No. 11-1507

IN THE

Supreme Court of the United States

TOWNSHIP OF MOUNT HOLLY, NEW JERSEY, *et al.*,

Petitioners,

v.

MT. HOLLY GARDENS CITIZENS IN ACTION, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL LEASED HOUSING ASSOCIATION, NATIONAL MULTI HOUSING COUNCIL, NATIONAL APARTMENT ASSOCIATION AND NEW JERSEY APARTMENT ASSOCIATION IN SUPPORT OF PETITIONERS

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I. INTEREST OF *AMICI CURIAE*[1]

The *amici curiae* – National Leased Housing Association, National Multi Housing Council, National Apartment Association, and New Jersey Apartment Association (jointly, the "Amici") – file this brief in support of the Petitioners. As explained below, the Amici represent the interest of developers, owners, managers, investors and other persons interested in multifamily housing and speak on behalf of housing providers, who have daily experience in dealing with rules prohibiting discrimination in housing.

The National Leased Housing Association ("NLHA") is a national organization dedicated to the provision and maintenance of affordable rental housing for all Americans. NLHA is a vital and effective advocate for nearly 500 member organizations, including developers, owners, managers, public housing authorities, nonprofit sponsors and syndicators involved in government related rental housing.

Based in Washington, DC, the National Multi Housing Council ("NMHC") is a national association representing the interests of the larger and most prominent apartment firms in the U.S. NMHC's members are the principal officers of firms engaged in all aspects of the apartment industry, including ownership, development, management,

1. The parties have consented to the filing of this brief and received timely notice of the Amici's intent to do so. (Such consents are being submitted herewith.) No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae* has made a monetary contribution to the preparation or submission of this brief.

and financing. NMHC advocates on behalf of rental housing, conducts apartment-related research, encourages the exchange of strategic business information, and promotes the desirability of apartment living. One-third of American households rent, and over 14 percent of households live in a rental apartment (buildings with five or more units).

The National Apartment Association ("NAA") is the leading national advocate for quality rental housing. NAA is a federation of 170 state and local affiliated associations, representing more than 55,000 members responsible for more than 6.2 million apartment units nationwide. NAA is the largest broad-based organization dedicated solely to rental housing. In addition to providing professional industry support and education services, NAA and its affiliated state and local associations advocate for fair governmental treatment of multi-family residential businesses nationwide.

The New Jersey Apartment Association ("NJAA") (and its predecessor, the Multihousing Industry of New Jersey) is a not-for-profit association that has represented the interest of multifamily property houses through New Jersey since 1987. The NJAA is a statewide organization of apartment owners, managers, builders and others involved in allied industries, who are dedicated to maintaining and improving existing properties and producing new and affordable apartments throughout New Jersey.

II. BACKGROUND

Congress adopted the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3601 *et seq.* ("FHA"), in 1968 to address persistent problems

of discrimination in housing. Originally focused on discrimination on the basis of race, color, national origin and religion, the FHA was expanded to address sex-based discrimination in 1974 and to address discrimination on the basis of familial status and disability in 1988. Housing and Community Development Act of 1974, Pub. L. 93-383, §808, 88 Stat. 633, 729 (1974); Fair Housing Amendments Act of 1988, Pub. L. 100-430, 102 Stat. 1619-39 (1988).

The Petition here raises important questions about the scope of the FHA and, in particular, whether it creates liability with respect to facially-neutral policies that have a disproportionate effect – or "disparate impact" – on members of the classes protected by the FHA. Over the life of the FHA, federal district and appellate courts have, by analogy to other federal antidiscrimination laws, concluded that the FHA creates disparate impact liability where, in the absence of evidence of intent to discriminate, neutral policies and practices have a harsher impact on members of the classes protected by the FHA than on the population at large. Disparate impact cases are distinguished from "disparate treatment" cases that normally require a showing of actual intent to discriminate against members of protected classes.

