No. 10-1032

IN THE
Supreme Court of the United States

STEVE MAGNER, *et al.*,
Petitioners,

v.

THOMAS J. GALLAHER, *et al.*,
Respondents.

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

BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS[1]

The NAACP Legal Defense & Educational Fund, Inc. (LDF) is a non-profit legal organization that for more than seven decades has helped African Americans secure their civil and constitutional rights. Throughout its history, LDF has challenged public and private policies and practices that deny African Americans housing opportunity and isolate African-American communities. *See, e.g.*, *McGhee v. Sipes*, 334 U.S. 1 (1948) (companion case to *Shelley v. Kraemer*, 334 U.S. 1 (1948)) (racially restrictive covenants); *Comer v. Cisneros*, 37 F.3d 775 (2d Cir. 1994) (racial discrimination in public housing and assistance programs); *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992) (redlining); *Kennedy Park Homes Ass'n, Inc. v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970) (exclusionary zoning); *Thompson v. U.S. Dep't of Hous. & Urban Dev.*, No. 95-CV-309, 2006 WL 581260 (D. Md. Jan. 10, 2006) (federal government's obligation to affirmatively further fair housing); Consent Decree, *Byrd v. First Real Estate Corp. of Ala.*, No. 95-CV-3087 (N.D. Ala. May 14, 1998) (racial steering); *Price v. Gadsden Corp.*, No. 93-CV-1784 (N.D. Ala. filed Aug. 30, 1993) (unfair lending practices); *Brown v. Artery Org., Inc.*, 654 F. Supp. 1106 (D.D.C. 1987) (private and municipal redevelopment plans that unfairly eliminate

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus state that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed blanket consent letters with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

or limit affordable housing for minority communities); *see also* NAACP Legal Defense & Educ. Fund, Inc. et al., *The Future of Fair Housing: Report on the National Commission of Fair Housing and Equal Opportunity* (Dec. 2008), *available at* http://naacpldf.org/files/publications/Future%20of%20Fair%20Housing.pdf. Before this Court, LDF has also played an instrumental role in advancing the doctrine of disparate-impact discrimination. *See, e.g.*, *Lewis v. City of Chicago*, 130 S. Ct. 2191 (2010); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

SUMMARY OF ARGUMENT

Since the enactment of the Fair Housing Act of 1968 (FHA), Pub. L. No. 90-284, 82 Stat. 81 (1968) (codified as amended at 42 U.S.C. §§ 3601-3631), this nation has made progress eliminating racial segregation and discrimination in public and private housing. Yet, as Justice Kennedy has emphasized:

> . . . our tradition is to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain. This is especially true when we seek assurance that opportunity is not denied on account of race. The enduring hope is that race should not matter; the reality is that too often it does.

Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

Even today, our nation's housing market is adversely affected by the vestiges of *de jure* residential segregation. Moreover, as our recent economic crisis has starkly revealed, racially discriminatory housing

policies and practices – utilized by private actors and by officials at every level of government – continue to deny housing opportunities to African Americans and to isolate African-American communities. *See, e.g.*, Debbie Gruenstein Bocian et al., *Foreclosures by Race and Ethnicity: The Demographics of a Crisis* (Ctr. for Responsible Lending), June 18, 2010, at 4, *available at* http://www.responsiblelending.org/mortgage-lending/research-analysis/foreclosures-by-race-and-ethnicity.pdf (noting that the recent foreclosure crisis is "particularly devastating to African-American and Latino families . . . [and] disproportionately impact[s] communities of color"); *see generally* Beryl Satter, *Family Properties: Race, Real Estate, and the Exploitation of Black Urban America* (2009); Douglas S. Massey & Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* 17-59 (1993).

The FHA's prohibition of disparate-impact discrimination is a key tool in the ongoing struggle to ensure fair housing for all and to promote a more inclusive society. By helping to redress unjustified racial disparities, disparate impact eliminates policies and practices that are as "disastrous and unfair to private rights and the public interest as the perversity of a willful scheme." *United States v. City of Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974) (internal quotation marks omitted).

Should the Court decide to reach the questions presented by the City of St. Paul and its officials (defendants below) in their petition for certiorari, it should conclude that disparate impact is cognizable, *see* Resp. Br. 43-59, and should adopt the burden-shifting framework that has been proposed by HUD,

see Implementation of the Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. 70,921 (proposed Nov. 16, 2011) (to be codified at 24 C.F.R. pt. 100), and that is supported by the United States in its amicus brief, *see* Amicus Br. of United States in Support of Neither Party [hereinafter "U.S. Br."]; Resp. Br. 59-60. Should the Court proceed further and reach the issues raised for the first time in the City's merits brief – involving the matter of whether the Eighth Circuit correctly applied the burden-shifting test – it should affirm the judgment of the court of appeals.[2]

LDF writes separately to emphasize that the burden-shifting framework – which has been en-

