, race or age, and Section 804(a) similarly makes it unlawful to "make unavailable or deny" housing "because of," *inter alia*, race.

The FHA also contains particularized exemptions from liability under Section 804(a) that presuppose the existence of disparate-impact liability. Those exemptions insulate from liability actions that deny housing based on: a person's conviction for drug offenses; a reasonable rule limiting the number of occupants; or an appraiser's taking into consideration factors other than race, gender, family status, or other protected charac-

teristics. Each of those statutory exemptions is grounded in concerns that, in the absence of the exemption, the statute would bar actions within the scope of the exemption on a disparate-impact theory. Without the exemptions, for instance, a claim could be made that a policy denying housing to persons with drug convictions has a disparate impact based on race or another protected characteristic.

The history of the statute further supports the conclusion that Section 804(a) encompasses disparate-impact claims. When Congress in 1988 comprehensively amended the FHA, including Section 804(a), Congress was aware of the uniform body of court of appeals precedent supporting disparate-impact claims, but made no relevant change to the statute. To the contrary, Congress rejected an amendment that would have required proof of discriminatory intent in a category of cases in response to certain courts of appeals decisions supporting disparate-impact liability.

B. To the extent there is any doubt about the existence of disparate-impact liability under Section 804(a), the authoritative interpretation of the agency charged with administering the statute should resolve the issue. The FHA grants HUD broad authority to administer and enforce the statute, including by conducting formal adjudications of FHA complaints and by promulgating rules implementing the statute. In exercising its authority to conduct formal adjudications, the agency—including in a decision by the Secretary himself—has consistently recognized and endorsed the viability of disparate-impact claims. This Court's decisions make clear that agency pronouncements of that variety command the full measure of deference under *Chevron*.

Here, moreover, HUD has reinforced its support of disparate-impact liability through additional means. Of particular note, HUD recently issued a proposed rule for notice and comment in which it reiterates its view that disparate-impact claims are cognizable under the statute. The agency's longstanding interpretation in its adjudication decisions and in the proposed rule is fully entitled to deference as a reasonable interpretation—indeed, the best reading—of Section 804(a).

II. The court of appeals correctly invoked a three-step burden-shifting framework for resolving disparate-impact claims under Section 804(a) that parallels the framework governing disparate-impact claims under Title VII. That framework fairly allocates the burdens of proof at each stage between the parties, and is consistent with the approach HUD has followed in its adjudications and its proposed rule.

While the court of appeals articulated appropriate standards for resolving disparate-impact claims, its application of those standards to respondents' claim was flawed. The court understood respondents to allege that the City's "aggressive" enforcement of its housing code had a disparate impact on African-American residents by operating disproportionately to deny them affordable housing in violation of Section 804(a). Because aggressive enforcement of a housing code can enhance the availability of affordable and safe housing to affected populations—indeed, insufficiently aggressive enforcement of a housing code could itself give rise to a disparate-impact claim—it is important to assess with care the evidentiary support for allegations that enforcement practices had an adverse and disparate effect. The court of appeals failed to do so here.

The court reasoned that the aggressive enforcement measures imposed financial burdens on respondents in a manner that reduced the stock of low-income housing, and that any such reduction necessarily had a disparate impact based on race because African-Americans make up a disproportionate share of tenants in low-income housing. The court, however, did not identify evidence that aggressive enforcement measures in fact reduced the stock of affordable housing. For instance, the court cited a report pointing to a decline in affordable housing, but the report attributed the decline to factors other than housing-code enforcement. And the court's reliance on affidavits by three individuals whose residences were condemned failed to raise a genuine issue about the impact on African-Americans as a class. Finally, the court held that respondents produced sufficient evidence that there were alternative means of achieving the City's legitimate goals with a less discriminatory effect; but the court identified no evidence suggesting that the alternative program could feasibly be operated on a broad scale, or indicating the comparative efficacy of the alternative program and the challenged practices.

ARGUMENT

I. DISPARATE-IMPACT CLAIMS ARE COGNIZABLE UNDER SECTION 804(a) OF THE FHA

Respondents allege that petitioners' enforcement of the City's housing code resulted in a disparate impact on African-American residents in violation of Section 804(a) of the FHA, 42 U.S.C. 3604(a). As the eleven courts of appeals to have considered the question have uniformly concluded, see pp. 17-18, *infra*, disparate-impact claims are cognizable under the statute. That conclusion follows from the statute's text, structure, and history. Ad-

ditionally, the federal agency principally responsible for administering the statute has consistently and authoritatively interpreted it to authorize disparate-impact claims.

A. The Text, Structure, And History Of The Statute Support The Recognition Of Disparate-Impact Claims

1. The FHA aims "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. 3601; *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 380 (1982) (recognizing Congress's "broad remedial intent" in passing the Act). Respondents ground their disparate-impact claim in Section 804(a) of the FHA, 42 U.S.C. 3604(a). See Br. in Opp. 14; see also Pet. Br. 1-2, 20. Section 804(a) makes it unlawful:

> 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). That language is best read to encompass disparate-impact claims.

By banning actions that "make unavailable or deny" housing on one of the specified bases, Section 804(a) focuses on the result of challenged actions—the unavailability or denial of a dwelling—rather than on the intent of the actor. Such a prohibition on specified outcomes that adversely affect a racial group is the essence of a prohibition on actions having a disparate impact, and is most naturally read to support a disparate-impact claim.