III. SUMMARY

Disparate impact liability is a judge-made rule that is not supported by the text of the FHA. As explained in more detail below, it is at odds with this Court's holdings in other cases that have construed federal antidiscrimination laws and that have scrutinized the text of those statutes to determine whether Congress actually intended to create disparate impact liability. As applied, disparate impact liability has created a series of intractable problems

in practice that underscore how inappropriate it is in the context of combatting housing discrimination. In the unlikely event that the Court determines disparate impact liability is created by the FHA, the Court should nevertheless accept the Petition, to address some of the profound legal anomalies the disparate impact theory has caused.

IV. ARGUMENT

A. THE COURT SHOULD ACCEPT THE PETITION TO DECIDE THAT THE FAIR HOUSING ACT DOES NOT INCORPORATE DISPARATE IMPACT LIABILITY.

1. Based On The Court's Analysis Of Similar Statutes, The Text Of The Fair Housing Act Does Not Support Disparate Impact Claims.

The Court should accept the Petition here to correct and clarify the scope of the FHA. Specifically, the Court should use this occasion to determine whether the FHA recognizes claims for discrimination based on disparate impact in housing. Although this Court has never addressed whether the FHA recognizes disparate impact claims, many lower courts, by analogy to other federal laws, have concluded that the FHA does support disparate impact liability. (*See* Pet. App. 20a-21a). The approach used by these courts ignores the text of the FHA, however, which does not contain the language used in other antidiscrimination laws to support disparate impact claims. The Petition provides a unique opportunity for the Court to correct these errors and to restore the FHA to the scope its drafters intended.

As this Court has elsewhere determined, the interpretation of a statute begins with the text of the statute itself. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The plain language of the portion of the FHA at issue here, however, does not contain language creating disparate impact liability. Thus, the FHA makes it unlawful

> to refuse to sell or rent . . ., or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status or national origin.

42 U.S.C. §3604(a).

Although as noted, the Court has not examined the FHA to determine whether this language creates a disparate impact claim, it has recognized that similar language in other statutes does not. Thus, in *Smith v. City of Jackson*, 544 U.S. 228 (2005), the court considered whether disparate impact liability arose under §4(a)(2) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §623(a)(2). Writing for the Court, Justice Stevens compared the language of §4(a)(2) of ADEA to the text of §703(a)(2) of Title VII, 42 U.S.C. §2000e-2(a)(2), which provides that

> (a) it shall be an unlawful employment practice for an employer –
>
> * * *
>
> (2) to limit, segregate, or classify his employees or applicants for

> employment in any way which would deprive or tend to deprive any individual of employment opportunities *or otherwise adversely affect* his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. §2000e-2(a)(2) (emphasis added). According to Justice Stevens, the "adversely affect" language in §703(a)(2) supports disparate impact claims, because

> Neither §703(a)(2) nor the comparable language of the ADEA simply prohibits actions that "limit, segregate, or classify" persons; rather the language prohibits such actions that "deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's" race or color. . . Thus, the text focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer.

City of Jackson, 544 U.S. at 235-36 (emphases in original). Applying this text-based approach, which focuses on actions that have the *effect* of discriminating, the Court ruled that §4(a)(2) of ADEA supported disparate impact claims. *Id.*

In contrast, Justice Stevens explained that §4(a)(1) of ADEA – a provision similar to §3604(a) of the FHA – does not support disparate impact claims. Thus, §4(a)(1) makes it unlawful for an employer

> to fail or refuse to hire or to discharge any individual or otherwise *discriminate against* any individual with respect to his compensation, terms, conditions or privileges of employment, *because of* such individual's age.

