No. 11-1507

In the Supreme Court of the United States

TOWNSHIP OF MOUNT HOLLY, NEW JERSEY, ET AL., PETITIONERS

v.

MT. HOLLY GARDENS CITIZENS IN ACTION, INC., ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether disparate-impact claims are cognizable under Section 804(a) of the Fair Housing Act (FHA), 42 U.S.C. 3604(a).

2. Whether courts should analyze FHA disparate-impact claims under a burden-shifting framework.

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This brief is submitted in response to this Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. Section 804(a) of the Fair Housing Act (FHA or Act), 42 U.S.C. 3604(a), makes it unlawful to, *inter alia*, "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." The FHA grants the Department of Housing and Urban Development (HUD) broad authority to promulgate rules interpreting and implementing the Act, 42 U.S.C. 3614a, as well as to conduct formal adjudication of FHA complaints, 42 U.S.C. 3610 and 3612. In exercising its adjudicatory authority under the statute,

HUD has long interpreted Section 804(a) to encompass disparate-impact claims. See, *e.g.*, *HUD* v. *Mountain Side Mobile Estates P'ship*, No. 08-92-0010-1, 1993 WL 307069, at *5 (HUD ALJ July 19, 1993), aff'd in relevant part, 56 F.3d 1243, 1251 (10th Cir. 1995). HUD also recently issued a regulation reinforcing its longstanding recognition of disparate-impact liability under the FHA and prescribing standards for adjudicating such claims. *Implementation of the Fair Housing Act's Discriminatory Effects Standard*, 78 Fed. Reg. 11,460, 11,482 (Feb. 15, 2013). In addition, the Department of Justice has authority to enforce the FHA, see 42 U.S.C. 3612(o), 3614(a)-(d), and has brought disparate-impact claims in its enforcement actions for decades. See, *e.g.*, *United States* v. *City of Black Jack*, 508 F.2d 1179, 1186 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975).

2. a. Mount Holly Gardens (the Gardens) is a 30-acre neighborhood of roughly 330 homes, located in the Township of Mount Holly, in Burlington County, New Jersey. Pet. App. 5a. Nearly all Gardens residents earn less than 80% of the area's median income and most earn much less. *Ibid.* At the time of the 2000 Census, approximately 20% of Gardens residents were white, 46% were African-American, and 29% were Hispanic. *Id.* at 6a. Overall, the Township of Mount Holly is 60% white, 23% African-American, and 13% Hispanic. *Id.* at 78a-79a

In 2000, petitioners (the township, township council, and township officials) determined that the Gardens should be designated as an "area in need of redevelopment" under New Jersey law. Pet. App. 7a-8a. Petitioners implemented an evolving series of redevelopment plans, culminating in a plan to buy all the homes in the Gardens, demolish the homes, and rebuild the neigh-

borhood. *Id.* at 8a-10a. Many Gardens residents objected to the redevelopment plan, complaining that they would be unable to afford to purchase a home in the area after redevelopment and that they would be unable to afford to live elsewhere in the township. *Id.* at 9a, 11a. Although petitioners offered to pay qualified homeowners in the Gardens between $32,000 and $49,000 for their homes, plus relocation assistance of $15,000, and $20,000 of no-interest loan assistance toward the purchase of a new home, the estimated cost of a new home in the Gardens after redevelopment was between $200,000 and $275,000. *Id.* at 10a. Renters in the area were also unlikely to be able to afford rents in the Gardens after redevelopment. *Ibid.* Most Gardens residents would therefore be unable to afford to live in the Gardens after redevelopment, including in the homes designated as affordable housing. *Id.* at 9a.

b. Respondents are Gardens residents, former residents, and a residents' association. Pet. App. 4a. In 2008, respondents filed suit in federal court alleging, *inter alia*, violations of Section 804(a) of the FHA, including disparate-impact claims, and seeking declaratory and injunctive relief. *Id.* at 12a. During the litigation, respondents submitted the report of a statistical and demographic expert, which concluded that the redevelopment plan would adversely affect 22.54% of the African-American households and 32.31% of the Hispanic households, but only 2.73% of the white households in the Township of Mount Holly. *Id.* at 15a-16a, 43a. The expert's report further concluded that the new homes in the redeveloped Gardens area would be affordable for 79% of Burlington County's white households, but for only 21% of African-American and Hispanic households in the County. *Id.* at 16a, 45a n.9. The expert further

concluded that most displaced Gardens residents would be unable to afford to relocate elsewhere in the Township. *Id.* at 18a.

