No. 11-1507

IN THE

Supreme Court of the United States

TOWNSHIP OF MOUNT HOLLY, TOWNSHIP COUNCIL OF TOWNSHIP OF MOUNT HOLLY, KATHLEEN HOFFMAN, as Township Manager of the Township of Mount Holly, JULES THIESSEN, as Mayor of the Township of Mount Holly,

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 FOR THE AMERICAN FINANCIAL SERVICES ASSOCIATION, THE COMMUNITY MORTGAGE BANKING PROJECT, THE CONSUMER MORTGAGE COALITION, THE INDEPENDENT COMMUNITY BANKERS OF AMERICA, AND THE MORTGAGE BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The American Financial Services Association ("AFSA"), the Community Mortgage Banking Project ("CMBP"), the Consumer Mortgage Coalition ("CMC"), the Independent Community Bankers of America ("ICBA"), and the Mortgage Bankers Association ("MBA"), (collectively, "*amici*") respectfully submit this brief as *amici curiae* in support of the petition for a writ of certiorari (the "Petition").

- AFSA is a national trade association for providers of financial services to consumers, including residential mortgage loans. AFSA seeks to promote responsible, ethical lending to informed borrowers and to improve and protect consumers' access to credit.

- CMBP is a public policy organization representing the interests of independent mortgage banking companies. CMBP supports housing and financial services policies that promote consumer access, borrower and investor transparency, and local competition and choice.

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1. No counsel for any party authored this brief in whole or in part, and no counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae*, their respective members, and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2(a), counsel for *amici* provided counsel of record for all parties timely written notice of *amici*'s intent to file this brief, and in response, counsel for the parties gave their consent to the filing of the brief. Writings from counsel for the parties consenting to the filing of this brief are being submitted herewith.

- CMC is a trade association comprised of national residential mortgage lenders, servicers, and service providers. CMC was formed in 1995 to pursue reform of the mortgage origination process. CMC members participate in every stage of the home financing process.

- ICBA is a trade association that represents nearly 5,000 community banks of all sizes and charter types nationwide. ICBA member community banks seek to improve cities and towns by using local dollars to help families purchase homes and are actively engaged in the business of residential mortgage lending in the communities that they serve.

- MBA is the national association of the real estate finance industry. With more than 2,200 members, including mortgage companies, commercial banks, thrifts, Wall Street conduits, and life insurance companies, MBA promotes fair and ethical lending practices to ensure the continued strength of the nation's residential and commercial real estate markets, expand homeownership, and extend access to affordable housing.

The Fair Housing Act prohibits discrimination in housing, 42 U.S.C. § 3604, and in "residential real estate-related transactions," *id.* § 3605.[2] *Amici*'s members

2. A residential real-estate related transaction "means any of the following: (1) The making or purchasing of loans or providing other financial assistance – (A) for purchasing, constructing, improving, repairing, or maintaining a dwelling; or (B) secured by residential real estate. (2) The selling, brokering, or appraising of residential real property." 42 U.S.C. § 3605(b).

are subject to the Fair Housing Act and related laws that prohibit discrimination in lending. *Amici* and their members are committed to supporting the Act and devote substantial resources to the advancement of fair lending practices. *Amici* strongly oppose the disparate treatment of individuals. The main issue presented in the Petition, though, is whether the Fair Housing Act goes beyond prohibiting disparate treatment and creates liability for actions performed without any intent to discriminate which may have a disproportionate effect on groups sharing certain statutorily-defined characteristics such as race or national origin. Because both Section 3604(a) of the Act, at issue here, and Section 3605(a) bar conduct undertaken "because of" a statutorily-protected characteristic, any decision of the Court as to whether disparate-impact claims are available under Section 3604 will likely extend to Section 3605.

SUMMARY OF THE ARGUMENT

Last term, the Court granted certiorari in the matter styled *Magner v. Gallagher*, No. 10-1032 ("Magner"), to review the same questions presented in the Petition here, namely whether the Fair Housing Act encompasses disparate-impact liability and if so, what standard and burden of proof apply. *Magner* was fully briefed and set for argument, but unfortunately, the petitioners withdrew the matter from the Court just prior to argument.[3] Granting the Petition would provide the Court the opportunity to address the questions that it was poised to decide in *Magner*, including examining the plain meaning of the language of the Act.