29 U.S.C. §623(a)(1) (emphasis added). As Justice Stevens explained, there are "key textual differences" between §§4(a)(1) and (2). *City of Jackson*, 544 U.S. at 236, n.6. Section 4(a)(2) contains language prohibiting conduct that "adversely affects" individuals, which supports a claim of disparate impact. On the other hand, §4(a)(1) of ADEA looks narrowly at discrimination "because of" membership in a protected class – the same language found in §3604(a) of the FHA – and supports intent-based disparate treatment claims, but not disparate impact claims. Thus, addressing the "because of" language in §4(a)(1), the Court in *City of Jackson* explained that "the focus of the paragraph is on the employer's actions with respect to the targeted individual." *Id.* Similarly, Justice O'Connor in dissent (with whom Justices Kennedy and Thomas joined), likewise recognized that "[n]either petitioners nor the plurality contend that the first paragraph [of ADEA], §4(a)(1), permits disparate impact claims, and I think it obvious that it does not. *That provision plainly requires discriminatory intent*. . . ." *Id.* at 249 (emphasis added).

The Court's analysis in *City of Jackson* reflects its developing jurisprudence on disparate impact claims in other federal antidiscrimination laws as well. In those statutes in which Congress prohibited action that had the *effect* or *result* of imposing outcomes on protected classes – including, in addition to §703(a)(1) of Title VII and §4(a)(1) of ADEA, the Americans with Disabilities Act, 42 U.S.C.

§12112(b) ("ADA"), the Rehabilitation Act of 1973, 29 U.S.C. §791(g) (the "Rehabilitation Act"), and the Voting Rights Act, 42 U.S.C. §1973(a) – the Court found that the statute supported disparate impact claims. *See* Kirk D. Jensen & Jeffrey P. Naimon, *The Fair Housing Act, Disparate Impact Claims and Magner v. Gallagher: An Opportunity To Return To the Primacy of the Statutory Text*, 129 BANKING L. J. 99, 104-106 (2012). But where the statute – such as §3604(a) of the FHA – lacks such results- or effects-based language, and only prohibits discrimination "*because of*," "*on the basis of*," or otherwise relating to status in a protected class, the statute does not recognize disparate impact liability. *Id.* at 106-107.

The Court should use the Petition to apply the rules derived from *City of Jackson* and the Court's developing jurisprudence to determine that §3604(a) does not contain the necessary language to create disparate impact liability. Unlike §703(a)(2) of Title VII, §4(a)(2) of ADEA and related provisions of the ADA, the Rehabilitation Act and the Voting Rights Act, §3604(a) lacks the results- or effects-based language that supported disparate impact liability. To paraphrase Justice Stevens' analysis in *City of Jackson*, §3604(a) focuses "on the motivation for the action" of the housing provider, rather than "on the effects of the action" of the provider. 544 U.S. at 236. Section 3604(a) undoubtedly prohibits intentional discrimination against persons in the classes protected by the FHA, but it does not address the results or effects of other action – that is, it does not support disparate impact liability.

The Court should use the Petition as an opportunity to correct the errors made by lower courts and bring the analysis of the FHA into line with other federal

antidiscrimination statutes. There is no good reason for §3604(a) of the FHA to remain an outlier, with a legal interpretation that is outside of and inconsistent with the Court's treatment of similar language in other antidiscrimination laws. This is particularly true where, as here, disparate impact liability under the FHA has distorted the marketplace in housing, as the following section explains.

2. Disparate Impact Liability Presents Unique Problems in the Housing Context That Make It Inappropriate As A Basis For Liability.

The Amici represent the developers, owners, and managers of multifamily housing throughout the United States, who are at the frontline of the Nation's ongoing effort to prevent housing discrimination and to assure that housing is made available to all, without regard to race, color, national origin, sex, familial status and disability. As a result, Amici are in a unique position to comment on the unintended consequences that current disparate impact rules have had on the housing industry.

As housing providers, their members often are called upon to develop rules or policies that facilitate the operation of their properties. In other cases, they are required to adhere to governmental rules that affect the location and zoning of their developments, the choice of their tenants, and the terms of tenancy. In such cases, they often find themselves facing claims that their policies, or policies they are required to follow, although neutral on their face, have a harsher impact on protected classes than on others. Although far from exhaustive, the following list provides examples of problems that the threat of disparate

impact liability presents to persons who develop, own or manage multifamily housing properties:

