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 Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITIONERS' REPLY BRIEF

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September 25, 2012

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Disparate impact claims are not cognizable under the Fair Housing Act ("FHA"). The judicial extension of FHA claims beyond the statute's clear text has left the Circuits to make up their own rules for evaluation of these claims. These circumstances have created litigation over claims never contemplated, nor intended, under the FHA.

The Respondents have been able to hold the Township's redevelopment efforts captive through litigation for almost nine years despite the Township's judicially recognized legitimate interests in alleviating blight. (Pet. App., 22a). Now Respondents complain that redevelopment has not started and that the Township has run out of money. Yet, every time the Township attempted to move forward, Respondents filed more litigation. The Third Circuit's finding of a prima facie claim under the FHA thwarts the Township's legitimate, judicially recognized, interest in eliminating blight.

Despite Respondents' characterization of the remaining houses as in need of "modest improvement," three levels of New Jersey Courts found the Gardens area to be blighted. (Pet. App., 12a). Under *N.J.S.A.* 40A:12A-5, a declaration of blight requires a finding of "stagnation that has a decadent effect on surrounding property." *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447, 460 (2007). Respondents' recitation of "facts" mischaracterizes

the facts as found by numerous judicial decisions in State and Federal Court.

Respondents fail to convincingly address the threshold issue of whether the FHA allows for recovery based on a disparate impact theory. Recent case law has seriously put this threshold issue into question. If this threshold question is answered in the negative, all other ancillary arguments become moot.

Respondents then attempt to use Department of Housing and Urban Development's ("HUD") proposed regulations as a smoke screen to hide the need to address the Circuit split regarding how disparate impact claims should be treated. HUD's proposed regulations do not address the critical question in this case: How should statistics be evaluated when presented in a plaintiff's prima facie case? A Circuit split exists regarding how such statistics should be evaluated. If this case had been considered by the Fourth, Sixth, Ninth or Eleventh Circuits, Respondents' FHA claims would have failed.

Certiorari should be granted.

I. NO CIRCUIT HAS RECOGNIZED DISPARATE IMPACT CLAIMS BASED ON FHA's TEXT.

A. Circuit Court Decisions Have Failed to Consider FHA's Text.

Determining whether disparate impact claims are cognizable under the FHA involves deliberation of

an issue never considered by any Circuit Court: whether *Smith v. City of Jackson,* 544 U.S. 228 (2005) alters the disparate impact analysis under Title VIII. Only two Circuit Courts have even mentioned *Smith* since it interpreted the cognizability of disparate impact claims under the Age Discrimination in Employment Act ("ADEA"). *See Graoch Assoc. # 33, L.P. v. Louisville/Jefferson County Metro. Human Relations Comm'n*, 508 F.3d 366, 392 (6th Cir. 2007) and *Gallagher v. Magner*, 636 F.3d 380, 383 (8th Cir. 2010) (Colloton, Riley, Loken, Gruender and Shepherd, dissenting).

In *Graoch*, the Sixth Circuit merely noted that "the Supreme Court has not shied away from allowing innovative disparate-impact claims. . . ." *Graoch Assoc.*, 508 F.3d at 392. By contrast, the Eighth Circuit's dissent contained a more thorough discussion, noting that,

> The FHA likewise does not include text comparable to that relied on in *Smith* and appearing in § 703(a)(2) of Title VII and § 4(a)(2) of the ADEA. Rather, the text of 42 *U.S.C.* § 3604(a) makes it unlawful to "make unavailable or deny . . . a dwelling to any person because of race, color, religion, sex, familial status, or national origin." This language appears similar to § 4(a)(1) of the ADEA, which the Court in *Smith* said does not support a claim based on disparate impact alone.

Gallagher, 636 F.3d at 383. The dissent suggested that the lack of consideration regarding the textual

basis for disparate impact made *en banc* review appropriate.