This Court has reached that conclusion when construing other anti-discrimination statutes whose terms similarly place principal focus on the discriminatory con-

sequences of the challenged actions rather than the actor's motive. In particular, both Section 703(a)(2) of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. 2000e-2(a)(2), and Section 4(a)(2) of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 623(a)(2), make it unlawful for an employer "to limit, segregate, or classify his employees in any way" that would "deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of" a specified characteristic (race, color, religion, sex, or national origin for Title VII; age for the ADEA).

In *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971), this Court held that Section 703(a)(2) of Title VII prohibits employers from taking actions that have the effect of discriminating on the basis of race, regardless of whether the actions are motivated by discriminatory intent. The Court explained that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Id.* at 432. See *Watson* v. *Forth Worth Bank & Trust*, 487 U.S. 977, 990-991 (1988) (if employer's practice "has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply"); see also *Smith* v. *City of Jackson*, 544 U.S. 228, 235 (2005) (plurality) (noting Court's recognition that its "holding [in *Griggs*] represented the better reading of the statutory text").

The same is true with respect to the parallel terms of Section 4(a)(2) of the ADEA, which this Court, in *Smith, supra*, likewise held encompass disparate-impact claims. The Court explained that, in prohibiting actions that "deprive any individual of employment opportunities or

otherwise adversely affect his [employment] status, because of" his age, 29 U.S.C. 623(a)(2), "the text" of the statute—like Section 703(a)(2) of Title VII—"focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer." *Smith*, 544 U.S. at 235-236 (plurality); see *id.* at 243 (Scalia, J., concurring in part and in the judgment) ("agree[ing] with all of the Court's reasoning"). That focus, the Court explained, "strongly suggests that a disparate-impact theory should be cognizable." *Id.* at 236 (plurality).

There is no reason to reach a different conclusion with regard to Section 804(a) of the FHA. The language of that provision likewise "focuses on the *effects* of the [challenged] action * * * rather than the motivation for the action." *Smith*, 544 U.S. at 236. Whereas Title VII and the ADEA prohibit actions that "deprive any individual of employment opportunities or otherwise adversely affect" his "status as an employee, because of," *inter alia*, race or age, the FHA analogously prohibits actions that "refuse to sell or rent" or "otherwise make unavailable or deny" housing to an individual "because of," *inter alia*, race. 42 U.S.C. 3604(a). Especially when read against the backdrop of Title VII, which was enacted before the FHA, Section 804(a) of the FHA is best read to include a prohibition on actions having the effect of disproportionately denying housing based on a protected characteristic, without regard to the actor's motivation.[1]

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[1] In 1991, Congress amended Title VII to add a provision expressly recognizing the existence of "disparate impact cases" under the statute, 42 U.S.C. 2000e-2(k), but Title VII contained no such provision when this Court in *Griggs* construed Section 703(a)(2) to encompass disparate-impact liability.

In contending otherwise, petitioners emphasize (Br. 15-16, 20-22, 26) that the text of Section 804(a) addresses actions having the effect of making housing unavailable "because of" race and other characteristics. According to petitioners (Br. 22), "the 'because of' language forecloses disparate-impact liability." The short answer to that contention is that it is foreclosed by this Court's decisions. Both Section 4(a)(2) of the ADEA and Section 703(a)(2) of Title VII likewise speak to the effect of a challenged action on an individual "because of" a protected characteristic, 29 U.S.C. 623(a)(2); 42 U.S.C. 2000e-2(a)(2), yet this Court construed both provisions to encompass a disparate-impact cause of action. See *Meacham* v. *Knolls Atomic Power Lab.*, 554 U.S. 84, 96 (2008) (explaining that, "in the typical disparate-impact case" under the ADEA, "the employer's practice is 'without respect to age' and its adverse impact (*though 'because of age'*) is 'attributable to a nonage factor'") (emphasis added). The same conclusion should obtain here.[2]

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[2] Contrary to petitioners' argument (Br. 27-29), the relevant similarity between Section 804(a) of the FHA, on one hand, and Sections 4(a)(2) of the ADEA and 703(a)(2) of Title VII, on the other hand, is not that each provision contains corresponding "catch-all" language. Instead, the relevant similarity is that the text of each provision "focuses on the *effects* of the [challenged] action on the [plaintiff] rather than the motivation for the action of the [defendant]." *Smith*, 544 U.S. at 236 (plurality). To be sure, in light of the distinct subject matters addressed by the provisions, the FHA naturally focuses on a different consequence (denying a person housing or otherwise making it unavailable) than do Title VII and the ADEA (depriving a person of employment opportunities or otherwise adversely affecting his employment status). But each of the provisions focuses on the effects of a challenged action in their respective subject areas rather than on the motives of the actor, and each thus supports disparate-impact liability.