- Many cities and towns across the country face difficulty in providing affordable "workplace" housing for municipal employees, including police, firefighters, emergency medical technicians, and teachers. They often seek assistance from housing developers to find solutions to these problems. In most cases, however, the racial composition of the municipal workforce does not match the racial composition of the local rental market. To the extent that there is any difference in the racial profile of the workforce and rental population generally, limiting housing to the workforce will have a tendency to reduce housing opportunity for one or more racial group while benefitting others. Despite the benefits offered by workforce housing, municipalities, developers and lenders often avoid such housing, because of the possibility that some group, possibly disadvantaged by the workforce limitation, will sue on the basis of the disparate impact upon them. The mere possibility of such litigation may give pause to stakeholders before developing workforce housing.

- Several Amici represent owners who participate in one of more federal housing programs, such as programs that insure owner mortgages or that subsidize tenant rents, such as the Section 8 rental assistance program. The U.S. Department of Housing and Urban Development ("HUD") administers many of these programs. Complying with federal statutes, HUD regulations adopted a

so-called "one strike rule," that requires owners to refuse admission to, or in some cases evict, tenants who have records of crime or drug use. *See* 25 CFR §5.850 *et seq.* HUD's rules set certain minimum requirements, but allow owners to adopt rules that impose stricter limitations. *See* HUD Handbook 4350.3, §4-7C.3-.4. Ominously, HUD recently urged owners to reconsider their limitations on providing housing to ex-offenders. HUD's argument suggests that owners who adopt rules that are stricter than HUD's minimal standards may subject themselves to disparate impact claims, if those policies are perceived to have a harsher impact on protected classes. Owners and managers who are not subject to HUD requirements may also wish to adopt criminal background screening requirements, and face even greater potential disparate impact risks. Indeed, some disparate impact complaints appear to challenge owners' adoption of strict one-strike responses, as the next section discusses.

- The Violence Against Women Act ("VAWA"), 42 U.S.C. §13701 *et seq.*, provides a variety of protections to victims of domestic violence, dating violence, sexual assault and stalking. Under the one-strike rules discussed above, some owners have adopted policies that require eviction where a person commits an act of violence, including an act of domestic violence. According to guidance released by HUD in February 2011, such policies – while neutral on their face and otherwise consistent with HUD's own one-strike policies – may create disparate impact liability under the FHA, to the extent that they have a disproportionate impact

based on sex, race or national origin. The guidance identified several cases in which such disparate impact claims were asserted based on sex. *See, e.g.*, *Warren v. Ypsilanti Hous. Auth.*, No. 4:02-cv-40034 (E.D. Mich. 2003) (zero tolerance policy); *Blackwell v. H.A. Hous. L.P.*, No. 05-cv-01225-LTB-CBS (D. Colo. 2005) (anti-transfer policy). This is a classic "damned if you do and damned if you don't situation" – owners are required to conform to HUD's anti-crime policies, but if they adopt stricter policies that are, nevertheless, consistent with HUD's guidelines, they may become subject to disparate impact liability. If HUD is concerned about owners adopting policies that are too severe, HUD should rewrite its rules to clarify what is acceptable. It should not threaten owners, who have legitimate grounds to prevent crime and maintain security at their properties, with FHA violations based on extreme applications of disparate impact liability.

- Owners and managers of rental housing often require, as part of their tenant screening process, that tenants demonstrate sufficient income to support rent – for example, that the applicable rent equals no more than 33% of a family's total income. Some state and local laws, however, make it unlawful for persons to discriminate on the basis of "source of income," such as the receipt of Section 8 rental assistance. Some tenants have contended that using a rent/income ratio constitutes disparate impact discrimination against Section 8 voucher-holders, or at least that the rent/income ratio should only be applied to the gap between the voucher amount and total rent. Although the FHA does not contain such

a "source of income" restriction and therefore such cases may not be resolved on the basis of federal law, they demonstrate how disruptive the threat of disparate impact liability can be to the orderly operation of a rental property.

