No. 10-1032

IN THE

Supreme Court of the United States

STEVE MAGNER, *et al.*,

Petitioners,

v.

THOMAS J. GALLAGHER, *et al.*,

Respondents.

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

BRIEF FOR THE AMICI CURIAE NATIONAL FAIR HOUSING ALLIANCE, NATIONAL ASSOCIATION OF HISPANIC REAL ESTATE PROFESSIONALS, AND NATIONAL ASSOCIATION OF REAL ESTATE BROKERS IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

National Fair Housing Alliance ("NFHA") is the only national organization dedicated solely to ending discrimination in housing. NFHA works to eliminate housing discrimination and to ensure equal housing opportunity for all people through leadership, education and outreach, membership services, public policy initiatives, advocacy and enforcement. NFHA was founded in 1988 and is headquartered in Washington DC. Today, NFHA is a consortium of more than 220 private, non-profit fair housing organizations, state and local civil rights agencies and individuals from throughout the United States. As NFHA represents fair housing professionals, including real estate professionals who may experience housing, lending, or insurance discrimination in their daily work, it has a direct interest in the types of claims cognizable under the Fair Housing Act ("FHA" or "Act"). Amici are dedicated to ensuring equal and fair access to housing and are therefore vitally interested in the ability of plaintiffs to bring disparate-impact claims under the Act.

The National Association of Hispanic Real Estate Professionals ("NAHREP") is a membership organization made up of multicultural real estate

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[1] Petitioners' and Respondents' written letters of consent to amicus briefs have been lodged with the Clerk. Pursuant to Rule 37.6, counsel for *amici* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity – other than *amici*, their members, and their counsel – contributed monetarily to the preparation or submission of this brief.

professionals dedicated to increasing the rate of sustainable Hispanic homeownership and to serving the community at large. NAHREP is one of the largest minority trade groups in the real estate industry and regularly addresses issues related to lending parameters, business practices and regulations that affect access to homeownership. NAHREP believes that strong consumer protection through laws like the Fair Housing Act is necessary to restore consumer and market confidence in homeownership.

The National Association of Real Estate Brokers ("NAREB") is a membership organization of predominately African American real estate professionals. Founded in 1947, NAREB is the nation's oldest and one of the largest minority real estate trade associations. NAREB was formed out of a need to secure the right to equal housing opportunities regardless of race, creed or color. Since its inception, NAREB has participated in advocacy efforts on behalf of minorities and fair housing for all.

SUMMARY OF ARGUMENT

The Fair Housing Act was passed in the immediate aftermath of Dr. Martin Luther King Jr.'s assassination and at a time of increasing concern that the United States was "moving towards two societies, one black, and one white—separate and unequal." *Report of the National Advisory Commission on Civil Disorders* ("*Kerner Report*") 1 (1968). The Act's expansive purpose is to provide "fair housing throughout the United States." 42 U.S.C. § 3601. Thus, the Act must be construed so

as to advance the "broad remedial intent of Congress." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982). But with or without a broad construction, the legislative history of the FHA strongly supports the use of disparate-impact analysis in cases brought under the FHA. Every circuit court that has considered the issue has held that disparate-impact claims exist under the FHA. *See, e.g.*, *Mt. Holly Gardens Citizens in Action v. Township of Mount Holly*, 658 F.3d 375, 384 (3d Cir. 2011) ("All of the courts of appeal that have considered the matter . . . have concluded that plaintiffs can show the FHA has been violated through policies that have a disparate impact . . . ."). As the agency charged by Congress with interpreting the Act, the Court must defer to the Department of Housing and Urban Development's ("HUD") longstanding acknowledgement of disparate-impact as a valid theory of liability under the FHA. And it is certainly the case that disparate-impact claims fall within any reasonable construction of the Act. *See City of Edmonds v. Oxford House*, 514 U.S. 725, 731 (1995) (the Act is entitled to a "generous construction"); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972) (same).

Open markets that are free of discrimination are critical to maintaining a healthy, robust real estate industry. Markets tainted by discrimination are inefficient and adversely affect all market participants. To this end, real estate developers and housing advocacy organizations have worked together as plaintiffs in FHA lawsuits to root out all forms of discrimination. *See, e.g., Hallmark Developers, Inc. v. Fulton County, Ga.*, 466 F.3d 1276, 1279-80 (11th Cir. 2006) (private developer challenging city zoning ordinance); *Metropolitan*

Housing Development Corp. v. Village of Arlington Heights ("*Arlington Heights*"), 558 F. 2d 1283, 1285-86 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978) (nonprofit developer challenging city's refusal to rezone property). These cases often arise in response to the enactment of municipal zoning or housing codes that needlessly restrict the free movement of people and the efficient transfer of property. The availability of disparate-impact claims under the FHA is therefore a keystone in combating discrimination in the housing market.

Finally, the Court need not decide whether the Eighth Circuit applied the proper disparate-impact standard for two reasons. First, Petitioners appear to have abandoned the position that they held when seeking certiorari and no longer ask the Court to adopt the balancing test that they previously supported. Second, in any event, HUD has long interpreted the FHA to include disparate-impact claims—an interpretation that is entitled to deference. And, in any event, HUD has commenced the formal rulemaking process and will soon issue a regulation outlining the proper disparate-impact standard; that rule will be entitled to *Chevron* deference.

