No. 11-1507

IN THE
Supreme Court of the United States

TOWNSHIP OF MOUNT HOLLY, 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 IN OPPOSITION FOR MT. HOLLY GARDENS RESPONDENTS

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QUESTIONS PRESENTED

Section 804(a) of the Fair Housing Act ("FHA") makes it unlawful "[t]o 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). All 11 courts of appeals to have considered the question have held that this provision prohibits housing practices with discriminatory effect, even in the absence of discriminatory intent, and have implemented complementary and overlapping tests for determining disparate impact. The United States Department of Housing and Urban Development ("HUD") agrees that disparate-impact claims are cognizable under § 804(a) of the FHA, and it is on the verge of issuing a final rule, promulgated after notice-and-comment rulemaking, that will standardize the methodology for implementing this disparate-impact inquiry.

The district court below converted petitioners' motion to dismiss into a motion for summary judgment, and before discovery had occurred granted summary judgment in favor of petitioners. The Third Circuit reversed the district court, holding that, when the pleadings and submissions are viewed in the light most favorable to respondents, respondents had met their *prima facie* burden to establish disparate impact, and that the record was insufficiently developed to complete the rest of the disparate-impact analysis.

The questions presented are:

1. Are the 11 courts of appeals and HUD wrong in concluding that disparate-impact claims are cognizable under FHA § 804(a)?

2. Should this Court establish a methodology for assessing disparate-impact claims under FHA § 804(a) when petitioners make no claim that this case would

come out differently under any of the tests employed by courts of appeals and, in any event, HUD regulations will soon resolve any discrepancies?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Mt. Holly Gardens Citizens in Action, Inc. states the following:

Mt. Holly Gardens Citizens in Action, Inc. is a private nonprofit corporation. It has no parent company, and no publicly held company has a 10% or greater ownership interest.

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Respondents brought this suit under the Fair Housing Act ("FHA") to challenge petitioners' total demolition of the predominately African-American and Hispanic low-income neighborhood known as the "Gardens." Petitioners' redevelopment project calls for acquisition by eminent domain and complete destruction of all Gardens' homes and replacing them with new, more expensive housing beyond the financial reach of Gardens residents. Before petitioners' redevelopment, the Gardens was a cohesive community of more than 300 occupied homes with many senior citizens and with unusually high rates of minority home-ownership. Ten years later, petitioners and the redeveloper have not constructed a single new unit and petitioners have run out of funds to continue. Yet, through its aggressive acquisition and demolition of more than 200 homes under the threat of eminent domain, petitioners have displaced hundreds of Gardens residents, most of whom petitioners have relocated outside of Mt. Holly. Approximately 70 households remain scattered throughout the Gardens. As a result, petitioners have devastated a once-stable minority community in need of only modest improvement.

The Third Circuit reversed a grant of summary judgment for petitioners, finding that disputed issues of fact remained. That judgment does not warrant further review. On the first question presented – whether the FHA encompasses a disparate-impact standard – the courts of appeals and the Executive Branch overwhelmingly agree, thus creating no need for this Court's review. On the second question presented, which assertedly presents a circuit split – the standard of proof for disparate-impact claims under the FHA – certiorari is unwarranted because the

United States Department of Housing and Urban Development ("HUD") is on the verge of issuing final regulations expressly designed to resolve that circuit split. Once issued, those authoritative regulations will obviate the need for this Court to address the second question presented. Additionally, given the procedural complications that will arise if HUD issues regulations while this case is pending before this Court, this Court should not address this issue at this time. Petitioners present no evidence that any disagreement among the circuits is leading to inconsistent results in similar cases, forum shopping, or other problems warranting this Court's attention. Nor have petitioners argued that similarly situated cases will not arise even if HUD's final regulations somehow do not provide necessary additional guidance for courts. Finally, petitioners cannot demonstrate that this Court's adoption of any particular court of appeals' decisional approach on the second question will benefit them.

STATEMENT

A. Factual Background

Respondents are current and former residents of Mount Holly Gardens ("the Gardens" or "the neighborhood"), a subdivision located in Mount Holly Township, New Jersey. Each of them has lived in the Gardens for at least a decade, many for much longer. Many are senior citizens. Leona Wright, for example, is 93 years old and has lived in the Gardens for 40 years. JA631[1] (Declaration of Leona P. Wright ("Wright Decl.")). Others have lived in the Gardens for decades, and their children also reside there.

[1] "JA" refers to the Joint Appendix submitted to the Third Circuit; "App." refers to the appendix accompanying the certiorari petition.

JA555-56 (Declaration of Ana Arocho); JA610 (Declaration of Henry Simons).

The Gardens was built in the 1950s to house military families. JA1693 (N.J. Dep't of the Public Advocate, Evicted From the American Dream: The Redevelopment of Mount Holly Gardens (Nov. 2008) ("Report")). The approximately 325 homes in the Gardens were mostly two-story brick buildings attached in rows of 8-10. App. 5a. They were set back from the street to create front yards, and their back yards abutted alleys that ran behind each block. *Id.*

The Gardens is the only neighborhood in the Township with predominantly African-American and Hispanic residents. *Id.* According to the 2000 Census, of the 1,301 residents of the Gardens, 46.1% were African-American, 28.8% were Hispanic, and 19.7% were non-Hispanic Whites. App. 6a. Its residents are also disproportionately poor: "[a]lmost all of these residents were classified as 'low income'; indeed, most were classified as having 'very low' or 'extremely low' incomes." *Id.* Despite the residents' low incomes, however, the Gardens had the highest rates of minority home-ownership within Burlington County. JA70-71 (Declaration of Andrew A. Beveridge, Ph.D.).

The design of the Gardens as densely built, privately owned attached townhomes caused foreseeable challenges. Without a homeowners' association, necessary maintenance of common spaces and shared features (such as roofs and walls) is hard to coordinate and fund, and maintenance problems are easily overlooked or deferred. App. 7a. Over time, some of the Gardens' homes began to fall into disrepair. *Id.* In addition, the density resulting from the compressed

design contributed to an increase in crime in the neighborhood. *Id.*

Still, "[f]or the past half century, the Gardens has been a close-knit community whose residents have repeatedly come together to respond to challenges that have arisen over the decades." JA1695 (Report). In the 1970s, residents formed a nonprofit called "Mt. Holly Citizens in Action." JA632 (Wright Decl.).[2] This group worked with residents and Township officials to help resolve problems in the community. *Id.*

In the 1990s, "community activists and business leaders worked to revitalize the Gardens" and "reverse the neighborhood's decline by rehabilitating properties and increasing social services." App. 7a; *see* JA2136 (Declaration of Rev. Kent R. Pipes). Although these efforts resulted in 10 homes being renovated and the establishment of a community policing center, App. 7a, the Township nonetheless adopted a dramatically different redevelopment strategy: destroying the Gardens and displacing all of its residents to create an entirely new community of much more expensive homes. App. 8a.