3. Disparate Impact Liability Should Not Be Used To Second-Guess Otherwise Valid Policy Decisions.

Although there are theoretical and practical differences between discrimination claims based on disparate treatment and disparate impact cases, the chief difference is that disparate treatment requires an actual showing of discriminatory intent, whereas disparate impact cases do not. As this case itself demonstrates, a party may be held liable on a disparate impact theory on a *prima facie* showing that a facially neutral policy had a disproportionate impact on protected classes. (*See* Pet. App. 22a-23a).

When sundered from an actual showing of discriminatory intent, however, almost any action, no matter how well-intended, can have a disproportionate impact on protected classes. As explained in more detail below, in disparate impact cases, statistical evidence of disproportionate impacts on protected classes may serve as a substitute for discriminatory intent in disparate treatment cases.

The grounds for doing so are at best unclear. In one view, evidence of a severely disproportionate impact on protected classes arguably could be a substitute for actual proof of discriminatory intent: if virtually everyone who is

impacted by a facially neutral rule is a member of a racial minority, the disparate impact arguably suggests that the rule is simply a cleverly-drafted effort to do indirectly what would otherwise be forbidden on disparate treatment grounds. In other words, a severely disproportionate impact may provide evidence of intent, in the sense that "an unexplained discriminatory effect may by itself support an inference of discriminatory intent. . . ." *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1533 (7th Cir. 1990) (Posner, J.). In such cases, disparate impact is a proxy for evidence of intent, rather than a substitute for intent.

In other cases, however, neutral policies simply have a harsher impact on a protected class as an accidental byproduct of the diversity of the general population. *See, e.g.*, *Connecticut v. Teal*, 457 U.S. 440, 454 (1982) (suggesting that intent is irrelevant in disparate impact cases). Given the size of the Nation's population and its broad ethnic and racial diversity, it is almost impossible for a neutral rule to affect every class protected by the FHA in the same way. In such cases – for example, in the workforce housing example (see discussion, *supra*, Section IV.A.2) – unless the affected population exactly duplicates the demographics of the general population, some classes will be benefited and some will not be, creating the bases for a *prima facie* showing of disparate impact.

In such situations, disparate impact does not operate as a proxy for evidence of intent to discriminate, but essentially an *ex post facto* veto of otherwise lawful policies – an opportunity to second-guess otherwise valid outcomes – simply because they have a harsher impact on one group than on another. In such cases, there are more appropriate methods to moderate behavior than to put

persons in jeopardy for pursuing otherwise rational and legitimate choices.

B. IF THE COURT BELIEVES THAT DISPARATE IMPACT LIABILITY EXISTS UNDER THE FAIR HOUSING ACT, THE PETITION PROVIDES AN OPPORTUNITY TO CLARIFY AND LIMIT THOSE ACTIONS THAT CREATE LIABILITY.

Even if the Court believes that the FHA supports disparate impact liability, it nevertheless should accept the Petition to correct some of the more egregious and harmful impacts of current disparate impact law, as described below.

1. Disparate Impact Liability Should Be Limited To Actions Against Governmental Entities And Not Private Parties.

The Court should take this opportunity to distinguish the application of disparate impact liability against public entities from its application against private firms or persons. Public entities hold a unique trust on behalf of the citizens they represent and are generally subject to constitutional obligations to provide equal protection to all persons within their jurisdiction. In such cases, the threat of disparate impact liability may be an effective means to assure that public bodies consider the impact of their actions on persons within their jurisdiction and to cause them to refrain from action that has an unequal impact. *See* Peter E. Mahoney, *The End(s) Of Disparate Impact: Doctrinal Reconstruction, Fair Housing And Lending Law, and the Antidiscrimination Principle*, 47 EMORY L.J. 409, 440–42 (1998). In most cases, governmental

agencies exercise a monopoly of power in their respective jurisdictions – only one government can issue a zoning permit or occupancy certificate in a particular jurisdiction – and consideration of the impact of rules governing their actions may be an appropriate exercise of disparate impact liability.