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3. *See* Stip. to Dismiss Writ of Certiorari, *Magner v. Gallagher* (Feb. 14, 2012) (No. 10-1032).

The issue of whether the Fair Housing Act encompasses disparate impact has never been settled since the Act's creation, and the different branches of the federal government have provided conflicting answers to the question. In enacting the Fair Housing Act, Congress only barred actions taken "because of" certain factors and did not include language creating liability for the "effect" of actions performed without any intent to discriminate. Nevertheless, the language of the Fair Housing Act has continually perplexed enforcement officials. The Department of Housing and Urban Development ("HUD"), the agency charged with enforcing the Act, determined to remain neutral as to whether the Fair Housing Act encompasses disparate-impact claims when it promulgated its official notice-and-comment rule. That rule has remained in effect for 23 years, and remains in effect to this day notwithstanding HUD's recent proposal that would recognize a disparate-impact approach. During that period, some administrations have stated that the Act only recognizes disparate treatment, and despite HUD's official regulatory position of neutrality, other administrations have applied disparate impact in enforcing the Act. Moreover, while lower federal courts have applied disparate impact to Fair Housing Act claims, recent decisions of this Court interpreting related anti-discrimination statutes instruct that language similar to the Fair Housing Act does *not* support disparate-impact claims. The Court, however, has never directly addressed the questions presented here.

In the absence of guidance from the Court, pressure continues on the residential mortgage lending industry to manage end numbers, which may assist in avoiding disparate-impact liability but runs counter to the purpose

of the Fair Housing Act. The Court's guidance is necessary so that businesses subject to the Act can determine the proper focus for compliance with it. The Petition presents the Court with the opportunity to provide such guidance, an opportunity that was denied the Court when the *Magner* petitioners withdrew the case from consideration. Accordingly, and for the reasons set forth below, the Court should grant certiorari in this matter.

ARGUMENT

I. THE ISSUE OF WHETHER THE FAIR HOUSING ACT RECOGNIZES DISPARATE IMPACT IS AN IMPORTANT FEDERAL QUESTION WHICH IS UNSETTLED AND RIPE FOR REVIEW

A. The Different Branches of the Government Have Taken Conflicting Views on the Availability of Disparate Impact under the Fair Housing Act; Lower Court Decisions Contradict This Court's Related Jurisprudence

The questions presented in the Petition, namely, whether the Fair Housing Act recognizes a disparate-impact theory of liability and if so, the applicable burden and standard of proof, have received remarkably conflicting treatment by the different branches of the federal government. Most importantly, when it enacted the Fair Housing Act in 1968,[4] Congress barred actions taken "because of" certain factors, such as race and national origin, but did not include language creating liability for

4. *See* Civil Rights Act of 1968, Pub. L. No. 90-284, Title VIII, 82 Stat. 73, 81-89 (1968).

the "effect" of actions performed without any intent to discriminate. Notably, when it amended the Fair Housing Act in 1988,[5] and even though disparate-impact law was well defined in related jurisprudence under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e, *et seq.*, Congress did not add language to the Fair Housing Act providing for a disparate-impact cause of action.[6]

The Executive Branch has taken the position in the past that the Act does not encompass disparate impact. In 1988, the Solicitor General submitted an *amicus* brief to the Court asserting that a plaintiff must prove *intentional* discrimination to establish a violation of the Fair Housing Act. *See* Brief for United States as *Amicus Curiae*, *Town of Huntington, N.Y. v. Huntington Branch, NAACP*, 488 U.S. 15 (1988) (No. 87-1961) ("[n]ot only do the statute's language and legislative history show that a violation of [the Fair Housing Act] requires intentional discrimination, substantial practical problems result if this requirement is discarded"), *available at* http://www.justice.gov/osg/briefs/1987/sg870004.txt. That same year, in signing the Fair Housing Amendments Act, the President stated that the amended Act "does not represent any congressional or executive branch endorsement of the notion, expressed in some judicial opinions, that violations [of the Act] may be established by a showing of disparate impact or discriminatory effects of a practice that is taken

5. *See* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988).