ARGUMENT

I. THE FAIR HOUSING ACT AUTHORIZES DISPARATE-IMPACT CLAIMS

Before the enactment of the FHA, this Court had addressed fair housing in several landmark cases. *See, e.g.*, *Jones v. Alfred Mayer Co.*, 392 U.S. 409 (1968) (Thirteenth Amendment gives Congress the power to stop private acts of racial

discrimination); *Reitman v. Mulkey*, 387 U.S. 369 (1967) (invalidating a facially-neutral state law that codified private sellers' "right to discriminate"). Most notably, in *Shelley v. Kraemer*, this Court prohibited the enforcement of racially restrictive housing covenants. 334 U.S. 1 (1948).

The FHA created a framework to tackle the problem of housing discrimination, both private and public at the federal, state and municipal levels. The Act sought to root out both plainly intentional discriminatory acts and seemingly "neutral" policies that allowed housing segregation to continue nationwide. *See, e.g.*, *The Future of Fair Housing: Report of the National Commission on Fair Housing and Equal Opportunity* ("*Cisneros / Kemp Report*") 8-9 (Dec. 2008), *available at* http://www.nationalfairhousing.org/Portals/33/reports/Future_of_Fair_Housing.PDF (discussing how, until the 1960s, federally-backed mortgages were rarely available to "transitional," racially mixed, or minority neighborhoods); Douglas Massey & Nancy Denton, *American Apartheid* 42-57 (1993) (discussing how, through the 1950s, African Americans were often displaced by federally-funded urban renewal projects and then relocated to public housing that was, by law or custom, segregated); *Kerner Report* 467-82 ("Until 1949, [the Federal Housing Administration's] official policy was to refuse to insure any unsegregated housing."). The Fair Housing Act was aimed at reversing this trend.

Senator Edward Brooke, a key drafter of the legislation alongside Senator Walter Mondale, undoubtedly saw the FHA as a means of addressing these institutionalized forms of segregation:

> Today's Federal housing official commonly inveighs against the evils of ghetto life even as he pushes buttons that ratify their triumph — even as he ok's public housing sites in the heart of Negro slums, releases planning and urban renewal funds to cities dead-set against integration, and approves the financing of suburban subdivisions from which Negroes will be barred. These and similar acts are committed daily by officials who say they are unalterably opposed to segregation, and have the memos to prove it. . . . But when you ask one of these gentlemen why, despite the 1962 fair housing Order, most public housing is still segregated, he invariably blames it on regional custom, local traditions, personal prejudices of municipal housing officials.

114 Cong. Rec. 2,281 (1968).

Forty years after the FHA's enactment, many of the public and private practices that so troubled its drafters still exist. *See, e.g.*, *Cisneros / Kemp Report* 8, 33 (describing the historical and continuing practices of "redlining," denying credit or insurance to certain geographic areas, and "reverse redlining," targeting areas for predatory lending); U.N. Comm. on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination*, U.N. Doc. CERD/C/USA/CO/6 (Feb. 2008), *available at* http://www2.ohchr.org/english/

bodies/cerd/docs/co/CERD-C-USA-CO-6.pdf (finding that African Americans and Hispanics are disproportionately concentrated in poor areas characterized by limited employment opportunities and inferior schools); *Discrimination in Metropolitan Housing Markets: National Results from Phase 1, Phase 2, and Phase 3 of the Housing Discrimination Study* (Mar. 2005), *available at http://www.huduser.org/portal/publications/hsgfin/hds.html* (reporting on the results of HUD tests wherein African Americans and Hispanics were "steered" away from units that were available to whites). The FHA continues to be an important tool for combating these discriminatory practices. *See, e.g.*, *Greater New Orleans Fair Hous. Action Ctr., et al. v. HUD*, et al., No. 1:08-1938, Settlement (D.D.C. July 7, 2011), *available at http://portal.hud.gov/hudportal/documents/huddoc?id=RoadHomeSettlement.pdf* (settling an FHA suit that challenged a HUD formula used to allocate grants to Louisiana homeowners that had a disparate impact on African Americans); *United States ex rel. Anti-Discrimination Ctr. v. Westchester County*, 668 F. Supp. 2d 548 (S.D.N.Y. 2009) (finding that the county had repeatedly falsely certified compliance with its affirmative obligation to integrate housing under the FHA); *Thompson v. HUD*, 348 F. Supp. 2d 398, 524 (D. Md. 2005) (finding that HUD violated the FHA by failing to ameliorate racial segregation in Baltimore); *Nat'l Fair Hous. Alliance, Inc. v. Prudential Ins. Co.*, 208 F. Supp. 2d 46 (D.D.C. 2002) (finding triable issues of fact as to whether defendants engaged in redlining that had a disparate impact on African Americans and Hispanics); *Hargraves v. Capital City Mort. Corp.*, 140 F. Supp. 2d 7, 21-22 (D.D.C. 2000) (finding

reverse redlining cognizable as an FHA disparate-impact claim).