In 2002, the Township commissioned a study ("Study") "to determine whether the Gardens should be designated as an 'area in need of redevelopment' under New Jersey's redevelopment laws," App. 7a, and therefore subject to eminent domain. *See* N.J. Stat. Ann. § 20:3-5; JA808 (Resolution of Township Council). The New Jersey Redevelopment Law establishes broad alternative categories under which property can be determined to be in need of redevel-

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[2] The group subsequently became inactive and its nonprofit status lapsed. It was later re-incorporated as Mt. Holly Gardens Citizens in Action, Inc., which is a respondent in this action. JA632 (Wright Decl.).

opment, such as: (1) the "generality of buildings" are "substandard" or "obsolescent"; (2) due to "obsolescence, overcrowding, faulty arrangement or design," "excessive land coverage," or "obsolete layout," the property is "detrimental" to the welfare of the community; or (3) a "growing lack" of "proper utilization of areas" has resulted in a "stagnant or not fully productive condition of land." N.J. Stat. Ann. § 40A:12A-5 (App. 65a-66a).

Without undertaking any interior inspections of occupied homes and ignoring the fact that many of the homes in the Gardens were in good repair, the Study concluded that the *entire* Gardens neighborhood was blighted under the Redevelopment Law. *See*, *e.g.*, JA806 (Study). The Study noted that "substantial density of development" leads to the residents using their back yards for parking, "leaving an unattractive and haphazard pattern of paved, gravel, and compacted dirt spaces" that "further contributes to the unkempt appearance of rear yards and contributes to drainage problem." JA781. Ultimately, the Study concluded that "[t]he obsolete design and layout of this development creates an environment such that light, air, and open space are lacking. This design and the property ownership structure, in today's world, also contribute to excess lot coverage, criminal activity, and a general lack of proper utilization of land." JA784.

In 2002, over the strong opposition of Gardens residents, the Township declared the Gardens blighted and proceeded with its plan to condemn all the houses in the neighborhood and displace all the residents. JA1695-96 (Report). The Township adopted its first redevelopment plan in 2003, and amended the plan in 2005 and 2008. App. 8a.

The current plan provides for the construction of up to 520 townhomes and apartments, of which only 56 would be designated as affordable housing. App. 8a-9a. Of those 56, only 11 "would be offered on a priority basis to existing Gardens residents." App. 9a. Thus, a plan purportedly conceived to respond to "density," "excess lot coverage," and "a general lack of proper utilization of land," JA781, 784 (Study), proposes to replace 325 low-income residences occupied predominantly by minorities with up to 520 mostly market-rate residences that will be unaffordable to existing Gardens residents. *See* JA991, 1117.[3]

Complete demolition of the neighborhood was not the only solution. *See* App. 25a-27a. Alternatives include: preserving existing homes and combining new construction with rehabilitation; phasing redevelopment to permit Gardens residents to remain in the neighborhood while construction was in progress; providing affordable replacement units for displaced residents; and providing adequate compensation and relocation assistance to enable Gardens residents readily to find replacement housing. *Id.*

Furthermore, the Township's method of implementing its destroy-and-displace plan has aggravated the plan's adverse impact on Gardens residents. Instead of acquiring properties as needed for new construction, the Township hastily bought properties[4] and vacated

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[3] Because the development's total land area is larger than the original Gardens community, the density of units per acre would remain essentially the same.

[4] Although the Township correctly asserts (at 7) that it did not resort to formal eminent domain, respondents have proffered ample evidence that many residents moved due to the threat of eminent domain, pressure to sell, and the chaos and risk caused by the aggressive demolition of homes – supporting an inference in respondents' favor on this point at the summary

them. The proliferation of vacant, deteriorating properties dramatically increased the vacancy rate in the neighborhood and exacerbated health and safety concerns. JA1978 (2/13/09 opinion denying motion for preliminary injunctive relief) ("Both sides agree that the vacant homes have created fire hazards, crime, squatters, graffiti, roaches and mold."). When the Township began demolishing the vacant properties, the remaining residents were forced to endure "noise, vibration, dust, and debris." App. 11a.[5] Worse, the remaining homes were structurally imperiled by the Township's demolition process:

> [T]he interconnected nature of the houses triggered a cascading array of problems. Uninsulated interior walls were exposed to the outside and covered with unsightly stucco or tar. But these coatings did not extend below grade, allowing moisture to seep into subterranean crawl spaces, creating an environment for mold problems. Above, the demolitions opened the roofs of adjoining homes. Those openings were patched with plywood, which was insufficient to stop water leaks.

Id.

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judgment stage. *See*, *e.g.*, JA557-60, 581-83, 587-90, 2130-32; JA1693, 1698, 1707-10, 1712-14 (Report). *See also* Institute for Justice, *Scorched Earth: Eminent Domain Abuse in the Gardens of Mount Holly* (Mar. 10, 2011), *available at* http://www.ij.org/freedomflix/44-mthollyvideo.

[5] Petitioners note (at 7) that the vacant properties were demolished because they posed health and safety hazards. However, the Township itself created these hazards by failing to maintain and secure its own vacant properties. JA391-92, 396, 398 (Declaration of Gray Smith); JA577 (Declaration of Vivan Brooks); JA622-23 (Declaration of Dagmar Vicente); JA1751-52 (Supplemental Report of Gray Smith).

"By June 2011, only 70 homes remained under private ownership" in the Gardens. *Id.* The rest were either destroyed or in the process of being destroyed. *Id.* "These conditions discouraged any attempt at rehabilitating the neighborhood and encouraged existing residents to sell their homes for less than they otherwise might have been worth." *Id.*

The displaced Gardens residents have had difficulty finding affordable replacement housing in the area. The court below observed that the Township was purchasing Gardens homes for $32,000 to $49,000 and that "[t]he estimated cost of a new home in the development was between $200,000 and $275,000, well outside the range of affordability for a significant portion of the African-American and Hispanic residents of the Township." App. 10a. Similarly, it noted that "the vast majority of . . . renters [from the Gardens] would be unable to afford the proposed market-rate rent" in the new development. *Id.* Ultimately, "the Township paid to relocate 62 families, 42 of which moved outside of [the] Township." *Id.*[6] Even so, relocated residents struggle to meet the costs of their new homes. JA1693, 1697, 1700-02, 1704-06, 1730-31 (Report).