c. The district court converted petitioners' motion to dismiss into a motion for summary judgment and granted it. Pet. App. 33a-61a. In relevant part, the court concluded that respondents had failed to establish a prima facie case of disparate-impact discrimination under Section 804(a) of the FHA. *Id.* at 41a-47a. The court rejected respondents' statistical analysis in part because it did not demonstrate that the redeveloped homes would be out of reach for most or all minority households in the County, although it acknowledged respondents' evidence that the disproportionately minority households in the Gardens before redevelopment would be unable to afford to stay in the area. *Id.* at 43a-46a & n.9. The court also faulted respondents for failing to demonstrate that the redevelopment plan would affect minority households in the Gardens in a different way than it would affect white households in the Gardens. *Id.* at 45a.

The court concluded in the alternative that, even if respondents had established a prima facie disparate-impact case, petitioners met their burden of showing a legitimate interest in pursuing the redevelopment plan. Pet. App. 43a & n.6. And, the court determined, respondents had not rebutted that legitimate interest by identifying a less discriminatory alternative available to petitioners. *Id.* at 47a-51a.

d. The court of appeals reversed the district court's grant of summary judgment and remanded for further factual developments on respondents' claims under Section 804(a) of the FHA. Pet. App. 1a-29a. The court concluded that the district court erred in rejecting the

statistical data respondents submitted in support of their disparate-impact claim. *Id.* at 15a-18a. The court of appeals held that that evidence, construed in the light most favorable to respondents, established a prima facie case of disparate impact on the basis of race. *Id.* at 15a-17a. The court also noted that the district court had erred in conflating the concepts of disparate impact and disparate treatment when it reasoned that each white Gardens resident was treated the same as each African-American or Hispanic Gardens resident. *Id.* at 19a. The court of appeals thus concluded that respondents had established a prima facie case of disparate-impact discrimination under the FHA. *Id.* at 23a-24a.

The court of appeals further noted that "everyone agrees that alleviating blight is a legitimate interest." Pet. App. 24a. The court found, however, a disputed issue of fact as to whether petitioners had alternative means of addressing blight that would be less discriminatory than the redevelopment plan. *Id.* at 25a-26a. The court of appeals thus remanded for further factual development to be followed by renewed motions for summary judgment. *Id.* at 28a-29a.

DISCUSSION

Petitioners ask this Court to decide whether disparate-impact claims are available at all under Section 804(a) of the Fair Housing Act, 42 U.S.C. 3604(a), and what analysis courts should use to decide such claims if they are cognizable. Review of those questions is unwarranted at this time. This Court granted a petition for a writ of certiorari presenting the same questions in *Magner* v. *Gallagher*, No. 10-1032, cert. granted, 132 S. Ct. 548 (2011), cert. dismissed, 132 S. Ct. 1306 (2012). In the intervening year, however, the Department of Housing and Urban Development has promulgated a

final rule, after notice and comment, that directly addresses those questions. No court of appeals has considered the final rule, and it would be appropriate for this Court to allow courts to implement HUD's recent guidance. Even if the Court were inclined to address these questions at this time, this case is not an appropriate vehicle for doing so. This case comes to the Court in an interlocutory posture and neither of the questions presented was pressed below.

A. The Question Whether Disparate-Impact Claims Are Available Under Section 804(a) Of The FHA Does Not Warrant Review

There is no conflict among the courts of appeals on the cognizability of disparate-impact claims under Section 804(a) of the FHA. To the contrary, every court of appeals to consider the issue (11 in all) has held that Section 804(a) of the FHA, 42 U.S.C. 3604(a), encompasses disparate-impact claims. See pp. 15-16, *infra*. The federal agency with the authority for administering and principal responsibility for enforcing the FHA has also consistently and authoritatively interpreted it to encompass disparate-impact claims, most recently in a rule adopted after notice and comment. The agency's interpretation is a reasonable construction of the statute's text, structure, and history, and no court of appeals has yet had occasion to consider the recently promulgated final rule. In those circumstances, review is unwarranted.