A. *Disparate-Impact Claims Further the Purposes of the Fair Housing Act*

The FHA was designed to replace America's segregated neighborhoods with "truly integrated and balanced living patterns." 114 Cong. Rec. 3,422 (1968) (statement of Sen. Mondale) (quoted in *Trafficante*, 409 U.S. at 211). The Act's stated purpose is "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. It also mandates that "[a]ll executive departments and agencies shall administer their programs . . . in a manner affirmatively to further the purposes of this title." 42 U.S.C. § 3608(d).

Fostering *integration* in housing was the primary goal of the FHA—not solely the elimination of intentionally discriminatory practices. *See, e.g.*, *Otero v. NYC Hous. Auth.*, 484 F.2d 1122, 1133 (2d Cir. 1973) ("We agree with the parties and with the district court that the Authority is under an obligation to act affirmatively to achieve integration in housing."). The promotion of integration necessarily requires attention to the *results* of current and prior practices in housing, which in turn requires the assessment of disparate impacts:

> [T]here are two types of discriminatory effects which a facially neutral housing decision can have: The first occurs when that decision has a greater adverse impact on one racial group than on another. The second is the effect

> which the decision has on the community involved; if it perpetuates segregation and thereby prevents interracial association it will be considered invidious under the Fair Housing Act.

Graoch Associates # 33, L.P. v. Louisville / Jefferson County Metro Human Relations Comm'n, 508 F.3d 366, 378 (6th Cir. 2007) (citations and internal quotation marks omitted).

Just as the Court found in *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971), with regard to Title VII of the Civil Rights Act of 1964, and in *Smith v. City of Jackson,* 544 U.S. 228 (2005), with regard to the ADEA, Congress passed the FHA to attack not just intentional discrimination but segregation in all forms—even segregation that is the result of seemingly neutral policies. The ability to pursue disparate-impact claims is therefore essential to meeting this congressional mandate and promoting fair housing. And, indeed, the legislative history of the Act reflects that very concern.

B. *The Legislative History of the Fair Housing Act Supports the Existence of Disparate-Impact Claims.*

The legislative history of the FHA strongly supports the availability of disparate-impact claims to redress discrimination in housing. The subsequent history surrounding the Fair Housing Amendments Act of 1988 ("FHAA")—which was enacted after many circuit courts had held that disparate-impact claims exist under the FHA—also

supports this determination, as does the record of FHA enforcement by federal agencies.

1. The FHA

Floor statements by numerous lawmakers surrounding the enactment of the FHA indicate congressional intent that the Act would address discriminatory effects as well as intentional discrimination.[2] Senator Walter Mondale, the Act's principal sponsor, noted that, despite prohibitions already in place against certain explicit segregation, "local ordinances *with the same effect*, although operating more deviously to avoid the Court's prohibition, were still being enacted . . . . [I]t seems only fair, and is constitutional, that Congress should

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[2] Petitioners call attention to floor statements wherein proponents described the Act as allowing a property owner "to do everything that he could do anyhow with his property . . . except refuse to sell it to a person solely on the basis of his color," and "[t]hat's all it does." 114 Cong. Rec. 5,643 (1968) (statement of Sen. Mondale) (cited in Pet. Br. 30); *see also id.* at 2,283 (statement of Sen. Brooke) ("A person can sell his property to anyone he chooses as long as it is by personal choice and not because of motivations of discrimination.") (cited in Pet. Br. 30). Petitioners argue that such statements imply that disparate-impact claims do not exist under the Act. This makes no sense. In context, Senator Mondale's words, "that's all [the Act] does," pertain only to the Act's effects on private sellers of property. As noted below, Senator Mondale described ways in which the Act would remedy the discriminatory effects of facially race-neutral ordinances and policies. The fact that Senators Mondale and Brooke, key sponsors of the FHA, promoted the Act as a means of preventing intentional discrimination does not, as Petitioners contend, imply that this was the Act's only function. Rather, their additional statements reveal that the Act is broad enough to cover *both* disparate treatment *and* disparate-impact claims.

now pass a fair housing act *to undo the effects*" of government-sanctioned discrimination. 114 Cong. Rec. 2,699 (1968) (emphasis added).[3] Another supporter of the Act, Senator Edward Brooke, added that merely requiring race-neutral housing practices is inadequate because African Americans in particular were "surrounded by a pattern of discrimination based on individual prejudice, often institutionalized by business and industry, and Government practices." *Id.* at 2,526. The emphasis on remedying longstanding and pervasive residential segregation and its effects on minority groups strongly implies that Congress intended to cure those ills by including disparate-impact liability in the Fair Housing Act.

The Senate's rejection of the Baker amendment similarly reinforces congressional intent to recognize disparate-impact claims. The Baker amendment would have exempted from liability any homeowner hiring a real estate agent "without indicating any preference, limitation or discrimination based on race . . . or an intention to make any such preference, limitation, or discrimination." *Id.* at 5,214. Senator Percy was among the many FHA supporters who objected to the amendment, pointing out that it would require

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[3] In its amicus brief in this case, the United States points to one facially neutral practice mentioned by Senator Mondale that the Act ought to prevent: the "refusal by suburbs and other communities to accept low-income housing." 114 Cong. Rec. at 2,277 (cited in U.S. Br. 17, n. 4). These instances could not be dealt with under the FHA were it to require proof of discriminatory intent or animus towards a particular protected group.

proof of a seller's specific racial preference, and that such proof "would be impossible to produce." *Id.* at 5,216. The Baker amendment was ultimately defeated, illustrating the sentiment that requiring proof of discriminatory intent would be inconsistent with the broad scope of the FHA and its goal of advancing housing integration.

