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 TO THE UNITED STATES AMICUS BRIEF

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PETITIONERS' REPLY TO UNITED STATES AMICUS BRIEF

The United States argues that regulations adopted by the Department of Housing and Urban Development ("HUD") settles the issue of whether "disparate impact" is cognizable under the Fair Housing Act ("FHA"), establishes the standard that will be universally applied by all Circuits and obviates the need for this Court's review. The United States contends that an agency's interpretation of Circuit Court decisions finding a "disparate impact" cause of action is dispositive.

None of the United States' arguments justify preclusion of this Court's review. HUD's late rush to adopt regulations began with the promulgation of new regulations during pendency of the *Magner* case, with final adoption during the wait for the United States' Brief in this matter. After 45 years, regulations have been adopted by HUD because of an alleged "ambiguity" now perceived in the statute.

First, there is no ambiguity in the statute. Second, the regulations do not cite to any "ambiguity" in the statutory text, instead relying on judicial and agency decisions to justify the regulation. Third, the "standards" allegedly set by the regulations provide no guidance to any local government or other business entity of the conduct that might constitute a violation.

The United States also raises other minor issues which have previously been addressed by the Township in its Reply Brief, namely the unanimity of the Circuit Courts regarding disparate impact claims (Reply, pp.5-6), and the impact of the summary judgment procedural posture of the case on acceptance of the petition. (Reply, p.12). Also, notwithstanding contrary assertions, Petitioners raised the issue of the cognizability of disparate impact claims in its Amended Petition for Rehearing below; the Third Circuit then ordered its decision be deferred pending the outcome in *Magner*.

The overriding flaw in the Circuit Court and agency decisions recognizing disparate impact under the FHA is that race must be a factor in policy decisions. Under the Third Circuit's decision, New Jersey municipalities planning redevelopment activities *must* count the number of racial minorities in a blighted area before taking any action in order to avoid a *prima facie* case being established against them under the FHA. If there are more minorities than whites in an area, any policy adopted will have a disparate impact on minorities. Leaving blight conditions alone, uncorrected, perpetuates minority ghettos; correcting blighted conditions in minority areas would necessarily have a disparate impact. To avoid potential liability under the FHA, race now becomes a factor in redevelopment and housing decisions. The cases, and now the regulation, have created the exact opposite condition than that intended by the FHA.

I. NO STATUTORY GAP EXISTS IN THE FHA FOR HUD TO FILL.

Putting aside the 45 years it has taken for HUD to determine there existed an "ambiguity" in the Fair Housing Act, even though HUD has been proceeding with enforcement actions under this "ambiguous" provision for those 45 years, the text of the statute is not ambiguous and the disparate impact portion of the regulation does not cite to any "ambiguity" in the statute.

A. The Statutory Text Is Not Ambiguous.

The promulgation of HUD's regulations does not preclude Supreme Court review until two threshold questions are resolved: (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). The United States presumes §804(a) is ambiguous and claims that disparate impact liability is grounded in HUD's reasonable interpretation of "otherwise make unavailable or deny" in §804(a). (SG Brief, pp.7-8). The United States presumes deference is required.

The Supreme Court recently confirmed that it is unnecessary to address whether *Chevron* deference applies when the regulation "'goes beyond the meaning that the statute can bear.'" *Freeman v. Quicken Loans, Inc.*, 132 S.Ct. 2034, 2040 (2012). "'There is a

basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted.'" *U.S. v. Locke*, 471 U.S. 84, 95 (1985). Adoption of HUD's regulations does not preclude review because the Supreme Court must first decide whether the regulation is a permissible construction of the statute. (Reply, pp.6-8). "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).

Unlike Title VII and the ADEA, the phrase "otherwise make unavailable or deny" in the FHA does not focus on the "effects" of an action. It identifies an actual *action* which is prohibited. The FHA prohibits the act of "otherwise mak[ing] unavailable" and the act of "deny[ing]" housing. 42 U.S.C. §3604. Nowhere does §804 prohibit an *effect* of that action. By contrast, Title VII and the ADEA prohibit the act of "limit[ing], segregat[ing] or classify[ing]" if that action "would . . . otherwise adversely *affect*" a person's employment status. 42 U.S.C. §2000e-2(a)(2) and 29 U.S.C. §623 [Emphasis added]. The text of Title VII and the ADEA prohibit an action because of its effect; §804(a) of the FHA prohibits the conduct regardless of its effect. These provisions are simply not analogous. The text of the FHA does not support the "ambiguity" claimed to be filled by the regulation.

The United States further claims §804(a) is analogous to Title VII and the ADEA because both prohibit conduct taken "because of" membership in a protected group. (SG Brief, p.12). This Court has made clear that the "because of" requirement merely requires the plaintiff to prove a causal relationship between the action and the protected class. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176-177 (2009); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239-240 (1989). The causation language does not support disparate impact liability.

Since HUD's interpretation is not a permissible interpretation of the statute, this Court need not apply *Chevron* deference. This Court should grant the Petition.