Meanwhile, the Gardens remains a wasteland, and the redevelopment project has stalled for lack of funds. *See* Rose Krebs, *Mount Holly Gardens*

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[6] Contrary to petitioners' assertion (at 8) that the Township took care to ensure that residents who wanted to remain in Mt. Holly would find housing, this is at best a disputed fact. Respondents introduced credible evidence showing a significant majority of residents desired to remain in Mt. Holly, but in fact nearly two-thirds of relocated families were forced to move out of the Township. JA743 (2000 Neighborhood Issues Analysis); JA1104-08 (Survey Results for Gardens Residents); App. 10a.

Redevelopment Hits a Wall, Burlington County Times, Mar. 7, 2012. Although more than 200 homes have been destroyed in the neighborhood, not one new housing unit has been built. In March 2012, the Township stopped purchasing homes and relocating residents. *See id.* Construction on the first part of Phase I of the project is tentatively scheduled for Fall 2012, while the later part of Phase I and the remaining Phases have no projected start date. *See* Rose Krebs, *Planning Board Grants Approval for Apartments at Mt. Holly Gardens*, Burlington County Times, July 18, 2012.

B. Proceedings Below[7]

Respondents brought suit in federal district court on May 27, 2008, alleging both disparate-impact and intentional discrimination in violation of the FHA, along with other statutory and constitutional claims. Respondents sought declaratory and injunctive relief preventing displacement of Gardens residents as well as damages.

On October 23, 2009, having previously dismissed several claims as moot, the court converted pending motions to dismiss the federal discrimination claims into a summary judgment motion and dismissed the remaining claims. On January 3, 2011, before petitioners had filed an answer, and without any opportunity for discovery, App. 4a, the court granted petitioners' motion for summary judgment. App. 62a.

The district court first held that respondents had not established a *prima facie* case of disparate impact because "the redevelopment plan does not apply differently to minorities than non-minorities. Several

[7] A prior state court action is not relevant to the issues raised in the certiorari petition before this Court.

[respondents] classify themselves as 'white,' yet the plan affects them in the exact same way as their minority neighbors." App. 44a (quoting 2/13/09 opinion denying motion for preliminary injunctive relief). Next, the court concluded that respondents had not established a material fact for trial concerning the availability of an alternative, less discriminatory course of action that would satisfy the Township's legitimate redevelopment goals because respondents had "not presented any plan more viable than the one implemented by the Township." App. 49a.

On appeal, the Third Circuit reversed the grant of summary judgment on the disparate-impact claim and remanded the case for further discovery. It held that the district court first erred by not evaluating respondents' evidence in the light most favorable to them. App. 16a. Applying the appropriate presumption, the court held that "[respondents'] statistics, like those presented in [*Resident Advisory Board v. Rizzo*, 564 F.2d 126 (3d Cir. 1977),] and other prominent housing discrimination cases, show a disparate impact." *Id.*; *see also* App. 16a-19a.[8] Moreover, the court held that the district court's "most troubling error" was its "conflation of the concept of disparate treatment with disparate impact." App. 19a; *see id.* ("The District Court essentially agreed with the Township that because 100% of minorities in the Gardens will be treated the same as 100% of non-minorities in the Gardens, the Residents failed to prove [their *prima facie* case]. This was in error.")

Finally, the court of appeals assessed the conflicting evidence concerning the existence of less discrim-

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[8] The parties disagree over the accuracy of respondents' statistics, *see* Pet. 11, but that issue is not before this Court under petitioners' questions presented.

inatory alternatives and concluded that "[t]hese contrasting statements, as well as the parties' continued arguments on appeal as to the cost and feasibility of an alternative relying on rehabilitation, create genuine issues of material fact that require further investigation." App. 27a-28a. Because these issues could not be resolved until "the record on alternatives has been more fully developed," App. 28a, the court remanded the case for further proceedings to produce "[a] more developed factual record," App. 29a.

REASONS FOR DENYING THE PETITION

I. CERTIORARI ON THE STANDARD OF PROOF FOR FHA DISPARATE-IMPACT CLAIMS IS UNWARRANTED

A. This Court Should Not Decide The Standard For Proving FHA Disparate-Impact Claims Until HUD Issues Its Final Regulations On This Issue

1. Certiorari on the petition's second question presented – the sole question on which petitioners assert a circuit split – would be improvident because HUD is preparing to promulgate final regulations on that issue that will supersede the decisional law that has emerged among the circuit courts. HUD's rulemaking, which began shortly after this Court granted certiorari in *Magner v. Gallagher*, 132 S. Ct. 548 (2011), *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), was expressly intended to address the second question presented in *Magner* and "to establish uniform standards for determining when a housing practice with a discriminatory effect violates the [FHA]." *Id.* at 70,921, 70,923. HUD's rulemaking is nearly complete. The comment period closed on

January 17, 2012, *see id.* at 70,921, and HUD is now reviewing those comments in anticipation of the publication of a final rule.[9]

HUD's proposed rule would implement a familiar three-part burden-shifting regime that closely mirrors and was modeled after that employed by the Sixth, Eighth, and Tenth Circuits. *See id.* at 70,923-24 & n.31; *see also Gallagher v. Magner*, 619 F.3d 823, 833-34 (8th Cir. 2010), *cert. granted*, 132 S. Ct. 548 (2011), *cert. dismissed*, 132 S. Ct. 1306 (2012).

Specifically, HUD's proposed rule would add § 100.500 to its regulations implementing the FHA. *See* 76 Fed. Reg. at 70,924-27. As proposed, § 100.500 confirms that "[l]iability may be established under [HUD's regulations] based on a housing practice's *discriminatory effect*, . . . even if the housing practice is not motivated by a prohibited intent." *Id.* at 70,926. Subsection (a) of the proposed rule defines a housing practice as having a "discriminatory effect" when it results in a "disparate impact on a group of persons" or a "segregated housing pattern[]" on the "basis of race, color, religion, sex, handicap, familial status, or national origin." *Id.*

Subsection (b) defines the types of justifications that are "legally sufficient" to rebut a *prima facie* showing of disparate impact. *Id.* at 70,927. Subsection (c) would require that the complainant or plaintiff bear the initial burden "of proving that a challenged practice causes a *discriminatory effect*." *Id.* "Once a complainant or plaintiff satisfies [this]

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[9] *See* Regulations.gov, Docket Folder Summary: Implementation of the Fair Housing Acts Discriminatory Effects Standard, *at* http://www.regulations.gov/#!docketDetail;dct=FR%252BPR%252BN%252BO%252BSR;rpp=25;po=0;D=HUD-2011-0138 (last visited Sept. 10, 2012).

burden . . . , the respondent or defendant has the burden of proving that the challenged practice has a necessary and manifest relationship to one or more legitimate, nondiscriminatory interests." *Id.* Finally, if the respondent or defendant satisfies that burden, "the complainant or plaintiff may still prevail upon demonstrating that the legitimate, nondiscriminatory interests supporting the challenged practice can be served by another practice that has a less *discriminatory effect*." *Id.*

HUD's proposed rule, once finalized, would thus implement a burden-shifting regime settling all of the significant questions regarding the appropriate standard of proof for FHA disparate-impact claims.