2. The existence of disparate-impact liability under Section 804(a) of the FHA is reinforced by the Act's structure, in that it contains three exemptions from liability that presuppose the availability of a disparate-impact claim. First, Congress specified that "[n]othing in [the FHA] prohibits conduct against a person because such person has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance." 42 U.S.C. 3607(b)(4). Because the Act contains no direct prohibition on discriminating against individuals with drug convictions, the inclusion of that exemption makes sense only if actions denying housing to individuals with drug convictions would otherwise be subject to challenge on the ground that they have a disparate impact based on race or another protected characteristic. That the exemption necessarily presupposes disparate-impact liability is made clear by a similar exemption in Title VII. See 42 U.S.C. 2000e-2(k)(3). Congress enacted the Title VII exemption for drug users as part of a provision expressly addressed to "disparate impact cases," 42 U.S.C. 2000e-2(k), and the language of the exemption specifies that it applies solely to disparate-impact claims, see 42 U.S.C. 2000e-2(k)(3) (allowing employers to prohibit employment of individuals who use or possess drugs unless "such a rule is adopted or applied with an intent to discriminate because of race").

Second, Congress specified that "[n]othing in [the FHA] limits the applicability of any reasonable * * * restrictions regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S.C. 3607(b)(1). Because the Act contains no direct bar against discrimination based on number of occupants, the purpose of the exemption necessarily was to pre-

clude suits contending that otherwise reasonable occupancy limits have a disparate impact based on a protected characteristic such as familial status or race. See *City of Edmonds* v. *Oxford House, Inc.*, 514 U.S. 725, 735 n.9 (1995). The reasonable-occupancy-limit exemption resembles an affirmative defense in the ADEA for actions "based on reasonable factors other than age." 29 U.S.C. 623(f)(1). The latter provision, as the plurality observed in *Smith*, "is simply unnecessary" as a defense to a claim of intentional age discrimination: an action based on reasonable factors other than age cannot support a claim of disparate treatment based on age. 544 U.S. at 238.

Finally, the FHA includes a targeted exemption specifying that "[n]othing in [the Act] prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status." 42 U.S.C. 3605(c). There would be no reason to enact an exemption for appraisers' actions based on factors *other than* protected characteristics unless the statute would otherwise bar such actions on a disparate-impact theory. See *Meacham*, 554 U.S. at 96 ("action based on a 'factor other than age' is the very premise for disparate-impact liability").

Those statutory exemptions thus strongly support the conclusion that Section 804(a) of the Act encompasses disparate-impact claims.[3]

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[3] While the exemptions by terms apply generally to all of the prohibitions in the FHA, not just Section 804(a), their applicability to Section 804(a) reinforces the conclusion that its terms encompass disparate-impact liability. Because respondents' disparate-impact claim is premised solely on Section 804(a), this case affords no occasion for the Court to consider the availability of disparate-impact liability under

3. The FHA's history also supports the existence of disparate-impact liability under Section 804(a).[4] Between the enactment of the FHA in 1968 and its substantial amendment in 1988, see Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619, all nine courts of appeals to consider the issue concluded that the Act authorizes suits based on disparate-impact claims. See, *e.g.*, *Huntington Branch, NAACP* v. *Town*

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other prohibitions in the FHA. *E.g.*, 42 U.S.C. 3604(b)-(f), 3605(a). Additionally, as discussed *infra*, pp. 23-24, HUD has recently issued proposed regulations in which the agency clarifies the existence of disparate-impact claims under a number of provisions of the FHA (including Section 804(a)). See 76 Fed. Reg. at 70,925 (explaining that "[v]iolations of various provisions of the Act may be established by proof of discriminatory effects," and discussing several FHA provisions). Unlike Section 804(a), certain of the FHA's other prohibitions make it unlawful "[t]o discriminate against any person" in specified, housing-related actions, *e.g.*, 42 U.S.C. 3604(b), 3605(a), and the term "discriminate" readily accommodates an interpretation encompassing disparate-impact liability. See, *e.g.*, *Alexander* v. *Choate*, 469 U.S. 287, 292 (1985) (addressing "whether federal law also reaches action * * * that discriminates * * * by effect"). HUD's final rule may speak directly to the availability of disparate-impact claims under those provisions, and it has been the position of the United States that disparate-impact liability is available under them. The pending rulemaking further counsels against this Court's consideration of those other provisions in this case.

[4] Petitioners err in contending (Br. 30-31) that floor statements at the time of the FHA's enactment suggest that the statute was intended only to cover actions with an intent to discriminate. Senator Mondale—the lead sponsor of the original Act—stated that the Act was intended to address segregation perpetuated not only by overt racial animus, but also by "frozen rules" and "[o]ld habits." 114 Cong. Rec. 3421 (1968). Senator Mondale also pointed to one practice the Act was intended to target that is facially neutral as to race—the "refusal by suburbs and other communities to accept low-income housing." *Id.* at 2277.

of Huntington, 844 F.2d 926, 935-936 (2d Cir.), aff'd, 488 U.S. 15 (1988); *Resident Advisory Bd.* v. *Rizzo*, 564 F.2d 126, 146 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978); *Smith* v. *Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982); *Hanson* v. *Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Arthur* v. *City of Toledo*, 782 F.2d 565, 574-575 (6th Cir. 1986); *Metropolitan Hous. Dev. Corp.* v. *Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978); *United States* v. *City of Black Jack*, 508 F.2d 1179, 1184-1185 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975); *Halet* v. *Wend Inv. Co.*, 672 F.2d 1305, 1311 (9th Cir. 1982); *United States* v. *Marengo County Comm'n*, 731 F.2d 1546, 1559 n.20 (11th Cir.), cert. denied, 469 U.S. 976 (1984).[5]