2. The 1988 Amendments

In the twenty years following the passage of the Fair Housing Act, every federal appeals court to consider the question of the availability of disparate-impact liability has held that such claims are cognizable under the Act. *See, e.g.*, *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934-36 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 146-48 (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, 574-75 (6th Cir. 1986); *Arlington Heights*, 558 F.2d at 1290; *United States v. City of Black Jack* ("*Black Jack*"), 508 F.2d 1179, 1184-85 (8th Cir. 1974), *cert. denied*, 422 U.S. 1043 (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).

Congress passed the FHAA in 1988 to add new prohibitions against familial status discrimination and disability; however, the operative language of the FHA remained the same. *See* Pub. L. No. 100-430, § 6(a)-(b) (1988); amended § 3604. Under such circumstances, Congress is "presumed to

be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978); *see also Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2494 n.11 (2009) ("When Congress amended [the relevant legislation] without altering the text of [the relevant provision], it implicitly adopted [this Court's] construction" of that provision.). Just as in *Lorillard*, Congress was aware in 1988 that "every court to consider the issue" of whether disparate-impact claims exist under the FHA had held that they do. *Lorillard*, 434 U.S. at 580. Thus, by passing the 1988 amendments without substantial change to the language, Congress ratified the existence of disparate-impact liability in fair housing cases.[4]

The legislative history[5] of the FHAA further supports the idea that Congress intended to preserve

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[4] In 1980, during an earlier attempt to amend the FHA to add similar provisions as the FHAA, Senator Orin Hatch described the lack of an explicit intent requirement in both the original Act and the proposed amendment as a "major concern" and insisted that the government be required to "make some showing that the practice was adopted or continued or rejected for an unlawful purpose." 126 Cong. Rec. 31,171 (1980). However, sponsors of the amendment rejected the addition of an intent requirement that "would make a radical change in the standard of proof in title VIII cases." *Id.* at 31,164 (statement of Sen. Birch Bayh). Although the 1980 amendment failed, these discussions illustrate congressional awareness that some circuits had held that the Act included disparate-impact claims.

[5] Petitioners have argued that President Reagan's statement upon signing the FHAA demonstrates the unavailability of disparate-impact claims despite judicial holdings to the

Continued on Next Page

disparate-impact claims. The House Judiciary Committee's Report on the FHAA discusses the "racially discriminatory effects" on minorities resulting from race-neutral adults-only housing ordinances as a source of liability, H.R. Rep. No. 100-711, at 21 (1988),[6] and also discusses the Second Circuit's decision in *Huntington*, which upheld

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contrary. Pet. Br. 34-35; *Presidential Statement on Signing the Fair Housing Amendments Act of 1988*, 24 Weekly Comp. Pres. Doc. 1141 (Sept. 13 1988) ("Title 8 speaks only to intentional discrimination."). However, a presidential signing statement made after Congress has passed legislation is irrelevant to congressional intent. *See, e.g.*, *Clinton v. City of New York*, 524 U.S. 417, 438 (1998) ("There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes."); Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 Vand. L. Rev. 1457, 1525-26 (2000) ("Congress's assent to the bill cannot be deemed an assent to a presidential signing statement that did not exist at the time Congress acted. . . . Accordingly, presidential signing statements, if legislative history at all, are really *post-enactment* legislative history and should receive, at most, the lesser weight due to materials that have that status.") (emphasis in original); *see also* Marc N. Garber & Kurt. A. Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 Harv. J. on Legis. 363 (1987). Senator Edward Kennedy echoed this in response on the Senate floor, that "Congress contemplated no such intent requirement" and that "the President may not use a signing statement to attempt to rewrite the law… contrary to the congressional intent." 134 Cong. Rec. 23,711-12 (1988).

[6] In its discussion of section 3604(f)'s ban on discrimination against disabled persons, which is substantially similar to section 3604(a), the Committee noted that the ban was "not limited to blatant intentional acts of discrimination" because acts "that have the effect of causing discrimination can be just as devastating as intentional discrimination" H.R. Rep. No. 100-711, at 25 (1988).

disparate-impact claims. *See id.* at 90. In addition, the House Judiciary Committee rejected an amendment that would have imposed an explicit intent requirement to challenge a zoning decision. *See id.* at 89. Committee reports in the Senate similarly discussed the "strong consensus" in the Circuit Courts in recognizing disparate-impact liability under the FHA before approving the 1988 amendments. *Fair Housing Amendments Act of 1987: Hearings on S. 558 Before the Subcomm. on the Constitution of the Sen. Comm. on the Judiciary* 529 (1987) (testimony and statement of Robert Schwemm); *see also id.* at 532-558. Thus, as in *Lorillard*, Congress "exhibited both a detailed knowledge of [the provisions of the 1968 Act] and their judicial interpretation and a willingness to depart from those provisions [was] regarded as undesirable." 434 U.S. at 581.