1. Section 804(a) makes it unlawful:

> To 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). The agency charged with responsibility for interpreting and principal responsibility for enforcing the FHA has long interpreted Section 804(a) to support disparate-impact liability. HUD recently reaffirmed that interpretation in a final rule adopted after notice and comment. Insofar as the text of Section 804(a) is ambiguous as to whether it authorizes disparate-impact claims, HUD's interpretation should be dispositive. See *Meyer* v. *Holley*, 537 U.S. 280, 287-289 (2003).

a. The FHA grants HUD broad authority to promulgate rules implementing and construing the statute. 42 U.S.C. 3614a. HUD recently issued a final rule, following a formal notice-and-comment process, reaffirming that Section 804(a) of the FHA encompasses disparate-impact claims. 78 Fed. Reg. at 11,481-11,482. The rule amends Part 100 of Title 24 of the Code of Federal Regulations to provide that: "Liability may be established under the Fair Housing Act based on a practice's discriminatory effect * * * even if the practice was not motivated by a discriminatory intent." 78 Fed. Reg. at 11,482 (to be codified at 24 C.F.R. 100.500). The regulation further states that:

> A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.

Ibid.

The preamble to the rule explains that HUD's longstanding view that Section 804(a) encompasses disparate-impact claims is grounded in its interpretation of the statutory language "otherwise make unavailable or deny"—which, as discussed herein (p. 10-12, *infra*), focuses on the *effect* of a challenged action, not the motivation of the relevant actor. 78 Fed. Reg. at 11,466. HUD further relied on the statutory exemptions discussed herein (p. 12-13, *infra*), as well as the Act's legislative history, in interpreting the Act to encompass disparate-impact claims. 78 Fed. Reg. 11,466.

b. HUD's recent rule reaffirmed its longstanding interpretation of the FHA, as embodied in formal adjudications of FHA complaints. See 42 U.S.C. 3610 and 3612 (granting HUD broad authority to conduct formal adjudication of FHA complaints). HUD, through formal adjudications that become final agency decisions after an opportunity for all parties to petition the Secretary for review, see 42 U.S.C. 3612(g) and (h); 24 C.F.R. 180.675, has interpreted the FHA—including Section 804(a)—to encompass disparate-impact claims in every adjudication to address the issue.[1] In addition, the Secretary, in a formal adjudication raising the question whether a disparate-impact claim is cognizable in an action under Section 804(a), issued a decision concluding that liability could be premised on a disparate-impact showing and that disparate-impact liability had been

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[1] See, *e.g.*, *HUD* v. *Twinbrook Vill. Apartments*, No. 02-00-0256-8, 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).

established in the case. *HUD* v. *Mountain Side Mobile Estates P'ship*, No. 08-92-0010-1, 1993 WL 307069, at *5 (HUD ALJ July 19, 1993), aff'd in relevant part, 56 F.3d 1243 (10th Cir. 1995).

When, as here, Congress expressly affords an agency authority to issue formal adjudications carrying the force of law, see 42 U.S.C. 3612, the agency's reasonable interpretation of the statute in such adjudications is entitled to the full measure of deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). See *United States* v. *Mead Corp.*, 533 U.S. 218, 230 & n.12 (2001) (explaining that *Chevron* deference is warranted for "the fruits of notice-and-comment rulemaking or formal adjudication," and listing "adjudication cases"); see also, *e.g.*, *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999). That understanding is sufficient to answer the question whether disparate-impact claims are available under Section 804(a). In exercising its formal adjudication authority, HUD—including the Secretary himself—has consistently and reasonably determined that the FHA, and Section 804(a) in particular, encompasses disparate-impact liability. That interpretation is entitled to deference. See *Smith* v. *City of Jackson*, 544 U.S. 228, 243-247 (2005) (Scalia, J., concurring in part and concurring in the judgment) (deferring to EEOC's interpretation that disparate-impact claims are cognizable under Section 4(a)(2) of the ADEA).

