No. 13-1371

IN THE

Supreme Court of the United States

TEXAS DEPARTMENT OF HOUSING
AND COMMUNITY AFFAIRS, *et al.*,

Petitioners,

v.

THE INCLUSIVE COMMUNITIES PROJECT, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE AMERICAN FINANCIAL SERVICES ASSOCIATION, THE CONSUMER MORTGAGE COALITION, THE INDEPENDENT COMMUNITY BANKERS OF AMERICA®, AND THE MORTGAGE BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The American Financial Services Association ("AFSA"), Consumer Mortgage Coalition ("CMC"), Independent Community Bankers of America® ("ICBA"), and Mortgage Bankers Association ("MBA") (collectively, "*amici*") respectfully submit this brief as *amici curiae* in support of petitioners.

- 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.

- 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, a national trade association, is the nation's voice for more than 6,500 community banks

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 37.3(a), counsel for the parties gave their consent to the filing of the brief, writings from whom expressing their consent have been filed with the Clerk of the Court.

of all sizes and charter types. ICBA member community banks seek to improve cities and towns by using local dollars to help families purchase homes and are actively engaged in residential mortgage lending in the communities they serve.

- MBA is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets, and to expand homeownership and extend access to affordable housing to all Americans. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, and others in the mortgage lending field.

Amici's members are subject to Section 805 of the Fair Housing Act (the "Act"), which prohibits discrimination in residential real estate-related transactions. 42 U.S.C. § 3605.[2] *Amici* and their members vigorously support the Act and strongly oppose discrimination "because

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).

of race, color, religion, sex, handicap, familial status, or national origin"[3] in any aspect of mortgage lending. *Id.* *Amici* operate in a highly-regulated environment and have serious concerns that stretching the law to recognize a disparate-impact theory of liability, which is precluded by the plain language of the Act, allows challenges to legitimate business practices that themselves raise no inference of unlawful discrimination. Indeed, these practices are often the result of legal requirements in the environment in which *amici* operate.

As the Court cautioned thirty-seven years ago, "[i]n many instances, to recognize the limited probative value of disproportionate impact is merely to acknowledge the 'heterogeneity' of the Nation's population." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 n.15 (1977) ("*Arlington Heights*"). This is particularly true with respect to the residential mortgage lending industry, where the application of sensible, risk-based underwriting criteria results in differential outcomes which merely reflect the heterogeneity of our society. The congressional purpose of the Act is properly achieved through a legal standard that focuses on the fairness of the process rather than on the outcomes of an otherwise fair and non-discriminatory process.

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3. In this brief, *amici* frequently reference discrimination on the basis of race, ethnicity, or national origin. These categories are the most frequent subjects of government and private claims brought under the Act against *amici's* members. The arguments presented herein, however, are equally applicable to the other prohibited bases of discrimination.

SUMMARY OF THE ARGUMENT

Petitioners have demonstrated that the plain language of Section 804(a) and Section 805(a) of the Act, 42 U.S.C. §§ 3604(a), 3605(a), require proof of discriminatory intent to establish a violation of the Act. *Amici* amplify petitioners' sound arguments by focusing on the circuit court decisions to which respondent, federal agencies, and their supporters cite for support and by explaining why this Court should not adopt the conclusions reached in those decisions. *Amici* further explain the harm inflicted on the residential mortgage lending industry by deviating from the requirement of establishing intentional discrimination as the means of proving a Fair Housing Act claim.

I. The three primary federal appellate decisions that recognize a disparate-impact theory under the Fair Housing Act were dismissive of the statutory language without analysis, misread this Court's opinion in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and exhibited an unfounded concern and misunderstanding of the standards for establishing intentional discrimination. Without further analysis, other circuits simply followed the early decisions. Yet, the legal reasoning presented in these decisions has not even persuaded the federal agencies responsible for enforcing the Act, and to this day, in advocating for the disparate-impact theory, the federal government cites to, but does not rely on the legal reasoning presented in, those decisions.[4] The United

4. *See, e.g.,* Brief for the United States as *Amicus Curiae* Supporting Respondents, *Township of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, No. 11-1507 (U.S.

States Department of Housing and Urban Development ("HUD") itself has regularly described the national issues of housing discrimination as presenting concerns of disparate treatment (that is, intentional discrimination), and it is difficult to identify any credible claim that cannot be pursued through this legal means.

II. *Amici* emphasize that the use of the disparate-impact theory has particularly deleterious effects on the residential mortgage lending industry. Sensible, risk-based credit standards—from basic minimum down-payment and credit-score requirements to more complex interactive risk attributes—are highly predictive of applicants' ability to repay debt. They can also yield adverse lending outcomes across racial and ethnic groups that, while disproportionate to their share of the population, merely "acknowledge the 'heterogeneity' of the Nation's population." *Arlington Heights*, 429 U.S. at 266. These differential outcomes form the basis for disparate-impact claims, even when all applicants were *treated* fairly and uniformly. Thus, the way to avoid an impact claim is to ensure that a lender's end numbers do not show disparities

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Oct. 28, 2013) (hereinafter "S.G. *Mount Holly* Merits Br."), *available at* http://www.justice.gov/sites/default/files/osg/briefs/2013/01/01/2011-1507.mer.ami.pdf; Brief for the United States as *Amicus Curiae*, *Township of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, No. 11-1507 (U.S. May 17, 2013) (hereinafter "S.G. *Mount Holly* Pet. Br."), *available at* http://www.justice.gov/osg/briefs/2012/2pet/6invit/2011-1507.pet.ami.inv.pdf; Brief for the United States as *Amicus Curiae* in Support of Neither Party, *Magner v. Gallagher*, No. 10-1032 (U.S. Dec. 29, 2011) (hereinafter "S.G. *Magner* Br."), *available at* http://www.justice.gov/sites/default/files/osg/briefs/2011/01/01/2010-1032.mer.ami.pdf.

in racial and ethnic *outcomes*. This, of course, incentivizes the consideration of the very factors proscribed by the Act. Recognition of a legal theory with such a foreseeable consequence does not advance *fair* housing or lending and may place lenders in an impossible situation where there is no choice that would avoid legal challenges.

