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 OF MASSACHUSETTS, ARIZONA, CALIFORNIA, CONNECTICUT, HAWAII, NEVADA, NEW MEXICO, NEW YORK, OHIO, OREGON, UTAH, AND WEST VIRGINIA, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici States have an interest in protecting their residents against housing discrimination and the substantial social and economic harm created by that conduct. Their Attorneys General are responsible for enforcing laws against housing discrimination in their respective jurisdictions. Based on the States' experiences in enforcing laws to ensure equal access to housing opportunities, the States believe that a disparate impact cause of action is indispensable to achieving the goals of the Fair Housing Act (FHA), 42 U.S.C. §§ 3601 *et seq*.

The position taken by Petitioners, if adopted by the Court, would severely undermine the FHA as an effective tool against prejudice in our society. The disparate impact theory permits redress when facially neutral policies result in dramatic racial or other disparities that thwart Congress's articulated goals for the FHA. It is also a critical tool in rooting out intentional discrimination, which can be difficult to detect and to prove even where it exists. Additionally, discriminatory housing practices perpetuate segregation, undermine the States' interest in promoting harmonious communities, and infringe on the dignity of individuals. Housing discrimination also harms States economically by impeding the development of the housing market. The States' anti-discrimination enforcement efforts demonstrate that more work must be done, and that all available tools are necessary to protect residents and to ensure equal treatment under the law.

SUMMARY OF ARGUMENT

Amici States urge the Court to follow the unanimous opinion of the Courts of Appeals in concluding that there is a disparate impact cause of action under the FHA.[1] Based on our experience in enforcing anti-discrimination laws, we believe that disparate impact claims are essential tools in eradicating discrimination and segregation in the housing market—two foundational purposes of the FHA.

Though more than 40 years old, the FHA remains vital to ensuring equality of opportunity in housing, irrespective of race, gender, national origin, religion, familial status, and disability. While overt and express hostility to members of protected groups may be increasingly uncommon (a direct consequence of the effectiveness of laws like the FHA), equality remains an elusive goal. Today, discrimination continues to occur regularly, but often more subtly. Those who engage in intentional discrimination sometimes mask it through the use of policies that are neutral on their face but discriminatory in their effect. Others may simply be indifferent to the discriminatory impact of policies that they choose, and thus perpetuate and exacerbate inequality. Making matters worse, as *Amici* States have learned through their recent enforcement work in the mortgage lending context, victims regularly do not know that they have been

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[1] *Amici* States support the legal position of the Respondents in response to the questions presented in the petition for certiorari, but do not address the validity of Respondents' specific claim of disparate impact liability in this case.

harmed by these neutral policies, yet the impact is systemic and, when taken together, substantial. Accordingly, *Amici* States urge the Court to conclude that the FHA permits disparate impact causes of action.

While all Circuits that have ruled on the first question presented have recognized disparate impact causes of action, they have varied in some respects as to the method of analysis. A majority of courts apply a burden-shifting test, similar to that applied in employment discrimination cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*. (Title VII), and in credit discrimination cases under the Equal Credit Opportunity Act, 15 U.S.C. §§ 1619 *et seq*. (ECOA). The United States Department of Housing and Urban Development (HUD), the federal agency charged with implementing the FHA, has proposed a regulation that also applies the burden-shifting approach. The States urge the Court to adopt the burden-shifting approach because it provides consistent analysis across discrimination statutes that use the same statutory language, comports with Court precedent on the issue, utilizes a well-understood and workable standard, and fairly places the respective burdens of proof on the parties best situated to make particular showings.

ARGUMENT

I. THE FAIR HOUSING ACT ALLOWS DISPARATE IMPACT CAUSES OF ACTION.

The statutory text and structure of the FHA, its legislative history, and HUD's long-standing interpretation and application of the statute make clear that it was intended to encompass disparate impact claims. Every federal appeals court to consider this question has endorsed this view. This interpretation also reflects Congress's considered judgment that residential segregation and discrimination stem in part from facially neutral practices whose impact inhibits equality of housing opportunities. This interpretation of the FHA also recognizes the statute's similarity to other federal anti-discrimination laws.