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[2] The significance of the questions presented here to the continuing vitality of disparate impact underscores the importance of selecting the *appropriate* case for their adjudication. For all of the reasons advanced by the Respondents, *see* Resp. Br. 21-42, this is not that case. The petition should be dismissed as improvidently granted on multiple grounds – including the lack of any live controversy as to the appropriate standard for adjudicating disparate-impact claims and the pending HUD rule-making on this very subject, *see* 76 Fed. Reg. 70,921; *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) ("*Chevron*'s premise is that it is for agencies, not courts, to fill statutory gaps."). Furthermore, the long-standing, uniform view of the federal courts of appeals and HUD that disparate-impact claims are cognizable under the FHA indicates that there is no controversy necessitating this Court's review of the first question presented. Finally, the City's eleventh-hour request (for the first time in its merits brief) that the Court determine whether the Eighth Circuit properly applied the burden-shifting standard on summary judgment, *see* Pet. Br. 44-53, is not worthy of the Court's limited time and resources.

dorsed by a majority of the courts of appeals and by HUD in its proposed rule-making – provides a workable, fair, and effective mechanism for rooting out concealed racially discriminatory intent as well as policies and practices that inflict or perpetuate adverse racial effects, without sufficient justification. Although there is "minor variation," 76 Fed. Reg. at 70,923, in how courts throughout this country have applied the burden-shifting framework, it has proven more than adequate for distinguishing between claims that are undeserving and those that are meritorious. Courts are well-equipped to apply this test in order to provide redress for the disparate and unjustified denial of housing opportunities while protecting the bona fide, non-discriminatory interests of defendants.

LDF also writes to emphasize that a municipality's code enforcement practices can be the proper subject of a valid disparate-impact claim. Where, as in this case, there is a demonstrable shortage of affordable housing and African Americans or another group covered by the FHA are disproportionately represented among low-income tenants, a City's selective and inflexible enforcement of its building code in a way that targets private landlords of low-income housing can have a disproportionate, adverse impact. Obviously, code enforcement has important public safety and health benefits, but the City and its amici go too far when they assert that code enforcement should be categorically exempt from disparate-impact claims. The FHA does not immunize municipalities from disparate-impact claims that challenge code enforcement, nor is it sound to infer

as much given the Act's goal of promoting fair housing opportunity.

ARGUMENT

I. The burden-shifting framework is workable, fair, and effective at rooting out unjustified barriers to housing opportunity.

The burden-shifting framework addresses two complementary goals of the FHA's prohibition against disparate-impact discrimination. First, it helps to screen out discrimination that is intentional, but subtle or concealed. The burden-shifting framework provides a powerful evidentiary tool in cases where discrimination may otherwise be difficult to prove – by countering, in an orderly and sensible fashion, explanations for policies or practices that have a demonstrably adverse impact. *Cf. Albemarle Paper Co. v. Moody*, 422 U.S. 405, 422, 425-36 (1975) (explaining disparate impact in Title VII context); *In re Emp't Discrimination Litig. Against Ala.*, 198 F.3d 1305, 1321 (11th Cir. 1999) (same).

Second, and equally important, the disparate-impact framework eliminates – through the same burden-shifting mechanism – practices that may be neutral on their face but nevertheless perpetuate racial disparities without any legitimate justification. *See Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 935 (2d Cir. 1988) ("Often [facially race-neutral] rules bear no relation to discrimination upon passage, but develop into powerful discriminatory mechanisms when applied."), *aff'd*, *Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15 (1988) (per curiam); *see also Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988) ("[T]he nec-

essary premise of the disparate-impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination."). These disparities "freez[e]" in place the status quo created by prior racial discrimination. *Griggs*, 401 U.S. at 430. Accordingly, a finding of disparate-impact discrimination may be tantamount to evidence of clandestine intentional discrimination or it may equate to an unjustified denial of housing opportunity, both of which perpetuate racial disadvantage in the housing market.[3]

The City and its amici assert that disparate impact threatens to disrupt the business interests of private defendants, *see, e.g.*, Amici Br. of the Indep. Cmty. Bankers of Am. et al. [hereinafter "Bankers Br."] at 25-26, and prevents governmental actors from advancing the public interest, *see generally* Amicus Br. of Twp. of Mt. Holly, New Jersey [hereinafter "Mt. Holly Br."].[4] But disparate impact's

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[3] Although not at issue in this case and therefore not the focus of this amicus brief, it is well established that the FHA also provides a mechanism to combat another type of discriminatory effect that a facially neutral housing practice or policy may have – *i.e.*, the effect of creating, perpetuating, or exacerbating segregated housing patterns. *See* 76 Fed. Reg. at 70,923, 70,926; *Graoch Associates #33, L.P. v. Louisville/ Jefferson County Metro Human Relations Commission*, 508 F.3d 366, 378 (6th Cir. 2007).

[4] The City and its amici further suggest that the mere possibility of litigation involving disparate-impact claims encourages defendants to adopt practices, such as quotas, that are constitutionally suspect. *See, e.g.*, Bankers Br. 26. This is nothing more than a red herring. This case does not present any constitutional issue. *Cf. Ricci v. DeStefano*, 129 S. Ct. 2658, 2664-65 (2009).

burden-shifting framework is designed to protect those policies and practices that are necessary to achieve legitimate, non-discriminatory objectives. And, as with other kinds of litigation, defendants have available to them ample tools to challenge any marginal claims. *See, e.g.*, Fed. R. Civ. P. 12, 56; *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309 (2011).