ARGUMENT

I. THE COURT OF APPEALS DECISIONS RECOGNIZING A DISPARATE-IMPACT THEORY UNDER THE FAIR HOUSING ACT ARE ROOTED IN LEGAL ERROR AND HAVE NOT BEEN CONSIDERED PERSUASIVE OR NECESSARY TO EFFECTIVE ENFORCEMENT OF THE LAW EVEN BY ENFORCEMENT AGENCIES

A. The Court of Appeals Decisions Fail to Support the Assertion That Discriminatory Intent Is Not Required to Prove a Fair Housing Act Claim

Recognition of disparate impact under the Fair Housing Act is rooted in three federal appellate decisions from the mid-1970s: *United States v. City of Black Jack, Missouri,* 508 F.2d 1179 (8th Cir. 1974); *Metropolitan Housing Development Corp. v. Village of Arlington Heights,* 558 F.2d 1283 (7th Cir. 1977) ("*Arlington Heights II*"); and *Resident Advisory Board v. Rizzo*, 564 F.2d 126 (3d Cir. 1977). The remaining court of appeals decisions voiced approval of one or more of these decisions without providing any further analysis.

1. *City of Black Jack*

In *City of Black Jack*, the Eighth Circuit noted that the Fair Housing Act "is designed to prohibit all forms of discrimination, sophisticated as well as simple-minded," 508 F.2d at 1184 (internal quotations omitted), a congressional objective that is achieved under an intent standard of proof. Significantly, the facts presented included evidence of intentional discrimination in connection with the defendant's adoption of a zoning ordinance that prevented development of new multiple-family residences, and the plaintiff "United States contend[ed] that the [subject] ordinance ought also be enjoined because it was enacted *for the purpose of* excluding blacks." *Id.* at 1183, 1185 n.3 (emphasis added). The court nonetheless declined to base its conclusion "on a finding that there was improper purpose." *Id.* at 1185 n.3. Rather, without any analysis or articulation of the Act's statutory provisions or any other legal support, the court simply pronounced that "[t]he plaintiff need make no showing whatsoever that the action resulting in racial discrimination in housing was racially motivated." *Id.* at 1185.[5]

2. *Arlington Heights II*

In contrast to *City of Black Jack*, the Seventh Circuit's decision in *Arlington Heights II* identified the statutory barrier to holding that intent is not required to show a violation of the Fair Housing Act. Nonetheless, rather

5. *But cf. Keller v. City of Fremont, Neb.*, 719 F.3d 931, 948 (8th Cir. 2013) ("there is reason to doubt whether the [Supreme] Court would approve *any* disparate impact cause of action" under the Act (emphasis in original)), *cert. denied*, 134 S. Ct. 2140 (May 5, 2014) (No. 13-1043).

than apply the standard of proof that Congress had established under the Act, the Seventh Circuit misread earlier decisions of this Court and sought to impose its own determination of proper public policy.

The procedural background of the *Arlington Heights* litigation demonstrates how the Seventh Circuit came to its improper interpretation of the Act. The *Arlington Heights* plaintiffs brought claims under both the Equal Protection Clause and the Act challenging the defendant's refusal to grant a re-zoning request to construct subsidized, low-cost housing. 558 F.2d at 1285-86. In its initial opinion, the Seventh Circuit concluded that the challenged conduct was not motivated by race, but nonetheless found a violation of the Equal Protection Clause on the basis of "discriminatory effects." *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 517 F.2d 409, 413, 415 (7th Cir. 1975) ("*Arlington Heights I*"). This Court granted *certiorari* to review *Arlington Heights I* and while the appeal was pending, issued its opinion in *Washington v. Davis*, 426 U.S. 229 (1976), holding that proof of a racially discriminatory purpose is necessary to establish a violation of the Equal Protection Clause. 426 U.S. at 242. Though the Court had yet to resolve *Arlington Heights*, the Seventh Circuit's decision was among those the *Davis* Court cited with disapproval. *Id.* at 245, n.12 ("[t]o the extent that those cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement"). Relying on *Davis*, the Court reversed *Arlington Heights I* on the Equal Protection Clause issue. 429 U.S. at 265-66. Observing that the Seventh Circuit had "proceed[ed] in a somewhat unorthodox fashion, [and] did not decide the statutory

question," this Court remanded for consideration of the Fair Housing Act claim. *Id.* at 271.

The Court's decisions in *Davis* and *Arlington Heights* were controversial—and also misinterpreted. One leading commenter opined that "[t]he new standard obviously makes it harder, perhaps impossible, to prove discrimination in most cases" and conjectured whether "zoning bodies, school boards and the like will not quickly learn to cover up their intentions and rely on the *Arlington Heights* case to protect them from the effect of their actions." Tom Wicker, *Tightening the Ring*, N.Y. TIMES, Jan. 30, 1977, at E17 ("generally speaking the *intent* to discriminate is a much harder standard to satisfy than the *effect* of discrimination, which is usually self-evident" (emphasis in original)).[6]

The Seventh Circuit expressed similar concerns when it considered the statutory question on remand

6. The Washington Post asserted that *Davis* "gave notice that … charges [of racial bias] will be much harder to prove in the future." John P. MacKenzie, *Court Rejects City Bias Suit On Police Test*, WASHINGTON POST, June 8, 1976, at A1. The Harvard Law Review Association advocated that courts—apparently rather than Congress—should maintain a lower bar for statutory discrimination claims to counterbalance the perceived raising of the bar for constitutional ones in *Davis*. *Constitutional Significance of Racially Disproportionate Impact*, 90 HARV. L. REV. 114, 122-23 (1976) ("it is important to preserve the full force of remedial statutes … which implement the congressional commitment to eliminating discrimination"). Time Magazine quoted the director of a fair-housing organization as commenting that "[t]he [*Arlington Heights*] decision raises the standards of proof much higher, maybe even impossibly high." *The Law: Intent, Not Impact*, TIME, Jan. 24, 1977, at 52.

in *Arlington Heights II*, stating that "[a] strict focus on intent permits racial discrimination to go unpunished in the absence of evidence of overt bigotry." 558 F.2d at 1290. Worrying that "evidence of intent has become harder to find" because "overtly bigoted behavior has become more unfashionable," the court rationalized that "a requirement that the plaintiff prove discriminatory intent before relief can be granted under the statute is often a burden that is impossible to satisfy." *Id.*

