No. 10-1032

IN THE

Supreme Court of the United States

STEVE MAGNER, ET AL.,
Petitioners,

v.

THOMAS J. GALLAGHER, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN BANKERS ASSOCIATION, CONSUMER BANKERS ASSOCIATION, FINANCIAL SERVICES ROUNDTABLE, AND HOUSING POLICY COUNCIL SUGGESTING REVERSAL

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INTEREST OF *AMICI CURIAE* [1]

The American Bankers Association ("ABA"), headquartered in Washington, D.C., is the principal national trade association of the financial services industry. The ABA's members, located in each of the 50 states, the District of Columbia, and Puerto Rico, include financial institutions of all sizes. ABA members hold a majority of the domestic assets of the banking industry in the United States. The ABA frequently submits *amicus curiae* briefs in state and federal courts in matters that significantly affect its members and the business of banking.

The Consumer Bankers Association ("CBA") is the only national financial trade group focused exclusively on retail banking and personal financial services—banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, the CBA provides leadership, education, research, and federal representation on retail banking issues. CBA members include most of the nation's largest bank holding companies, as well as regional and super-community banks that collectively hold two-thirds of the industry's total assets.

The Financial Services Roundtable ("Roundtable") represents 100 of the largest integrated financial companies providing banking, insurance, and invest-

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amici curiae*, their members, or *amici's* counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of *amicus* briefs have been filed with the Clerk of the Court.

ment products and services to American consumers. Roundtable members finance the majority of single and multifamily housing in the United States.

The Housing Policy Council is made up of 32 companies that are among the nation's leaders in mortgage finance and that originate an estimated 75 percent of mortgages for American home buyers.

Also appearing as *amici* are 54 bankers associations from each of the 50 states and Puerto Rico. These associations represent the interests of their members (which include state and federally chartered banks, as well as savings and loan associations) at the state and local level. They provide a voice for the industry in state legislatures across the nation, as well as support their members with research and information, public relations, continuing professional education, and educational materials.

Amici, on behalf of their members, have a substantial interest in the outcome of this case. *Amici*'s members are strongly committed to providing lending and financial services in a nondiscriminatory manner. Clarification of the Fair Housing Act ("FHA") issues in this case will benefit both consumers and financial institutions by reducing ambiguity and promoting compliance.

The questions presented—(1) whether the FHA supports claims against a city based on an alleged "disparate impact" of the city's housing improvement efforts on FHA-protected classes, and (2) if so, what framework applies to the analysis of such claims—could affect whether and how *amici*'s members are subject to FHA disparate-impact claims. Plaintiffs in other cases have brought disparate-impact claims against lenders under both the "sale or rental" FHA

provision at issue here, 42 U.S.C. § 3604, as well as the separate FHA section applicable to lending, 42 U.S.C. § 3605.

SUMMARY OF ARGUMENT

I. When Congress intends to prohibit facially neutral conduct that has a disparate impact on members of a protected class, Congress uses specific language directed to the "effects" of that conduct. But when Congress speaks only to discriminatory acts committed "because of" a person's protected status, it prohibits only intentional discrimination, *i.e.*, disparate treatment. Congress used only disparate-treatment language in the FHA.

The FHA provision at issue here, 42 U.S.C. § 3604 ("Section 3604")—like Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e-2(a)(1), and Section 4(a)(1) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(a)(1)—prohibits only intentional discrimination. Section 3604 proscribes conduct relating to the sale or rental of dwellings that is undertaken against an individual "because of" that person's membership in a class protected under the statute. Section 3604 does not refer to conduct that "adversely affects" or "tends to deprive" members of a protected class—language that substantiates the basis for disparate-impact causes of action. *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991 (1988) (plurality opinion) (construing Title VII Section 703(a)(2)); *see also Smith v. City of Jackson*, 544 U.S. 228, 236 (2005) (plurality opinion) (construing ADEA Section 4(a)(2)). Section 3604 therefore does not provide a cause of action for disparate-impact discrimination.

Section 3604's construction affects *amici* because plaintiffs bring disparate-impact claims against lenders under Section 3604. Plaintiffs bring such claims despite the fact that a separate section of the FHA, 42 U.S.C. § 3605 ("Section 3605"), which contains no language whatsoever supporting a disparate-impact theory of liability, constitutes the statute's sole prohibition on discriminatory lending. If the Court holds that Section 3604 permits disparate-impact claims, the Court should make clear that its holding does not apply to lender liability.