2. HUD's interpretation of the language of the FHA—based on its expertise and embodied in a formal rulemaking and in formal adjudications—is reasonable. Because the FHA "has not directly addressed the precise question" of whether it encompasses disparate-impact liability, HUD's interpretation of the statutory language is entitled to deference. *Chevron*, 467 U.S. at

843; *Mead*, 533 U.S. at 227 (agency's gap-filling regulation is "binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute").

a. The FHA aims "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. 3601; *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 380 (1982) (recognizing Congress's "broad remedial intent" in passing the Act).

Section 804(a) makes it unlawful, *inter alia*, to "refuse to sell or rent * * * or otherwise to make unavailable or deny, a dwelling to any person because of" a prohibited characteristic including race or sex. 42 U.S.C. 3604(a). That language is best read to encompass disparate-impact claims. By banning actions that "otherwise make unavailable or deny" housing on one of the specified bases, Section 804(a) focuses on the challenged action's result—the unavailability or denial of a dwelling—rather than on the actor's intent. That prohibition on outcomes is most naturally read to support a disparate-impact claim.

This Court has reached that conclusion when construing other anti-discrimination statutes with a similar focus on an action's discriminatory consequences, rather than the actor's motive. In particular, both Section 703(a)(2) of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. 2000e-2(a)(2), and Section 4(a)(2) of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 623(a)(2), make it unlawful for an employer "to limit, segregate, or classify his employees" in any way that would "deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of" a specified character-

istic (race, color, religion, sex, or national origin for Title VII; age for the ADEA).

In *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971), this Court held that Section 703(a)(2) of Title VII prohibits employers from taking actions that have the effect of discriminating on the basis of race, regardless of whether the actions are motivated by discriminatory intent. The Court explained that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Id.* at 432.[2]

The same is true with respect to the parallel terms of Section 4(a)(2) of the ADEA, which this Court, in *Smith*, *supra*, likewise held encompass disparate-impact claims. The Court explained that, in prohibiting actions that "deprive any individual of employment opportunities or otherwise adversely affect his [employment] status * * * because of" his age, 29 U.S.C. 623(a)(2), "the text" of the statute—like Section 703(a)(2) of Title VII—"focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer." *Smith*, 544 U.S. at 235-236 (plurality); see *id.* at 243 (Scalia, J., concurring in part and concurring in the judgment) ("agree[ing] with all of the Court's reasoning"). That focus, the Court explained, "strongly suggests that a disparate-impact theory should be cognizable." *Id.* at 236 (plurality).

There is no reason to reach a different conclusion with regard to Section 804(a) of the FHA. Petitioners emphasize (Pet. 15-16) that the text of Section 804(a) does not include the word "affect," unlike Title VII and

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[2] In 1991 Congress amended Title VII to expressly recognize "disparate impact cases," 42 U.S.C. 2000e-2(k), but Title VII contained no such provision when this Court in *Griggs* construed it to encompass disparate-impact liability.

the ADEA. But the text of Section 804(a) is analogous in that it "focuses on the *effects* of the [challenged] action * * * rather than the motivation for the action." *Smith*, 544 U.S. at 236 (plurality). Whereas Title VII and the ADEA prohibit actions that "deprive any individual of employment opportunities or otherwise adversely affect" his status as an employee, "because of," *inter alia*, race or age, the FHA analogously prohibits actions that "refuse to sell or rent" or "otherwise make unavailable or deny" housing to an individual "because of," *inter alia*, race. 42 U.S.C. 3604(a). Especially when read against the backdrop of Title VII, which was enacted before the FHA, the text of Section 804(a) of the FHA is best read to include a prohibition on actions having the effect of disproportionately denying housing based on a protected characteristic, without regard to the actor's motivation.

b. The existence of disparate-impact liability under Section 804(a) of the FHA is reinforced by the Act's structure, in that it contains three exemptions from liability that presuppose the availability of a disparate-impact claim.