The situation is different where private parties are involved. In some cases, courts have concluded that in actions involving private persons, at least some element of intent is necessary to demonstrate a violation of the FHA. *E.g.*, *Bellwood*, 895 F.3d at 1533; *Brown v. Artery Org.*, 654 F. Supp. 1106, 1114-16 (D.D.C. 1987). There are several reasons for this distinction, the first being that private owners must take the demographic makeup of the larger community as they find it. In such cases, holding private persons "responsible for consequences over which they have no control" will only discourage them from taking necessary steps to improve and upgrade their properties. *Brown*, 654 F. Supp. at 1116. Moreover, unlike governmental bodies, private persons do not set jurisdiction-wide rules that invoke equal protection issues. To the extent the Court believes that disparate impact liability is provided in the FHA, therefore, the Petition presents the Court with an opportunity to clarify that pure disparate impact liability should only apply to public entities, and that at least some direct evidence of discriminatory intent is necessary to maintain a FHA claim against a private entity.

2. The Court Should Establish A Benchmark For Determining Whether A Statistical Disparity Constitutes A *Prima Facie* Case Of Disparate Impact Discrimination.

In *Hazelton Sch. Dist. v. United States*, the Court explained that "gross statistical disparities" may constitute *prima facie* proof of pattern or practice discrimination. 433 U.S. 299, 307-308 (1977). There the Court suggested in dictum that the benchmark for "gross statistical disparities" is "greater than two or three standard deviations" for large samples. *Id.* at 309 n.14 (quoting *Castaneda v. Partida*, 430 U.S. 482, 497 n.17 (1977)).

Since *Hazelton*, some federal courts have held that statistical evidence need not be a "gross disparity" to establish a *prima facie* case of a disparate impact so long as the disparity is, for example, "significant" and/or "substantial."[2] *E.g.*, *Shidaker v. Tisch*, 833 F.2d 627, 631 (7th Cir. 1987); *Page v. U.S. Indus., Inc.*, 726 F.2d 1038, 1054 (5th Cir. 1984) (requiring a "marked disproportion"). Nevertheless, these courts have not explained the statistical difference between "gross" and "significant," "substantial," or "marked." *See, e.g.*, *Shidaker*, 833 F.2d at 631 n.5. Nor has this Court approved of such characterizations of the statistical evidence necessary to establish a *prima facie* case of disparate impact discrimination.

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2. Federal courts of appeals have failed to even consistently articulate whether a disparity must be "significant" *and* "substantial" or whether the terms are interchangeable references to statistical disparities that support an inference of causation. *See Stagi v. AMTRAK*, 391 Fed. Appx. 133, 139 n.8 (3d Cir. 2009).

Similarly, cases have not articulated any threshold to demonstrate a sufficient disparate impact to constitute a *prima facie* case. *See Stagi*, 391 Fed. Appx. at 137 (stating that no mathematical formula exists to determine whether plaintiffs have established a *prima facie* case). Cases in which federal courts of appeal have found a disparate impact sufficient to constitute a *prima facie* case of discrimination under the FHA have often included adverse impacts on minorities that are two to three times greater than the impact on non-minorities. *E.g.*, *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988) (blacks were three times more likely to be affected by shortage of affordable housing); *Keith v. Volpe*, 858 F.2d 467, 484 (9th Cir. 1988) (FHA violated where blocked housing project had twice the adverse impact on minorities); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1061 (4th Cir. 1982) (removal of low income housing "fell 2.65 times more harshly on black population than on the white"). As the Third Circuit in this case recognized, such disparities are significantly less than the disparity identified in *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 142 (3d Cir. 1977), which the court repeatedly cited with approval. (*See* Pet. App. 16a-17a).

In this case, the Third Circuit's opinion continued the trend of ad hoc evaluation of statistical disparities. Although the court suggested that *Hazelton*'s "gross statistical disparity" standard is applicable in FHA disparate impact cases (see Pet. App. 15a), the court did not explain how it was applying the standard. The court merely concluded, "The disparate impact here, while not as extreme as the impact in *Rizzo*, is similar to or greater than the disparate impact found sufficient to establish a *prima facie* case elsewhere." (Pet. App. 17a). In short, the disparity was comparable to disparities in some other

cases that were deemed sufficient to constitute *prima facie* evidence and therefore was sufficient in this case.