Against that background, Congress substantially amended the Act in 1988, including by adding new provisions barring discrimination based on familial status and disability, establishing the discussed statutory exemptions that presume the availability of disparate-impact actions, and enhancing HUD's authority to interpret and implement the Act. See §§ 1-15, 102 Stat. 1619-1636. Congress was aware that the FHA, including Section 804(a), had uniformly been interpreted to encompass disparate-impact claims.[6] Significantly, however, Con-

[5] The First and Tenth Circuits directly confronted the question for the first time after the 1988 amendments and agreed with their sister circuits, see *Langlois* v. *Abington Hous. Auth.*, 207 F.3d 43, 49 (1st Cir. 2000); *Mountain Side Mobile Estates P'ship* v. *HUD*, 56 F.3d 1243, 1251 (10th Cir. 1995), while the D.C. Circuit has yet to resolve it, see *2922 Sherman Ave. Tenants' Ass'n* v. *District of Columbia*, 444 F.3d 673, 681 (2006).

[6] See, *e.g.*, H.R. Rep. No. 711, 100th Cong., 2d Sess. 21 (1988) (citing courts of appeals decisions in discussing a policy that could have a "discriminatory effect" on minority households); 134 Cong. Rec. 23,711

gress chose, when amending the Act—including an amendment of Section 804(a) to add familial status as a protected characteristic—to leave that provision's operative language unchanged. See *Forest Grove Sch. Dist.* v. *T.A.*, 129 S. Ct. 2484, 2494 n.11 (2009) ("When Congress amended [the Act] without altering the text of [the relevant provision], it implicitly adopted [this Court's] construction" of that provision.); cf. *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) (noting that "every court to consider the issue" had agreed on the statute's interpretation, and explaining that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change"). Notably, moreover, Congress specifically rejected an amendment that would have countered decisions recognizing disparate-impact challenges to zoning decisions and would have required proof of intentional discrimination in such challenges. See H.R. Rep. No. 711, 100th Cong., 2d Sess. 89-91 (1988) (dissenting views of Rep. Swindall).

Petitioners note (Br. 34) that President Reagan, when signing the 1988 amendments, disavowed the notion that they "represent[ed] any congressional or executive branch endorsement of the notion, expressed in some judicial opinions," of disparate-impact liability under the FHA. *Remarks on Signing the Fair Hous. Amendments Act of 1988*, 24 Weekly Comp. Pres. Doc.

(1988) (Statement of Sen. Kennedy) (noting unanimity of courts of appeals as to the disparate-impact test); *Fair Hous. Amendments Act of 1987: Hearings Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 100th Cong., 1st Sess. 529-557 (1987) (testimony of Prof. Robert Schwemm, Univ. of Ky. Law Sch.) (extensively describing prevailing view in the courts of appeals that the FHA prohibited disparate-impact discrimination).

1140, 1141 (Sept. 13, 1988). And HUD regulations issued soon thereafter declined to "resolve the question of whether intent is or is not required to show a violation." 54 Fed. Reg. 3235 (Jan. 23, 1989). But neither of those statements casts doubt on Congress's awareness of courts' unanimous construction of the FHA as encompassing disparate-impact claims when it amended the statute without changing the operative language. In any event, once directly confronted with the question in administrative adjudications and other contexts when exercising the authority granted to it in the 1988 amendments, HUD, as explained next, has consistently determined that the FHA provides for disparate-impact claims.

B. The Court Should Defer To HUD'S Authoritative Interpretation Of Section 804(a) Of The FHA As Encompassing Disparate-Impact Liability

Consistent with the text, structure, and history of the statute, the agency principally charged with responsibility for interpreting and enforcing the FHA has long interpreted Section 804(a) to support disparate-impact liability. Insofar as the provision were thought to be ambiguous, HUD's longstanding interpretation should be dispositive. See *Meyer* v. *Holley*, 537 U.S. 280, 287-289 (2003).

1. a. The FHA grants HUD broad authority to conduct formal adjudication of FHA complaints, 42 U.S.C. 3610 and 3612, as well as to promulgate rules implementing and construing the statute, 42 U.S.C. 3614a. HUD, through formal adjudications that become final agency decisions after an opportunity for all parties to petition the Secretary for review, see 42 U.S.C. 3612(g); 24 C.F.R. 180.675, has interpreted the FHA—including Section 804(a)—to encompass disparate-impact claims

in every adjudication to address the issue.[7] In addition, the Secretary, in a formal adjudication raising the question whether a disparate-impact claim is cognizable in an action under Section 804(a), issued a decision "find[ing] that * * * a disparate impact, if proven, would establish a violation," and further finding that a prima facie case of disparate-impact liability had been established in the case. *HUD* v. *Mountain Side Mobile Estates P'ship*, No. 08-92-0010-1, 1993 WL 307069, at *5 (July 19, 1993), aff'd in relevant part, 56 F.3d 1243 (10th Cir. 1995).