First, Congress specified that "[n]othing in [the FHA] prohibits conduct against a person because such person has been convicted" of a drug offense. 42 U.S.C. 3607(b)(4). Because the Act contains no direct prohibition on discriminating against drug offenders, the exemption only makes sense if denying housing because of drug convictions would otherwise support a disparate-impact claim based on a protected characteristic.

Second, Congress specified that "[n]othing in [the FHA] limits the applicability of any reasonable * * * restrictions regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S.C.

3607(b)(1). Because the Act contains no direct bar against discrimination based on number of occupants, Congress must have included the exemption to bar claims that occupancy limits have a disparate impact based on a protected characteristic. See *City of Edmonds* v. *Oxford House, Inc.*, 514 U.S. 725, 735 n.9 (1995).

Finally, the FHA includes a targeted exemption specifying that "[n]othing in [the Act] prohibits" a real estate appraiser from "tak[ing] into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status." 42 U.S.C. 3605(c). There would be no reason to exempt appraisers' actions based on factors *other than* the protected characteristics unless the statute would otherwise bar such actions on a disparate-impact theory. See *Meacham* v. *Knolls Atomic Power Lab.*, 554 U.S. 84, 96 (2008) ("action based on a 'factor other than age' is the very premise for disparate-impact liability"). Those statutory exemptions thus strongly support the conclusion that Section 804(a) of the Act encompasses disparate-impact claims.

c. The FHA's history also supports the existence of disparate-impact liability under Section 804(a). Between the enactment of the FHA in 1968 and its substantial amendment in 1988, see Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619, all nine courts of appeals to consider the issue concluded that the Act authorizes disparate-impact claims. See pp. 15-16, *infra*.

Against that background, Congress substantially amended the Act in 1988, including by adding new provisions barring discrimination based on familial status and disability, establishing the previously discussed statutory exemptions that presume the availability of

disparate-impact actions, and enhancing HUD's authority to interpret and implement the Act. See §§ 1-15, 102 Stat. 1619-1636. Congress was aware that the FHA, including Section 804(a), had uniformly been interpreted to encompass disparate-impact claims.[3] But Congress chose, when amending the Act—including an amendment of Section 804(a) to add familial status as a protected characteristic—to leave that provision's operative language unchanged. See *Forest Grove Sch. Dist.* v. *T.A.*, 557 U.S. 230, 244 n.11 (2009) ("When Congress amended [the Act] without altering the text of [the relevant provision], it implicitly adopted [this Court's] construction" of that provision.); cf. *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) (noting that "every court to consider the issue" had agreed on the statute's interpretation, and "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change"). Notably, moreover, Congress specifically rejected an amendment that would have required proof of intentional discrimination in challenges to zoning decisions. See H.R. Rep. No. 711, 100th Cong., 2d Sess. 89-91 (1988) (dissenting views of Rep. Swindall).

Petitioners argue that Congress's failure to amend the FHA in 1991 when it amended Title VII to explicitly

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[3] See, *e.g.*, H.R. Rep. No. 711, 100th Cong., 2d Sess. 21 (1988) (citing courts of appeals decisions in discussing a policy that could have a "discriminatory effect" on minority households); see also 134 Cong. Rec. 23,711 (1988) (noting unanimity of courts of appeals as to the disparate-impact test); *Fair Housing Amendments Act of 1987: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. 529-557 (1987) (Statement of Prof. Robert Schwemm, Univ. of Ky. Law Sch.) (extensively describing prevailing view in the courts of appeals that the FHA prohibited disparate-impact discrimination).

include disparate-impact claims "demonstrates Congress's intent to exclude such claims under the FHA." Pet. 17. That is not so. Congress's 1991 amendment of an entirely separate statute (Title VII) has no bearing on the then-settled interpretation of the FHA as encompassing disparate-impact claims. This Court's decision in *Gross* v. *FBL Financial Services, Inc.*, 557 U.S. 167 (2009), is not to the contrary. See Pet. 17-18. The Court in *Gross* held that, when interpreting the ADEA, it could not apply the burden-shifting framework Congress added to Title VII in 1991. 557 U.S. at 174. Critically, the Court noted that "Congress neglected to add such a [burden-shifting] provision to the ADEA when it amended Title VII" in 1991, "even though it *contemporaneously amended* the ADEA in several ways." *Ibid.* (emphasis added). The Court drew a negative inference from Congress's failure to adopt the same amendment in the ADEA, noting that "'negative implications raised by disparate provisions are strongest' when the provisions were 'considered simultaneously when the language raising the implication was inserted.'" *Id.* at 175 (quoting *Lindh* v. *Murphy*, 521 U.S. 320, 330 (1997)). No such negative implication is appropriate here because Congress did not amend the FHA in 1991.