2. It is unnecessary and inadvisable for the Court to wade into the second question presented before HUD issues its final rule. That rule is almost certain to receive *Chevron* deference from the courts of appeals, *see Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), requiring the lower courts to revisit their prior rulings. Thus, the new rule will likely obviate the need for this Court's resolution of the issue.

HUD's interpretation of the standard of proof for FHA disparate-impact claims is a classic example of agency rulemaking to which *Chevron* deference applies. Congress expressly conferred on HUD rulemaking authority to implement the FHA. *See* 42 U.S.C. §§ 3608(a), 3614a. Accordingly, any "ensuing regulation" promulgated by the agency is "binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001).

HUD's final rule will have gone through notice-and-comment rulemaking, thus warranting *Chevron* deference. *See*, *e.g.*, *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 714 (2011) ("The Department issued the full-time employee rule only after notice-and-comment procedures, . . . a consideration identified in our precedents as a 'significant' sign that a rule merits *Chevron* deference.") (quoting *Mead*, 533 U.S. at 230-31); *cf. Smith v. City of Jackson*, 544 U.S. 228, 243 (2005) (Scalia, J., concurring in part and concurring in the judgment) (finding the Equal Employment Opportunity Commission's interpretation that the Age Discrimination in Employment Act of 1967 ("ADEA") permits disparate-impact liability, issued through notice-and-comment rulemaking, to present an "absolutely classic case for deference to agency interpretation").[10]

Under *Chevron*, HUD's final rule is binding as long as Congress has not spoken to the "precise question at issue," 467 U.S. at 842, and the rule is a "permissible" or "reasonable" interpretation of the statute, *id.* at 843-44. Here, there is no doubt that Congress has not directly addressed the standard of proof for FHA disparate-impact claims. The relevant FHA provision in this case, § 804(a), makes it unlawful

> [t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the

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[10] Consistent with this view, the courts of appeals have utilized *Chevron* to analyze other interpretations of the FHA promulgated by HUD through notice-and-comment rulemaking. *See*, *e.g.*, *Ojo v. Farmers Group, Inc.*, 600 F.3d 1205, 1208 (9th Cir. 2010) (en banc) (per curiam) (deferring under *Chevron* to HUD regulation issued through notice-and-comment rulemaking); *see also Mountain Side Mobile Estates P'ship v. Secretary of Hous. & Urban Dev.*, 56 F.3d 1243, 1248 (10th Cir. 1995) (same).

> sale or rental of, *or otherwise make unavailable or deny*, a dwelling to any person *because of* race, color, religion, sex, familial status, or national origin.

42 U.S.C. § 3604(a) (emphases added). Other FHA sections use similar language. *See*, *e.g.*, *id.* §§ 3604(b), 3605(a), 3606. Congress's prohibition of actions that "otherwise make unavailable or deny" housing to any person "because of" a prohibited characteristic does not clearly speak to the appropriate standard of proof in disparate-impact cases. Thus, HUD's final rule will be binding unless it is unreasonable. *See Chevron*, 467 U.S. at 843 ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."). And, because the proposed regulation adopts a standard of proof utilized by several courts of appeals, there is no realistic likelihood that it will fail *Chevron*'s reasonableness standard.

HUD's authoritative regulation will eliminate any differences in approach among the various circuits and obviate the need for this Court's review. The courts of appeals have recognized that Congress has not clearly spoken to the issue – and that the courts' respective frameworks reflect their best effort to fill the interpretive gap that Congress has left open. *See*, *e.g.*, *Graoch Assocs. # 33, L.P. v. Louisville/ Jefferson County Metro Human Relations Comm'n*, 508 F.3d 366, 373-74 (6th Cir. 2007) (concluding that its multi-factor balancing inquiry, used to evaluate FHA claims brought against governmental entities, was "compatible, not inconsistent," with a burden-shifting test the circuit was importing from its Title VII disparate-impact jurisprudence into the Title

VIII context); *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 51 (1st Cir. 2000) (concluding that requiring defendant to offer a justification for a demonstrated disparate impact is "a fair reading of the [FHA's] 'because of race' prohibition" and that a burden-shifting approach is merely "better" than a multi-factor test); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 149 (3d Cir. 1977) (noting that criteria for determining liability in FHA disparate-impact cases "must emerge . . . on a case-by-case basis" and that the "discretion of the district court" in determining whether a *prima facie* case should result in liability should be guided by the "rough measures" of a burden-shifting regime); *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977) ("*Arlington Heights II*") (noting that Congress's intent required that the court look beyond establishment of a disparate impact, but then looking to "[f]our critical factors . . . from previous cases," rather than evidence of congressional intent, to determine under what circumstances a disparate impact violates the FHA). These decisions thus acknowledge, at least implicitly, that HUD's authoritative construction would warrant *Chevron* deference and resolve the issue.[11]

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[11] For the same reason, it is also unlikely that the courts of appeals would conclude that their own prior interpretation of the FHA forecloses the agency's reading. While an agency's interpretation of a statute, otherwise owed deference under *Chevron*, need not receive deference by a court that has previously concluded that that statute unambiguously dictates a contrary result, *see National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005), as noted above the courts of appeals have not indicated that the FHA *unambiguously* commands a specific disparate-impact test. Thus, they would be unlikely to find that their prior judicial construction of the FHA overrides the agency's considered interpretation. *See id.* ("A court's prior judicial construction of

In an analogous context, courts of appeals have given *Chevron* deference to HUD regulations interpreting FHA § 804(a) to prohibit discrimination in the provision of homeowner's insurance. *See* 24 C.F.R. § 100.70(d)(4). Prior to the issuance of those regulations, the Fourth Circuit had held that § 804(a) did not apply to the provision of homeowner's insurance. *See Mackey v. Nationwide Ins. Cos.*, 724 F.2d 419, 424-25 (4th Cir. 1984). After HUD promulgated its formal regulations, every appeals court to consider the question has concluded that HUD's regulations are binding. As Judge Easterbrook put it: "Events have bypassed *Mackey*. . . . No matter how a court should have understood the [FHA] in 1984, . . . the question [after promulgation of HUD's regulations] is whether the Secretary's regulations are tenable. They are." *NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287, 301 (7th Cir. 1992); *accord Ojo*, 600 F.3d at 1208 ("HUD's construction of the FHA is reasonable and *Chevron* requires us to defer to it."); *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1356-60 & n.2 (6th Cir. 1995). The same result would likely obtain here: once HUD's regulations are promulgated, the circuit split will yield to those regulations.