3. Enforcement by Federal Agencies

Since the 1988 Amendments, HUD has acted in administrative proceedings and in other contexts with the full understanding that disparate-impact claims are cognizable under the Act. Today's Fair Housing Act grants to the Secretary of HUD explicit authority to administer the Act and to investigate and adjudicate claims under the Act before an administrative law judge ("ALJ"). 42 U.S.C. §§ 3608(a), 3610(g), 3612. In addition, HUD's administrative courts have consistently found FHA liability under a disparate-impact theory, *see, e.g.*, *HUD v. Mountain Side Mobile Estates P'ship*, Nos. 08-92-0010-108-92-0011-1, 1993 WL 307069, at *5 (HUDALJ July 19, 1993), *aff'd in relevant part*, 56 F.3d 1243, 1250 (10th Cir. 1995); *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). In 1994, HUD joined with other federal agencies in adopting the "Interagency Policy Statement on Discrimination in Lending," which recognizes disparate-impact liability under the FHA. 59 Fed. Reg. 18,266, 18,269-70 (Apr. 15 1994). *Chevron* deference extends to ALJ decision and other administrative actions, even without formal rulemaking procedures.[7] *See, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 230 & n.12 (2001) ("[A]s significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded.").

Additionally, HUD in its rulemaking capacity recently released its "Implementation of the Fair Housing Act's Discriminatory Effects Standard," stating that it "has long interpreted the Act to prohibit housing practices with a discriminatory effect, even where there has been no intent to

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[7] For example, HUD recently issued a memorandum to its field offices discussing the applicability of disparate-claims for female victims of domestic violence who are evicted due to "zero-tolerance" policies, under which the entire household is evicted for the criminal activity of one household member. Because the overwhelming majority of domestic violence victims are women, it is women who are disproportionately affected by such policies. *See* Memorandum from Sarah Pratt, HUD Deputy Assistant Secretary for Enforcement and Programs, to Fair Housing and Equal Opportunity Regional Directors 5-6 (Feb. 9, 2011), *available at* http://www.hud.gov/offices/fheo/library/11-domestic-violence-memo-with-attachment.pdf.

discriminate." Implementation of the Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. 70,921, 70,921 (proposed Nov. 16, 2011) (to be codified at 24 C.F.R. § 100.500(c)(3)).[8] This ongoing process also "warrants respectful consideration." *See Dada v. Mukasey*, 554 U.S. 1, 20-21 (2008) (quoting *Wis. Dep't. of Health and Family Servs. v. Blumer*, 534 U.S. 473, 497 (2002)). Through the regulatory comment and rulemaking process, HUD will soon adopt a rule addressing the disparate-impact standard. And once the rule is issued it will be entitled to full *Chevron* deference. *Meyer v. Holley*, 537 U.S. 280, 287-88 (2003) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-845 (1984)); *see also Smith,* 544 U.S. at 243-47 (Scalia, J. concurring in part and in the judgment).

The United States Department of Justice (DOJ) also has authority to enforce the antidiscrimination provisions of the FHA. *See* 42 U.S.C. § 3614. In addition to bringing disparate-impact claims, *see Black Jack*, 508 F. 2d at 1184-85 and *United States v. Housing Authority of Chicksaw*, 504 F. Supp. 716, 727, 729-33 (S.D. Ala. 1980), the DOJ has also joined HUD in recognizing FHA disparate-impact claims in the "Interagency Policy Statement on Discrimination in Lending." 59 Fed. Reg. at 18,269-70. As Petitioners note, the United States once filed an

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[8] Petitioners also argue that the proposed HUD standards for recognizing disparate-impact claims are not entitled to *Chevron* deference "because they are contrary to the plain language of the statute." Pet. Br. at 36-37. Respondents and other amici have rebutted these arguments exhaustively, and amici join in those arguments.

amicus brief arguing against the existence of disparate-impact claims. Pet. Br. 33-34. However, since the 1988 FHAA and the reaffirmation of the Act's purpose to cure discriminatory effects, the DOJ has participated in dozens of lawsuits as amicus curiae and brought lawsuits advocating on behalf of disparate-impact liability under the FHA.[9] In fact, the DOJ has also filed an amicus brief in support of disparate-impact liability in the present matter. U.S. Br. 22-23; *see also id.* at 10-22, 24 (arguing that both the text and the history of the FHA support disparate-impact liability).

Based on the legislative history of the Act and the 1988 amendments as well as its interpretation by executive agencies, the Act clearly encompasses disparate-impact liability.