Moreover, disparate impact claims are indispensable to achieving Congress's articulated goals for the FHA. *Amici* States have relied on disparate impact to enforce housing discrimination laws where intentional discrimination could not be proved, but widespread harm resulted to protected groups. Given the changing nature of discrimination, disparate impact claims will be the means for law enforcement to continue to respond robustly in the future.

A. *Amici* States Have Long Relied On Disparate Impact Claims To Enforce Housing Discrimination Laws.

Amici States bring housing discrimination enforcement actions on a frequent basis. While some of these cases address clearly intentional

discrimination by individual landlords or homeowners, others rely on disparate impact theories to challenge policies of large and sophisticated actors that have a discriminatory effect on protected groups.

1. States Play A Key Role in Guarding Against Discrimination in Housing.

Each amicus State shares Congress's commitment to combating discrimination and, to that end, has its own anti-discrimination laws that prohibit discriminatory conduct in the context of housing, employment, public accommodations, and other areas. These laws also establish state-level regimes for the investigation and enforcement of alleged civil rights violations that complement the central role of HUD and other federal agencies.

For example, Massachusetts has a Commission Against Discrimination (MCAD) that, in partnership with HUD, receives and reviews complaints of housing discrimination. *See* Mass. Gen. Laws c. 151B, § 5. If the MCAD makes a finding of probable cause, the matter proceeds either administratively or, if one party elects judicial determination, through the courts. *Id.* In the latter instance, the matter is sent to the Attorney General for statutorily-mandated prosecution. *Id.* The Massachusetts Attorney General also has the authority to pursue cases directly in the absence of an initial complaint reviewed by the MCAD. *See* Mass. Gen. Laws c. 151B, § 9. Other states have substantially similar schemes for investigating and prosecuting fair housing complaints. *See, e.g.,* Conn. Gen. Stat. 46a-55; Or. Rev. Stat. §§ 659A.820 & 659A.885; W. Va. Code §§ 5-11A-1 *et seq.*

Nationally, there are 102 local and state agencies that receive funding from HUD to review and investigate housing discrimination complaints. *See* U.S. Dep't of Housing & Urban Development, *Annual Report on Fair Housing FY 2010* at 17, *available at* portal.hud.gov/hudportal/documents/huddoc?id=ANNUALREPORT2010.PDF. The volume of matters handled by these agencies remains quite high. During each of the past three years, more than 8,000 complaints were filed with these agencies. *Id.* at 19. Many of these complaints are eventually prosecuted in the courts, with claims pursued under both the FHA and state fair housing laws.[2]

2. States Utilize Disparate Impact Theory in Housing Enforcement Actions.

The *Amici* States' experience shows that, without a disparate impact cause of action available under the FHA, many widespread harms would be difficult, if not impossible, to remedy under the statute. Some of the most recent examples occurred in the area of home mortgage lending, where *Amici* States have asserted disparate impact claims under state and federal fair housing laws.

Massachusetts recently resolved by Consent Judgment an enforcement action against Option One Mortgage Corp., a subsidiary of H&R Block, Inc. *See Commonwealth v. H&R Block, Inc.*, Civ. No. 08-2474-BLS1 (Suffolk Sup. Ct.). As part of that matter,

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[2] Irrespective of the actual claims asserted, the FHA is often pertinent to these matters. Many state courts look to federal case law interpreting the FHA when analyzing state analogues.

Massachusetts alleged that Option One's discretionary pricing policy—the manner by which its independent mortgage brokers were compensated—caused African-American and Hispanic borrowers to pay, on average, hundreds of dollars more for their loans than similarly-situated white borrowers. While there was no allegation of intentional discrimination with respect to the pricing policy, Massachusetts pursued this claim because Option One's practices caused demonstrable and widespread harm to minority borrowers.