The court conceded that "[t]he major obstacle to concluding that action taken without discriminatory intent can violate section 3604(a) [of the Fair Housing Act] is the phrase 'because of race' contained in the statutory provision." 558 F.2d at 1288. The court deemed this language to represent the "narrow view" that "a party cannot commit an act 'because of race' unless he intends to discriminate between races." *Id.* Yet, the court expressed apprehension that adopting the "narrow view" would "excuse the Village from liability because it acted without discriminatory intent." *Id.* In an attempt to find support for its view outside the language of the Act, the Seventh Circuit turned to the Title VII standard as described in *Griggs*, but misread that decision (as explained in Part I.B, *infra*) and concluded that the "because of race" language of Title VII did not require proof of discriminatory purpose.[7] *Id.* at 1288-89. The court also ignored the language of the statute itself by looking to the legislative history of the Act and imposing its own view of proper public policy,

7. Title VII of the Civil Rights Act of 1964 addresses employment discrimination. The Fair Housing Act was enacted as Title VIII of the Civil Rights Act of 1968. *See* Pub. L. No. 90-284, 82 Stat. 73, 81-89 (1968).

stating "[w]e cannot agree that Congress in enacting the Fair Housing Act intended to permit municipalities to systematically deprive minorities of housing opportunities simply because those municipalities act discreetly." *Id.* at 1290. The court thus concluded, based on its misreading of *Griggs* and its own policy views, that the Act did not require proof of discriminatory intent.

3. *Rizzo*

The Third Circuit largely followed *Arlington Heights II* in *Rizzo*, a case challenging the defendants' failure to allow construction of a low-income housing project. 564 F.2d at 129-30. It also recognized the statutory problem: "Looking to [§] 3604(a) itself, we note that the 'because of race' language might seem to suggest that a plaintiff must show some measure of discriminatory intent," but "[w]e would be most reluctant to sustain such a requirement." *Id.* at 146-47. Applying flawed logic, however, it took solace in this Court's remand of *Arlington Heights* for consideration of the statutory claim, believing that "the Court at least implied that considerations other than those necessary for proof of equal protection violations must govern [Fair Housing Act] claims." *Id.* at 147. The Third Circuit concluded that *Arlington Heights II* "has persuasively put to rest the assumption that the 'because of race' language in [§] 3604(a) requires proof of … intent," and like the Seventh Circuit, looked to the legislative history of the Act—which it found to be "somewhat sketchy"—to conclude that the "congressional purpose demands a generous construction of [the Fair Housing Act]." *Id.*

4. Other Circuit Court Decisions

The remaining courts of appeals that have recognized a disparate-impact standard under the Fair Housing Act simply voiced approval of one or more of the decisions in *City of Black Jack*, *Arlington Heights II*, or *Rizzo*, without providing any further analysis of how the statutory language would authorize liability without requiring proof of intentional discrimination. *See*, *e.g.*, *United States v. Mitchell*, 580 F.2d 789, 791 (5th Cir. 1978) (citing *Arlington Heights II* without analyzing statutory language);[8] *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1311 (9th Cir. 1982) (relying upon *Arlington Heights II* and *Rizzo* without examination of statute); *Smith v. Town of Clarkton, N.C.*, 682 F.2d 1055, 1065 (4th Cir. 1982) (agreeing with *Arlington Heights II*, *Rizzo*, and *City of Black Jack* without considering statutory language); *Arthur v. City of Toledo, Ohio*, 782 F.2d 565, 574-75 (6th Cir. 1986) (same); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934-35 (2d Cir. 1988) (same);[9] *Mountain Side Mobile Estates P'ship v. Sec'y of HUD*, 56 F.3d 1243, 1250-51 (10th Cir. 1995) (same); *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49 (1st Cir. 2000) (agreeing with *Arlington Heights II* and *Rizzo*); *cf. Jackson v. Okaloosa County,*

8. As the Seventh Circuit recognized, however, *Mitchell* involved *intentional* discrimination. *See Vill. of Bellwood v. Dwivedi*, 895 F.2d 1521, 1533 (7th Cir. 1990) (refusing to find that *Mitchell* was a disparate-impact case because it was "a clear case of deliberate steering" of minority housing applicants).

9. While this Court affirmed the decision of the Second Circuit in *Town of Huntington*, in doing so, it specifically stated that "we do not reach the question whether that test [(i.e., disparate impact)] is the appropriate one." *Town of Huntington, N.Y. v. Huntington Branch, NAACP*, 488 U.S. 15, 18 (1988) (per curiam).

Fla., 21 F.3d 1531, 1542 & n.17 (11th Cir. 1994) (applying disparate impact without analyzing statutory language).[10]

B. The Requirement That a Fair Housing Act Plaintiff Demonstrate an Intent to Discriminate Does Not Impede Effective Enforcement of the Law

The courts of appeals' mistake in concluding that a violation of the Act does not require proof of discriminatory intent derives largely from the Seventh Circuit's misreading of *Griggs* in *Arlington Heights II*. The Seventh Circuit erred when it stated that "[t]he important point to be derived from *Griggs* is that the Court did not find the 'because of race' language to be an obstacle to its ultimate holding that intent was not required under Title VII." 558 F.2d at 1289 & n.6. This Court's decision in *Smith v. City of Jackson, Mississippi*, 544 U.S. 228 (2005), confirms the error.

In *Smith*, the Court was unanimous in the conclusion that the "because of" language in Section 4(a)(1) of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 623(a)(1), "does not encompass disparate impact liability," but rather contemplates only intentional discrimination. *See* 544 U.S. at 236 n.6 (plurality op.) (Section 4(a)(1) of ADEA makes it unlawful for an employer "to fail or refuse to hire … any individual … *because of* such individual's age," and "[t]he focus of the paragraph is on the employer's actions with respect to the

10. The District of Columbia Circuit has not addressed the issue. *See 2922 Sherman Ave. Tenants' Ass'n v. District of Columbia*, 444 F.3d 673, 679 (D.C. Cir. 2006).

targeted individual" (emphasis added)); *id.* 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., concurring in judgment) ("[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"). And the Seventh Circuit pointed to no provision of the Fair Housing Act comparable to the "otherwise adversely affect" language of Title VII—at issue in *Griggs*—that would authorize a disparate-impact theory of liability. *See Griggs*, 401 U.S. at 426 n.1 (quoting relevant language of Title VII, found in 42 U.S.C. § 2000e-2(a)(2)). There is no such provision in the Fair Housing Act. *See* Pet'rs' Br. at 19-24.