6. Nor did Congress add such language to the Fair Housing Act in 1991 when it amended Title VII to better articulate the disparate-impact cause of action available under that statute. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

without discriminatory intent.… [The Act] speaks only to intentional discrimination." "Remarks on Signing the Fair Housing Amendments Act of 1988," Public Papers of President Ronald W. Reagan, Ronald Reagan Presidential Library (Sept. 13, 1988), *available at* http://www.reagan.utexas.edu/archives/speeches/1988/091388a.htm.

Meanwhile, in its initial official rulemaking under the Fair Housing Act, HUD stated that its "regulations are *not* designed to answer the question of whether intent is or is not required to show a violation" of the Act and that it would "maintain a *neutral* position on the issue of whether discriminatory intent is necessary for advertising to be considered violative." Implementation of Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232, 3234-35, 3275 (Jan. 23, 1989) (emphasis added). Although HUD later joined an interagency "Policy Statement on Discrimination in Lending," which opined that a violation of the Fair Housing Act could be established under a disparate-impact approach, 59 Fed. Reg. 18,266, 18,269 (Apr. 15, 1994),[7] HUD did not seek to change the existing rule, in which it took a neutral position regarding the availability of disparate impact under the Act, until last year.

In November 2011, HUD deviated from its past official rulemaking position. Just nine days after the Court granted the petition for certiorari in *Magner*, HUD proposed an official notice-and-comment rule seeking to amend its Fair Housing Act regulations to expressly provide for disparate-impact liability. *See* Implementation

7. Notably, this Policy Statement was not subject to the notice-and-comment rulemaking process.

of Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. 70,921, 70,926-27 (Nov. 16, 2011). If finalized as proposed, the rule (1) would require a *defendant* "to prove that the challenged practice has a *necessary and manifest* relationship to one or more of the housing provider's legitimate, nondiscriminatory interests," and even if the defendant meets that burden, (2) would permit a plaintiff to prevail by demonstrating only that a less-discriminatory alternative exists that *might* serve the defendant's business interests. *See id.* at 70,925 (emphasis added). Moreover, in an *amicus* brief submitted to the Court in *Magner*, the current administration raised novel arguments in support of disparate impact under the Fair Housing Act, arguments that run counter to the plain language of the Act and rely upon propositions which find no support in Court precedent. *See* Brief for United States as *Amicus Curiae*, *Magner v. Gallagher* (Dec. 29, 2011) (No. 10-1032), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2012/01/10-1032-SG-amicus-brief.pdf. The fact that HUD, the agency charged with promulgating rules to enforce the Fair Housing Act, *see* 42 U.S.C. §§ 3610, 3614a, has vacillated regarding the meaning of the Act demonstrates the need for the Court to provide a clear answer.

Finally, although the Court has examined whether other federal anti-discrimination statutes recognize disparate impact, it has not examined whether the Fair Housing Act recognizes such a theory and if so, the applicable burden and standard of proof. Various lower federal courts, however, have incorrectly applied the Court's analysis of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621, *et seq.*, and Title VII to conclude that the Fair Housing Act encompasses

disparate-impact liability.[8] In particular, lower courts have improperly relied on *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), in concluding that the "because of" language in Title VII supports a disparate-impact approach. As the Court has recently made clear, this is not the proper lesson of *Griggs*. *See Smith v. City of Jackson, Miss.*, 544 U.S. 228, 235-36 & n.6 (2005) (plurality op.); *Ricci v. DeStefano*, 557 U.S. 557, 129 S. Ct. 2658, 2672-73 (2009). *Smith* and