A. The threshold showing required at the prima facie stage adequately polices the boundaries of disparate impact.

As illustrated by the longstanding application of the burden-shifting framework in fair housing cases, equal employment litigation, *see, e.g.*, *Lewis*, 130 S. Ct. 2191; *Griggs*, 401 U.S. 424, and other contexts, *see, e.g.*, Civil Rights Division, U.S. Dep't of Justice, *Title VI Legal Manual* 47-53 (2001), *available at* http://www.justice.gov/crt/about/cor/coord/vimanual.php, disparate impact is feasible. In the Title VII context, this Court has made clear that the prima facie showing of disparate impact imposes "constraints that operate to keep [disparate-impact] analysis within its proper bounds." *Watson*, 487 U.S. at 994. The same rationale applies in the context of the Fair Housing Act.

To begin, plaintiffs must trace any adverse effects to a specific, identifiable practice.[5] *See 2922*

[5] There is one potential exception to this requirement. In the Title VII context, if a plaintiff can show that "the elements" of a defendant's overall "decisionmaking process are not capable of separation for analysis," then, for purposes of proving disparate impact, "the decisionmaking process may be analyzed as one . . . practice." 42 U.S.C. § 2000e-2(k)(1)(B)(i); *see, e.g.*, *McClain v. Lufkin Indus.*, 519 F.3d 264, 278 (5th Cir. 2008).

Sherman Ave. Tenants' Ass'n v. Dist. of Columbia, 444 F.3d 673, 681 (D.C. Cir. 2006); U.S. Br. 29. As this Court has observed, the plaintiff's obligation to identify a specific practice when mounting a disparate-impact claim is "not a trivial burden." *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 101 (2008); *cf. Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2555-56 (2011). Because the "requirement has bite," *Meacham*, 554 U.S. at 100, it "ought to allay" the specter of potential defendants being forced to alter otherwise legitimate practices to avert marginal claims, *id.* at 101.

Beyond identifying a specific practice, plaintiffs at the prima facie stage must offer "proof of disproportionate impact." *2922 Sherman Ave. Tenants' Ass'n*, 444 F.3d at 680. As the Eighth Circuit recognized in the instant case, Pet. App. 23a-24a, this Court has eschewed a "rigid mathematical formula" for the adverse effects showing. *Watson*, 487 U.S. at 995. Instead, the Court has expressed a preference for a "case-by-case approach" to accommodate the "'infinite variety'" of statistical methods and the reality that the "'usefulness [of different methods] depends on all of the surrounding facts and circumstances.'" *Id.* at 995 n.3 (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 (1977)). Defendants may utilize a variety of tools to challenge the reliability of plaintiffs' statistical evidence. *Id.* at 996 (describing different methods to refute plaintiffs' data).

A prima facie case may be established "by showing that the challenged practice of the defendant 'actually or predictably results in racial discrimination' . . . ." *Huntington*, 844 F.2d at 934 (quoting

Black Jack, 508 F.2d at 1184-85); *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1217 (2d Cir. 1987); *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1036-38 (2d Cir. 1979). In *Watson*, this Court sanctioned in the analogous Title VII context a statistical showing that raises "an inference of causation." 487 U.S. at 995.[6] As the Eighth Circuit properly concluded, no "single document [need] connect[ ] the dots." Pet. App. 20a. Rather, "it is enough that each analytic step is reasonable and supported by the evidence." *Id.* Other courts of appeals have recognized that inferences may demonstrate a causal relationship between the disputed practice and adverse effects on housing opportunities for racial minorities and other groups covered by the FHA. *See, e.g.*, *Hallmark Developers, Inc. v. Fulton Cnty.*, 466 F.3d 1276, 1287 (11th Cir. 2006) (collecting cases); *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565,

[6] The Title VII context provides guidance as to the statistical showing required at the prima facie stage. In order to establish a prima facie case of disparate impact, a Title VII plaintiff must offer statistical or other empirical evidence that the challenged policy disproportionately affects minorities. *See, e.g.*, *Bradley v. Pizzaco of Neb., Inc.*, 939 F.2d 610, 612-13 (8th Cir. 1991) (plaintiff presented testimony of dermatologists that between 25% and 45% of black males were afflicted by pseudofolliculitis barbae ("PFB"), while white males rarely suffer from PFB or comparable skin disorders; plaintiff also presented military studies supporting the conclusion that significant numbers of black males with PFB cannot shave). A plaintiff cannot rely on conclusory opinions unsupported by statistical or empirical evidence. *See Antrum v. Wash. Metro. Area Transit Auth.*, 710 F. Supp. 2d 112, 122-23 (D.D.C. 2010) (plaintiff failed to establish prima facie case of disparate impact where he relied solely on EEOC determination that no-beard policy had a significant statistical impact on black males and failed to present evidence supporting that conclusion).

577 (2d Cir. 2003) (supporting similar causal analysis); *Keith v. Volpe*, 858 F.2d 467, 484 (9th Cir. 1988) (same); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 142 (3d Cir. 1977) (same).