When, as here, Congress expressly affords an agency authority to issue formal adjudications carrying the force of law, see 42 U.S.C. 3612, the agency's reasonable interpretation of the statute in such adjudications is entitled to the full measure of deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). See *United States* v. *Mead Corp.*, 533 U.S. 218, 230 & n.12 (2001) (explaining that *Chevron* deference is warranted for "the fruits of notice-and-comment rulemaking or formal adjudication," and listing "adjudication cases"); see also, *e.g.*, *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999). That understanding controls this case. In exercising its formal adjudication authority, HUD—including the Secretary himself—has consistently and reasonably determined that the FHA, and Section 804(a) in particular, encompasses disparate-impact liability. The agency's interpretation commands deference. See

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[7] See, *e.g.*, *HUD* v. *Twinbrook Vill. Apartments*, No. 02-00-0256-8, 2001 WL 1632533, at *17 (HUD ALJ Nov. 9, 2001); *HUD* v. *Pfaff*, No. 10-93-0084-8, 1994 WL 592199, at *7-*9 (HUD ALJ Oct. 27, 1994), rev'd on other grounds, 88 F.3d 739 (9th Cir. 1996); *HUD* v. *Ross*, No. 01-92-0466-8, 1994 WL 326437, at *5, *7 (HUD ALJ July 7, 1994); *HUD* v. *Carter*, No. 03-90-0058-1, 1992 WL 406520, at *5 (HUD ALJ May 1, 1992).

Smith, 544 U.S. at 243-247 (Scalia, J., concurring in part and in the judgment) (deferring to EEOC's interpretation that disparate-impact claims are cognizable under Section 4(a)(2) of the ADEA).

b. HUD has also reinforced its endorsement of disparate-impact liability through other means. For example, it joined with other federal enforcement agencies in providing guidance concerning fair-lending standards under the FHA and the Equal Credit Opportunity Act (ECOA), 15 U.S.C. 1691 *et seq.*, and that guidance explicitly notes the availability of a disparate-impact theory. See 59 Fed. Reg. 18,269-18,270 (Apr. 15, 1994). Moreover, the original HUD enforcement handbook, published in 1995, instructed its enforcement staff that disparate-impact claims are available under the FHA. See HUD, No. 8024.01, *Title VIII Complaint Intake, Investigation & Conciliation Handbook*, Pt. 7-12 (1995). That view has also been expressed in appellate briefs filed on behalf of HUD. See, *e.g.*, Brief for HUD Secretary as respondent in *Pfaff* v. *HUD*, No. 94-70898 (9th Cir.), 1995 WL 17017239; Brief for HUD Secretary as respondent in *Mountain Side Mobile Estates P'ship* v. *HUD*, No. 94-9509 (10th Cir. 1994). And HUD recently reiterated the availability of a disparate-impact theory for sex-discrimination claims under the FHA. See HUD, Office of Fair Hous. & Equal Opportunity, *Assessing Claims of Hous. Discrimination Against Victims of Domestic Violence Under the Fair Hous. Act & the Violence Against Women Act* 5-6 (Feb. 9, 2011).

c. The FHA also grants the Department of Justice authority to enforce the statute by filing actions in federal court. See 42 U.S.C. 3614. The Department has filed numerous briefs explaining that the FHA supports disparate-impact liability. See, *e.g.*, Brief for the United

States as Amicus Curiae in *Mt. Holly Gardens Citizens in Action* v. *Township of Mt. Holly*, No. 11-1159 (3d Cir.), http://www.justice.gov/crt/about/app/briefs/mthollybrief.pdf; Brief for the United States as Amicus Curiae in *Veles* v. *Lindow*, No. 99-15795 (9th Cir. 1999), http://www.justice.gov/crt/about/app/briefs/veles.pdf; Brief for the United States in *United States* v. *Glisan*, Nos. 81-1746 and 81-2205, at 15-20 (10th Cir.).

Petitioner observes (Br. 33-34) that, in 1988, the government filed an amicus brief in this Court arguing that the FHA proscribes only intentional discrimination. See Brief for the United States as Amicus Curiae in *Town of Huntington* v. *Huntington Branch, NAACP*, No. 87-1961 (S. Ct. 1988) at 13-18. But that brief was filed before the enactment of the 1988 statutory amendments giving HUD its full authority to administer and enforce the Act, and thus before the agency's formal adjudications and other administrative pronouncements endorsing the existence of disparate-impact liability under the statute. The brief thus also predated the enactment of the statutory exemptions that presuppose the viability of disparate-impact claims (see pp. 15-16, *supra*). As explained, moreover, the United States has repeatedly filed briefs since the 1988 amendments espousing the position that the amended Act encompasses disparate-impact claims.

2. On November 16, 2011, HUD issued a Notice of Proposed Rule-Making (NPRM) that invites comment on a proposed rule reiterating the agency's consistent view that the FHA encompasses disparate-impact liability and establishing standards for resolving disparate-impact claims.[8] See 76 Fed. Reg. at 70,921. The NPRM

[8] Petitioner observes (Br. 36) that HUD formally issued the NPRM within days of the Court's grant of certiorari in this case. The process

explains that HUD "has long interpreted the Act to prohibit housing practices with a discriminatory effect, even where there has been no intent to discriminate." *Ibid.* The NPRM requests comments by January 17, 2012. *Ibid.* Although the NPRM has yet to yield a final rule, the proposed rule fortifies HUD's longstanding support of disparate-impact liability under the FHA. And while HUD's interpretation of the FHA in formal adjudications commands deference wholly aside from the proposed rule, HUD's confirmation of its position in its proposed rule affords added reason to defer to its longstanding interpretation.