8. *See, e.g., Graoch Assocs. # 33, L.P. v. Louisville/Jefferson County Metro Human Relations Comm'n*, 508 F.3d 366, 372 (6th Cir. 2007) ("[r]elying on the analogy between Title VII and the FHA, several other circuits have applied essentially this approach to disparate-impact claims under the FHA"); *2922 Sherman Ave. Tenants' Ass'n v. District of Columbia*, 444 F.3d 673, 679 (D.C. Cir. 2006) (noting that the Fair Housing Act's "language prohibiting discrimination – 'because of ... race ... or national origin' – is identical to Title VII's, and since *Griggs*, every one of the eleven circuits to have considered the issue has held that the FHA similarly prohibits not only intentional housing discrimination, but also housing actions having a disparate impact"); *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 51 (1st Cir. 2000) (noting that "[i]n light of *Griggs* and the similarity of the statutes, it is a fair reading of the Fair Housing Act's 'because of race' prohibition to ask that a demonstrated disparate impact in housing be justified by a legitimate and substantial goal of the measure in question"); *Pfaff v. U.S. Dep't of Hous. & Urban Dev.*, 88 F.3d 739, 745 & n.1 (9th Cir. 1996) ("look[ing] for guidance to employment discrimination cases" in finding that Fair Housing Act provides for disparate impact); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 146 (3d Cir. 1977) ("in [Fair Housing Act] cases, by analogy to Title VII cases, unrebutted proof of discriminatory effect alone may justify a federal equitable response"). *But see Latimore v. Citibank Fed. Sav. Bank*, 151 F.3d 712, 714 (7th Cir. 1998) (cautioning against the "wholesale transposition" of discrimination theories and standards of proof from the Title VII context to the unique area of "credit discrimination").

Ricci each confirm that the term "because of," including such language in Title VII, does not permit a disparate-impact approach. *See Smith*, 544 U.S. at 235-36 & n.6 (plurality op.);[9] *Ricci*, 129 S. Ct. at 2672-73. Specifically, the Court has held that certain provisions of the ADEA and Title VII, *not* found in the Fair Housing Act, recognize disparate-impact claims because those statutes contain language directed to the "*effects*" of discrimination. *See Smith*, 544 U.S. at 235-36 (plurality op.); *Ricci*, 129 S. Ct. at 2672-73.[10] By contrast, the Fair Housing Act does *not* contain language concerned with the "effects" of the challenged action but proscribes only conduct undertaken "because of" certain factors. *See* 42 U.S.C. §§ 3604, 3605.[11]

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9. The concurring and dissenting opinions in *Smith* demonstrate that on this point, the *Smith* Court was unanimous. *See* 544 U.S. at 246 (Scalia, J., concurring) ("the only provision of the ADEA that could conceivably be interpreted to effect [a disparate-impact] prohibition is § 4(a)(2)"); *id.* at 249 (O'Connor, J., dissenting) ("[n]either petitioners nor the plurality contend that the first paragraph, § 4(a)(1), authorizes disparate impact claims, and I think it obvious that it does not. That provision plainly requires discriminatory intent").

10. *See also* 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, 101-110 (2012).

11. *See also Gross v. FBL Fin. Servs.*, 557 U.S. 167, 174-75 (2009) (Congress is presumed to act intentionally where it does not add language to one statute that it has included in another statute); *cf. Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 168 n.16 (1993) ("we may not add terms or provisions where [C]ongress has omitted them").

As noted above, the Court was poised to review this very issue in *Magner*, but could not because the parties challenging the disparate-impact theory withdrew their petition just before oral argument.[12] By granting the Petition, the Court will have the opportunity to address the question, notwithstanding the *Magner* petitioners' precipitate decision to withdraw the matter from review,[13] and resolve more than four decades of conflicting positions adopted by the different branches of the federal government. Because the important, unsettled questions presented in the Petition concerning the applicability of disparate-impact claims under the Fair Housing Act are ripe for review, the Court should grant the Petition.

B. Uncertainty Concerning Disparate-Impact Liability under the Fair Housing Act Pressures Businesses to Consider Prophylactic Measures That Run Counter to the Purpose of the Fair Housing Act

While a disparate-treatment claim is well suited to rooting out discrimination, uncertainty concerning the application of a disparate-impact theory under the Fair Housing Act pressures businesses to consider

12. *See* note 3, *supra*.