For instance, the Third Circuit recently concluded that plaintiffs had provided sufficient evidence of their prima facie case to withstand summary judgment. *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375, 382 (3d Cir. 2011). Observing that "'[n]o single test controls," the court determined that plaintiffs' statistical showing "plausibl[y]" demonstrated that African Americans and Latinos residing in the subject neighborhood would be disproportionately displaced by the township's redevelopment plan because a "vast majority," *id.*, would not be able to afford the proposed market-rate units, *id.* at 379-80.[7] This

[7] In its amicus brief, Mount Holly township urges this Court to limit disparate-impact claims "to those situations where there is evidence of segregative effect." Mt. Holly Br. 8. LDF agrees with Mount Holly insofar as it emphasizes the importance and laudable goal of eradicating segregation. *Id.* at 6-8. Yet, the township sets up a false and dangerous choice between integration, on the one hand, and the promotion of housing opportunity by eliminating unjustified and unnecessary facially neutral policies that adversely and disproportionately affect racial minorities, on the other. The FHA strives to eliminate both. Moreover, any conflict that occurs in practice between the equally critical governmental goals of promoting public health and safety and promoting integration can be reconciled through the second and third prong of the burden-shifting test. In fact, Mount Holly acknowledges the utility of HUD's proposed burden-shifting test for protecting the interests of both plaintiffs and defendants. Mt. Holly Br. 22-23; *see also* 76 Fed. Reg. at 70,922 ("Under the [Fair Housing] Act, housing practices – regardless of any discriminatory motive or intent – cannot be maintained if they operate to deny protected

standard by no means guarantees plaintiffs success at the prima facie stage. Courts reject disparate-impact claims that fail to provide sufficient evidence, through inferences or otherwise, of a causal relationship between the disputed practice and its alleged adverse effects. *See, e.g.*, *McCauley v. City of Jacksonville*, 739 F. Supp. 278, 282 (E.D.N.C. 1989) (granting summary judgment to municipality due to lack of "evidence in the record from which one could infer that a significantly higher percentage of . . . families [qualified to rent low-income units] would have been black").

The courts of appeals have declined to impose additional evidentiary requirements at the initial stages of disparate-impact litigation due to the significant risk that otherwise deserving claims will be dismissed and because defendants' interests are adequately protected by the prima facie showing requirement and in subsequent stages of the burden-shifting framework. In *Huntington*, for example, the Second Circuit rejected the district court's adoption of a four-factor balancing test, *see Huntington Branch, NAACP v. Town of Huntington*, 668 F. Supp. 762, 781-82 (E.D.N.Y. 1987) (balancing adverse effects, the defendant's interest, the nature of the requested relief, and proof of intent), at the prima facie stage, 844 F.2d at 935, concluding that it was too burdensome in light of the expansive purposes of the Fair Housing Act, *id.* at 936 (observing that the FHA's legislative history "argues persua-

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groups equal housing opportunity or they create, perpetuate, or increase segregation *without a legally sufficient justification*." (emphasis added)).

sively against so daunting a prima facie standard"). The Second Circuit concluded that Huntington's refusal to amend its zoning ordinance to permit affordable housing in a neighborhood that was 98% white disproportionately and adversely affected the town's racial minorities. *Id.* at 938. Analogizing to the showing accepted by this Court in *Griggs*, and using an analysis similar to the Eighth Circuit's approach in this case, the Second Circuit inferred a prima facie case of disparate impact from a series of related facts: the town's minorities were disproportionately poor, disproportionately relied on affordable housing, and were overrepresented on the waiting list for Section 8 certificates. *Id.* While not "endorsing the [Second Circuit's] precise analysis," this Court affirmed the Second Circuit's judgment that the *Huntington* plaintiff had established its prima facie case. *Town of Huntington*, 488 U.S. at 18 ("[W]e are satisfied on this record that disparate impact was shown . . . .").

To withstand summary judgment, plaintiffs therefore need only provide enough material evidence to establish an inference of a causal relationship. As discussed below, *see infra* Part III, the plaintiff landlords (Respondents here) amply satisfied this standard.

B. After a prima facie case is established, liability attaches only if the defendant fails to justify its policy *or* if its legitimate objective can be achieved by some other less discriminatory means.

Of course, plaintiffs do not necessarily prevail on the merits simply by surviving the prima facie stage.

Importantly, disparate-impact liability does not attach unless defendants fail to show that the disputed policy has a "necessary and manifest relationship to a legitimate, nondiscriminatory interest." 76 Fed. Reg. at 70,924, 70,925. If defendants succeed at this second stage, plaintiffs must then demonstrate a less discriminatory way to achieve the *same* objective. *Id.*

Therefore, the objections of the City and its amici – that they will be precluded from pursuing legitimate business goals, *see* Bankers' Br. 2-3, or promoting the public welfare – are unfounded. The FHA's prohibition against disparate-impact discrimination does not condemn policies simply because they have adverse effects. Rather, it precludes only those policies that have such adverse effects and that are unnecessary to the achievement of the defendant's legitimate, non-discriminatory goals. *See Graoch Associates #33, L.P. v. Louisville/ Jefferson County Metro Human Relations Commission*, 508 F.3d 366, 374-75 (6th Cir. 2007) ("Of course, not every housing practice that has a disparate impact is illegal. We use the burden-shifting framework described above . . . to distinguish the artificial, arbitrary, and unnecessary barriers proscribed by the FHA from valid policies and practices crafted to advance legitimate interests."); *Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev.*, 56 F.3d 1243, 1254-57 (10th Cir. 1995) (concluding that disputed occupancy restrictions had "a manifest relationship" to legitimate, nondiscriminatory objective of protecting the sewer capacity of the mobile park and promoting "quality of park life").