II. OPEN MARKETS, FREE FROM DISCRIMINATION, ARE CRITICAL TO THE PROSPERITY OF THE REAL ESTATE INDUSTRY

Where discrimination occurs, it distorts and limits access to markets. It not only harms those who are the specific victims of the discrimination but also hurts all who participate or want to participate

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[9] *See, e.g.*, Br. of U.S. as *Amicus Curiae* in *Veles v. Lindow*, No. 99-15785 (9th Cir. 1999), *available at* http://www.justice.gov/crt/about/app/briefs/veles.pdf; Br. of U.S. as *Amicus Curiae* in *2922 Sherman Ave. Tenants' Ass'n v. District of Columbia* (D.D.C. 2004) (No. 1:00cv00862), *available at* http://www.justice.gov/crt/about/hce/documents/amicus_sherman.php; Br. of U.S. as *Amicus Curiae* in *Mt. Holly Gardens Citizens in Action Inc. v. Twp. Of Mt. Holly*, No. 11-1159, 2011 WL 2322224 (3d Cir. Sept. 13, 2011).

in those markets. For that reason, developers and others in the real estate industry have, on many occasions, brought suits under the FHA to combat overt and covert discrimination and arbitrary practices with discriminatory effects. For example, in *Greater New Orleans Fair Housing Action Center. v. St. Bernard Parish* ("*St. Bernard*"), a developer and a nonprofit housing organization joined together in bringing an action challenging a moratorium on the construction of multi-family housing in the parish. The Plaintiffs proceeded under the FHA and also sought to enforce a prior consent decree that had settled a previous fair housing claim relating to the post-Katrina enactment of a "blood relative ordinance," which restricted residents from renting to anyone other than blood relatives. *See* 641 F. Supp. 2d 563, 565-66 & 565 n.1 (E.D. La. 2009) (describing the initial action and defendants' later violations of the consent order). In the underlying action, one of the plaintiffs' claims alleged that the "colorblind" ordinance had a disparate impact under the FHA because it effectively locked blacks out of the 93 percent white parish.[10] In the consent decree enforcement action, the court found that the moratorium on the development of multi-family dwellings also had a disparate impact on African Americans. *Id.* at 565-67, 574.

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[10] *See Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish*, No. 2:06-CV-07185 (E.D. La. Filed Nov. 2, 2006, Amend. Compl., 11, *available at* http://www.lawyerscommittee.org/admin/fair_housing/documents/files/0023.pdf.

A. *Discrimination Creates Inefficiencies in Housing and Financial Markets*

For more than fifty years, economists have studied the negative impacts of discrimination on free markets. In 1957, economist Gary Becker published a groundbreaking work on the impact of discrimination on economic markets. Gary S. Becker, *The Economics of Discrimination* (2d ed. 1971). In it, he provided the first systematic effort to use economic theory to analyze the effects of prejudice on the earnings, employment and occupations of minorities. Since then, many studies have built on his work. *See, e.g.,* David Rusk, *The "Segregation Tax": The Cost of Racial Segregation to Black Homeowners*, (The Brookings Institution 2001), *available at* http://www.brookings.edu/~/media/Files/re/reports/2001/10metropolitan policy-rusk/rusk.pdf (finding that in the 100 largest metropolitan areas, black homeowners receive 18 percent less value for their homes than white homeowners); John Yinger, *Closed Doors, Opportunities Lost: The Continuing Cost of Housing Discrimination* 98-103 (1995) (estimating the annual cost of discrimination in the mid-1990s housing market at $2.0 billion for Blacks and $1.2 billion for Hispanics).

In fact, Alan Greenspan, while Chairman of the Federal Reserve, observed that, quite simply, discrimination is bad for business:[11]

[11] The Court also recently noted that the financial benefits of diversity and integration are "not theoretical but real, as major American businesses have made clear that the skills needed in

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> Discrimination is against the interests of business — yet business people too often practice it. To the extent that market participants discriminate, they erect barriers to the free flow of capital and labor to their most profitable employment, and the distribution of output is distorted. In the end, costs are higher, less real output is produced, and national wealth accumulation is slowed. By removing the non-economic distortions that arise as a result of discrimination, we can generate higher returns to both human and physical capital.

Remarks by Alan Greenspan, "Economic Challenges in the New Century," before the Annual Conference of the National Reinvestment Coalition (March 22, 2000), *available at* http://www.federalreserve.gov/boarddocs/ speeches/2000/20000322.htm.

The negative financial consequences of segregation and discrimination have been well documented. *See, e.g.*, Alan Berube & Bruce Katz, *Katrina's Window: Confronting Concentrated Poverty Across America* (The Brookings Institution 2005), *available at* http://www.brookings.edu/~/media/Files/re/reports/2005/10poverty_berube/20051012_Concentratedpoverty.pdf (discussing the relationship between segregation and concentrated poverty); Thomas M. Shapiro, *The Hidden Cost of*

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today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Grutter v. Bollinger*, 539 U.S. 306, 330-31 (2003).