3. The reasonableness of the authoritative interpretation of the agency charged with interpreting and enforcing the FHA is reinforced by the unanimity of the courts of appeals' views on the availability of disparate-impact claims under the statute. Eleven courts of appeals—every court of appeals to consider the question—have held that the FHA authorizes disparate-impact suits. See, *e.g.*, *Langlois* v. *Abington Hous. Auth.*, 207 F.3d 43, 49 (1st Cir. 2000); *Huntington Branch, NAACP* v. *Town of Huntington*, 844 F.2d 926, 935-936 (2d Cir.),

aff'd, 488 U.S. 15 (1988); *Resident Advisory Bd.* v. *Rizzo*, 564 F.2d 126, 146 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978); *Smith* v. *Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982); *Hanson* v. *Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Arthur* v. *City of Toledo*, 782 F.2d 565, 574-575 (6th Cir. 1986); *Metropolitan Hous. Dev. Corp.* v. *Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978); *United States* v. *City of Black Jack*, 508 F.2d 1179, 1184-1185 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975); *Halet* v. *Wend Inv. Co.*, 672 F.2d 1305, 1311 (9th Cir. 1982); *Mountain Side Mobile Estates P'ship* v. *HUD*, 56 F.3d 1243, 1251 (10th Cir. 1995); *United States* v. *Marengo Cnty. Comm'n*, 731 F.2d 1546, 1559 n.20 (11th Cir.), cert. denied, 469 U.S. 976 (1984).

In light of the uniformity of the decisions of the courts of appeals, and in light of HUD's subsequent—and recent—promulgation of a final rule authoritatively establishing the availability of disparate-impact claims under Section 804(a) of the FHA, there is no occasion at this time for this Court to grant review of the first question presented by the petition.

B. The Question Of The Precise Standard Courts Should Employ To Evaluate Disparate-Impact Claims Under The FHA Does Not Warrant Review

Petitioners also urge the Court to grant their petition for a writ of certiorari to settle a disagreement among the courts of appeals about how to analyze disparate-impact claims under the FHA. Pet. 22-23. Even if review of that question were otherwise warranted, there is no basis for granting review at this time in light of HUD's recent rule, which establishes a uniform analytical framework that presumably will be employed na-

tionwide. See 78 Fed. Reg. at 11,474 (noting that the rule "will apply to pending and future cases").

1. Petitioners are correct (see Pet. 22-33) that courts of appeals have employed slightly different analytical frameworks in the several decades during which they have considered disparate-impact claims under the FHA. A majority of courts used a burden-shifting framework that is similar to that used in Title VII cases.[4]

HUD's recently promulgated rule adopts such a framework in establishing the method for proving a disparate-impact claim. Under the rule, a plaintiff has the burden of "proving that a challenged practice caused or predictably will cause a discriminatory effect." 78 Fed. Reg. at 11,482 (to be codified at 24 C.F.R. 100.500(c)(1)). If the plaintiff satisfies that burden, the defendant then has the burden of showing "that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests." 78 Fed. Reg. at 11,482 (to be codified at 24 C.F.R. 100.500(c)(2)). If the defendant succeeds, the plaintiff must demonstrate that "substantial, legitimate, nondis-