New York resolved an investigation involving similar allegations against Countrywide Home Loans through an Assurance of Discontinuance. *In the Matter of: Countrywide Home Loans*, Assurance of Discontinuance Pursuant to N.Y. Exec. Law 63(15) (Nov. 22, 2006). In that matter, the New York Attorney General found statistically significant disparities in "discretionary components of pricing, principally [p]ricing [e]xceptions in the retail sector and [b]roker [c]ompensation in the wholesale sector." *Id*. at 3. Additionally, Illinois filed two discriminatory lending lawsuits, one each against Wells Fargo and Countrywide, alleging that African-American and Hispanic borrowers were disproportionately placed in high-cost loans and paid more for their loans.[3]

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[3] The United States Department of Justice recently entered into a $335 million settlement with Countrywide, relating to similar allegations of discrimination in lending based on race, national origin, and marital status. *See U.S. v. Countrywide Financial Corp.*, 2:11-CV-10540 (C.D. Cal. 2011). That case was premised on a disparate impact cause of action under both the FHA and ECOA. Illinois's suit against Countrywide was also resolved in connection with the U.S.'s Consent Order.

Though the allegations in each matter differ slightly, these cases concern discretionary decision-making aggregated over large groups of borrowers. While there were no allegations of "smoking gun" policies or practices that would clearly show intentional misconduct, there were substantial and statistically significant disparities that the *Amici* States believed could not be explained by business reasons.

Amici States have also used disparate impact claims to challenge zoning ordinances, occupancy restrictions, and English-only policies. *See, e.g., Support Ministries for Persons with AIDS, Inc. v. Vill. of Waterford, N.Y.*, 808 F.Supp. 120 (N.D.N.Y. 1992) (holding that Waterford's interpretation and application of local zoning ordinance had disparate impact on the basis of disability); *CHRO ex rel. Hurtado v. Falk*, CHRO No. 8230394 (landlord's English-only policy had disparate impact based on national origin and ancestry); *CHRO ex rel. Schifini v. Hillcroft Partners*, CHRO No. 8520090 (landlord's policy of limiting occupancy had disparate impact based on familial status).

B. Discrimination Occurs More Subtly, But Large Disparities Persist.

The preceding enforcement actions are recent examples of how discrimination has become less blatant, yet persists and causes real harm to protected groups. Segregation in housing and barriers to equal opportunity remain a great concern for communities throughout the country. Disparate impact causes of action are needed to respond to contemporary forms of

bias and to eliminate practices and policies that perpetuate segregated housing patterns.

1. Biases Persist and Affect Decision-making and Policies.

Discrimination is easiest to conceptualize in terms of obviously exclusionary actions perpetrated by individuals who readily admit to being prejudiced. However, social science research indicates that contemporary discrimination is often more subtle. *See e.g.*, John F. Dovidio, *On the Nature of Contemporary Prejudice: The Third Wave*, 57 J. Soc. Issues 829 (2001); Gordon Hodson, et al., *The Aversive Form of Racism*, *in* The Psychology of Prejudice and Discrimination: Racism in America 120-130 (ed. Jean Lau Chin 2004). Because discrimination is widely understood to be unacceptable in contemporary society, its practitioners rarely confess their motivations, and far more often conceal or disavow their discriminatory intent, which can make intentional discrimination, where it exists, difficult to detect and even harder to prove.

In addition, extensive published literature has now demonstrated that bias often affects judgment and decision-making in unconscious ways, in a manner such that the decision-makers themselves are unaware of the disparity and bias for which they are responsible.[4] The Court has recognized in the Title VII

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[4] *See*, *e.g.*, Mahzarin R. Banaji et al., *Implicit Stereotyping in Person Judgment*, 65 J. Personality & Soc. Psychol. 272, 272-281 (1993); Brian A. Nosek et al., *The Implicit Association Test at Age 7: A Methodological and Conceptual Review*, *in* Social Psychology

context that "subconscious stereotypes and prejudice" are "a lingering form of the problem" of discrimination, *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988), and that such biases have "precisely the same effects as a system pervaded by impermissible intentional discrimination." *Id.* at 990-991. Even well-intentioned individuals who genuinely believe themselves to be fair and uninfluenced by bias often make decisions in ways that create or contribute to disparities. Accordingly, unconscious bias remains a significant obstacle to equal opportunity, especially in the housing market.[5]