Being African American: How Wealth Perpetuates Inequality 105-25 (2004) (discussing how segregation and discriminatory financing contribute to wealth inequality). The hyper-segregation of blacks and Latinos in urban areas has also led to inferior access to public services, education, jobs and transportation, all of which have a negative economic impact. *See American Apartheid* 148-85. "[B]arriers to spatial mobility are barriers to social mobility, and where one lives determines a variety of salient factors that affect individual well-being: the quality of schooling, the value of housing, exposure to crime, the quality of public services, and the character of children's peers." *Id.* at 150. Segregation also contributes to wealth inequality, since, for example, American familial wealth is closely tied to home values and homes located in neighborhoods with high concentrations of nonwhites tend to be undervalued.[12] *See generally Melvin L.* Oliver & Thomas M. Shapiro, *Black Wealth / White Wealth* 6-7 (1997). And discrimination in housing and mortgage markets impose significant costs on minority households when they search for houses to purchase, "whether or not [they] actually encounter[] discrimination." John Yinger, *Cash in Your Face: The Cost of Racial*

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[12] In the aftermath of the foreclosure crisis, communities of color have experienced a disproportionate loss of wealth. Between 2005 and 2009, median wealth adjusted for inflation fell by 66 percent among Latino households and 53 percent among African-American households, compared with 16 percent among white households. Rakesh Kochhar et al., Pew Research Ctr., *Twenty-to-One: Wealth Gaps Rise to Record Highs Between Whites, Blacks and Hispanics* 1 (2011) *available at* http://www.pewsocialtrends.org/.files/2011/07/SDT-Wealth-Report_7-26-11_FINAL.pdf.

and Ethnic Discrimination in Housing, 42 J. Urb. Econ. 339, 340 (1997).

B. *Disparate-Impact Liability Promotes Efficiency in the Financial and Housing Markets*

Often the only way to weed out facially-neutral but nonetheless discriminatory practices in housing markets—and thus improve those markets for all participants—is for market participants to pursue disparate-impact claims where appropriate. It is hard (though not impossible) to imagine in 2012 that a federal agency, state government, local municipality, planning board, or private firm would support an overtly discriminatory, Jim Crow-style housing policy.[13] But that is not to say that housing

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[13] Of course, amici are well-aware that intentional discrimination in violation of the FHA continues to exist. *See, e.g., United States v. Beck*, No. 09-CV-1143, Consent Decree and Order (D. Minn. Feb. 28, 2011), *available at* http://www.justice.gov/crt/about/hce/documents/becksettle.pdf (settling case in which landlord refused to rent to an African American); *United States v. Biswas*, No. 09-cv-683, Consent Decree and Order (M.D. Ala. Feb. 3, 2011), *available at* http://www.justice.gov/crt/about/hce/documents/biswassettle.pdf (settling case wherein landlords admitted to white testers that they had adopted rental policies intended to discourage African-American applicants). *United States, NFHA & LIHS v. Uvaydov*, No. 09-04109, Settlement Agreement and Order (E.D.N.Y. Oct. 21, 2010), *available at* http://www.justice.gov/crt/about/hce/documents/uvaydovsettle.pdf (settling lawsuit which alleged that defendants had expressed a desire not to rent to African Americans); *Regional Economic Community v. City of Middletown*, 294 F. 3d 35, 48-52 (2d Cir. 2002) (finding triable issues of facts as to whether the city intentionally discriminated based on disability); *Kormoczy v. HUD*, 53 F. 3d 821, 823-25 (7th Cir. 1995)

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discrimination has been eradicated—far from it. Discrimination and segregation endure for two main reasons. First, "because clever men may easily conceal their motivations . . . ." *Black Jack*, 508 F. 2d at 1185 (citations omitted). Defendants today are less likely to discriminate blatantly than they were in the past. Disparate-impact claims are therefore vital in stopping facially-neutral policies that have the same discriminatory effects as Jim Crow laws.

Second, even in the absence of "clever" machinations, courts have recognized that "the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme." *Id.* Or as Saint Bernard of Clairvaux put it, "hell is full of good wishes and desires." The ability to prosecute disparate-impact claims is therefore necessary because it allows plaintiffs to pursue FHA lawsuits that would not otherwise survive as disparate treatment claims alone. *See, e.g., Oti Kaga, Inc. v. S.D. Hous. Dev. Auth.,* 342 F.3d 871, 883 (8th Cir. 2003) (denying plaintiff developer's disparate treatment claim for lack of evidence, but remanding a disparate-impact claim for further consideration); *Arlington Heights*, 558 F. 2d at 1287-88 (rejecting plaintiffs' disparate treatment claim, but remanding the disparate-impact claim, and emphasizing the differences between the two).

In the interest of supporting open markets, real estate developers often bring FHA suits against

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(upholding administrative law judge decision that defendants had intentionally discriminated based on familial status).

municipalities. In such suits, it can be difficult to divine the intent of municipal legislators or planners who adopt rules with discriminatory effects. And "[o]ften, such rules bear no relation to discrimination upon passage, but develop into powerful discriminatory mechanisms when applied." *See Huntington*, 844 F.2d at 935. Because it lacks an intent requirement, a disparate-impact claim is more likely to survive to weed out policies or practices with a discriminatory effect that bear no relation to legitimate or bona fide concerns. *See, e.g.*, *NSP Dev., Inc. v. City of Newberg*, No. 96–1450-HA, 2000 WL 900474, at *8-12 (D. Or. Jan. 21, 2000) (allowing a developer's disparate-impact claim to continue, but rejecting its disparate treatment claim because of a lack of direct evidence of discriminatory intent); *Hispanics United of DuPage County v. Village of Addison, Ill.*, 988 F. Supp. 1130, 1154-57 (N.D. Ill. 1997) (granting consent decree and concluding that plaintiffs, landlords and tenants, presented facts that "could have shown discriminatory effect").