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[4] For examples of federal courts that apply a burden-shifting analysis under the Fair Housing Act, see *Langlois*, 207 F.3d at 49-50 (1st Cir.); *Huntington Branch, NAACP*, 844 F.2d at 939 (2d Cir.); *Lapid-Laurel, L.L.C.* v. *Zoning Bd. of Adjustment*, 284 F.3d 442, 466-467 (3d Cir. 2002); *Graoch Assocs. # 33, L.P.* v. *Louisville/Jefferson Cnty. Metro Human Relations Comm'n*, 508 F.3d 366, 374 (6th Cir. 2007); *City of Black Jack*, 508 F.2d at 1185 (8th Cir.); *Ojo* v. *Farmers Grp., Inc.*, 600 F.3d 1205, 1207 (9th Cir. 2010) (en banc) (per curiam); *Mountain Side Mobile Estates P'ship*, 56 F.3d at 1254 (10th Cir.). The Fourth Circuit has employed a balancing test in challenges to municipal actions, see *Town of Clarkton*, 682 F.2d at 1065, but has found burden-shifting appropriate in cases against private defendants, see *Betsey* v. *Turtle Creek Assocs.*, 736 F.2d 983, 988-989 (1984).

criminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect." 78 Fed. Reg. at 11,482 (to be codified at 24 C.F.R. 100.500(c)(3)). HUD's decision to apply a burden-shifting analysis to disparate-impact claims appropriately "fill[s] [a] gap left" in the statutory scheme, and thus is entitled to deference under *Chevron*, 467 U.S. at 843.

The rule's burden-shifting framework sensibly allocates the burdens of proof. Plaintiffs are generally best situated to demonstrate the effects of a challenged practice. Defendants are similarly best situated to offer a substantial, legitimate, and nondiscriminatory reason for engaging in the challenged practice. And it is fair to assign to plaintiffs the burden of demonstrating the existence of alternative means that would have a less discriminatory effect on them and that would achieve the defendant's substantial, legitimate, and nondiscriminatory interests. "Under this formulation, neither party is saddled with having to prove a negative (the nonexistence of bona fide reasons or the absence of less discriminatory alternatives), and the plaintiffs do not have to guess at and eliminate the [defendant's] reasons for proceeding in the manner it chose." *Hispanics United* v. *Village of Addison*, 988 F. Supp. 1130, 1162 (N.D. Ill. 1997). Therefore, HUD's framework is a reasonable interpretation of the FHA.

2. Petitioners argue in their reply brief (at 9-12) that courts of appeals will likely remain divided about how to interpret FHA disparate-impact claims because HUD's rule does not address the role that statistics play in establishing a plaintiff's prima facie case of disparate impact. Petitioners' contention does not provide a basis for certiorari review.

As petitioners acknowledge (Reply Br. 9), courts of appeals agree that a disparate-impact claim is generally established with statistical evidence. See *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988) ("The evidence in these 'disparate impact' cases usually focuses on statistical disparities."). This Court has made clear in the employment context that a plaintiff may establish a prima facie case of disparate-impact discrimination by relying on statistics if the plaintiff "isolat[es] and identif[ies] the specific [challenged] practices that are allegedly responsible for any observed statistical disparities." *Smith*, 544 U.S. at 241 (emphasis omitted) (quoting *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642, 656 (1989)). In the preamble to the final rule, HUD explains that disparate-impact claims under the FHA should be treated in similar fashion, *i.e.*, plaintiffs must "prov[e] that a challenged practice causes a discriminatory effect." 78 Fed. Reg. at 11,469.[5]

Petitioners argue, however, that different courts of appeals have required different types of statistical showings in different cases. That is hardly surprising, as different factual scenarios necessarily require different types of evidence. In a Title VII suit challenging a hiring criterion, for example, a plaintiff must focus on the statistical impact of the challenged criterion on the pool of potential applicants. In a Title VII suit challenging a promotion criterion, by contrast, statistical evidence should focus on the pool of existing employees potentially eligible for promotion. Those differences do not re-

[5] The rule also acknowledges that, as in the employment context, it may be appropriate in some cases to challenge a decision-making process as a whole rather than one aspect of the process if it is not possible to segregate different stages of the process. 78 Fed. Reg. at 11,469; see 42 U.S.C. 2000e-2(k)(1)(B)(i).

flect conflicts in the manner of analyzing disparate-impact claims; they merely reflect case-specific applications of universal principles.[6] The same is true in the fair housing context, as the preamble to HUD's rule recognizes. See 78 Fed. Reg. at 11,468 ("Whether a particular practice results in a discriminatory effect is a fact-specific inquiry. Given the numerous and varied practices and wide variety of private and governmental entities covered by the Act, it would be impossible to specify in the rule the showing that would be required to demonstrate a discriminatory effect in each of these contexts."). If a disagreement among the courts of appeals about how a plaintiff may use statistics to establish a prima facie case under HUD's rule were to develop in the future, this Court could consider it at a later time.