Defendants may rebut a prima facie case of disparate impact by demonstrating that the challenged practice is justified by a legitimate societal goal, such as alleviating blight, *see Mt. Holly Gardens Citizens in Action*, 658 F.3d at 386, or protecting local infrastructure, such as sewage systems, *see Mountain Side*, 56 F.3d at 1255-57, or by quality of life concerns, such as density, traffic flow, and pedestrian safety, *see id.*

At the third stage of the burden-shifting framework, plaintiffs typically will propose an alternative housing plan or practice, which can then be compared to the challenged practice. *See, e.g.*, *Mt. Holly Gardens Citizens in Action*, 658 F.3d at 386-87; *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 70 (D. Mass. 2002). The trier of fact must then determine whether plaintiffs' proposal is workable and furthers defendants' legitimate goals while reducing the disparate effects on the minority group. *See Mt. Holly Gardens Citizens in Action*, 658 F.3d at 387. Liability results only if plaintiffs satisfy these requirements.

C. The defendant appropriately bears the burden of persuasion at the second stage of the burden-shifting inquiry.

The Respondents (plaintiffs below) have conceded that code enforcement here serves a legitimate, nondiscriminatory objective. A ruling on this issue, therefore, is unnecessary to the outcome of this litigation. Resp. Br. 29-31. Nonetheless, should the Court decide to address this matter, it should allocate to the defendants the burden of demonstrating a "necessary and manifest relationship" between the

challenged practice and any "legitimate, nondiscriminatory interest." 76 Fed. Reg. at 70,924, 70,925. As the United States notes, this is "the sounder approach," U.S. Br. 27, because the defendant is uniquely positioned to explain its rationale. For example, defendants can point to factors they analyzed or relied upon when adopting the policy; the problems or harms they sought to remedy; and any previous policies they pursued that did not sufficiently address their objectives.[8] Because of information asymmetries between the plaintiffs and defendants, placing the burden on the plaintiffs at the second stage would not be a sensible way to evaluate the evidence. As HUD's proposed rule recognizes, the allocation of the burden to defendants at the second stage avoids the awkwardness of having to "prove a negative." 76 Fed. Reg. at 70,924 (quoting *Hispanics United of DuPage Cnty. v. Vill. of Addison*, 988 F. Supp. 1130, 1162 (N.D. Ill. 1997)). This method of proof serves another useful purpose in fair housing cases in particular, where – unlike in the

[8] *Cf.* H.R. Rep. No. 102-40, pt. 2, at 5 (1991), *reprinted in* 1991 U.S.C.C.A.N. 684, 699 (stating, in justification of the prohibition against disparate impact in employment codified in the Civil Rights Act of 1991, that "[t]he practical reasons for placing the burden of proving business necessity on the employer are obvious: the employer has control over the employment process, selects the practices used to make an employment decision, and is more likely to be aware of the relative costs and benefits of the practices used and of the alternative practices that were not used in making the employment decision. The Committee believes that it confounds logic to place on a job applicant or employee the burden of demonstrating the absence of business necessity for a discriminatory employment practice when the employer, who selected that practice in the first place, has ready access to all of the relevant information.").

Title VII context – the disputed facially-neutral policy may be based upon complex considerations and a "variety of circumstances." *Huntington*, 844 F.2d at 936-37; *see also id.* at 936 ("The difficulty . . . is that in Title VIII cases there is no single objective like job performance to which the legitimacy of the facially neutral rule may be related.").

Allocating the burden to plaintiffs at the second stage also would have limited utility given that they bear the burden of proof at the *third* stage under HUD's proposed rule. 76 Fed. Reg. at 70,924. At this last stage, plaintiffs must demonstrate that there is a less discriminatory alternative for meeting defendants' *same* legitimate objectives. Such a showing naturally requires some understanding of the *actual* grounds that the defendants relied upon when they adopted the policy or practice. *Cf. United States v. Virginia*, 518 U.S. 515, 535-36 (1996) (discussing "actual purpose" requirement in context of equal protection challenge). Simply permitting defendants to identify any objective after litigation has commenced – without demonstrating its relationship to the disputed policy or practice – imposes unnecessary and wasteful barriers to the adjudication of disparate-impact claims.