B. The Disparate Impact Regulations Do Not Purport to Interpret Any Statutory Provision.

HUD's regulations are not based on its interpretation of any particular statutory provision. Rather, HUD's regulations represent HUD's belief that the FHA as a whole *should* include disparate impact liability. Part 100 of Title 24 of the Code of Federal Regulations sets forth HUD's regulations interpreting the various parts of the FHA and is now made up of Subparts A through G. Subpart A sets forth general provisions relating to authority, scope, exemptions and definitions and does not purport to interpret any provision of the FHA. Subparts B through F each

purport to interpret a specific provision of the FHA and explicitly identify each statutory provision interpreted therein. *See* 24 CFR 100.50(a) (Subpart B); 24 CFR 100.110(a) (Subpart C); 24 CFR 100.200 (Subpart D); 24 CFR 100.300 (Subpart E); and 24 CFR 100.400(a) (Subpart F).

Unlike the other subparts, new Subpart G, which is the new disparate impact rule, does not identify any specific statutory provision which it is interpreting. 24 CFR 100.500. Instead, it creates a new basis for liability under the FHA without reference to any specific statutory provision. *Id.* It states, "[l]iability may be established under the Fair Housing Act based on a practice's discriminatory effect, as defined in paragraph (a) of this section, even if the practice was not motivated by a discriminatory intent." *Id.* Then the regulation proceeds to set forth standards for determining disparate impact liability.

Unlike the other Subparts, which clearly state the statutory provisions they interpret, Subpart G was HUD's attempt to expand the reach of the FHA to encompass liability not contained in the text of the FHA. HUD's new regulation codifies the judicial case law of the Circuit Courts in an effort to forestall Supreme Court review on this issue. This is not the proper function of rulemaking authority.

C. None of the FHA Statutory Exemptions Support a Conclusion That Disparate Impact Liability Must be in the FHA, Though Not Specifically Stated.

Contrary to the United States' assertions, three exemptions to the FHA do not presuppose disparate impact liability. Rather, the three exemptions each provide a defense to intentional discrimination claims.

1. Drug Dealer Exception.

While it is true that there is no direct prohibition on discriminating against persons convicted of a drug offense, it is also true that intent to discriminate can be shown by "indirect" evidence in a disparate treatment case. *Gallagher v. Magner*, 619 F.3d 823, 831 (8th Cir. 2010). Indirect evidence of discriminatory intent can be shown using the *McDonnell Douglas* burden-shifting test. *Ibid.* A plaintiff alleging disparate treatment "may also 'simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated' the challenged decision." *Budnick v. Town of Carefree*, 518 F.3d 1109, 1114 (9th Cir. 2008). Because the test for disparate treatment and the test for disparate impact claims are so similar, they are often confused. *Zuniga v. Kleberg Cnty. Hosp., Kingsville, Tex.*, 692 F.2d 986, 990, n.7 (5th Cir. 1982). *See also Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 933-934 (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).

In the Sixth Circuit, a prima facie case under the *McDonnell Douglas* burden-shifting test can be made out if the plaintiff shows: "he is a member of a protected class, that he applied to and was qualified to rent or purchase certain housing, that he was rejected, and that the housing remained available thereafter." *Graoch Associates #33, L.P. v. Louisville/ Jefferson Cnty. Metro Human Relations Comm'n*, 508 F.3d 366, 371 (6th Cir. 2007). This could easily be shown if a minority had applied to rent an apartment and was rejected, especially if the landlord did not have a written policy stating that tenants convicted of a drug offense would be rejected.

Under the *McDonnell Douglas* test, the burden would shift back to the defendant to prove a legitimate non-discriminatory reason for its actions. *Chauhan v. M. Alfieri Co., Inc.*, 897 F.2d 123, 127 (3d Cir. 1990). The drug dealer exception allows a landlord to simply point to the renter's drug conviction as an absolute defense to disparate treatment liability.

In addition, legislative history suggests that the exception was added to clarify that individuals convicted of a drug offense would not be protected under the handicapped provisions. *See* 134 Cong. Rec. H4673, H4674-4675 (daily ed., June 23, 1988) (discussing need for exemption even though FHA does not protect drug dealers).

2. Occupancy Limit Exception.

The exception relating to occupancy in §3607(b)(a) provides an exception to the handicap discrimination provision, not an exception to an implied disparate impact liability. Section 3604(f)(1)(B) prohibits discrimination or making unavailable a dwelling due to a handicap. More particularly, §3604(f)(2)(B) defines "[t]o discriminate" to include "refusal to make accommodations in rules, policies, practices or services, when such accommodations may be necessary to afford such persons equal opportunity to use and enjoy a dwelling." An ordinance, regulation or statute setting forth an occupancy limit could be considered a rule or policy for which an accommodation is required under §3604(f)(2)(B).

If an occupancy limit made it impossible to open a group home in a particular location, a plaintiff could claim that the occupancy limit made housing unavailable to them. Without the occupancy limit exception, the plaintiff could claim that the government's refusal to relax the occupancy limit is a refusal to make reasonable accommodations necessary to afford handicapped residents an equal opportunity to reside in a dwelling. The occupancy limit exception ensures that the failure to relax a local, State, or Federal restriction regarding the maximum number of occupants permitted to occupy a dwelling was not considered discrimination under §3604(f)(2)(B).