More subtle forms of discrimination can be difficult to detect, especially when perpetrated by institutional actors or by a large number of actors operating under an institutional policy giving them broad discretion. As *Amici* States have learned through their experiences prosecuting discriminatory lending practices, matters are made even more challenging because individuals rarely know that they have been the victims of a discriminatory policy when it is not discriminatory on its face. Borrowers in protected groups have no means of comparing themselves to similarly-situated counterparts. This makes the

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and the Unconscious: The Automaticity of Higher Mental Processes 265-292 (John A. Bargh ed. 2007).

[5] *See, e.g.*, Kristin A. Lane et al., *Implicit Social Cognition and the Law*, 3 Ann. Rev. L. & Soc. Sci. 427 (2007); Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 Vand. L. Rev. 55, 74–77 (2009); Robert G. Schwemm, *Why Do Landlords Still Discriminate (And What Can Be Done About It)?*, 40 J. Marshall L. Rev. 455, 507 (2007).

ability to bring a disparate impact claim all the more critical, particularly for those, such as *Amici* States, who have the ability to aggregate and analyze large pools of potentially affected individuals. *See, e.g.,* Margery Austin Turner et al., *Discrimination in Metropolitan Housing Markets: National Results from Phase I HDS 2000* (discriminatory practices often become apparent only when measuring their impact), *available at* www.urban.org/uploadedPDF/410821_Phase1_Report.pdf.

2. Segregation Remains in Housing Patterns Throughout the Country.

Housing patterns across urban and rural regions of the United States remain largely segregated by race. *See* John Iceland et al., Racial and Ethnic Residential Segregation in the United States: 1980-2000, U.S. Census Bureau (2002). Since 1980, the level of Hispanic and Asian segregation has been "on the rise." Camille Zubrinsky Charles, *The Dynamics of Racial Residential Segregation*, 29 Ann. Rev. Soc. 167, 169 (2003). Segregation between African-American and white populations has been on a slight decline, but remains high—fifty-eight percent of suburban neighborhoods, for example, remain exclusively white. Lynette Rawlings, et al., *Race and Residence: Prospects for Stable Neighborhood Integration*, 3 Neighborhood Change in Urb. Am. 1, 5 (Mar. 2004). As the National Commission on Fair Housing and Equal Opportunity explained: "the racial and ethnic makeup of neighborhoods experienced by the average White American is starkly different than those experienced by the average Latino or Black American." The Future of Fair Housing: Report of the National Commission on Fair Housing and Equal Opportunity 5 (2009) (citing

Professor John Logan, Chicago Hearing Testimony at 1 (July 18, 2008)), *available at* prrac.org/projects/fairhousingcommission.php.

Residential segregation is not limited to race. Other classes of individuals and families protected under the FHA continue to experience systemic isolation and segregation from neighborhoods and communities. Families with children encounter obstacles to obtaining housing, particularly when faced with exclusionary zoning policies or occupancy restrictions. *See, e.g.,* Edward Allen, *Six Years After Passage of the Fair Housing Amendments Act: Families with Children*, 9 Admin. L.J. Am. U. 297, 300-01 (1995). The same is true for individuals with disabilities. *See, e.g.,* Urban Inst., *Discrimination Against Persons with Disabilities: Barriers at Every Step* 3 (2005), *available at* www.hud.gov/offices/fheo/library/dss-download.pdf (prepared for the Office of Policy Development and Research, HUD).

C. Disparate Impact Claims Are Necessary To Further The Broad Purposes Of The FHA.

The Congressional record and Supreme Court precedent make the broad, remedial purposes of the FHA quite clear. Following this understanding of the law, federal agencies and federal Circuits have concluded that disparate impact causes of action are available under the FHA. This is the correct analysis, because the FHA's underlying goals cannot be attained unless disparate impact claims are actionable.