The *City of Black Jack, Arlington Heights II,* and *Rizzo* courts were also dismissive of the Act's plain language. The Eighth Circuit failed to consider it altogether. The Seventh and Third Circuits each described the plain language, but proceeded to ignore it and then erred in reaching for their own determination of appropriate public policy rather than applying that which Congress had articulated through the plain wording of the law. The concerns expressed by the courts that led them to override the statutory language were also misplaced. Contrary to the misperceptions at the time, and the apprehension of the Seventh Circuit, a focus on intent does *not* "permit[] racial discrimination to go unpunished in the absence of evidence of overt bigotry." *Arlington Heights II*, 558 F.2d at 1290. Nor is the burden of proving intent "impossible to satisfy," nor does it mean that those who seek to discriminate "discreetly" would be exempted from liability. *Id.*

Rather, in *Davis*, the Court said that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another," namely that it has a disproportionate racial impact. *See* 426 U.S. at 242. Nor is there any requirement that "the necessary discriminatory racial purpose must be express." *Id.* at 241. This Court repeated and further articulated the method of establishing intent in *Arlington Heights*, noting that "*Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes." 429 U.S. at 265.

In *Rogers v. Lodge*, 458 U.S. 613 (1982), the Court again confirmed that a requirement to prove intentional discrimination does not limit claims to only instances of overt bigotry. 458 U.S. at 618. The Court recognized that "discriminatory intent need not be proved by direct evidence" and reiterated that "invidious discriminatory purpose," required under *Davis* and *Arlington Heights* to prove a constitutional violation, may be "*inferred* from the totality of the relevant facts." *Id.* (emphasis added) ("determining the existence of a discriminatory purpose demands a sensitive inquiry into such circumstantial *and* direct evidence of intent as may be available" (emphasis added, internal quotations omitted)); *see also Lindsay v. Yates*, 578 F.3d 407, 415-18 (6th Cir. 2009) (Fair Housing Act disparate-treatment claim may be shown through "existence of circumstantial evidence which creates an inference of discrimination"). And, in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), the Court held that a plaintiff's initial burden in proving intentional discrimination "*is not onerous*." 491 U.S. at 186-88 (emphasis added) (citing test in *McDonnell Douglas Corp.*

v. Green, 411 U.S. 792 (1973)), *superseded by statute on other grounds by* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1017 (1991). Thus, the Court's precedent demonstrates that the concerns of the courts of appeals, which caused them improperly to reach beyond the language of the statute, were not well-founded considering the Court's contemporaneous decisions.

Finally, it is significant to note that *City of Black Jack*, *Arlington Heights II*, and *Rizzo* certainly were not devoid of circumstantial evidence of intentional discrimination, but the courts seemed to be searching for proof of overt discrimination. *See City of Black Jack*, 508 F.2d at 1185 n.3; *Rizzo*, 564 F. 2d at 142; *see also Arlington Heights II*, 558 F.2d at 1288-90 ("the natural and foreseeable consequence of [the Village's] failure to rezone was to adversely affect black people seeking low-cost housing and to perpetuate segregation in Arlington Heights"). Notwithstanding the expansive language of their decisions, it is not clear that these courts would find a violation of the Act when there is no evidence of purposeful discrimination "whatsoever," *City of Black Jack*, 508 F.2d at 1185, in the manner authorized by HUD's 2013 rule, discussed below.

C. The Court of Appeals Decisions Have Been Unpersuasive to the Federal Agencies Responsible for Enforcing the Act

At the time of the 1988 amendments to the Act, nine courts of appeals had held the Act to encompass a disparate-impact theory of liability, and yet the federal agencies remained unconvinced that those findings were correct. For instance, in 1987, shortly before Congress amended the Act, the Solicitor General told the Court

that a plaintiff must prove *intentional* discrimination to establish a violation of the 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. And the President, in signing the Fair Housing Amendments Act, reiterated this position, stating 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 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 (Sept. 13, 1988), *available at* http://www.reagan.utexas.edu/archives/speeches/1988/091388a.htm.

The 1988 amendments to the Act provided notice-and-comment rulemaking authority to HUD. In 1989, HUD adopted a rule construing and implementing the amended Act. Yet, in doing so, HUD did not determine that either the then-existing court of appeals decisions or the recent congressional action provided a basis for concluding that the disparate-impact theory of liability was authorized by the law. Rather, HUD declared that its "regulations are *not* designed to resolve the question of whether intent is or is not required to show a violation" of the Act. Implementation of Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232, 3234-35 (Jan. 23, 1989) (emphasis

added) (hereinafter "HUD's 1989 Interpretive Rule"). This remained HUD's official position for 24 years.[11]

The current administration takes a different view from that expressed in HUD's 1989 Interpretive Rule. In its 2011 term, the Court considered a petition to review the same question presented here. *See Magner v. Gallagher* (No. 10-1032). Just days after the Court granted *certiorari*, HUD issued for comment a proposed amendment to the 1989 rule. *See* Implementation of Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. 70,921, 70,921 (Nov. 16, 2011). That amendment, for the first time, articulated that a violation of the Fair Housing Act could be established through a disparate-impact approach. *Id.* at 70,924-70,925.[12] In its 2012 term, the Court again considered a petition to review the same question presented here. *See Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.* (No. 11-1507). In October 2012, the Court invited the Solicitor General to express the views of the government, and between then and the date the Solicitor General responded in May 2013, HUD finalized its new disparate-impact rule. *See* Implementation of Fair Housing Act's Discriminatory Effects Standard: Final Rule, 78 Fed. Reg. 11,460, 11,478

11. Although HUD later joined an interagency "Policy Statement on Discrimination in Lending," which opined that a violation of the Act could be established under a disparate-impact theory, 59 Fed. Reg. 18,266, 18,269 (Apr. 15, 1994), that policy statement was not subject to official notice and comment, and HUD did not seek then to amend its 1989 rule that articulated a contrary agency position.