II. Should the Court conclude that disparate-impact claims are cognizable under Section 3604, it also should confirm that the three-step analytical framework specified in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), applies to such claims. *See Smith*, 544 U.S. at 240. Applying the *Wards Cove* analysis, the plaintiff in any FHA disparate-impact case bears the burden of persuasion throughout each of three analytical steps. *See Wards Cove*, 659–60. Ultimately, the plaintiff can prevail only by proving either that the challenged practice served no legitimate goal identified by the defendant or that an alternative practice that avoids the disparate impact is "'equally as effective as the challenged practice in serving the [defendant's] legitimate business goals.'" *Id*. at 660, 661 (quoting *Watson*, 487 U.S. at 998).

ARGUMENT

I. THE FAIR HOUSING ACT DOES NOT PERMIT DISPARATE-IMPACT CLAIMS

A. The Text of 42 U.S.C. § 3604 Provides No Basis for Claims of Disparate Impact

The starting point in any question of statutory construction is, of course, the text. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). Section 3604(a) makes it unlawful "[t]o 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).

As the plurality explained in *Smith v. City of Jackson*, 544 U.S. 228 (2005), the critical textual question for determining if a statute supports a disparate-impact claim is whether the statute "focuses on the *effects* of the action on the [protected individual] rather than the motivation for the action of the [defendant]." *Id*. at 236 (emphasis in original); *see Watson*, 487 U.S. at 991 (concluding that Title VII "may be analyzed under the disparate impact approach" because the statute prohibits employer practices that "adversely affect" an employee's status). When Congress chooses statutory language to target the *effects* of facially neutral conduct, the statute prohibits disparate-impact discrimination. Conversely, a statute that proscribes only discrimination based on protected status, but does not address the effects of facially neutral conduct, supports only claims of disparate treatment.

Section 3604(a) prohibits specific conduct without consideration of the effects of that conduct. Under Section 3604(a), it is unlawful to refuse to sell, rent, or negotiate for, or otherwise make unavailable or deny, a dwelling based on a person's protected status. The statute does not include the word "affect" or otherwise refer to the effects of facially neutral conduct. By focusing on the prohibited acts, and not on the effect of those acts, Congress limited recovery under Section 3604(a) to claims of disparate treatment.

In this regard, the text of Section 3604(a) parallels the text of other statutory provisions that do not permit disparate-impact claims. Section 703(a)(1) of Title VII and Section 4(a)(1) of the ADEA prohibit specific discriminatory conduct, but those provisions do not focus on the "effects" of the prohibited conduct.[2] *See Ricci v. DeStefano*, 129 S. Ct. 2658, 2672–73 (2009) (construing Title VII § 703(a)(1) as a disparate-treatment provision); *Smith*, 544 U.S. at 236 n.6, 249 (finding no disparate-impact liability under ADEA § 4(a)(1)). "The similarity of language in [these provisions] is . . . a strong indication

[2] Section 703(a)(1) of Title VII provides that it shall be unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

Section 4(a)(1) of the ADEA similarly provides that it shall be unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1).

that [they] should be interpreted *pari passu*." *Northcross v. Bd. of Educ. of Memphis City Sch.*, 412 U.S. 427, 428 (1973) (per curiam).

In contrast, Section 3604(a) is textually distinct from other statutory provisions that permit claims for disparate impact, such as Section 703(a)(2) of Title VII, 42 U.S.C. § 2000e-2(a)(2), Section 4(a)(2) of the ADEA, 29 U.S.C. § 623(a)(2), and Section 102 of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12112(b). Each of those other provisions prohibits conduct that "adversely affects" a protected class, using language the Court has recognized as authorizing claims of disparate impact.[3] *See Griggs v. Duke Power Co.*, 401 U.S. 424, 426 n.1, 429–31

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[3] Section 703(a)(2) of Title VII provides that it shall be an unlawful employment practice for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise ***adversely affect*** his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(2) (emphasis added).

Section 4(a)(2) of the ADEA provides that it shall be unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise ***adversely affect*** his status as an employee, because of such individual's age." 29 U.S.C. § 623(a)(2) (emphasis added).

Section 102 of the ADA defines "discrimination" to include "limiting, segregating, or classifying a job applicant or employee in a way that ***adversely affects*** the opportunities or status of such applicant or employee because of the disability of such applicant or employee." 42 U.S.C. § 12112(b)(1) (emphasis added). *See also id*. § 12112(b)(3)(A) (discrimination includes "utilizing standards, criteria, or methods of administration . . . that ***have the effect*** of discrimination on the basis of disability" (emphasis added)).

(1971) (Section 703(a)(2) of Title VII permits disparate-impact claims); *Smith*, 544 U.S. at 235–36 (Section 4(a)(2) of the ADEA permits disparate-impact claims); *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003) (Section 102(b) of the ADA permits disparate-impact claims).