Respondents fail to cite a single case where the language "otherwise make unavailable" has been used to support the finding that disparate impact claims are cognizable under the FHA. Several Circuits have decided disparate impact cases because of the FHA's similarity to Title VIII. *See Gallagher*, 636 F.3d at 382; *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 934 (2d Cir. 1988), *aff'd in part sub nom. Town of Huntington, N.Y. v. Huntington Branch, N.A.A.C.P.*, 488 U.S. 15 (1988); *Smith v. Town of Clarkton, N.C.*, 682 F.2d 1055, 1065 (4th Cir. 1982); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 147 (3d Cir. 1977). Others simply adopted the reasoning of sister Circuits who had found disparate impact claims cognizable. *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49 (1st Cir. 2000); *Keith v. Volpe*, 858 F.2d 467, 482 (9th Cir. 1988); *Arthur v. City of Toledo, Ohio*, 782 F.2d 565, 574 (6th Cir. 1986); *U.S. v. Mitchell*, 580 F.2d 789, 791-792 (5th Cir. 1978); *U.S. v. City of Black Jack, Missouri*, 508 F.2d 1179, 1184-1185 (8th Cir. 1974). One Circuit found disparate impact claims cognizable based on the "purpose of Congress in enacting the Fair Housing Act. . . ." *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1289-1290 (7th Cir. 1977). Not a single circuit has actually relied upon the text of the FHA as a basis for the disparate impact theory.

Once the Circuits ruled on this issue, such decisions were considered precedential and the issue was

not revisited. *See Gallagher*, *supra*, 636 F.3d at 383 (Colloton, Riley, Loken, Gruender and Shepherd, dissenting) (noting that the "district court and the parties understandably have taken disparate-impact analysis as a given under circuit precedent"). One Circuit has acknowledged that "reasonable minds could disagree as to whether the FHA contemplates disparate impact liability." *Graoch Assoc.*, *supra*, 508 F.3d at 375. Since the Circuit Courts have strongly rooted precedents not based on textual interpretations, it is important for this Court to grant Certiorari to clarify whether these precedential decisions are still appropriate in light of *Smith v. City of Jackson,* 544 U.S. 228 (2005). The Mt. Holly redevelopment presents a significant case requiring Supreme Court guidance on this important issue.

B. Unanimity in the Circuit Courts' Lack of Consideration of the FHA's Text does not Preclude Supreme Court Review.

Less than a year ago, this Court believed that the question presented here was sufficiently important to justify granting of Certiorari, although the Circuit Courts had unanimously decided this issue. In *Magner v. Gallagher*, Docket No. 10-1032, Certiorari was granted, presumably under *Rule* 10(c). That Rule authorizes granting Certiorari where "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court. . . ." *Rule* 10(c) contains no prohibition against Certiorari simply

because the decision at issue was consistent with other Circuit Court decisions. The critical questions are: (1) Whether the decision below raises an important question of federal law; and (2) Whether the Supreme Court has decided the issue. The questions presented satisfy these requirements.

II. *CHEVRON* DEFERENCE IS NOT WARRANTED IN THIS CASE.

A. *Chevron* Deference to Proposed Regulations for a Disputed Cause of Action is Inappropriate.

Any deference to HUD's regulations before they are actually adopted is not warranted. "[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, ***and*** that the agency interpretation claiming deference ***was promulgated*** in the exercise of that authority." *U.S. v. Mead Corp.*, 533 U.S. 218, 226-227 (2001) (emphasis added). Currently, HUD has only proposed regulations addressing disparate impact. It has not promulgated them. Even when they are adopted, there may be a question as to whether deference to such regulations is appropriate in this case. *See Bloch v. Frischholz*, 587 F.3d 771, 781 (7th Cir. 2009) ("rote application of *Chevron* deference might be inconsistent with the judicially enforceable

nature of the FHA's private right of action," although such regulations could still be given "great weight").

In arguing that HUD's proposed regulations are entitled to deference, Respondents put the cart before the horse. Not only do Respondents expect this Court to grant deference to regulations that have not been adopted, they expect such deference even before the canons of statutory interpretation have fully vetted whether disparate impact claims were intended by the Legislature. "Even for an agency able to claim all the authority possible under *Chevron,* deference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004).

While the Circuit Courts have considered some of the devices for judicial construction of the FHA, they have not considered the most important device: the plain language of the statute. *Dean v. U.S.*, 556 U.S. 568, 572 (2009) (when interpreting a statute, "'[w]e start, as always, with the language of the statute'"). *See also Holster v. Gatco, Inc.*, 130 S. Ct. 1575, 1577 (2010). Before this Court can or should grant deference to HUD's proposed regulations, it must first decide the threshold question of whether disparate impact claims are cognizable under the FHA's text.