Finally, the City's reasoning – that *Smith v. City of Jackson*, 544 U.S. 228 (2005), requires the Court to apply *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), and allocate the burden to plaintiffs at the second stage – is flawed. It bears emphasis that, as a result of Congress's enactment of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C.), *Wards Cove* no longer governs

the allocation of burdens in the Title VII disparate-impact context; instead, claims of disparate impact in employment are reviewed using the traditional burden-shifting framework developed in *Griggs* and subsequent cases, *see* 42 U.S.C. § 2000e-2(k), which have been closely followed in judicial interpretations of the FHA. Moreover, as this Court subsequently made clear in *Meacham*, although *Smith* involved the applicability of disparate impact to claims under the Age Discrimination in Employment Act (ADEA), it did not speak to how the burden of proof should be allocated in ADEA disparate-impact cases and applied *Wards Cove* for only a limited purpose that has no bearing in this case. *See Meacham*, 554 U.S. at 98 (noting that *Smith* "made only two specific references to aspects of the *Wards Cove* interpretation of Title VII that might have 'remain[ed] applicable' in ADEA cases": first, the "existence of disparate impact liability," and second, the "plaintiff-employee's burden of identifying which particular practices allegedly cause an observed disparate impact"). Indeed, *Meacham* cautioned against reading its invocation of *Wards Cove* to imply the vitality of aspects of that opinion "beyond what mattered" in *Smith*. *Id*.

II. Building code enforcement can be the subject of a bona fide disparate-impact claim.

Obviously building code enforcement is important, but the City and its amici err in their assertion that it should be categorically exempt from disparate-impact claims. Pet. Br. 54; Amici Br. of the Int'l Municipal Lawyers Ass'n et al. at 14-17. The City asserts that, if building code enforcement is not exempt from disparate-impact claims, governmental defendants might be discouraged from pursuing

bona fide objectives that promote public health and safety. But the same objection could be lodged to preclude challenges to racially exclusionary zoning, *see, e.g.*, *Huntington*, 844 F.2d at 937, or *any* other unlawful enforcement claim – including allegations of disparate treatment – on the theory that it might deter City officials who are concerned about litigation from legitimate enforcement activity.

Code enforcement in the disparate-impact context should be no more exempt from the FHA than a code enforcement claim alleging intentional discrimination. *See, e.g.*, Amicus Br. of United States, *2922 Sherman Ave. Tenants' Ass'n v. Dist. of Columbia* (D.D.C. 2004) (No. 00-CV-862), *available at* http://www.justice.gov/crt/about/hce/documents/amicus_sherman.php (asserting selective code enforcement violated FHA's disparate-impact and disparate-treatment prohibitions). Both kinds of claims are integral to meeting the objectives of the FHA. Indeed, federal regulations specifically require communities that receive federal housing assistance to take account of building code enforcement for purposes of local planning and development because of its potential to adversely affect the low-income housing supply. *See* 24 C.F.R. § 91.210(e) (observing that "building codes" may have negative impact on "the cost of housing or the incentives to develop, maintain, or improve affordable housing").

In *Graoch Associates #33, L.P. v. Louisville/Jefferson County Metro Human Relations Commission*, the Sixth Circuit declined to exempt from disparate-impact liability the refusal of landlords to participate in a Section 8 program for low-

income tenants. 508 F.3d at 374.[9] The court observed, first, that the burden-shifting analysis itself helps to "distinguish the artificial, arbitrary, and unnecessary barriers proscribed by the FHA from valid policies and practices crafted to advance legitimate interests." *Id.* at 374-75. Second, it noted the absence of any coherent, principled basis for exempting some practices from disparate-impact liability while recognizing others.[10] Without statutory guidance, the Court "lack[s] the authority to evaluate the pros and cons of allowing disparate-impact claims challenging a particular housing practice and to prohibit claims that [it] believe[s] to be unwise as a matter of social policy." *Id.* at 375; *cf. Meacham*, 554 U.S. at 91-92 (discussing statutory basis for "reasonable factor other than age" exemption under the ADEA).

Finally, as this Court has repeatedly observed in many different contexts, the mere fact that a challenged practice serves a lawful government objective does not necessarily insulate the government from liability. If the practice relies on unlawful means or the defendant is unable to show that it would have made the same decision in the absence of the impermissible factor, the defendant may be held liable.

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[9] Although the Sixth Circuit applied a modified burden-shifting analysis, 508 F.3d at 373, its reasoning is instructive.

[10] Simply because a practice may not readily lend itself to disparate-impact analysis does not mean that it should be categorically exempt. *Cf. Graoch*, 508 F.3d at 377 ("The mere fact that a landlord *often* can withdraw from Section 8 without violating the terms of Section 8 or the FHA does not mean that withdrawal from Section 8 *never* can constitute a violation of the FHA." (emphasis in original)).

Cf. Gratz v. Bollinger, 539 U.S. 244, 275 (2003); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285 (1977). Thus, in disparate-impact litigation, courts should be similarly well-equipped to sort through the competing objectives and considerations at issue through application of the well-established, burden-shifting framework.