3. HUD's imminent issuance of its final rule also makes this case an extremely poor vehicle to address the FHA disparate-impact standard. If the Court grants certiorari, HUD's issuance of its rule likely will require the Court to address a host of complicated administrative-law issues that have divided

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a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.").

members of the Court in the past. All of this can and should be avoided by awaiting HUD's regulations and further percolation in the courts of appeals concerning any challenge to HUD's eventual rule.

First, if the Court grants certiorari, there is a substantial likelihood that HUD's regulations will be promulgated while this case is pending before the Court,[12] which could lead to re-briefing or re-argument, to the writ being dismissed as improvidently granted, or to a remand to the Third Circuit to address the impact of the rule. *Cf. Medellin v. Dretke*, 544 U.S. 660, 662 (2005) (per curiam) (dismissing writ as improvidently granted due to intervening Executive Branch action). And, if the Court resolves this issue after the issuance of the new rule, it would lack the benefit of any court of appeals' review of HUD's action arising from a petition for review of final agency action under the Administrative Procedure Act.

This Court's disposition last Term of *Douglas v. Independent Living Center of Southern California, Inc.*, 132 S. Ct. 1204 (2012), exemplifies the potential difficulties facing this case. In *Douglas*, the Court granted certiorari "to decide whether [Medicaid providers and beneficiaries] could mount a Supremacy Clause challenge to . . . state [Medicaid] statutes" on the basis that they were preempted by 42 U.S.C. § 1396a(a)(30)(A). *Id.* at 1209. After oral argument, the Centers for Medicare & Medicaid Services ("CMS") decided that several of the pertinent state statutes "compl[ied] with federal law." *Id.* at 1210. The Court ordered supplemental briefing to address

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[12] The proposed rule was published in the Federal Register on November 16, 2011, more than a year before this Court would hear oral argument in this case.

the new CMS approvals. 132 S. Ct. 547 (2011). The Court ultimately never reached the merits of the question on which it granted certiorari. Instead, citing the "[now-]different posture" of the cases before it, the Court remanded to the Ninth Circuit to consider, *inter alia*, the effect of the agency's decision on that court's interpretation of § 1396a(a)(30)(A). 132 S. Ct. at 1210-11. The Court reasoned that "ordinarily" courts "apply certain standards of deference to agency decisionmaking" and that the parties "ha[d] not suggested reasons why courts should not now . . . apply those ordinary standards of deference" to the agency's intervening decision. *Id.* at 1210 (citing *Brand X* and *Chevron*). Here, similarly, the courts below did not consider, much less defer to, HUD's interpretation of the relevant federal statute, and it would be "inefficient" to grant certiorari now when the real issue is likely to be the validity of HUD's nearly final rule under *Chevron*. *Id.* at 1211.

If, on the other hand, this Court grants certiorari and issues its decision before HUD issues its final rule, this Court will have unnecessarily generated complicated issues of administrative law likely to vex the lower courts. In *Brand X*, this Court held that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference," but "only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." 545 U.S. at 982. If this Court decides the standard for FHA disparate-impact claims *prior* to HUD's rule, lower courts will be required to determine whether this Court's decision was intended to displace or leave room for the agency's interpretation.

That such a determination is not straightforward is underscored by this Court's recent decision in *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836 (2012). In *Home Concrete*, this Court held that its prior opinion in *Colony, Inc. v. Commissioner*, 357 U.S. 28 (1958), displaced the Treasury Department's authority to promulgate regulations interpreting a provision of the Internal Revenue Code. Despite *Brand X*, the plurality in *Home Concrete* refused to give *Chevron* deference to the agency's regulation, even though *Colony* had explicitly stated that the Internal Revenue Code provision at issue was not unambiguous. 132 S. Ct. at 1843-44 (plurality). The implications of *Home Concrete* are far from clear. *See id.* at 1847 (Scalia, J., concurring in part and concurring in the judgment) (predicting that "confusion and uncertainty" will follow the Court's decision). Should the Court decide this case prior to HUD's issuance of its final rule, lower courts will have to grapple with the *Brand X* / *Home Concrete* inquiry, leading to the possibility of yet a different circuit split – not on the interpretation of the FHA, but on a collateral and complicated issue of administrative law.

4. This Court can avoid these difficulties because there is no urgent need to resolve the issue presented. The differences among the lower courts on the standard of proof for FHA disparate-impact liability are not causing problems in the fair application of the statute. The variations among the circuits' respective standards lie at the margins; petitioners have offered no evidence that these differences are yielding fundamentally different outcomes in substantially similar cases or would result in any different result on remand in this case. To the contrary, several courts have commented on the similarity of the two

tests and have indicated that the selection of one test over the other would not affect the outcome of the case. *See Greater New Orleans Fair Hous. Action Ctr. v. United States Dep't of Hous. & Urban Dev.*, 639 F.3d 1078, 1085 (D.C. Cir. 2011) (finding that the outcome of the case did not depend on whether the court followed the Seventh Circuit's four-factor balancing test or the Second Circuit's burden-shifting test); *Rizzo*, 564 F.2d at 148 n.32 (adopting burden-shifting test but noting that the outcome would be the same using the *Arlington Heights II* four-factor approach); *In re Malone*, 592 F. Supp. 1135, 1166 n.21 (E.D. Mo. 1984) (noting that the difference between the two tests "is primarily procedural"), *aff'd mem. sub nom. Malone v. City of Fenton*, 794 F.2d 680 (8th Cir. 1986) (table). The similarity between the multi-factor test and the burden-shifting test may also explain why several circuits have adopted a hybrid of those two tests. These courts have often done so after remarking on the overlapping nature of the two tests. *See*, *e.g.*, *Graoch Assocs.*, 508 F.3d at 373-74 (noting that two of the factors outlined by the Seventh Circuit in *Arlington Heights II* "nicely capture[] the inquiry that we must perform at the third step in the burden-shifting framework" and that therefore the multi-factor test and burden-shifting test are "compatible, not inconsistent"); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 936 (2d Cir.) ("Once a prima facie case of adverse impact is presented, . . . the inquiry turns to the standard to be applied in determining whether the defendant can nonetheless avoid liability under Title VIII. The Third Circuit in *Rizzo* [employing a burden-shifting test] and the Seventh Circuit in *Arlington Heights II* [employing a multi-factor test] have both made useful contributions to this inquiry.