13. Prior to the withdrawal of the petition, the Court received sixteen merits briefs of *amicus curiae*, including the government's brief discussed above. The various *amicus* briefs explored the wide range of potential impacts that a decision on the questions presented would have in light of the important federal policies underlying the Fair Housing Act. The volume of briefing submitted in *Magner*, and range of view points expressed, demonstrate the importance of the issues that were presented in *Magner* and are presented again in the Petition.

prophylactic measures to minimize risk, which measures run counter to the purpose of the Act. The threat of disparate-impact liability arises when the end results of a business's operations have different demographic results, despite the uniform application of sound, neutral standards. In lending, for example, generally-accepted credit assessment standards, which themselves raise no inference of discrimination, may produce differential results that can be correlated with factors such as race or national origin. Down-payment requirements, debt-to-income requirements, loan-to-value requirements, and other underwriting requirements all can impact various racial and ethnic groups differently.[14] If the differences produced by neutral policies are deemed statistically significant (that is, the results can not be attributed to mere chance), the lender faces the prospect of a disparate-impact lawsuit.

As do most businesses, lenders strive to minimize the risk of ever facing a disparate-impact challenge because a lawsuit alleging discrimination on the basis of race, national origin, or other statutorily-defined characteristic is a serious charge that can occasion an immediate reputational injury and business disruption.

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14. For instance, down-payment requirements can have a differing effect on racial groups because of the disparity between the average wealth of white households and the average wealth of minority households. *See* Pew Research Center, *Twenty-to-One: Wealth Gaps Rise to Record Highs between Whites, Blacks and Hispanics*, at 1 (Jul. 2011) (analyzing 2009 U.S. Census Bureau data; finding in 2009, the median wealth of white households was 20 times that of African-American households and 18 times that of Hispanic households), *available at* http://www.pewsocialtrends.org/files/2011/07/SDT-Wealth-Report_7-26-11_FINAL.pdf.

Disparate-impact claims under the Fair Housing Act have the potential to impact thousands of lenders represented by *amici*.[15] The allegation of a statistical impact on a group is still newsworthy even if there is no reasonable inference that it is caused by an impermissible differential treatment. And, importantly, defending allegations of disparate impact – even if proven to be meritless – is typically very expensive. In these circumstances, it is not surprising that businesses feel pressure to manage their end numbers – for instance, through the use of quotas – so as to avoid legal risk.[16] The Court, however, has expressed concern that efforts to avoid a disparate-impact legal challenge may themselves constitute intentional unlawful discrimination. *See, e.g., Ricci*, 129 S. Ct. at 2664 (considering race in employment decisions "is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it

15. Under the federal Home Mortgage Disclosure Act ("HMDA"), 12 U.S.C. §§ 2801, *et seq.*, approximately 8,000 lenders – ranging from large, national enterprises to small, local operations with limited resources – are required to report information regarding their residential mortgage lending activities, 12 U.S.C. § 2803; *see* 12 C.F.R. § 203.4, which disclosures are subject to intense public scrutiny. Such scrutiny leads to an additional threat of Fair Housing Act disparate-impact claims. Accordingly, the Court's guidance will greatly assist these lenders in best complying with the Act.

16. The Court has cautioned against this result even as it has permitted the use of a disparate-impact approach based on language in other federal anti-discrimination statutes not found in the Fair Housing Act. *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 992-93 (1988) (in Title VII context, noting that "the inevitable focus on statistics in disparate-impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures").

not taken the action, it would have been liable under the disparate-impact statute"); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499-500 (1989) (rejecting a set-aside program for minority contractors, since "an amorphous claim that there has been past discrimination ... cannot justify the use of an unyielding racial quota").

The federal legislative and regulatory response to the recent financial crisis has only increased the threat that lenders will face disparate-impact claims and thus the concomitant pressure on lenders to manage end numbers. For instance, the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank Act"), and certain of its proposed implementing regulations, created two separate categories of residential mortgage loans – Qualified Mortgages ("QMs") and Qualified Residential Mortgages ("QRMs") – both of which prescribe facially-neutral practices that may nonetheless give rise to disparate-impact claims.[17] Whether a particular loan