3. Appraisal Exception.

The FHA authorizes HUD to "make rules . . . to carry out this chapter." 42 U.S.C. §3614a. HUD had used this authority to enact regulations clarifying what constitutes prohibited practices under §3605. 24 CFR 100.110(a). This includes regulations regarding unlawful practices in appraising property. 24 CFR 100.135. Because of this broad authority to define discriminatory practices, the statutory inclusion of the appraisal exception ensures that professional property appraisal methodology would not subject appraisers to FHA liability.

Intentional discrimination has been found based on a "proxy" theory. Under the "proxy" theory, if a plaintiff can show that a facially neutral classification was used as a proxy for a protected group, it is considered equivalent to intentional discrimination. The rationale behind the "proxy" theory is that "a regulation or policy cannot 'use a technically neutral classification as a proxy to evade the prohibition of intentional discrimination.'" *Cmty. Servs., Inc. v. Wind Gap Mun. Auth.*, 421 F.3d 170, 177-178 (3d Cir. 2005). It has been recognized that the distinction between disparate impact and disparate treatment "becomes fuzzy" in these proxy situations. *McWright v. Alexander*, 982 F.2d 222, 228 (7th Cir. 1992).

Without the appraiser exception, certain valuation factors (location, for example) in an appraisal can be raised as violations because the factor could be viewed as a proxy for intentional discrimination

against a protected group. Similarly, a particular manner in which comparable sales are selected or evaluated could be viewed as a proxy for intentional discrimination against a protected group. The appraisal exception statutorily allows an appraiser independence in undertaking appraisals, so long as race, color, religion, national origin, sex, handicap, or familial status are not considered.

II. HUD's Regulations Provide Vague, Inadequate Standards for Evaluating Disparate Impact Claims.

The HUD regulation does not provide a "uniform analytical framework" for evaluating disparate impact claims. (SG Brief, p.16). All the HUD regulations do is establish a generic burden-shifting framework for the Courts to apply. They do not establish any evidentiary standard for evaluating statistical evidence of disparate impact.

The United States suggests the Township is seeking a rigid mathematical formula for evaluating statistical evidence of disparate impact. (SG Brief, pp.19-20). What the Township is seeking is for this Court to set appropriate evidentiary guidelines for evaluating statistical evidence of disparate impact, as it did for Title VII cases.

In *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977 (1988), this Court expanded the reach of disparate impact claims to hiring practices using subjective

selection criteria. In doing so, the Court acknowledged,

> [T]he inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures. . . . It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces.

Id. at 992. Because of this concern, the Supreme Court set forth "evidentiary standards" for the proper evaluation of statistical evidence. *Id.* at 993. First, a plaintiff is required to identify the specific practice being challenged. *Id.* at 994. Second, a plaintiff must offer statistical evidence "sufficiently substantial" to raise an inference of causation. *Id.* at 994-995. Third, a plaintiff must show that hiring or promotion had "a racial pattern significantly different from that of the pool of applicants." *Id.* at 995.

The Court also provided guidelines on how a defendant could challenge statistical evidence. It suggested that statistics could be challenged based on (1) "small or incomplete data sets and inadequate statistical techniques"; (2) the statistics were based on an applicant pool lacking minimal job qualifications; and (3) the statistics fail to adequately show causation. *Id.* at 996-997.

Finally, the Court also set forth guidelines on evaluating the suitability of the less discriminatory selection devices. It noted that "[f]actors such as the cost or other burdens" are relevant in determining whether an alternative selection device is "equally as effective as the challenged practice" in meeting the legitimate business goals. *Id.* at 998.

The United States claims it would be "impossible" to set forth guidelines for evaluating statistical evidence of disparate impact claims. (SG Brief, p.20). Yet, some Circuits have done so. *See Hallmark Developers, Inc. v. Fulton Cnty., Ga.*, 466 F.3d 1276, 1286 (11th Cir. 2006).

The HUD regulations do not require any showing of causation even though the FHA contains the same "because of" language found in Title VII. (*See* pp.4-5, *supra*). The HUD regulations do not address the scope of the "impact": does the impact have to be one that promotes segregation, can the impact be as broad as under Title VII or narrower as under the ADEA or is it sufficient that the impact is simply to make housing unavailable for any time under any condition to a single person. The HUD regulations do not provide any standard for evaluating the reliability of statistical evidence: do statistics have to reflect an appropriate pool of persons, or show some substantial or minimal measure of causative effect. The United States argues there is no need for any statistical standards because every lower court, and the enforcing agency, will adopt a standard applicable to each case.

In *Watson*, adequate standards were needed to avoid a Hobson's choice where an employer had no choice but to utilize prophylactic measures in violation of Title VII. Inadequate standards in the housing context place government entities in a no-win situation when dealing with blighted minority neighborhoods: a government can either leave an urban ghetto undisturbed (violating the policy of perpetuating urban ghettos) or it can take action (running the risk that a resident dissatisfied with the action will be guaranteed a *prima facie* disparate impact case). Adequate standards are necessary to enable an actor to avoid violating the law.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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