As Respondents point out, *Chevron* deference is only appropriate if "the rule is a 'permissible' or 'reasonable' interpretation of the statute. . . ." (Opp'n

Br. at 14). Before deference can be afforded, the Court must answer two questions: (1) Did Congress unambiguously address the question at issue; and (2) If not, whether "the agency's answer is based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984). *See also Barnhart v. Walton*, 535 U.S. 212, 218 (2002). When determining ambiguity, "[t]he implausibility of Congress's leaving a highly significant issue unaddressed (and thus 'delegating' its resolution to the administering agency) is assuredly one of the factors to be considered. . . ." *Christensen v. Harris County*, 529 U.S. 576, 591, n.5 (2000). Moreover, determining whether disparate impact claims are cognizable is critical to whether or not HUD's regulations exceed permissible bounds. *See Alexander v. Sandoval*, 532 U.S. 275, 286, n.6 (2001) (if a statute only proscribes purposeful discrimination, then regulations proscribing discriminatory effect "'go well *beyond* that purpose'"). This Court cannot consider granting HUD's proposed regulations deference unless and until it determines whether such disparate impact claims are actually cognizable under the FHA.

B. Substantive Gaps are Unaddressed by the Proposed Regulations.

If disparate impact is cognizable, HUD's proposed regulations fail to address two critical questions raised in the Petition:

(a) What is the correct test for determining whether a prima facie case of disparate impact has been made?

(b) How should statistical evidence be evaluated?

(Pet. at ii). HUD's proposed regulations clarify that a plaintiff has the burden of proving "discriminatory effect." 76 *FR* 70921, 70927, §100.500(c)(1). While the regulations define "discriminatory effect" as a housing practice that "actually or predictably . . . (1) [r]esults in a disparate impact on a group of persons on the basis of race . . . ; or (2) has the effect of creating, perpetuating, or increasing segregated housing patterns on the basis of race . . . ", 76 *FR* 70921, 70926, §100.500(a), they do not provide any guidance as to when a plaintiff has proven discriminatory effect.

The Circuit Courts agree that "[t]ypically, a disparate impact is demonstrated by statistics." *Hallmark Developers, Inc. v. Fulton County, Ga.*, 466 F.3d 1276, 1286 (11th Cir. 2006). *See also Graoch Assoc.*, *supra*, 508 F.3d at 374 (requiring statistical evidence); and *Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev.*, 56 *F.3d* 1243, 1251 (10th Cir. 1995) (noting that both Title VIII and Title VII cases,

typically establish disparate impact through statistics).

In some Circuits, guidelines have been established for evaluating statistics. In the Eleventh Circuit, statistics are evaluated based on the following guidelines:

> First, it may be inappropriate to rely on "absolute numbers rather than on proportional statistics." Second, "statistics based on the general population [should] bear a proven relationship to the actual applicant flow." Third, the appropriate inquiry is into the impact on the total group to which a policy or decision applies.

Hallmark Developers, 466 F.3d at 1286 (internal citations omitted). Other Circuits have similar requirements. *See Graoch Assoc.*, 508 F.3d at 378 (requiring a court to look at the total group to which a policy applies and compare the impact on minorities to that on non-minorities within the group); *Tsombanidis v. W. Haven Fire Dept.*, 352 F.3d 565, 576-577 (2d Cir. 2003) (requiring the use of "appropriate comparison groups" and identification of the "members of a protected group that are affected" and identification of "similarly situated persons who are unaffected by the policy"); *Mountain Side*, 56 F.3d at 1253 (requiring use of appropriate comparables).

By contrast, the Third Circuit has no standard for evaluating statistics, simply requiring "proof of disproportionate impact, measured in a plausible

way." (Pet. App., 15a). This alone is sufficient to establish a prima facie case in the Third Circuit.

Had the standards in *Hallmark Developers* been applied in this case, Respondents would not have established a prima facie case of disparate impact. Respondent's statistics did not use appropriate comparable groups. (Pet. at 10-11). The challenged policy is the Redevelopment Plan, which calls for the acquisition and demolition of every property in the Gardens. By State law, the group to which the policy applied is only those properties that have been declared in need of redevelopment. *N.J.S.A.* 40A:12A-7(a). Since every property in the Gardens will be acquired, 100% of the minority residents in the area, and 100% of the white residents will have their homes acquired, each being impacted equally.