In enacting the FHA, Congress sought to "remove the walls of discrimination which enclose minority

groups," 114 Cong. Rec. 9563 (1968) (statement of Rep. Celler), and to foster "truly integrated and balanced living patterns." 114 Cong. Rec. 3422 (1968) (statement of Sen. Mondale). *See also* H. Res. 1095, 110th Cong., 2d. Sess. (2008) ("[T]he intent of Congress in passing the Fair Housing Act was broad and inclusive, to advance equal opportunity in housing and achieve racial integration for the benefit of all people in the United States.").

These purposes were reaffirmed with passage of the FHA amendments in 1988. Congress found that, twenty years after the enactment of the FHA, segregation and discrimination persisted throughout America's housing markets. *See* H.R. Rep. No. 711, 15 (1988)); Leland B. Ware, *New Weapons for an Old Battle: The Enforcement Provisions of the 1988 Amendments to the Fair Housing Act*, 7 Admin. L.J. Am. U. 59, 60-63 (discussing the impact of racial discrimination in housing). Congress passed the amendments to expand the scope of the FHA, incorporating new prohibitions against familial status and disability-based discrimination. Importantly, at the time these amendments were adopted, the Congressional record made clear that the FHA had been interpreted by nine Circuits to permit disparate impact liability. *See* 134 Cong. Rec. 23,711-12 (1988) (statement of Sen. Kennedy) ("Congress accepted th[e] consistent judicial interpretation … of the Federal courts of appeals that the FHA prohibit[s] act that have discriminatory effects, and that there is no need to prove discriminatory intent.").

Supreme Court precedent is in accord. Classifying housing integration as a "policy that Congress considered to be of the highest priority," the Court has

held that the FHA should be broadly construed in order to achieve that goal. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209, 212 (1972) ("The language of the Act is broad and inclusive," and is therefore accorded a "generous construction."); *see also City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731-32 (1995) (interpreting FHA's exception to disability discrimination "narrowly in order to preserve the primary operation of the policy") (internal quotation omitted).

Recognizing these broad purposes, each Circuit that has ruled on the issue has interpreted the FHA to include disparate impact liability. *See, e.g., Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977) ("A strict focus on intent permits racial discrimination to go unpunished . . . ."). HUD and the Department of Justice have done the same, and their interpretations have been followed by nine other federal agencies in a Policy Statement on the FHA and ECOA. Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18,266, 18,269 (Apr. 15, 1994). Moreover, because the Department of Justice and HUD are the primary enforcement agencies for the FHA (42 U.S.C. § 3610), their interpretations are entitled to deference. *See, e.g., Schuetz v. Banc One Mortgage Corp.*, 292 F.3d 1004, 1012 (9th Cir. 2002) (interpreting *Barnhart v. Walton*, 535 U.S. 212 (2002) to determine that HUD policy statements warrant *Chevron* deference); *see also Smith v. City of Jackson*, 544 U.S. 228, 239 (2005) (noting that the Department of Labor and EEOC "have consistently interpreted the ADEA [Age Discrimination in Employment Act] to authorize relief on a disparate-impact theory").

Congress enacted the FHA to eliminate intentional discrimination as well as foreseeable discriminatory effects of housing policies and practices. *See* 114 Cong. Rec. 5214-5222 (1968) (Congress rejected an amendment that sought to remove disparate impact as a cause of action against individual homeowners). It did so because conduct that perpetuates segregation can be as deleterious as purposefully discriminatory conduct in frustrating the national commitment "to replace the ghettos 'by truly integrated and balanced living patterns.'" *Trafficante*, 490 U.S. at 211 (quoting 114 Cong. Rec. 3422 (statement of Sen. Mondale)). Accordingly, disparate impact claims are a necessary part of the FHA. As the Court held in recognizing disparate impact claims under Title VII in *Griggs v. Duke Power Company*, 401 U.S. 424 (1971): "[P]ractices, procedures, or tests neutral on their face, and even neutral in [their] intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Id.* at 430; *see also Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 349 (1977) (describing ostensibly neutral practices that "perpetuate[] the effects of prior discrimination").