Statutes that authorize claims for disparate-impact discrimination also prohibit practices that "tend to" interfere with rights of protected classes. *See* 42 U.S.C. § 2000e-2(a)(2); 29 U.S.C. § 623(a)(2); 42 U.S.C. § 12112(b)(6). The Court in *Meacham v. Knolls Atomic Power Laboratory*, 554 U.S. 84 (2008), observed that the ADEA's "tend to deprive" language supports a disparate-impact construction of ADEA Section 4(a)(2). *Id*. at 96 n.13; *see also Hernandez*, 540 U.S. at 53 (similar recognition under ADA). The Seventh Circuit also has recognized that this language "seems designed to expand the reach of [the ADEA beyond disparate treatment liability] by forbidding practices having a *tendency* to harm members of the favored groups, i.e., disparate impact." *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1127 (7th Cir. 1987) (emphasis in original). By contrast, Section 3604(a) does not contain language directed at the harmful "tendencies" of facially neutral conduct.

Respondents argue (Cert. Opp. 14) that the phrase "or otherwise" in Section 3604 is a talismanic indicator of a disparate-impact statute. But such "or otherwise" language appears in both Section 4(a)(1) of the ADEA and Section 703(a)(1) of Title VII. *See supra* note 2. As discussed, those provisions do not provide for disparate-impact claims. A majority of the Court in *Smith* agreed that Section 4(a)(1) of the ADEA, which prohibits employers from "otherwise discriminat[ing] against any individual," does not

authorize disparate-impact claims. *Smith*, 544 U.S. at 236 n.6 (plurality opinion); *id*. at 249 (O'Connor, J., concurring).[4]

Because Section 3604(a) lacks any textual indicia of a disparate-impact provision, the statute prohibits only intentional discrimination. Where the statutory text is clear, the court's analysis ends with the text. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003).[5]

B. Lenders Are Not Subject to Disparate-Impact Claims Under the FHA

Plaintiffs may not, in any event, pursue disparate-impact claims against housing *lenders* under Section 3604(a). Section 3605, not Section 3604, addresses discriminatory lending practices, and Section 3605 too prohibits only disparate treatment. Clarity on this point would help guide the lower courts in properly dismissing disparate-impact claims against lenders brought under Section 3604(a).

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[4] A chart containing the relevant provisions of Title VII, the ADEA, and the FHA is set forth in an Appendix.

[5] In any event, *amici* agree with Petitioners that Congress did not "implicitly ratif[y]" in 1988 the views of some lower courts that the FHA supported disparate-impact liability. Pet. Br. 32. "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 361 U.S. 304, 313 (1960); *see Massachusetts v. EPA*, 549 U.S. 497, 530 n.27 (2007) ("[P]ost-enactment legislative history is not only oxymoronic but inherently entitled to little weight." (internal quotation marks omitted)). Congress presumptively knew the importance of "effects" language to a disparate-impact construction when it passed the Fair Housing Amendments Act in August 1988 because of this Court's reading of Title VII Section 703(a)(2) in *Watson* months earlier. *See Watson*, 487 U.S. at 990–91.

1. The circuit courts to have considered the issue broadly agree that Section 3604 does not apply to lenders. *See, e.g.*, *Gaona v. Town & Country Credit*, 324 F.3d 1050, 1056 n.7 (8th Cir. 2003); *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1554 n.27 (5th Cir. 1996); *Mackey v. Nationwide Ins. Cos.*, 724 F.2d 419, 423 (4th Cir. 1984). *But see Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489, 493 (S.D. Ohio 1976).

Section 3605 specifically addresses lending practices. Section 3605 makes it unlawful for "any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin." 42 U.S.C. § 3605(a). Section 3605 defines a "residential real estate-related transaction" to include "[t]he making or purchasing of *loans* or providing other financial assistance . . . for purchasing, constructing, improving, repairing, or maintaining a dwelling[,] or secured by residential real estate." *Id.* § 3605(b)(1)(A)–(B) (emphasis added). Section 3605 thus expressly and specifically applies to lending.

Section 3604, by contrast, simply establishes general categories of prohibited conduct and identifies protected classes. *See* 42 U.S.C. § 3604(a), (b), (f). The conduct prohibited under Section 3604 includes discriminatory "sell[ing]," "rent[ing]," "negotiat[ing] for the sale or rental," and "mak[ing] unavailable or deny[ing] a dwelling." 42 U.S.C. § 3604(a); *see id.* § 3604(b) (referring to "discriminat[ion] . . . in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities

in connection therewith"); *id.* § 3604(f) (referring to "the sale or rental" and the "mak[ing] unavailable or deny[ing] a dwelling"). Section 3604 is silent both as to lending and as to borrowers.