Respondents' statistics would not establish a prima facie case of disparate impact when evaluated under the guidelines in *Hallmark Developers*. *See also HDC, LLC v. City of Ann Arbor*, 675 F.3d 608, 613 (6th Cir. 2012) (finding no evidence the handicapped suffered disproportionately compared to other individuals who would benefit from the proposed housing); *Graoch Assoc.*, 508 F.3d at 378-379 (no impact even though 90% of apartment occupants were minority because the policy applied to *all* residents); *Gamble v. City of Escondido*, 104 F.3d 300, 306-307 (9th Cir. 1997) (statistics did not utilize appropriate comparable groups); *Edwards v. Johnston County Health Dept.*, 885 F.2d 1215, 1223-1224 (4th Cir. 1989) (no "'disproportionate burden on minorities'" because

both white and non-white farm workers were impacted equally); and *Bonvillian v. Lawler-Wood Housing, LLC*, 242 Fed. Appx. 159, 160 (5th Cir. 2007) ("the building is closed to *all* potential tenants;" thus, "there is no 'significantly greater discriminatory impact on members of a protected class'").

Even Respondents' statistics regarding the percentage of minorities who could afford the proposed housing under the Redevelopment Plan fail to establish a prima facie case under the *Hallmark* standards. *Hallmark Developers*, 466 F.3d at 1286 (whether current homeowners or renters could afford housing at proposed prices was "speculative"). In this case, the speculative nature of Respondents' statistics was noted by the District Court. (Pet. App., 45a-46a, n.9). Respondents' statistics would have fared no better in the Fourth Circuit. *Williams v. 5300 Columbia Pike Corp.*, 103 F.3d 122 (4th Cir. 1996).

In the Third Circuit, a defendant is more likely to incur FHA liability than in other circuits. Because HUD's proposed regulations offer no guidance on how to evaluate statistical evidence of disparate impact, Circuit Courts are likely to rely on existing precedent. Since there are conflicts among the Circuits on this point, Certiorari should be granted to resolve this conflict.

III. THE PROCEDURAL POSTURE OF THIS CASE DOES NOT AFFECT WHETHER CERTIORARI IS GRANTED.

While the record below in this latest lawsuit may not have been "fully" developed, this dispute is hardly in its infancy. Respondents and the Township have been litigating these exact claims since 2003. The record below, at the converted summary judgment stage, contained a mere 2,782 pages and required seven appendix volumes on appeal. This voluminous appendix contains more than enough facts to decide the relevant legal questions at hand. This Court need not decide the ultimate merits of this case; it need only articulate the governing legal standard.

Simply because this case is at the summary judgment stage, Supreme Court review is not precluded. 28 *U.S.C.* §1254. Other cases have been certified by this Court notwithstanding the fact that each came to this Court from the grant of a summary judgment which had been overturned on appeal, one of the most recent being *Gallagher v. Magner*, 619 F.3d 823, 838 (8th Cir. 2010), *cert. granted,* 132 S. Ct. 548 (2011), *cert. dismissed,* 132 S. Ct. 1306 (2012).

IV. THIS COURT CAN PROPERLY CRAFT A DECISION TO AVOID THE PARADE OF HORRIBLES SUGGESTED BY RESPONDENTS.

Respondents' opposition is the proverbial Chicken Little syndrome, asserting that the sky will fall if this Court weighs in on the disparate impact issue before HUD's proposed regulations are finalized. The asserted "host of complicated administrative-law issues . . . " (Opp'n Br. at 17-18) are nothing more than a smoke screen that can be easily resolved with appropriate guidance from this Court. Respondents' reason for denying Certiorari is "it could be complicated."

There is no guarantee as to when, or even if, HUD's proposed regulations will be adopted. In June, 2012, the House of Representatives adopted amendment H.AMDT.1363, *available at* http://thomas.loc.gov/cgi-bin/bdquery/D?d112:3:./temp/~bdIG9U::|/home/LegislativeData.php?n=BSS;c=112|, last visited 9-18-12, which prohibits the use of federal funds to finalize HUD's proposed disparate impact regulations. Although the Senate has not acted on this amendment, HUD also has not acted on its proposed regulations.

If HUD's proposed regulations are adopted while this appeal is pending, the Court can simply clarify how its ultimate decision would impact the regulations.

CONCLUSION

For the foregoing reasons, Certiorari should be granted.

Respectfully submitted,

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