D. The FHA Is Consistent With Other Federal Laws That Recognize Disparate Impact Claims.

Congress has sought to protect individuals from invidious discrimination in areas that touch all aspects of a person's life—education, employment, public accommodations, credit, and housing. The Court has already recognized disparate impact causes of action for many of these laws. It should do the same with regard to the FHA. *See Huntington Branch, NAACP*

v. Town of Huntington, 844 F.2d 926, 935 (2d Cir.), *aff'd*, 488 U.S. 15 (1988) (analogizing the FHA to Title VII, as "part of a coordinated scheme of federal civil rights laws enacted to end discrimination").

For example, the Court has upheld disparate impact analysis under the federal employment discrimination statutes, Title VII in *Griggs*, 401 U.S. 424, and the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq*. (ADEA), in *Smith v. City of Jackson*, 544 U.S. 228. Both statutes 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 protected characteristic. 42 U.S.C. § 2000e-2(a)(2); 29 U.S.C. § 623(a)(2). Recognizing that "[t]he objective of Congress[,] plain from the language of the statute[,] was to achieve equality of employment opportunities and remove barriers . . ." 401 U.S. at 429-430, the Court held that Title VII proscribes acts or practices perpetuating discrimination, regardless of intent. *Id.* The Court similarly went on to recognize disparate impact causes of action under the ADEA. *Smith*, 544 U.S. at 235-236 (holding that language in the ADEA of "otherwise adversely affect [a person's] status as an employee" justifies disparate impact analysis).

The standard established in *Griggs* and continued in *Smith* and the broad interpretation the Court has given to the FHA starting in *Trafficante* should guide the Court's interpretation of the text. The language of the FHA "focuses on the effects of a practice rather than the actor's motivation." Lindsey E. Sacher, *Through the Looking Glass and Beyond: The Future of*

Disparate Impact Doctrine Under Title VIII, 61 Case W. Res. L. Rev. 603, 611 (2010). Accordingly, the phrase "otherwise make unavailable or deny," 42 U.S.C. § 3604(a), should be interpreted to permit disparate impact causes of action under the statute. Making housing "unavailable" and "deny[ing]" housing opportunities were among the principal adverse effects that Congress sought to proscribe by enacting the FHA.

In addition, disparate impact liability under the FHA establishes consistency throughout the federal code. For example, both the FHA and ECOA may apply to certain circumstances involving housing. Congress provided the explicit instruction that ECOA should follow Title VII analysis. *See* S. Rep. 94-589, 94th Cong., 2d Sess. at 406 (1976) ("Thus, judicial constructions of antidiscrimination legislation in the employment field, in cases such as *Griggs*, and *Albemarle Paper Company v. Moody* (U.S. Supreme Court, June 25, 1975) [422 U.S. 405], are intended to serve as guides in the application of this Act, especially with respect to the allocations of burdens of proof.").[6] It would not make sense for there to be disparate impact claims under ECOA, but not the FHA.

Petitioners argue that, because the language of the FHA is distinguishable from Section 703(a)(2) of Title VII, it should not be construed to include disparate impact claims. *See* Pet. Br. 23-26. That argument is

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[6] In June 1995, the Federal Reserve Board staff amended its Regulation B Commentary, adding an explicit "effects test" to ECOA regulations. *See* 12 C.F.R. Part 202, Supp. I, Official Staff Interpretations, Comment 6(a)-2 (1995).

unavailing. The Court's analysis in *Griggs* included Section 703(h), which allows the use of tests in employment decision-making so long as "such test, its administration or action upon the results is not designed, intended or used to discriminate *because of* race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(h) (emphasis added). This language, which is also found in the FHA, was interpreted by the Court to cover "the consequences of employment practices, not simply the motivation." *Griggs*, 401 U.S. at 432. ECOA similarly prohibits discrimination "on the basis of" protected classes, 15 U.S.C. § 1691(a)(1), but was nonetheless intended by Congress to include disparate impact liability. Given that these other provisions allow for disparate impact claims, the Court should conclude that the FHA similarly allows for such a theory of recovery.