17. As part of the QM paradigm, Congress contemplated an "ability-to-repay" ("ATR") rule, which will explicitly require consumer mortgage lenders to consider an applicant's "credit history, current income, expected income the consumer is reasonably assured of receiving, current obligations, debt-to-income ratio or the residual income the consumer will have after paying non-mortgage debt and mortgage-related obligations, employment status, and other financial resources other than the consumer's equity in the dwelling or real property that secures repayment of the loan." Dodd-Frank Act § 1411(a)(2) (to be codified at 15 U.S.C. § 1639c(a)(3)). While Congress provided that lenders could satisfy the ATR requirements by lending to the standards set forth in the QM rules, *see id.* § 1412 (to be codified at 15 U.S.C. § 1639c(b)), those standards are also likely to have disparate impact on groups based on characteristics enumerated under the Fair Housing Act.

qualifies as a QM or a QRM loan necessarily depends on the risk profile of both the borrower and the loan.[18] Borrowers that present less risk are more likely to be eligible for these types of loans. Groups and individuals with less wealth or income, often correlated with minority groups,[19] are less likely to qualify for these loans. Yet, to avoid disproportionate results between non-minority and minority groups, lenders may choose to restrict the

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In addition, Congress exempted so-called QRM loans from costly risk-retention requirements for securitized loans. QRM loans are to be defined by regulations that "tak[e] into consideration underwriting and product features that historical loan performance data indicate result in a lower risk of default, such as-

(i) documentation and verification of the financial resources relied upon to qualify the mortgagor;

(ii) standards with respect to–

> (I) the residual income of the mortgagor after all monthly obligations;
>
> (II) the ratio of the housing payments of the mortgagor to the monthly income of the mortgagor;
>
> (III) the ratio of total monthly installment payments of the mortgagor to the income of the mortgagor;"

and other factors. Dodd-Frank Act § 941(b) (to be codified at 15 U.S.C. § 78o-11(e)(4)(B)).

18. While a lender may choose to make loans that do not qualify as a QM or QRM loan, the lender would face substantially higher costs for making loans that do not so qualify. Regardless of whether a lender makes QM or QRM loans, lenders will be required to ensure that a loan applicant has the ability to repay a given loan under the related ATR rule.

19. *See,* note 14, *supra*.

number of these loans made to otherwise qualified non-minority applicants.

Because the application of disparate-impact theory to the Fair Housing Act produces results that run counter to the Act, the Court should grant the Petition to remove the uncertainty as to the scope of Fair Housing Act liability.

II. THE THIRD CIRCUIT'S DISPOSITION OF THE QUESTIONS PRESENTED CONFLICTS WITH THE RELEVANT JURISPRUDENCE OF THIS COURT

Because the Court has yet to address the questions presented by the Petition, and because the courts of appeals have rendered myriad decisions that conflict with related Court precedent, the Court should grant the Petition to review those decisions and resolve the questions presented.

A. This Court's Jurisprudence Regarding Disparate Impact under Other Anti-Discrimination Statutes Does Not Support the Existence of Disparate-Impact Liability under the Fair Housing Act

Following other lower courts and its prior precedent, the Third Circuit stated below that the Fair Housing Act recognizes disparate-impact claims notwithstanding the plain language of the statute that only conduct undertaken "because of" certain enumerated characteristics is actionable. *See Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mt. Holly*, 658 F.3d 375, 381-82 (3d Cir. 2011) ("Mt. Holly") ("to determine whether action of this

sort was 'because of race' we look to see if it had a 'racially discriminatory effect,' i.e., whether it disproportionately burdened a particular racial group so as to cause a disparate impact"). The circuit court's decision is in direct conflict with this Court's ADEA and Title VII jurisprudence recognizing the availability of disparate-impact claims based on language that is not found in the Fair Housing Act. As discussed above, under *Smith* and *Ricci*, only if a statute "focuses on the *effects* of the action on the [protected individual] rather than the motivation for the action of the [defendant]" does the statute prohibit disparate impact. *Smith*, 544 U.S. at 236 (emphasis in original) (plurality op.); *see Ricci*, 129 S. Ct. at 2672-73. By granting the Petition, the Court can resolve the conflict between its precedent and the courts of appeals' decisions regarding the availability of a disparate-impact theory under the Fair Housing Act.