Petitioners argue (Br. 36) that there is no basis for deferring to the proposed regulations because they have yet to be adopted in a final rule. Petitioners, however, entirely disregard the need for deference to HUD's formal adjudications. The longstanding existence of those adjudications also disposes of petitioners' (incorrect) argument (Br. 37) that any final rule by HUD would not apply "retroactively" to this case. Nor is there merit to petitioners' assertion (Br. 36) that HUD's interpretation is unreasonable because it is foreclosed by the statute's plain language: that conclusion is highly difficult to square with the uniformity of the contrary view of the 11 courts of appeals to consider the issue. In any event, HUD's interpretation, as explained (see pp. 11-20, *supra*), is the best—and, at the very least, a permissible—reading of the statute.

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of promulgating the proposed rule, however, had long been underway. See http://www.reginfo.gov/public/do/eoDetails?rrid=120471 (noting that proposed rule was submitted to the Office of Management and Budget for review in early June 2011).

II. THE COURT OF APPEALS CORRECTLY HELD THAT A BURDEN-SHIFTING FRAMEWORK GOVERNS THE RESOLUTION OF DISPARATE-IMPACT CLAIMS UNDER SECTION 804(a), BUT THE COURT ERRED IN ITS APPLICATION OF THAT FRAMEWORK TO THIS CASE

A. This Court Should Adopt The Burden-Shifting Framework Applied By A Majority Of The Courts Of Appeals And Set Forth In HUD's NPRM

1. In considering disparate-impact claims under the FHA, a majority of the courts of appeals have employed a burden-shifting framework akin to that applied in disparate-impact cases under Title VII.[9] See 42 U.S.C. 2000e-2(k). Under that framework, a plaintiff first must establish a prima facie case by showing that a specific challenged practice actually or predictably has a disparate impact on the basis of a protected characteristic. *E.g.*, *Fair Hous. in Huntington Comm., Inc.* v. *Town of Huntington*, 316 F.3d 357, 366 (2d Cir. 2003). The burden then shifts to the defendant to establish that the challenged practice has a necessary and manifest relationship to the defendant's legitimate and nondiscrimi-

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[9] In addition to the Eighth Circuit, Pet. App. 16a-17a, see *Langlois*, 207 F.3d at 49-50 (1st Cir.); *Huntington Branch, NAACP*, 844 F.2d at 939 (2d Cir.); *Lapid-Laurel, L.L.C.* v. *Zoning Bd. of Adjustment*, 284 F.3d 442, 466-467 (3d Cir. 2002); *Graoch Assocs. # 33, L.P.* v. *Louisville/Jefferson County Metro Human Relations Comm'n*, 508 F.3d 366, 374 (6th Cir. 2007); *Ojo* v. *Farmers Group, Inc.*, 600 F.3d 1205, 1207 (9th Cir. 2010) (en banc) (per curiam), amended by 2010 WL 1729742 (9th Cir. 2010); *Mountain Side Mobile Estates P'ship*, 56 F.3d at 1254 (10th Cir.). The Fourth Circuit has employed a balancing test in challenges to municipal actions, see *Town of Clarkton*, 682 F.2d at 1065, but has found burden-shifting appropriate in cases against private defendants, see *Betsey* v. *Turtle Creek Assocs.*, 736 F.2d 983, 988-989 (1984).

natory interests. *E.g.*, *Mt. Holly Gardens Citizens in Action, Inc.* v. *Township of Mount Holly*, 658 F.3d 375, 382 (3d Cir. 2011). If the defendant makes that showing, the burden reverts to the plaintiff to prove that the defendant's legitimate interests can be served by an alternative policy yielding a less discriminatory effect. *E.g.*, *Graoch Assocs. # 33, L.P.* v. *Louisville/Jefferson County Metro Human Relations Comm'n*, 508 F.3d 366, 374 (6th Cir. 2007).

That burden-shifting framework—which the court of appeals invoked below, see Pet. App. 16a-17a—is sound. Because it parallels the standards applied in Title VII disparate-impact cases, courts considering FHA disparate-impact claims can draw on the considerable body of law developed under Title VII. Additionally, the framework sensibly allocates the burdens of proof. Plaintiffs are generally best situated to demonstrate the discriminatory effects of a challenged practice. Defendants are similarly best situated to offer a legitimate, nondiscriminatory reason for engaging in the challenged practice. And it is fair to assign to plaintiffs the burden of demonstrating the existence of alternative means that would have a less discriminatory effect on them and that would achieve the defendant's legitimate objectives. "Under this formulation, neither party is saddled with having to prove a negative (the nonexistence of bona fide reasons or the absence of less discriminatory alternatives), and the plaintiffs do not have to guess at and eliminate the [defendant's] reasons for proceeding in the manner it chose." *Hispanics United of DuPage County* v. *Village of Addison*, 988 F. Supp. 1130, 1162 (N.D. Ill. 1997).