Petitioners are also mistaken in arguing (Pet. 33-36) that recognition of disparate-impact claims under the FHA in this context "conflicts with one of the goals of the FHA because it impedes [petitioners'] ability to replace a minority predominated ghetto with an integrated mixed race, mixed income housing project." Pet. 33. The court of appeals did not hold in this case that respondents will succeed on their FHA disparate-impact

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[6] Petitioners overstate any disagreement that does exist, erroneously contending that the Third Circuit "has no standard for evaluating statistics, simply requiring 'proof of disproportionate impact, measured in a plausible way.'" Reply Br. 10-11 (quoting Pet. App. 15a). The Third Circuit has made clear in the Title VII context that a "*prima facie* showing" of disparate impact "requires the plaintiff to prove a significant statistical disparity and to 'demonstrate that the disparity [he] complain[s] of is the result of one or more of the employment practices that [he is] attacking.'" *NAACP* v. *North Hudson Reg'l Fire & Rescue*, 665 F.3d 464, 476 (2011) (quoting *Newark Branch, NAACP* v. *City of Bayonne,* 134 F.3d 113, 121 (3d Cir. 1998)) (brackets in original), cert. denied, 132 S. Ct. 2749 (2012).

claim. The court held only that respondents had established a prima facie case of disparate impact and that petitioners had proffered a legitimate nondiscriminatory interest behind their redevelopment program. Pet. App. 15a-24a. On remand, the district court will presumably apply HUD's new rule in determining whether respondents can carry their burden to demonstrate that a less discriminatory alternative could serve petitioners' substantial, legitimate, and nondiscriminatory interests. See 78 Fed. Reg. at 11,482 (to be codified at 24 C.F.R. 100.500(c)(3)). Given the lack of factual development in this case, it is impossible to know now whether petitioners will be able to pursue their redevelopment plan.

C. Even If The Court Were Inclined To Decide The Questions Presented At This Time, This Is Not An Appropriate Vehicle

For the reasons discussed, the questions presented do not merit this Court's review at this time. Even if the Court were inclined to consider the issues now, in spite of the unanimity of the courts of appeals and HUD's authoritative interpretations of the FHA, this case would not afford an appropriate vehicle in which to do so.

First, this case comes to the Court in an interlocutory posture. The district court converted petitioners' motion to dismiss into a summary judgment motion. Pet. App. 34a-35a. No party has yet prevailed on petitioners' claims or defenses; the court of appeals remanded the case for further summary-judgment proceedings. The outcome of those proceedings may clarify the legal questions petitioners would have this Court review and may obviate the need for any review at all. And if petitioners do not prevail on remand, they may seek this Court's review at that time. See Eugene Gressman et al., *Su-*

preme Court Practice 249 (9th ed. 2007) ("It is often most efficient for the Supreme Court to await a final judgment and a petition for certiorari that presents all issues at a single time rather than reviewing issues on a piecemeal basis.").

In addition, as petitioners acknowledge (Pet. 37), they did not raise either of the questions presented in the district court or the court of appeals. Petitioners argue (Pet. 37-38) that their failure to raise the issues below is of no moment because doing so would have been futile in light of the Third Circuit's previous holdings that disparate-impact claims are available under the FHA. But petitioners had an opportunity to raise both questions presented after this Court granted a petition for a writ of certiorari in *Magner* v. *Gallagher*, *supra*, which presented the same questions. Although petitioners' rehearing petition was pending at that time, petitioners filed two supplements to their petition, neither of which argued that the FHA does not encompass disparate-impact claims or that, if such claims are cognizable, they should be analyzed under a particular framework.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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