The United States suggests that the beneficial effects of code enforcement may provide grounds for rejecting a disparate-impact claim at the prima facie stage, *see* U.S. Br. 31, particularly because the "*failure* to aggressively enforce a housing code could give rise to a disparate-impact claim" under the FHA, *id.* at 32 (emphasis in original). These points conflate the purpose of the threshold, prima facie inquiry with the objectives of the latter stages of the burden-shifting framework. As explained above, *see supra* Part I.B, even after a plaintiff establishes a prima facie case, liability does not attach unless that policy or practice is determined to have an *unjustified*, disproportionate adverse impact. *Cf. Mt. Holly Gardens Citizens in Action*, 658 F.3d at 385-86 (finding genuine issue of material fact as to whether less discriminatory alternative exists to defendant's legitimate goal of "alleviating blight"); *Huntington*, 844 F.2d at 937 ("Though a town's interests in zoning requirements are substantial, they cannot, consistently with Title VIII, *automatically* outweigh significant disparate effects." (emphasis added)). This means that practices that have both beneficial *and* discriminatory effects may still be unlawful if there is another, less discriminatory means to accomplish the same objective.

Consideration of any beneficial effects, therefore, belongs at the second and third stages of the burden-shifting test, which are intended to address the legitimacy of the defendant's asserted justification and the availability of less discriminatory alternatives. *Huntington*, 844 F.2d at 935 (noting "confusion . . . engendered by the tendency of some courts to consider factors normally advanced as part of a defendant's justification for its challenged action in assessing whether the plaintiff has established a prima facie case"); *see also Mountain Side*, 56 F.3d at 1252 (observing that "[i]n the Title VII context, we have held that a defendant's justification for the challenged action should not be considered in assessing the establishment of a prima facie case"). Tracking the example offered by the United States, the same reasoning would apply to a disparate-impact claim challenging a municipality's selective under-enforcement of its code: plaintiffs would have to demonstrate adverse effects at the prima facie stage followed by a determination that the policy's disparate impact was unjustified at the second and/or third stages. The United States errs, therefore, insofar as it suggests that a disparate-impact claim can be defeated at the prima facie stage simply because of some purported benefits of the disputed policy.

III. The Eighth Circuit correctly applied the burden-shifting test on summary judgment.

Should the Court decide to address whether the Eighth Circuit properly applied the burden-shifting test – a matter that the City Petitioners belatedly raise in their merits brief, *see supra* note 2 – it should affirm the judgment of the Eighth Circuit. Under the application of the burden-shifting frame-

work described above, the Respondents (plaintiffs below) presented sufficient facts to withstand summary judgment. The case should be remanded for further proceedings on the third-stage, the less-discriminatory-alternative prong. Pet. App. 24a-26a.

The City's constrained reading of the facts runs counter to the standards for summary judgment and disserves the objectives of disparate impact. As this Court is well aware, a court must "look at the record and any inferences to be drawn from it in the light most favorable to the nonmovant." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). "To deny one party's motion for summary judgment . . . is not to grant summary judgment for the other side. . . ." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 128-29 (2001) (Breyer, J., concurring). Indeed, the City's "invocation of what is missing from the record and its assumptions about what is present in the record only confirm that both parties, if they so desire, should have a fair opportunity to fill the evidentiary gap." *Id.*

The Respondents satisfied the prima facie showing. They challenged an identifiable, specific policy of selective, inflexible code enforcement targeting private landlords of low-income housing, Resp. Br. 14-15 (citing record), consistent with the City's stated mission of "closing down 'problem properties.'" Pet. App. 53a. As the non-moving party, the Respondents presented sufficient facts to establish significant adverse racial effects and a strong inference of causation between these effects and the selective enforcement scheme. According to the Eighth Circuit, the Respondents offered evidence demonstrating that the City of St. Paul had a shortage of af-

fordable housing at the time this litigation arose. *Id.* at 17a-18a (noting that in 2005 the "City estimated that 32% of the households in St. Paul had unmet housing needs); Resp. Br. 5-6 (citing record). This shortage increased the demand for affordable rental options in the private market. *See id.* at 5 (same). There is no question that African Americans in the City of St. Paul "make up a disproportionate percentage of low-income tenants," Pet. Br. 7, who were concentrated in the City's inner core, Resp. Br. 6.[11]

The Eighth Circuit noted evidence in the record demonstrating that the City's selective and unyielding application of its building code against the Respondents increased the costs of maintaining their stock of low-income housing. Pet. App. 18a-19a (Respondents "reported a substantial increase in costs, resulting in evictions for tenants and 'forced sales' of their properties in some cases," allegations that were "corroborated by" an internal City memorandum). The Eighth Circuit's description is consistent with the Respondents' expert report, which identified the "harsh financial burdens," the appreciable loss of revenue, and the "dramatic[ ]" increase in business expenses, Resp. Br. 14-15, that resulted from the City's selective enforcement scheme, *id.* at 15. Due to the Respondents' limited profit margins, *id.* at 10, 11, these increased costs, *id.* at 15, compelled some private landlords to sell their properties and others

[11] The Respondents note that "[p]recise statistical data on the effects of the City's policy on the minority population are unavailable because the City has never produced the data from the assessment of impediments to fair housing (including specifically 'building codes') that it was required to create under federal law." Resp. Br. 15 (citations omitted).