2. In their petition for a writ of certiorari, petitioners argued (Pet. 15-21) that there is a disagreement

among courts of appeals about whether to apply the burden-shifting framework invoked below or instead to apply a multi-factor balancing approach. At that stage, petitioners favored the balancing approach. Pet. 24-26. Petitioners now shift course (Br. 38-41) and urge adoption of the burden-shifting approach, but with one modification: relying on *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642, 659-660 (1989), petitioners would place the burden of proof at the second stage of the inquiry—concerning whether the challenged practice is legitimate and nondiscriminatory—on the plaintiffs. The allocation of the burden of proof at the second step would make no difference in this case because respondents concede that petitioners' enforcement of the City's housing code bears a manifest relationship to legitimate and nondiscriminatory objectives. See Br. in Opp. 4. At any rate, the sounder approach is to allocate the burden on that issue to defendants, who are better positioned to speak to the legitimacy and nondiscriminatory nature of their own practices. That approach is consistent with the framework that now governs Title VII cases after Congress in 1991 amended the statute to alter the approach prescribed by *Wards Cove*. See 42 U.S.C. 2000e-2(k)(1)(A)(i).

Moreover, in formal adjudications, HUD has consistently assigned to defendants the burden of proof at the second stage of the inquiry. See, *e.g.*, *Twinbrook Vill. Apartments*, 2001 WL 1632533, at *17; *Pfaff*, 1994 WL 592199, at *8; *Carter*, 1992 WL 406520, at *6. Indeed, the Secretary considered and rejected the argument that *Wards Cove* should generally govern the second-

step inquiry. See *Mountain Side Mobile Estates P'ship*, 1993 WL 307069, at *6-*7.[10]

3. HUD's proposed rulemaking adheres to the burden-shifting framework applied by the agency in its formal adjudications, including by allocating the burden of proof to defendants at the second step of the analysis. See 76 Fed. Reg. at 70,925, 70,927. The agency, however, expressly solicited comments on "whether a burden-shifting approach should be used to determine when a housing practice with a discriminatory effect violates the Fair Housing Act." *Id.* at 70,925. The agency also sought comments on the allocation of the burden of proof at the third stage of the inquiry, concerning "the existence or nonexistence of a less discriminatory alternative to the challenged practice." *Ibid.* It therefore is conceivable that HUD's final rule would depart from the NPRM in certain respects with regard to the precise standards for resolving disparate-impact claims under the FHA. Accordingly, if this Court concludes that Section 804(a) of the FHA encompasses disparate-impact claims, it may wish to defer decision on the precise standards governing resolution of those

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[10] Petitioners emphasize (Br. 38, 41) that this Court in *Smith* applied certain aspects of *Wards Cove* to ADEA disparate-impact claims after it observed that the 1991 amendments to Title VII, while modifying *Wards Cove* for purposes of Title VII, did not amend the ADEA. See *Smith*, 544 U.S. at 240. Petitioners conclude that *Wards Cove* thus should govern the second stage of the burden-shifting inquiry under the FHA. That is incorrect. This Court clarified in *Meacham* that *Smith*'s comments about *Wards Cove* pertained only to two aspects of *Wards Cove*: "the existence of disparate-impact liability," and the assignment to the plaintiff of the "burden of identifying which particular practices allegedly cause an observed disparate impact." *Meacham*, 554 U.S. at 98. Moreover, in *Smith*, unlike here, there were no agency decisions addressing the allocation of the burden.

claims until HUD's final rule—to which *Chevron* deference would be owed—is issued.

B. The Court Of Appeals' Application Of Disparate-Impact Standards To This Case Was Flawed

Although the court of appeals correctly recognized that disparate-impact claims are cognizable under Section 804(a) of the FHA, and correctly articulated the burden-shifting framework that governs consideration of disparate-impact claims, see Pet. App. 16a-17a, the court erred in applying that framework to the claim in this case.

1. Respondents allege that petitioners' approach to enforcing the City's housing code had a disparate impact on the ability of African-Americans to obtain housing, in violation of Section 804(a) of the FHA. To establish a prima facie case here, respondents were required to identify a "specific practice" that caused the alleged disparate impact on African-American residents. See *Meacham*, 554 U.S. at 100-101. Respondents do not contend that mere enactment of a housing code, or mere evenhanded enforcement of a housing code, could support a disparate-impact claim. Instead, the court of appeals understood respondents to challenge "the City's aggressive Housing Code enforcement practices," including the issuance of false citations and the imposition of sanctions without adequate opportunity to reach a cooperative resolution or remedy the violation. Pet. App. 17a. Insofar as the City's "aggressive" enforcement practices constitute a "specific practice" subject to challenge on a disparate-impact theory, respondents were required to demonstrate a genuine issue on whether that specific practice had a disparate and adverse effect on African-American residents.

In concluding that respondents made that showing, the court of appeals reasoned that the City's aggressive housing-code enforcement practices imposed financial burdens on respondents, that those increased burdens reduced the stock of affordable housing, and that the reduction in affordable housing necessarily produced a disparate impact on African-American residents because they represent a disproportionate share of low-income housing tenants. Pet. App. 18a-20a. The court's approach is flawed.