12. *Magner* settled prior to oral argument before the Court. *See* Stip. to Dismiss Writ of Certiorari, *Magner v. Gallagher,* No. 10-1032 (U.S. Feb. 14, 2012).

(Feb. 15, 2013) (hereinafter "HUD's 2013 Interpretive Rule"), *vacated by Am. Ins. Ass'n v. U.S. Dep't of Hous. & Urban Dev.*, --- F. Supp. 3d ----, 2014 WL 5802283, at *1 (D.D.C. Nov. 7, 2014) (concluding that the plain language of the Fair Housing Act "prohibits disparate treatment *only*, and … [HUD and its secretary], therefore, exceeded their authority" under the Administrative Procedures Act, 5 U.S.C. §§ 551, *et seq.*, in promulgating the 2013 rule (emphasis in original)).

Yet, even having promulgated a disparate-impact rule, when briefing the Court on the question presented here, the government has never relied on the legal reasoning of any of the court of appeals decisions to have examined the question. *See generally* S.G. *Mount Holly* Merits Br.; S.G. *Mount Holly* Pet. Br.; S.G. *Magner* Br. Rather, the Solicitor General has offered new reasons in support of its conclusion that the Act recognizes a disparate-impact theory, none of which any court of appeals has ever adopted. For instance, the Solicitor General has asserted that (1) the provisions of Section 804(a), which make it unlawful "[t]o refuse to sell or rent … or otherwise make unavailable or deny, a dwelling to any person because of race," indicate Congress' design to apply a disparate-impact theory, S.G. *Mount Holly* Merits Br. at 9-10; and (2) Section 804(a) of the Act "contains three exemptions from liability that presuppose the availability of a disparate-impact claim," *id.* at 18.

Notably, this month, in *American Insurance Ass'n*, the United States District Court for the District of Columbia vacated the 2013 rule and rejected these arguments, ruling that the phrase "otherwise make unavailable or deny" "indicates that the statute is meant to prohibit

intentional discrimination only."[13] 2014 WL 5802283, at *8. The court stated that the government's contention that the three exemptions "presuppose the presence of disparate-impact liability appears to be nothing more than wishful thinking." *Id.* Rather, they are merely exemptions from liability, meaning that it would be improper to infer discriminatory intent under the described circumstances.

D. The Fair Housing Act's Requirement That a Plaintiff Demonstrate Discriminatory Intent Is Consistent with the Act's Legislative Purpose and HUD's Own Studies

Courts must enforce the law as written by Congress and lack the authority to reevaluate public policy, an error made by several courts that have found disparate-impact liability under the Act. Nonetheless, it bears emphasis that the intent standard advances the effective enforcement of the law.

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13. Indeed, the courts of appeals have applied the "otherwise make unavailable" language in an entirely different context unrelated to the standard of proof required by the law. For instance, *Arlington Heights II* and *Rizzo* each isolated the "make unavailable" language in describing the claims presented. *See Arlington Heights II*, 558 F.2d at 1287; *Rizzo*, 564 F.2d at 146. But that was appropriate because those claims involved challenges to government land-use or zoning decisions. The terms of the statute prohibiting discrimination in the sale or rental of housing did not fit the circumstances of those cases, but the claim could be presented on the basis that the governmental actions made housing unavailable. HUD itself recognized this point in promulgating its 1989 rule, where it declared that land-use violations are covered by the "otherwise make unavailable" language of the Act while at the same time declining to answer the question "whether intent is or is not required to show a violation" of the Act. *Compare* HUD's 1989 Interpretive Rule, 54 Fed. Reg. at 3240, *with id.* at 3234-35.

For instance, the Act requires HUD to "make studies with respect to the *nature and extent* of discriminatory housing practices in representative communities, urban, suburban, and rural throughout the United States." 42 U.S.C. § 3608(e) (emphasis added). HUD conducted such studies in 1977, 1989, and 2000, which certainly provide an adequate time period to evaluate the issue of discrimination present in the country. *See* Margery A. Turner, et al., for U.S. Dep't of Hous. & Urban Dev., *Discrimination in Metropolitan Housing Markets: National Results from Phase 1 of HDS2000*, Executive Summary, at i (Nov. 2002) (noting prior studies), *available at* http://www.huduser.org/portal/publications/pdf/Phase1_Report.pdf. Each of these studies focuses exclusively on the extent to which certain racial and ethnic groups, among others, may have been subjected to disparate treatment in their search for housing—that is, whether they encountered intentional discrimination *because of* their race or ethnicity. For instance, in connection with its 2000 housing discrimination study, the agency stated:

> HUD's goals for the study include rigorous measures of change in *adverse treatment* against blacks and Hispanics nationwide, site-specific estimates of *adverse treatment* for major metropolitan areas, estimates of *adverse treatment* for smaller metropolitan areas and adjoining rural communities, and new measures of *adverse treatment* against Asians and Native Americans.

Id. (emphasis added). Thus, in responding to the congressional requirement that HUD define the "nature" of housing discrimination, HUD defined it to be disparate

"treatment," consistent with the language of and policy behind the statute. Had HUD thought that disparate impact was at issue, it would have been expected to study the extent to which rent levels or housing prices disproportionately impact different racial groups, or the extent to which the construction of small apartments disproportionately impact families with children. It did not do so.

Notwithstanding the extensive briefing on the Act's standard of proof submitted to the Court in three separate cases (*Magner*, *Mount Holly*, and this matter), advocates of the disparate-impact theory have yet to describe any credible claims that would be precluded by recognition of the requirement to establish discriminatory intent. As described below, there are a large number of non-credible claims that are allowed to survive in the absence of any requirement that the claims be based on an intent to discriminate.

II. THE DISPARATE-IMPACT THEORY IS PARTICULARLY INAPPROPRIATE FOR APPLICATION TO THE RESIDENTIAL MORTGAGE LENDING INDUSTRY BECAUSE THE MERE HETEROGENEITY OF SOCIETY CAUSES DIFFERENTIAL OUTCOMES

Application of the disparate-impact legal theory to the lending industry brings to the fore the Court's long-expressed concern of focusing on outcomes in a society that is not homogeneous. As noted above, the concern was expressed by the Court in *Arlington Heights*. *See* 429 U.S. at 266 n.15. In *Davis*, the Court also cautioned that an undue focus on impact might invalidate policies "designed

to serve neutral ends[,] … would be far-reaching[,] and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." 426 U.S. at 248. Residential mortgage lending could well have been added to this list.