to "withdraw from the low-income rental market" altogether, *id.* at 14-15. This reduction in the availability of affordable housing predictably lowered the supply available to the City's minority population, which disproportionately relied on such housing. *See id.* at 6, 8-15.[12] As described in Part I.A *supra*, the Eighth Circuit's analysis of the prima facie showing comported with a common method of showing a disproportionate adverse effect through reasonable inferences.[13]

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[12] The impact of increased costs and reduced revenue on a preexisting shortage of affordable housing, in the context of the Respondents' tenuous financial circumstances, should be clear from a straightforward application of basic economic theory. If a policy or practice demonstrably increases the cost of supplying a particular good, it is reasonable to conclude that less of that good will be supplied, particularly where (as here, apparently) the profit margins are slim. *See* Resp. Br. 10-12; *cf. Duke Power Co. v. Carolina Envt'l Study Grp., Inc.*, 438 U.S. 59, 75-77 (1978) (noting that, if statutory limitation on liability were lifted, developers of nuclear power would withdraw from market).

[13] The City Petitioners assert that "some of [the Respondents'] properties with African-American tenants were not subject to what they considered illegal code enforcement, and that some of their properties which were subject to code enforcement were either vacant or occupied by white tenants." Pet. Br. 6. Such facts, if true, are immaterial for purposes of summary judgment. Disparate impact does not require that *all* African Americans in St. Paul must be adversely affected by the selective application of the City's housing code to private landlords of affordable housing – only that they be *disproportionately* (and unnecessarily) affected as members of a covered group. Indeed, if all African Americans were adversely affected, it might be more suggestive of a pattern or practice of disparate *treatment* than disparate impact. *Cf. Int'l Bhd. of Teamsters*, 431 U.S. at 342 n.23.

The Court need not rule on the second-stage of the burden-shifting test. According to the court of appeals, the Respondents conceded that enforcement of the City's housing code had "a manifest relationship to legitimate, non-discriminatory objectives," Resp. Br. 19, obviating the need for any showing by the City at this stage.

That leaves only the third stage of the burden-shifting test – whether the Respondents demonstrated that the City's "legitimate nondiscriminatory interests," here the promotion of the public welfare, could be "served by a policy or decision that produces a less discriminatory effect." 76 Fed. Reg. at 70,924. The Respondents argued that the City's former housing code enforcement program, "Problem Properties 2000" ("PP2000"), could achieve the same objectives. Pet. App. 24a-25a.

According to the Eighth Circuit, the Respondents identified a report prepared by the City indicating that PP2000 was a workable alternative to the City's policy of selectively enforcing its housing code against private landlords of low-income housing, a conclusion that apparently was "corroborated by" code enforcement officials. *Id.* at 25a. The City countered by asserting that PP2000 would not alleviate the demonstrated adverse effects because the landlords would still be subject to the existing housing code and, therefore, their costs of compliance would still be the same. *Id.* at 26a.

But as the Eighth Circuit pointed out, the City's assertion neglected an important component of the Respondents' claim, which was that the selective and *inflexible* application of the City's code enforcement

policy increased their costs of doing business and reduced their revenue, *id.*, factors that were not an issue under the more conciliatory PP2000 program. Because of the Respondents' limited profit margins, the City's unyielding scheme led them or forced them out of the affordable housing market, thereby reducing the affordable housing supply. *Id.* Construing the facts in the light most favorable to the Respondents, as it was required to do for non-movants on summary judgment,[14] the Eighth Circuit reasonably concluded that the Respondents had created a genuine dispute of material fact regarding whether PP2000 was a "viable alternative" to the City's concededly legitimate health and public safety goals. Accordingly, it determined that "summary judgment was improper as to [the Respondents'] disparate im-

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[14] The United States asserts that "[t]he [Eighth Circuit] identified no evidence that it would be feasible to apply [PP2000] on a far broader scale as an overall approach for enforcing the housing code." U.S. Br. 32. But this misconceives the nature of the inquiry on summary judgment. As the moving party, the *City* – not the Respondents – bore the "initial responsibility of informing the district court of the basis for its motion," and identifying "those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). This required initial showing necessarily frames the summary judgment inquiry and the non-moving party's response. The Eighth Circuit concluded that the City failed to meet this standard because it, *inter alia*, did not argue that PP2000 would "fail to accomplish the objectives of Housing Code enforcement." Pet. App. 26a. In sum, the Respondents were not required to present evidence that PP2000 would work on a "far broader scale" because the City (apparently) failed to present evidence in the first instance that the Respondents' proffered alternative was comparatively ineffective.

pact claim" and remanded for further proceedings. *Id.*

LDF takes no position as to whether the Respondents will, or should, ultimately prevail on their disparate-impact claim. But, the Eighth Circuit's judgment was assuredly correct. Under the workable and well-established burden-shifting framework and, viewing the record in the light most favorable to the Respondents, there are genuine issues of material fact that preclude summary judgment in favor of the City.

CONCLUSION

For the foregoing reasons, if the Court reaches the questions presented in this case, it should affirm the judgment of the Eighth Circuit.

Respectfully submitted,

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