Both circuits essentially recognize that in the end there must be a weighing of the adverse impact against the defendant's justification."), *aff'd in part*, 488 U.S. 15 (1988) (per curiam).

Nor have petitioners offered any evidence that the differences in the circuits' tests are generating forum-shopping or other problems necessitating this Court's intervention. Indeed, housing issues are usually localized, making forum shopping difficult if not wholly infeasible, and making it unlikely that any defendant will be subject to inconsistent legal duties. *Cf. Macone v. Town of Wakefield*, 277 F.3d 1, 10 (1st Cir. 2002) (noting, after rejecting appellants' FHA claims, that appellants' equal-protection claims failed because of the court's "extreme reluctance" to involve itself in "local planning decisions" that are a "matter of local concern"); *Mountain Side*, 56 F.3d at 1253 (finding that proof of a disparate-impact claim "must focus on the local housing market and local family statistics" and that national statistics are "so far removed from the local arena that [they are] of little weight in our analysis").

Moreover, FHA disparate-impact claims arise frequently in the courts of appeals, and thus the Court is unlikely to lack an appropriate vehicle for resolving these issues in the future. Four circuits have decided issues related to FHA disparate-impact claims in the last six months alone. *See HDC, LLC v. City of Ann Arbor*, 675 F.3d 608, 613 (6th Cir. 2012) (affirming district court's dismissal of FHA disparate-impact claim); *Hopkins v. Springfield Hous. Auth.*, No. 12-1382, 2012 WL 2512899, at *2 (7th Cir. July 2, 2012) (affirming district court's denial of preliminary injunction on FHA disparate-impact claim under § 804(f)(3)(B)); *Cinnamon Hills Youth Crisis Ctr.,*

Inc. v. Saint George City, 685 F.3d 917, 922 (10th Cir. 2012) (affirming grant of summary judgment to defendant on plaintiff's FHA disparate-impact claim); *Steed v. Everhome Mortg. Co.*, No. 11-13100, 2012 WL 2849482, at *4 (11th Cir. July 11, 2012) (per curiam) (affirming district court's grant of summary judgment on plaintiff's FHA disparate-impact claim).

B. The Facts And Procedural Posture Of This Case Also Make It An Inappropriate Vehicle For Resolving The Standard For FHA Disparate-Impact Liability

In addition to the imminent HUD rule, the particular facts and procedural posture of this case make it ill-suited for resolving the standard for FHA disparate-impact liability. First, the case does not come to this Court on a fully developed factual record. The district court below converted a pending motion to dismiss into a motion for summary judgment and subsequently granted summary judgment to petitioners. App. 34a-35a. Given that the proper standard of proof under the FHA is a highly fact-intensive question, the absence of a full factual record will likely impede the Court's consideration of the question.

Second, because of the summary judgment posture, this Court is "'required to view all facts and draw all reasonable inferences in favor of the nonmoving party.'" *Crawford v. Metropolitan Gov't of Nashville & Davidson County*, 555 U.S. 271, 274 n.1 (2009) (quoting *Brosseau v. Haugen,* 543 U.S. 194, 195 n.2 (2004) (per curiam)). As such, summary judgment for petitioners would be inappropriate even if this Court were to adopt an FHA disparate-impact test different from the burden-shifting approach used below.

The court below found that respondents have made out a *prima facie* case of disparate impact, noting respondents' statistical evidence that minorities are far more likely to be affected by the redevelopment than are non-minorities. App. 15a-17a. The court then concluded that petitioners have advanced a legitimate interest behind the redevelopment plan: "alleviating blight." App. 24a. Finally, the court found that respondents have submitted sufficient evidence to "create genuine issues of material fact" regarding whether less discriminatory alternatives exist. App. 27a-28a.[13]

The lower court's analysis – and outcome – would be much the same under the multi-factor test employed by other circuits.[14] Respondents' evidence of discriminatory effect would similarly counsel against affirming the district court's grant of summary judgment. *See Arlington Heights II*, 558 F.2d at 1290 (noting that courts should first consider "how strong is the plaintiff's showing of discriminatory effect"). Indeed, the Third Circuit explicitly found that respondents' showing of a disparate impact was "similar to

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[13] Even if this Court were to adopt a version of the burden-shifting test requiring the plaintiff to demonstrate that a less discriminatory alternative exists, the Third Circuit's conclusion that respondents' and petitioners' competing statements regarding "the cost and feasibility of an alternative" create "genuine issues of material fact" would still preclude summary judgment for petitioners. App. 27a-28a.

[14] Because the hybrid approach exemplified by the Second Circuit's decision in *Huntington Branch* considers several of the factors listed in *Arlington Heights II* in weighing the merits, but otherwise adheres to a burden-shifting approach, if respondents' claims would survive both a burden-shifting test and the multi-factor test, those claims would survive the hybrid test. *See* 844 F.2d at 935-36.

or greater than the disparate impact found sufficient to establish a *prima facie* case" in cases where the court utilized the four-factor approach of *Arlington Heights II*, *see Keith v. Volpe,* 858 F.2d 467, 483-84 (9th Cir. 1988) (affirming district court's judgment under both the *Arlington Heights II* standard and the *Rizzo* standard), and a hybrid approach, *see Huntington Branch*, 844 F.2d at 937-38. App. 17a.

Moreover, although the court below found that petitioners have advanced a legitimate reason for the redevelopment plan, that finding does not inexorably lead to a grant of summary judgment for petitioners under the multi-factor test.[15] Instead, it is but one factor to consider. *See Arlington Heights II*, 558 F.2d at 1293 (noting that courts should consider "the interest of the defendant in taking the action" and should "less readily" find that a governmental body has violated the FHA when that body acts "within the ambit of legitimately derived authority").