A. Sensible, Risk-Based Lending Standards That Are Applied Fairly May Not Result in Outcomes by Group That Are Proportional to the Group's Share of the Population

A brief description of the residential mortgage financing process assists with understanding both the context in which disparate-impact claims may arise under the Fair Housing Act and the unwarranted adverse effects that those claims have on the residential mortgage lending industry.

1. Residential Mortgage Lending

There are two common methods for offering residential mortgage loans to consumers, retail lending and wholesale lending. In retail lending, lenders offer loans directly to consumers through their own loan origination personnel. In wholesale lending, independent third-party mortgage brokers offer loans and present loan applications to one or more residential mortgage lenders on behalf of the brokers' customers. Some lenders have both retail and wholesale origination channels, while others focus on one channel.

To maintain the liquidity necessary to fund loans, both retail and wholesale lenders sell the great majority of loans that they originate to secondary-market investors, including private investors and the government-sponsored enterprises ("GSEs"), Fannie Mae and Freddie Mac. These investors establish guidelines to which lenders must underwrite loans to make them eligible for purchase.[14] Various federal government agencies, including the Federal Housing Administration ("FHA") and the Department of Veterans Affairs ("VA"), also promulgate standards that lenders must follow to make loans eligible for government insurance or guarantee.

In general, lenders and investors must evaluate available information relative to both the *ability* of a consumer to repay a loan and the apparent *willingness* of the consumer to repay debts. Today, this evaluation is mainly performed using automated underwriting systems that consider multiple factors. Fannie Mae and Freddie Mac require the submission of loan applications by means of their market-dominant proprietary automated underwriting systems. Underwriting systems are complex and consider the relationship among many factors; lenders using the systems generally are not privy to the algorithms by which the systems analyze applicant data and render decisions. There are, however, certain basic factors relevant to underwriting virtually all residential

14. The Federal Housing Finance Agency ("FHFA"), which oversees Fannie Mae and Freddie Mac, provides directives to those entities about the attributes of loans that they may purchase in the secondary market. *See, e.g.,* Press Release, FHFA, FHFA Limiting Fannie Mae and Freddie Mac Loan Purchases to "Qualified Mortgages" (May 6, 2013), *available at* http://www.fhfa.gov/webfiles/25163/QMFINALrelease050613.pdf.

mortgage loan applications, three of which are highlighted here.

Down-payment or loan-to-value (LTV) requirements. The amount that a consumer pays out of pocket (or the amount of equity that a consumer has in his or her home) can be an important factor in evaluating the likelihood that the consumer will repay the loan. Consumers who make smaller down payments relative to the price of their house are more likely to default. On the other hand, requiring consumers to make larger down payments increases the number of consumers who cannot afford to enter the housing market. *See* Ability-to-Repay and Qualified Mortgage Standards under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 6408, 6412 (Jan. 30, 2013) (hereinafter, "ATR Rule") ("[m]ortgage loan terms and credit standards have tightened most for consumers … with less money available for a down payment").

Debt-to-income (DTI) requirements. The ratio of an applicant's debt to his or her income is predictive of the applicant's ability to repay the loan. *See* ATR Rule, 78 Fed. Reg. at 6526. According to the Consumer Financial Protection Bureau, "[a]t a basic level, the lower the debt-to-income ratio, the greater the consumer's ability to pay back a mortgage loan would be under existing conditions as well as changed circumstances, such as an increase in an adjustable rate, a drop in future income, or unanticipated expenses or new debts." *Id.* at 6526-27. Recent data indicate that a DTI ratio "correlates with loan performance, as measured by delinquency rate … in *any* credit cycle." *Id.* at 6527 (emphasis added).

Credit-score requirements. Consumer credit scores are used by mortgage lenders to evaluate the history of an applicant's repayment of debt which is predictive of the likelihood the applicant will repay debt in the future. *See* ATR Rule, 78 Fed. Reg. at 6470.[15] These proprietary scores are regularly incorporated into the automated underwriting systems used to evaluate mortgage loan applications. *See* Board of Governors of Fed. Reserve Sys., *Report to the Congress on Credit Scoring and its Effects on the Availability and Affordability of Credit*, at 11, 22-23 (Aug. 2007) (hereinafter, "FRB Study") (noting proprietary credit "scores are involved in more than 75 percent of all mortgage originations"), *available at* http://www.federalreserve.gov/boarddocs/rptcongress/creditscore/creditscore.pdf. The scores may take into account aspects of the applicant's credit history such as the number and age of the applicant's credit lines, the applicant's payment history, and judgments, collections, or bankruptcies involving the applicant. *See* ATR Rule, 78 Fed. Reg. at 6470.

2. Differences in Economic and Credit Characteristics among Racial or Ethnic Groups

National data indicate that on average, racial and ethnic groups have differences in economic and credit characteristics. United States Census Bureau data reveal significant differences in wealth, a primary source for a

15. Congress has endorsed the use of a uniform, objective credit reporting system. *See* H.R. Rep. No. 108-396, at 65 (2003) (Fair Credit Reporting Act, 15 U.S.C. §§ 1681, *et seq.*, was designed to create a "national credit reporting system" that "permits consumers to transport their credit with them wherever they go").

down payment, between white households on the one hand and African-American and Hispanic households on the other. The Federal Reserve Board ("FRB") most recently reported that the median wealth of white households was approximately $142,000, but was only $18,100 for minority households.[16] Government data also indicate that the ratio of debt to assets differs significantly between racial and ethnic groups. For instance, in 2010, the leverage ratio (that is, the ratio of the sum of all debt to the sum of all assets) for white families was less than one-half than that for nonwhite or Hispanic families.[17] And the median income of white households is greater than that of African-American and Hispanic households.[18]

Similarly, the FRB has recognized that standardized credit scores "are predictive of credit risk for the population as a whole and for all major demographic groups." FRB Study at S-1, O-13. Nonetheless, the FRB

16. Jesse Bricker, et al., Div. of Research & Statistics, *Changes in U.S. Family Finances from 2010 to 2013: Evidence from the Survey of Consumer Finances*, 100 Federal Reserve Bulletin, at 12 (Sept. 5 2014), *available at* http://www.federalreserve.gov/pubs/bulletin/2014/pdf/scf14.pdf.