II. THE BURDEN-SHIFTING APPROACH UTILIZED BY THE EIGHTH CIRCUIT AND PROPOSED BY HUD SHOULD BE ENDORSED BY THE COURT.

In response to the second question presented, *Amici* States urge the Court to adopt the burden-shifting approach utilized by the Eighth Circuit below and proposed by HUD in its new regulations. The burden-shifting approach provides a workable and familiar methodology that makes disparate impact claims distinct from intentional discrimination claims, and appropriately distributes the evidentiary burden between the parties.

A majority of Circuits have adopted this burden-shifting approach, which is modeled after the

disparate impact analysis in Title VII cases.[7] *See* 42 U.S.C. § 2000e-2(k). That view is the correct one. Because it involves a near-identical standard as applied in Title VII disparate impact cases, courts considering FHA disparate impact claims can draw on the considerable body of law developed in employment discrimination cases. Additionally, as *amicus* United States contends, 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 reasonable 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 proffered legitimate objectives. *See Hispanics United of DuPage County v. Vill. of Addison*, 988 F. Supp. 1130, 1162 (N.D. Ill. 1997) ("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. . . .").

Adoption of the burden-shifting approach would have the added benefit of creating comparable standards across various anti-discrimination laws. ECOA explicitly follows Title VII in its statutory construction and interpretation. S. Rep. 94-589; *see*

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[7] In addition to the Eighth Circuit, seven other Circuits have utilized the burden-shifting approach in analyzing disparate impact claims under the FHA. *See* U.S. Br. 25 n.9.

also 12 C.F.R. Part 202, Supp. I at § 202.6(a), n.2. The HUD approach, consistent with the Eighth Circuit's interpretation of disparate impact claims, likewise follows Title VII in its burden-shifting test. Federal agencies have adopted this approach uniformly for enforcement purposes. Absent a uniform approach, the overlap between FHA and ECOA could create obstacles to enforcement: when attempting to pursue litigation under both statutes for the same cause of action, agencies could be faced with different evidentiary burdens to prove the same disparate impact.

One slight variation between the Title VII and FHA standards should be the burden on the defendant to show a justification for the challenged practice, given the inherent differences between employment and housing decisions. *See, e.g., Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 148-149 (3d Cir. 1977) ("[T]he 'business necessity' test employed in Title VII job discrimination cases is of somewhat uncertain application in Title VIII [FHA] cases . . . [and therefore] Title VIII criteria must emerge, then, on a case-by-case basis.") (internal citation omitted). Several lower courts have attempted to tailor Title VII's standard to the housing context by applying broad definitions of business necessity, or alternatively a "manifest relationship." *Mountain Side Mobile Estates P'ship v. HUD*, 56 F.3d 1243, 1254 (10th Cir. 1995) (interpreting the "business necessity" standard to be analogous to a "manifest relationship"). HUD proposes a "legally sufficient justification" standard that would encompass public and private actors in a broader and more accurate scope than the term "business necessity" may imply, by requiring both a sufficient interest and a sufficient link between the

alleged discriminatory act and the legitimate interest. *Amici* States urge the Court to adopt HUD's proposed standard.[8]

The burden-shifting test is the superior method of analysis, among those being considered by the Court. The balancing test and the hybrid approach run the risk of fusing disparate treatment and disparate impact claims, due to the consideration of intent. The burden-shifting approach is also the most efficient use of judicial resources. It requires a showing of a disparate impact before consideration of the defendant's justification. The balancing approach considers all factors simultaneously, potentially requiring further use of scarce court resources when unnecessary.

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[8] Petitioners urge the Court to adopt the burden-shifting standard applied in *Wards Cove Packing Company, Inc. v. Atonio,* 490 U.S. 642 (1989). For the reasons described in the United States' brief (at 28 n.10), *Amici* States urge the Court not to adopt the *Wards Cove* standard.

CONCLUSION

For the foregoing reasons, the Court should rule that a disparate impact cause of action is available under the FHA and that the burden-shifting analysis proposed by HUD and adopted by a majority of Circuits provides the correct framework for analyzing such claims under the FHA.

Respectfully submitted,

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