As an initial matter, the court failed to identify evidence adequately supporting a finding that the challenged enforcement practices in fact caused any reduction in available affordable housing. The court referenced a city report on vacant buildings that showed an increase in vacant homes during the relevant period, Pet. App. 19a, but that report, as the district court explained, *id.* at 65a, attributes the increase to a number of factors having nothing to do with housing-code enforcement, which the report does not mention. The court also stated that respondents had produced evidence that the aggressive enforcement practices "temporarily, if not permanently, burdened [respondents'] rental businesses," *id.* at 20a; but a "temporary" financial burden on landlords would not necessarily deny housing or make it unavailable, as is required by Section 804(a). Finally, although the court referenced the affidavits of three tenants whose homes had been condemned, *id.* at 19a, that small sample sheds little light on the overall impact of the City's enforcement practices on the stock of low-income housing, and the court identified no evidence addressing whether the challenged practices were applied to (or the impact on) any housing

beyond respondents' own properties, which constitute a minuscule fraction of the market.

The court also failed to identify evidence that the challenged aggressive enforcement practices had a disproportionately adverse effect on African-Americans as a class. The court acknowledged that "merely showing that there is a shortage of housing accessible to a protected group is insufficient to establish a prima facie case for a disparate impact claim," and that there is instead a need to "show that such a shortage is causally linked to a neutral policy, resulting in a disproportionate adverse effect on the protected population." Pet. App. 22a n.4. But in finding that requirement satisfied, the court simply asserted that "the evidence demonstrates that there is a shortage of affordable housing and that the City's aggressive code enforcement exacerbated that shortage," *id.* at 22a, presumably in reliance on the aforementioned city report on vacant buildings and the three tenant affidavits. Because those materials fail to establish that the challenged enforcement practices "exacerbated" any shortage of affordable housing, they necessarily fail to show that the challenged practices caused a shortage that disproportionately affected African-Americans as a group.

The deficiencies in the court's approach are notable because aggressive enforcement of a housing code can lead to an *increase* in the availability of low-income housing that meets minimal safety standards, thus potentially benefitting groups who are disproportionately represented in low-income housing. For that reason, merely compelling landlords to bring their rental properties up to code—indeed, doing so aggressively—cannot suffice in itself to prove a disproportionately adverse effect on a racial group, even if the affected ten-

ants primarily belong to the group. In certain situations, the *failure* to aggressively enforce a housing code could give rise to a disparate-impact claim under Section 804(a) if it had the effect of disproportionately denying housing on the basis of a protected characteristic. Consequently, it is especially important to assess with care the evidentiary support for allegations that aggressive enforcement of a housing code causes a disparate and adverse effect based on race. The court of appeals failed to do so here.

2. The court of appeals further erred in concluding that respondents met their burden at the third step of the burden-shifting inquiry. Respondents, having conceded the legitimacy and nondiscriminatory nature of petitioners' objectives in aggressively enforcing the housing code, were required to produce evidence of alternative means by which petitioners could serve their legitimate objectives with a less discriminatory effect. The court held that respondents satisfied their burden by pointing to PP2000, a short-term, resource-intensive program employed by the City in 2000, which focused on a small group of landlords with a history of repeated violations and attempted to encourage code compliance through a cooperative and less punitive approach. See Pet. App. 24a-26a, 66a-67a n.9; C.A. App. 429-431.

The court failed to identify evidence showing that PP2000 would adequately serve the City's legitimate objectives with a less discriminatory effect. The court identified no evidence that it would be feasible to apply that targeted program on a far broader scale as an overall approach for enforcing the housing code. Additionally, the district court had found that respondents "offered no evidence showing that the PP2000 program would achieve [petitioners'] objectives without discrimi-

natory effect." Pet. App. 67a n.9. The court of appeals pointed to no such evidence, instead relying on evidence indicating that PP2000 achieved some success in terms of code compliance and promoting a cooperative relationship with landlords, *id.* at 26a—none of which speaks to the comparative efficacy of PP2000 relative to the challenged aggressive enforcement practices, or to the degree to which either program's imposition of costs on landlords would disproportionately adversely effect African-American tenants. The court of appeals thus erred in concluding that respondents had raised a genuine issue concerning the viability of PP2000 as an alternative to the challenged enforcement practices.[11]

[11] Because the court of appeals applied a flawed analysis in concluding that respondents presented adequate evidence to survive summary judgment, this case presents no occasion to entertain petitioners' contention (Br. 53-56) that the Court should categorically exempt housing-code enforcement practices from disparate-impact scrutiny to avoid equal-protection concerns.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

Relevant Provisions of the Fair Housing Act

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

Discrimination in the sale or rental of housing and other prohibited practices

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

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

Discrimination in residential real estate-related transactions

* * * * *

(c) Appraisal exemption

Nothing in this subchapter prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status.

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

Religious organization or private club exemption

* * * * *

(b)(1) Nothing in this subchapter limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling. Nor does any provision in this subchapter regarding familial status apply with respect to housing for older persons.

* * * * *

[b](4) Nothing in this subchapter prohibits conduct against a person because such person has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance as defined in section 802 of title 21.

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

Administration

(a) Authority and responsibility

The authority and responsibility for administering this Act shall be in the Secretary of Housing and Urban Development.

Relevant Provisions of Title VII of the Civil Rights Act of 1964

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

Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

* * * * *

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * * *

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if–

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a con-

trolled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [21 U.S.C. 801 et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

Relevant Provision of the Age Discrimination in Employment Act

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

Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer–

* * * * *

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.