Such ad hoc determinations fail to provide sufficient guidance to entities faced with potential disparate impact claims under the FHA. Absent an articulated statistical threshold, beyond which a *prima facie* case of disparate impact discrimination is established, entities cannot effectively analyze whether a facially neutral housing policy would be presumptively unlawful. Moreover, the absence of such a threshold encourages lawsuits and threatens liability where the potential impact of a housing policy is relatively minor, even if it appears somewhat disproportionate due to a small sample size or other factors.

Additionally, the absence of any bright line is troubling because statistical analysis of the kind credited by the Third Circuit in this case does not identify discrimination as the likely *cause* of the disparity. Statistical significance, based on a sufficiently large sample size, merely suggests that a disparate impact is unlikely to be random. Given our diverse society, there may be an unquantifiable number of alternative explanations that could account for a statistical disparity, apart from discriminatory animus. Establishing a statistical bright line for a *prima facie* case of disparate impact would not resolve this underlying problem with reliance on only statistical disparities to show discrimination, but it would, at a minimum, ensure that courts apply a consistent standard that sufficiently minimizes the likelihood of chance disparities.

Thus, the Court should grant the Petition for certiorari to clarify whether statistical disparities are sufficient to establish a *prima facie* case of discrimination under the

FHA, and if so, the degree of statistical disparity that plaintiffs must prove to establish a *prima facie* case of disparate impact under the FHA.

3. The Court Should Allow Disparate Impact Claims Only When The Impact Is Qualitatively Different On the Protected Class Than It Is On Nonprotected Classes.

As noted above, disparate impact liability in some cases reflects the perception that evidence of disproportionate impacts on a protected class provides a proxy for direct evidence of intent, while other cases treat disparate impact as a substitute for evidence of intent. *See* discussion, *supra*, Section IV.A.3. In both situations, however, it is assumed that a quantitative measure of impact is, by itself, sufficient to show actionable discriminatory conduct in violation of the FHA.

The Petition provides the Court with an opportunity to determine whether such quantitative impacts are alone sufficient to support a disparate impact claim, or whether, in addition to such quantitative measurements, a plaintiff advancing a disparate impact claim should indicate that the impact on the protected class is different qualitatively as well. In a disparate treatment case, persons in the protected class are treated differently *because* of their membership in that class – they are denied housing or denied equal terms specifically because of their race, color, national origin, sex, familial status or disability. Victims of such discrimination are by definition treated differently from persons who are not in those protected classes. In the absence of a qualitative distinction between the treatment of persons in a protected class and those

not in a protected class, it is difficult to conceive of how a disparate treatment case could be maintained.

Disparate impact cases have ignored proof of such qualitative differences, requiring only statistical evidence of a quantitative difference to establish a *prima facie* case. But there is no reason why evidence of qualitative differences in impacts should be disregarded in disparate impact cases. If two persons, one in a protected class and one not in a protected class, experience exactly the same impact as a result of a facially neutral policy, it is difficult to argue that the person in the protected class has a discrimination claim, solely because he or she is in that protected class. In other words, in the absence of intent, something more than a mere numerical impact on a protected class should be required to prove a violation occurred.

Thus, in addition to addressing the statistical problems in defining how much impact is sufficient to support a disparate impact claim (see discussion, *supra*, Section IV.B.2), the Court should also explore whether a person asserting a disparate impact claim should show, as part of the *prima facie* case, that the challenged policy or practice had a qualitatively different impact on him or her, as a member of that protected class, than it had on persons outside that class. In such a case, persons seeking to assert a disparate impact claim should be required to prove, as part of their *prima facie* case, that the challenged policy or practice not only fell more heavily on members of the protected class in a numerical sense, but that the effect was harsher on the protected class than on others, *because* of their participation in that class.

V. CONCLUSION

For the foregoing reasons, the Court should accept the Petition.

Respectfully submitted,

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