Disparate-impact analysis is necessary to guard against the passage of similar "neutral" laws with discriminatory results that restrict market access and decrease efficiency. The ability to pursue disparate-impact claims therefore is essential to the efficient operation of housing markets and to combating public or private actions that distort those markets.[14]

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[14] The elimination of disparate-impact liability may endanger other forms of FHA liability, such as the Seventh Circuit's "exploitation theory" wherein "the plaintiffs must show that (1) as a result of racial segregation, dual housing markets exist,

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Certainly, the broader integration goals of the FHA are also best served by disparate-impact claims, which recognize "[e]ffect, not motivation, [as] the touchstone because a thoughtless housing practice can be as unfair to minority rights as a willful scheme." *Mount Holly*, 658 F.3d at 385 (quoting *Smith v. Anchor Bldg. Corp.,* 536 F.2d 231, 233 (8th Cir. 1976)).

C. *The Continued Availability of Disparate-Impact Liability Will Not Require Banks and Mortgage Companies to Grant Loans to Unqualified Applicants*

Contrary to the argument set forth in the amicus brief of the Pacific Legal Foundation, et al. (the "PLF Brief"), the continued availability of disparate-impact as a theory of liability under the FHA will *not* lead to blue ruin. According to the PLF Brief, disparate-impact liability will somehow require "banks and mortgage companies to grant loans to unqualified applicants in order to avoid . . . liability under the Fair Housing Act." PLF Brief at 31-33; *see also* Independent Bankers of America, et al. Br. at 1-4.

These amici either fail to appreciate that disparate-impact already exists as a liability theory in every circuit that has considered the issue *or* they

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and (2) defendant sellers took advantage of this situation by demanding prices and terms unreasonably in excess of prices and terms available to white citizens for comparable housing." *Honorable v. Easy Life Real Estate Sys.,* 100 F. Supp. 2d 885, 886-87 (N.D. Ill. 2000) (citing *Clark v. Universal Builders, Inc.,* 706 F.2d 204, 206 (7th Cir. 1983)).

have no data to back up their suggestion that disparate-impact analysis will lead to bad loans. They fail to cite a single instance where a bank has been forced to grant loans to unqualified borrowers in any of the eleven circuits that already allow (and for decades have allowed) disparate-impact claims under the FHA.

Disparate-impact analysis certainly does not require mortgage originators or others to lower standards to ensure that all minority borrowers qualify for a mortgage. Far from it. The Act simply guarantees that persons who wish to finance, build, purchase, or rent a home are not prevented from doing so by "artificial, arbitrary, and unnecessary barriers" that "operate invidiously to discriminate on the basis of . . . [an] impermissible classification." *See Griggs*, 401 U.S. at 431 (discussing the purpose of disparate-impact analysis in Title VII). Defendants in disparate-impact suits must present "bona fide and legitimate justifications" or "compelling governmental interest" for adopting a policy with discriminatory effects. *Huntington*, 844 F.2d at 939. Only in the absence of such a justification or interest are defendants required to change their policies.

Rather than lowering borrower or renter standards, disparate-impact liability improves courts' ability to protect fair housing by "look[ing] beyond the form of a transaction to its substance and proscribe practices which actually or predictively result in racial discrimination, irrespective of defendant's motivation." *Williams v. Matthews Co.*, 499 F.2d 819, 826 (8th Cir. 1974).

III. THE COURT NEED NOT ADDRESS THE SECOND QUESTION PRESENTED

Because Petitioners have changed their position on the second question raised in their petition for certiorari, as described fully in the Respondents' Brief, there is no reason to address it. *See* Resp. Br. at 40-42. Further, this Court should defer to the ongoing administrative rulemaking process, which HUD is using to issue a rule on the proper FHA disparate-impact standard, a rule that will be entitled to *Chevron* deference.

On petition for certiorari, Petitioners questioned the applicability of the burden-shifting test to FHA disparate-impact claims and asked this Court to adopt a "balancing test" instead. *See* Pet. Br. Cert. at 6. Now, however, Petitioners' merits brief agrees that the burden-shifting test is the appropriate standard and abandons its earlier argument. Pet. Br. 41-43. Thus, there is no active disagreement between the Petitioners and Respondents and the Court should dismiss Petitioners' writ as improperly granted—at least as to the second Question presented. *See Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 107 (2001); *see also Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972) (no Article III standing in the absence of a live case or controversy).

In addition, HUD has commenced the process of administrative rulemaking and has proposed regulations that will establish a uniform test for deciding disparate-impact claims under the FHA. 76 Fed. Reg. at 70,925. Once adopted, these regulations will be entitled to deference and govern all FHA disparate-impact cases. *Chevron*, 467 U.S. at 843.

Indeed, whether or not this Court embraces a particular test for this case, future disparate-impact cases will still be controlled by the agency's construction of the statute. *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

CONCLUSION

For the foregoing reasons, amici respectfully request that this Court affirm the judgment of the court of appeals as to the availability of FHA disparate-impact claims and defer to HUD to determine the appropriate test through the administrative rulemaking process.

Respectfully Submitted,

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