B. The Third Circuit Applied a Standard of Proof That Finds No Support in the Court's Disparate-Impact Jurisprudence

Even if the Third Circuit correctly applied disparate impact to the Fair Housing Act claims at issue, the standard of proof that the court applied conflicts with this Court's jurisprudence on disparate-impact claims. Specifically, the circuit court found that once a plaintiff makes a *prima facie* case of discrimination, the Fair Housing Act requires the defendant to establish not only "a legitimate, non-discriminatory reason for its actions" *but also* "that 'no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact.'" *Mt. Holly*, 658 F.3d at 381-82. Only then does "the burden once again shift[] to those

challenging the action [to] demonstrate that there is a less discriminatory way to advance the defendant's legitimate interest." *Id.* at 382; *see id.* at 385-86 (clarifying burden shifting; although plaintiff must ultimately "provide evidence" of less-discriminatory alternative, defendant must first show absence thereof).[20]

The Third Circuit's holding conflicts with this Court's articulation of the standard of proof for a disparate-impact claim under an anti-discrimination statute where the statute is otherwise silent concerning the applicable standard. The Court set forth the standard, which the Third Circuit should have followed below, in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) ("Wards Cove").[21] In particular, the Court concluded that in pursuing a disparate-impact claim, a plaintiff must first establish a *prima facie* case of discrimination by (1) identifying the specific policy or practice that purportedly caused the alleged harm, (2) demonstrating that the policy had an impact unfavorable on minorities, and (3) establishing that the policy actually caused the impact. *See* 490 U.S. at 656. If the plaintiff makes such a showing, the defendant can

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20. As discussed in the Petition, other courts of appeals have applied a variety of standards of review to disparate-impact claims under the Fair Housing Act. *See* Pet. at pp. 22-33. This split alone warrants granting the Petition as to the second question presented.

21. In response to the Court's decision in *Wards Cove*, Congress amended Title VII to add a specific standard of proof for future Title VII litigation. See 42 U.S.C. §§ 2000e-2(k)(1)(A)-(B). Congress never amended the Fair Housing Act to add such a standard, and in *Smith*, the Court recognized the applicability of *Wards Cove* to anti-discrimination statutes modeled on the pre-amended version of Title VII. *See* 544 U.S. at 240.

justify the challenged policy by articulating a legitimate business goal that the policy serves. *See id.* at 658-59 ("at the justification stage of … a disparate-impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer").[22] Having articulated a legitimate business goal, the defendant should prevail unless the plaintiff can demonstrate "that 'other tests or selection devices, without a similarly undesirable racial effect, would also serve the ... legitimate [business] interest[s]'" in an equally effective manner. *Id.* at 660. By imposing a standard wherein the defendant must first demonstrate the absence of a less-discriminatory alternative, the Third Circuit deviated from *Wards Cove*. Accordingly, and assuming the Court were to first find that the Fair Housing Act recognizes a disparate-impact theory (which it does not), the Court should grant the Petition to clarify that *Wards Cove* supplies the proper standard of proof.

22. The Court expressly disclaimed any requirement that the defendant establish that its policy was "essential" or "indispensable." 490 U.S. at 659.

CONCLUSION

The contradictory positions taken by the different branches of the federal government in determining the scope of the Fair Housing Act necessitates the Court's intercession to answer the questions presented in the Petition. Notwithstanding the plain language of the Fair Housing Act, and the recognition of some administrations that a party must demonstrate discriminatory intent to establish a claim under the Act, the courts of appeals and other administrations have interpreted the Act differently, in a manner that not only authorizes disparate-impact claims but also places a substantial burden on defendants in defending such claims, each at variance with the Court's relevant jurisprudence. The resolution of the questions presented in the Petition is of vital importance to the residential mortgage lending industry. A ruling on those questions would resolve the uncertainty concerning the scope of the Act and would allow *amici*'s members, and businesses generally, to determine the proper focus for compliance with the Act. Moreover, a decision on the issues this case presents could resolve the conflict between disparate-impact liability and the explicit Dodd-Frank Act requirements that mortgage lenders consider factors known to have a disproportionate effect on groups sharing certain statutorily-defined characteristics. The Court recognized the importance of resolving the issues of whether the Fair Housing Act recognizes disparate impact, and the applicable standard of proof if it does, when it granted the petition for certiorari in *Magner*, and should do the same here.

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Respectfully submitted,

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