17. Jesse Bricker, et al., Div. of Research & Statistics, *Changes in U.S. Family Finances from 2007 to 2010: Evidence from the Survey of Consumer Finances*, 98 Federal Reserve Bulletin, at 55-56 (June 11, 2012), *available at* http://www.federalreserve.gov/pubs/bulletin/2012/pdf/scf12.pdf.

18. U.S. Census Bureau, Table H-17. Households by Total Money Income, Race, and Hispanic Origin of Householder: 1967 to 2013 (median income for white households—$55,257, African-American households—$34,598, and Hispanic households—$40,963), *available at* http://www.census.gov/hhes/www/income/data/historical/household/2013/H17.xls.

found that the "[d]ifferences in credit scores among racial or ethnic groups … are particularly large," with 52.6% of African-Americans and 30.1% of Hispanics in the sample appearing in the lowest two score deciles, as compared to 16.3% of non-Hispanic whites. *See id.* at 80.

B. Disparate-Impact Claims, Which Do Not Require any Assertion That a Consumer Is Treated Differently for an Impermissible Reason, Present Intractable Issues for Lenders

The sensible, risk-based criteria used to evaluate a consumer's qualification for residential mortgage credit assess the economic and credit characteristics of the *individual* consumer and are applied fairly and uniformly to all consumers. Yet, differences in the economic and credit characteristics across race and ethnicity can lead to differences in the availability or terms of credit when those groups are viewed as a whole.[19] Even though government agencies recognize the foreseeable consequences of

19. For instance, data reported pursuant to the Home Mortgage Disclosure Act ("HMDA"), 12 U.S.C. §§ 2801, *et seq.*, for the year 2013 (the most recent year for which data are available) reflect that African-American applicants for conventional home-purchase loans were rejected at a rate more than twice the rate at which white applicants were rejected (35.20% versus 13.27%). *See* HMDA National Aggregate Report Table 4-2: Conventional Purchases by Race (2013), *available at* http://www.ffiec.gov/hmdaadwebreport/NatAggWelcome.aspx. Hispanic applicants were rejected at a rate more than 1.7 times the rate at which white applicants were rejected (23.25% versus 13.27%). *See id.* Under HMDA, approximately 8,000 lenders—ranging from national enterprises to local operations—are required to report information regarding their residential mortgage lending activities. 12 U.S.C. § 2803; *see* 12 C.F.R. § 1003.4.

the fair and non-discriminatory application of credit standards, HUD has taken the position that such outcomes can provide the basis for a legal challenge pursuant to a disparate-impact theory. For instance, HUD asserts that "HUD and courts have recognized that analysis of loan level data identified through HMDA may indicate a disparate impact." HUD's 2013 Interpretive Rule, 78 Fed. Reg. at 11,478. This is the problem with the theory, not a justification for it.

Under the disparate-impact theory, it is not necessary for a plaintiff to assert that a lender *treated* any applicant differently because of race, national origin, or any other impermissible factor. Rather than examining the fairness of a business's operations, a disparate-impact claim focuses solely on the *outcome* of those operations. Of course, a lender might ultimately prevail in litigation, and HUD asserts that a lender facing a disparate-impact challenge "would have the opportunity to refute the existence of the alleged impact and establish a substantial, legitimate, non-discriminatory interest for the challenged practice." HUD's 2013 Interpretive Rule, 78 Fed. Reg. at 11,478. What this ignores, however, is that virtually every lender in the United States could be sued for using non-discriminatory credit standards simply because variations in economic and credit characteristics produce different credit outcomes among racial and ethnic groups. And even though the starting point of a disparate-impact claim—statistical differences in outcomes across borrower groups—raises no inference of unlawful discrimination taken because of a prohibited factor,[20] lenders may face

20. The FRB has stated that HMDA data "does not include all of the characteristics of the borrower and loan that banks

a heavy burden of proof,[21] expend substantial amounts of money, and suffer the reputational consequences of a discrimination charge. Most lenders implement policies designed to avoid facing legal challenges, but that is virtually impossible to achieve if the outcomes of the fair and non-discriminatory application of credit standards can provide the basis for a legal claim.

Indeed, the disparate-impact theory has given rise to numerous types of challenges against lenders, all of which create the same type of intractable issues. For instance, credit-score thresholds have been a target of Fair Housing Act disparate-impact claims. In 2010, the National Community Reinvestment Coalition filed administrative complaints with HUD against 22 lenders alleging that their policies of requiring a credit score above the FHA minimum had a disparate impact on

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consider when pricing a loan…. Therefore, although differences in higher-priced lending by race and ethnicity remain after controlling for risk scores, one cannot conclude they are evidence of discrimination." Board of Governors of the Federal Reserve System, "The 2013 Home Mortgage Disclosure Act Data," Federal Reserve Bulletin (Oct. 2014), *available at* http://www.federalreserve.gov/pubs/bulletin/2014/pdf/2013_HMDA.pdf. Information regarding the disposition of loan applications is reported, but consumers' credit scores, income and assets, cash reserves, DTI ratios, and LTV ratios are *not* required to be reported. 12 C.F.R. § 1003.4.

21. HUD's 2013 Interpretive Rule, which shifts the burden of proof to defendants, *see* 78 Fed. Reg. at 11,482, *codified at* 24 C.F.R. § 100.500(c), is contrary to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). *See* 490 U.S. at 656-61; *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. ---, 131 S. Ct. 2541, 2554-55 (2011).

minorities in violation of the Fair Housing Act.[22] None of the complaints alleged that the lenders' credit-score threshold was established "because of" race or national origin. Rather, the claim was that the uniform application of objective credit-score thresholds disproportionately impacted minority applicants.

Defending against these types of claims raises significant challenges. A lender may argue that a certain credit-score threshold is necessary to maintain a certain level of loan performance, in recognition of the fact that a lower cutoff would result in increased defaults and losses. Reducing losses and increasing return on investment are legitimate business interests, yet under the disparate-impact theory as articulated in HUD's 2013 Interpretive Rule, lenders may be required to justify the necessity of a certain level of return given the racial or ethnic impact that results from the use of credit-score thresholds. *See* 78 Fed. Reg. at 11,479-80.