Lastly, under the multi-factor approach, the court would consider "the nature of the relief which the

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[15] Petitioners erroneously claim (at 26) that the First Circuit grants judgment to a defendant who can establish a legitimate reason for its actions, regardless of whether plaintiffs can establish a less discriminatory alternative. In the very case cited by petitioner, *Langlois v. Abington Housing Authority*, the First Circuit noted the district court's finding that the defendant had failed to prove the lack of a less discriminatory alternative, 207 F.3d at 50, stating that "it is not easy to imagine how a less restrictive alternative would work" in that case, *id.*, and then instructed that the parties were "free to revisit" the issue on remand, *id.* at 50 n.6. Such an inquiry would be unnecessary if the First Circuit, unlike every other circuit adopting a burden-shifting test, immediately granted judgment to a defendant who demonstrated a legitimate goal behind its actions.

plaintiff seeks." *Id.*[16] Here, respondents seek injunctive relief preventing the Township from acquiring the remaining occupied homes or forcibly evicting tenants and homeowners. Thus, this factor would also favor respondents, as they are not "seek[ing] to compel the defendant to construct integrated housing or take affirmative steps to ensure that integrated housing is built"; rather, they are "seek[ing] to enjoin the defendant from interfering" with respondents' housing. *Id.*; *see Gomez*, 867 F.2d at 403 (finding the fourth factor cut in plaintiffs' favor when "[t]he plaintiffs originally attempted to restrain the defendants from renovating their apartment building" and subsequently sought "primarily damages").

In *Arlington Heights II*, the Seventh Circuit instructed the district court to enter judgment in favor of the plaintiff-residents – as long as that court found there was no alternative site suitable for public housing – when just two factors favored the plaintiffs. Here, too, at least two factors favor respondents. Given the summary judgment posture of this case, petitioners would not be entitled to reversal of the Third Circuit's decision under any standard currently employed by the courts of appeals. This Court's resolution of the second question presented, therefore, would provide petitioners with no benefit.[17]

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[16] Although the *Arlington Heights II* court also considered proof of discriminatory intent, *see* 558 F.2d at 1292, the Seventh Circuit has described the existence of such proof as the "least important of the four factors," *id.*, and has also confirmed that "a discriminatory effect, without any discriminatory intent, *may* constitute a violation of the FHA," *Gomez v. Chody*, 867 F.2d 395, 402 (7th Cir. 1989).

[17] Petitioners also hint (at 24) at a circuit split regarding the statistical proofs required to establish a *prima facie* case.

II. WHETHER DISPARATE-IMPACT CLAIMS ARE COGNIZABLE UNDER THE FHA IS NOT AN ISSUE THAT NECESSITATES THIS COURT'S ATTENTION

Petitioners' central argument in support of certiorari on whether disparate-impact claims are cognizable under the FHA is that the 11 courts of appeals to have considered the issue in the past 38 years have all resolved the issue consistently but incorrectly. There is no need for this Court to review an issue of statutory interpretation where there is such widespread and longstanding agreement in the lower courts. Moreover, not only is there no conflict among the courts of appeals, the agency entrusted with implementing and enforcing the FHA – HUD – has long agreed with the lower courts in interpretations adopted in formal adjudications. Finally, as discussed above, HUD is in the process of finalizing regulations that confirm this universal understanding of the statute. This remarkable unanimity makes clear that there is no confusion or error regarding the availability of disparate-impact claims under the FHA justifying this Court's review.

A. Every Court Of Appeals To Have Considered The Issue Has Held That Disparate-Impact Claims Are Cognizable Under The FHA

Petitioners do not argue that there is some confusion among the lower courts warranting this Court's review. Pet. 13-21. Nor could they, because all 11

However, no circuit court cited by petitioners has acknowledged a circuit split on this question, and the court below relied on the standards used by other circuits and by this Court in ruling that the residents' statistical proofs were sufficient. App. 15a-17a.

courts of appeals to have considered the issue have held that disparate-impact claims are cognizable under the FHA. *See United States v. City of Black Jack*, 508 F.2d 1179, 1184-85 (8th Cir. 1974); *Arlington Heights II*, 558 F.2d at 1290; *Rizzo*, 564 F.2d at 146; *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1311 (9th Cir. 1982); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982); *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1559 n.20 (11th Cir. 1984); *Arthur v. City of Toledo*, 782 F.2d 565, 574-75 (6th Cir. 1986); *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Huntington Branch*, 844 F.2d at 935; *Mountain Side*, 56 F.3d at 1250-51; *Langlois*, 207 F.3d at 49. None has held to the contrary.[18] *See Greater New Orleans Fair Hous. Action Ctr.*, 639 F.3d at 1085 ("Each of the eleven circuits that have resolved the matter has found the disparate impact theory applicable under the [FHA].").

Indeed, petitioners recognize the lack of conflict, Pet. 14, but suggest that this Court's review is warranted because "the Supreme Court has not decided whether disparate impact claims are cognizable under the FHA" and thus the issue "has remained unresolved and ripe for review for over two decades," Pet. 13. This argument fundamentally misunderstands this Court's role and certiorari standards. Where the courts of appeals are in broad and longstanding agreement on an issue of statutory interpretation and Congress has acquiesced in this interpretation for nearly 38 years, there is simply no need for this Court to weigh in on the meaning of the statutory text.

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[18] The D.C. Circuit has not decided this issue. *See Greater New Orleans Fair Hous. Action Ctr.*, 639 F.3d at 1085.

B. The Agency Charged With Enforcing And Implementing The FHA Agrees That Disparate-Impact Claims Are Cognizable Under The FHA, And Its View On The Matter Is Entitled To Deference

Not only do all of the courts of appeals to have considered the matter agree that § 804(a) of the FHA encompasses disparate-impact claims, so too does the primary federal agency entrusted with enforcing and implementing the Act.