The disparate-impact theory of liability has also been used by government enforcement agencies to challenge the standard business practice of permitting loan originators an amount of discretion to compete in the marketplace, for example, by reducing the price of a loan to match or beat the offer of another lender.[23] Under the disparate-

22. *See* Press Release, U.S. Dep't of Hous. & Urban Dev., HUD to Investigate Allegations that 22 Banks and Mortgage Lenders Discriminate against African American and Latino Loan Seekers (Dec. 8, 2010), *available at* http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2010/HUDNo.10-266.

23. *See*, *e.g.*, Complaint ¶¶ 17-41, *United States v. SunTrust Mortgage, Inc.*, No. 3:12-cv-00397-REP (E.D. Va. May 31, 2012).

impact theory, it is purportedly not necessary to allege or (ultimately) prove that the persons exercising the discretion to adjust loan price *treated* consumers differently because of race or ethnicity. Instead, the claims are based on the notion that a non-discriminatory practice—reducing the loan price in response to a competing offer *obtained by the consumer*—nevertheless caused different *outcomes* for different racial and ethnic groups.

And recently, lenders have faced lawsuits for originating loans sponsored by the federal government itself. The benefits of the loans insured by the FHA and guaranteed by the VA are well known. In particular, these loan programs provide a means of access to credit for consumers unable to afford a substantial down payment or who lack the credit quality required for conventional products.[24] The federal lending programs have proven to

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Of course, in *Wal-Mart*, the Court noted that granting employees discretion is "a very common and presumptively reasonable way of doing business—one that we have said should itself raise no inference of discriminatory conduct." 131 S. Ct. at 2554 (quotations omitted). Since the *Wal-Mart* decision, federal courts have not allowed private civil claims of this nature to proceed as a class action. *See, e.g.*, *In re Countrywide Fin. Mortgage Lending Practices Litig.*, 708 F.3d 704, 709-10 (6th Cir. 2013); *Rodriguez v. Nat. City Bank*, 726 F.3d 372, 383-86 (3d Cir. 2013). Yet HUD states that it "does not agree that the Supreme Court's decision in *Wal-Mart* means that policies permitting discretion may not give rise to discriminatory effects liability under the Fair Housing Act." HUD's 2013 Interpretive Rule, 78 Fed. Reg. at 11,468.

24. *See* Press Release, U.S. Dep't. of Hous. & Urban Dev., FHA–Mutual Mortgage Insurance Fund: 2015 Summary Statement & Initiatives, at Z-1 (2014) (FHA lending serves a market that lacks access to conventional credit), *available at*

be particularly beneficial to minority borrowers,[25] and yet the concentration of minority borrowers in the programs, along with the fees that the government requires, have forced lenders to defend claims of a Fair Housing Act violation caused by an alleged "disparate impact" on minorities.[26]

Again, these types of actions raise intractable issues for defendants that do not further legitimate enforcement of the Act. A lender may demonstrate that it has strong policies against unlawful discrimination and that all employees have been trained to treat consumers without regard to impermissible factors, but these efforts aimed at fair, non-discriminatory treatment are largely for naught

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http://portal.hud.gov/hudportal/documents/huddoc?id=FY15CJ_FHAFND.pdf; *see also* Press Release, U.S. Dep't of Veterans Affairs, *VA Guarantees its 21 Millionth Home Loan*, Office of Public & Intergovernmental Affairs (Oct. 29, 2014) (VA has guaranteed 21 million loans over the last 70 years—nearly 90 percent of which were made with no down payment), *available at* http://www.va.gov/opa/pressrel/pressrelease.cfm?id=2652.

25. *See* U.S. Dep't of Hous. & Urban Dev., *Issue Brief: FHA's Impact on Increasing Homeownership Opportunities for Low-Income and Minority Families During the 1990s*, at 2-3 (Dec. 2000).

26. *Compare City of Miami v. Bank of Am. Corp.*, 2014 WL 3362348 (S.D. Fla. July 9, 2014) (granting motion to dismiss), *appeal docketed* No. 14-14543 (11th Cir. Oct. 14, 2014), *and City of Miami Gardens v. Wells Fargo & Co.*, 2014 WL 6455660 (S.D. Fla. Oct. 1, 2014) (granting motion to dismiss without prejudice), *with City of L.A. v. Citigroup, Inc.*, --- F. Supp. 2d ----, 2014 WL 2571558 (C.D. Cal. June 9, 2014) (denying motion to dismiss); *see also City of L.A. v. JP Morgan Chase & Co.*, 2014 WL 3854332 (C.D. Cal. Aug. 5, 2014) (granting motion to dismiss without prejudice).

if the lender may still be subject to litigation regarding outcomes reflective of society's heterogeneity even when there is no discriminatory treatment. The result is that interpreting and enforcing the Act to encompass disparate-impact liability forces lenders to bear significant litigation costs and reputational damage from lawsuits that have no basis under the Act.

The disparate-impact theory of liability also engenders a "Catch-22" paradigm that does not advance Congress' objective that factors such as race and national origin play no role in a credit decision. With the focus solely on the racial and ethnic *outcomes* of a process that may otherwise be fair and non-discriminatory, disparate impact has the potential to push businesses to consider the very factors that the Act prohibits. For instance, if disparate-impact claims can be based simply on outcomes of fair practices, some lenders may feel compelled to mitigate the risk of having to defend such outcomes by affirmatively considering race in lending decisions. But such conduct would likely constitute intentional discrimination that itself violates the Act. *See, e.g., Ricci v. DeStefano*, 557 U.S. 557, 585 (2009) ("under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action"). The Court has cautioned against this result even as it has permitted the use of a disparate-impact theory of liability under other federal anti-discrimination statutes based on other language not found in the 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").

CONCLUSION

The proper focus of the Act is on the elimination of disparate treatment of persons on bases that Congress has prohibited. A switch to a demand for equal outcomes as the necessary basis to avoid legal claims is unwarranted under the terms of the statute, is contrary to sound public policy, and leads to the type of deleterious results described above. *Amici* respectfully urge that the Court reverse the decision of the Fifth Circuit.

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