The FHA grants HUD broad authority to conduct formal adjudications of FHA complaints as well as to promulgate rules implementing and construing the statute. *See* 42 U.S.C. §§ 3610, 3612, 3614a. In its formal adjudications over the course of many years, HUD has consistently interpreted § 804(a) as encompassing disparate-impact claims. *See HUD v. Mountain Side Mobile Estates P'ship,* Nos. 08-92-0010-1 & 08-92-0011-1, 1993 WL 307069, at *5 (HUD Sec'y July 19, 1993) (holding that "the Charging Party did establish a prima facie case of disparate impact and that a disparate impact, if proven, would establish a violation of the Act"), *aff'd in relevant part*, 56 F.3d 1243 (10th Cir. 1995); *see also HUD v. Twinbrook Village Apartments*, Nos. 02-00-0256-8, et al., 2001 WL 1632533, at *17 (HUD ALJ Nov. 9, 2001); *HUD v. Pfaff*, No. 10-93-0084-8, 1994 WL 592199, at *7-*9 (HUD ALJ Oct. 27, 1994), *rev'd on other grounds*, 88 F.3d 739 (9th Cir. 1996); *HUD v. Ross*, No. 01-92-0466-8, 1994 WL 326437, at *5, *7 (HUD ALJ July 7, 1994); *HUD v. Carter*, No. 03-90-0058-1, 1992 WL 406520, at *5 (HUD ALJ May 1, 1992). Similarly, HUD has filed numerous briefs in federal court expressing its view that the FHA supports disparate-impact liability, including in this

Court last Term in *Magner*. *See* Brief for the United States as Amicus Curiae in Support of Neither Party, *Magner v. Gallagher*, No. 10-1032 (U.S. filed Jan. 30, 2012) ("U.S. *Magner* Br."), *available at* http://www.justice.gov/osg/briefs/2011/3mer/1ami/2010-1032.mer.ami.pdf.[19] HUD's longstanding interpretation of the Act – in alignment with 11 of the courts of appeals – buttresses the argument against certiorari. The absence of a conflict or confusion on the issue renders this Court's review unnecessary.

Moreover, if the Court were to grant certiorari on this issue, HUD's interpretation of the statute, adopted in formal adjudications and pursuant to authority expressly delegated to it by Congress, would warrant this Court's deference under *Chevron*. *See Mead*, 533 U.S. at 230 & n.12.

Finally, as noted above, HUD is in the process of adopting regulations confirming its long-held adjudicative position that disparate-impact claims are cognizable under the FHA. *See* 76 Fed. Reg. at 70,921 ("HUD . . . has long interpreted the Act to prohibit housing practices with a discriminatory effect, even where there has been no intent to discriminate."). Once finalized, these regulations will also be entitled to this Court's deference. *See supra* pp. 13-14; *see also Smith*, 544 U.S. at 243-44 (Scalia, J., concurring in part and concurring in the judgment). Additionally,

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[19] *Amici* American Financial Services Association, et al., point to one brief filed by the United States in 1988 disavowing disparate-impact claims under the FHA. *See* AFSA Br. 6. However, that brief was filed before Congress amended the FHA to include exemptions that presuppose disparate-impact liability and also before Congress amended the FHA to give HUD its full authority to interpret and enforce the Act. *See* U.S. *Magner* Br. 23.

because these regulations are pending final adoption, this case presents a poor vehicle for addressing the first question presented, for all the reasons previously discussed regarding the second question presented. *See supra* pp. 17-20.

C. The Court Below Correctly Held That The FHA Incorporates Disparate-Impact Claims

Petitioners' primary argument in favor of certiorari on whether the FHA encompasses disparate-impact claims appears to be that all the lower courts and HUD are wrong.[20] However, given the widespread and universal agreement among lower courts and HUD, it is unsurprising that the text, structure, and history of the FHA make clear that § 804(a) encompasses disparate-impact claims.

The text of § 804(a) also parallels language in Title VII and the ADEA that this Court has held encompasses disparate-impact claims. *See* 42 U.S.C. § 2000e-2(a)(2) (§ 703(a)(2) of Title VII of the Civil

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[20] Petitioners make no credible claim that the potential for disparate-impact liability causes problems that would warrant this Court's intervention. Instead, petitioners suggest that disparate-impact liability "would render illegal many legitimate governmental and private activities designed to promote the general welfare of the community," Pet. 21, without citing to any case in the last four decades in which this has occurred. In addition, two *amici* raise novel constitutional challenges to disparate-impact liability under the FHA and to the validity of the FHA itself. *See* Brief Amicus Curiae of Pacific Legal Foundation and Center for Equal Opportunity in Support of Neither Party 17-20; Brief *Amicus Curiae* of Eagle Forum Education & Legal Defense Fund, Inc. in Support of Petitioner 10-12. Because these issues were not raised, briefed, or resolved below, and because *amici* have not cited any circuit court decision addressing them, this case is not an appropriate vehicle for reaching these issues.

Rights Act of 1964); 29 U.S.C. § 623(a)(2) (§ 4(a)(2) of the ADEA). Section 804(a) makes it unlawful

> *[t]o refuse to sell or rent* after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, *or otherwise make unavailable or deny*, a dwelling to any person *because of* race, color, religion, sex, familial status, or national origin.

42 U.S.C. § 3604(a) (emphases added).

Similarly, § 703(a)(2) of Title VII makes it unlawful for an employer

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

Id. § 2000e-2(a)(2) (emphases added). In *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), this Court held that § 703(a)(2) prohibits actions that have a disparate impact on the basis of race, regardless of whether they are the product of overt discrimination. In a subsequent case, a plurality of this Court opined that the *Griggs* decision was premised on "the better reading of the statutory text." *Smith*, 544 U.S. at 235 (plurality) (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991 (1988)).

The relevant language of the ADEA is identical to Title VII. Section 4(a)(2) of the ADEA makes it unlawful for an employer

> *to limit, segregate, or classify* his employees in any way which would deprive or tend to deprive any individual of employment opportunities *or*

> *otherwise adversely affect* his status as an employee, *because of* such individual's age.

29 U.S.C. § 623(a)(2) (emphases added). In *Smith*, this Court held that § 4(a)(2) prohibits actions that have a disparate impact as well as those that are motivated by discriminatory intent. 544 U.S. at 235-36 (plurality); *id.* at 247 (Scalia, J., concurring in part and concurring in the judgment).

Section 804(a) of the FHA embodies the same structure as Title VII and the ADEA: it prohibits both discriminatory treatment (it shall be unlawful to refuse to sell or rent because of race, etc.) *and* discriminatory impact (it shall be unlawful to otherwise make unavailable or deny a dwelling because of race, etc.). The language in the secondary clause focuses on the effects of the challenged action in each case. This language, in each statute, prohibits actions that have a disparate impact on the protected class(es).

Moreover, the existence of FHA disparate-impact claims is further evidenced by three FHA exceptions, each of which presupposes disparate-impact liability. First, the FHA exempts from liability reasonable restrictions "regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S.C. § 3607(b)(1). Second, the Act exempts actions that are targeted to persons who have been convicted of a drug offense. *Id.* § 3607(b)(4). Finally, § 3605(c) provides that "[n]othing in [the Act] prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status." *Id.* § 3605(c). If the FHA prohibited only discriminatory treatment, there would be no need for Congress to create these exemptions from liability based on classifications that are not prohibited.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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