Section 3604 cannot be read to pertain to lenders when Section 3605 specifically enumerates prohibited lending conduct. "However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling.'" *Clifford F. MacEvoy Co. v. United States ex rel. Calvin Tomkins Co.*, 322 U.S. 102, 107 (1944) (quoting *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932)); *see also United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2330 (2011) (similar).

Thus, the Eighth Circuit has correctly determined that Section 3604 "bars discrimination in sales and rentals, rather than loans." *Gaona*, 324 F.3d at 1056 n.7. The Fourth Circuit similarly reasoned that, "[i]f [Section 3604] was designed to reach every discriminatory act that might conceivably affect the availability of housing, [Section 3605's] specific prohibition of discrimination in the provision of financing would have been superfluous." *Mackey*, 724 F.2d at 423. And the Fifth Circuit has observed that "the plain language of [Sections 3604 and 3605] seems to indicate that § 3605 is the vehicle for discrimination claims involving the financing of residential housing." *Simms*, 83 F.3d at 1554 n.27.

2. Like Section 3604(a), Section 3605 does not permit disparate-impact claims. Section 3605 does not contain language about the "effects" of facially neutral classifications. As originally enacted in 1968,

and as amended in 1988, Section 3605 prohibits "discriminat[ion] . . . *because of*" an individual's protected status. 42 U.S.C. § 3605(a) (emphasis added); *see* Civil Rights Act of 1968, Pub. L. No. 90-284, § 805, 82 Stat. 73, 83 (original); Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 6(c), 102 Stat. 1619, 1622 (amended). Thus, Section 3605 prohibits only disparate *treatment*. *See Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2350 (2009) (reasoning that the words "because of" in ADEA Section 4(a)(1) indicate Congress's intent to prohibit disparate treatment). By retaining Section 3605's exclusive use of disparate-treatment language when amending the provision in 1988, Congress reaffirmed its intent to permit only disparate-treatment claims against lenders.

Based on Respondents' interpretation of the FHA, Section 3605 is even less susceptible to a disparate-impact construction than Section 3604. Respondents have argued that Section 3604(a) permits disparate-impact claims because it contains the phrase "or otherwise." *See* Cert. Opp. 14. Section 3605, however, does not contain, and has never contained, the phrase "or otherwise." Even if such language could suggest an authorization for disparate-impact claims (*but see supra* Part I.A), its omission from Section 3605 underscores Congress's intent not to subject lenders to such claims under the FHA. The FHA prohibits discrimination in lending only to the extent a lender's conduct was based on discriminatory animus—*i.e.*, disparate treatment.

Thus, if the Court ultimately rules in Respondents' favor that Section 3604 permits disparate-impact claims, the Court should state explicitly that its holding does not extend to lender liability.

II. IF DISPARATE-IMPACT CLAIMS ARE DEEMED COGNIZABLE UNDER THE FHA, THE *WARDS COVE* ANALYTICAL FRAMEWORK SHOULD APPLY

If this Court concludes that disparate-impact claims are viable under the FHA, it should hold that the analytical framework set forth in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), governs those claims. The Court in *Wards Cove* set forth a particular burden-shifting framework that governs disparate-impact claims under non-Title VII statutes such as the FHA. *See Smith*, 544 U.S. at 240.

A. Most Circuits Have Applied a Burden-Shifting Approach in FHA Cases but Have Failed To Do So Properly

Lower courts have adopted various approaches for assessing disparate-impact claims under the FHA. A majority of the circuits follow some form of burden-shifting framework, generally involving three steps, under which the plaintiff and the defendant alternately bear the burden to establish relevant facts. *See, e.g.*, *Affordable Hous. Dev. Corp. v. City of Fresno*, 433 F.3d 1182, 1194–95 (9th Cir. 2006); *Oti Kaga, Inc. v. S.D. Hous. Dev. Auth.*, 342 F.3d 871, 883 (8th Cir. 2003); *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment of Twp. of Scotch Plains*, 284 F.3d 442, 466–67 (3d Cir. 2002); *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 51 (1st Cir. 2000).

As an alternative to the burden-shifting approach, some courts apply a balancing approach, which involves weighing the parties' respective interests along with considerations of the relief requested and any evidence of discriminatory intent. *See Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558

F.2d 1283, 1290 (7th Cir. 1977). Other courts apply a hybrid approach, using a burden-shifting framework but incorporating "balancing" factors. *See Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 936, 939–40 (2d Cir. 1988). Two circuits that initially adopted a balancing or hybrid approach have since replaced it with a burden-shifting analysis in certain circumstances. *See Salute v. Stratford Greens Garden Apts.*, 136 F.3d 293, 302 (2d Cir. 1998); *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 988 & n.5 (4th Cir. 1984).

In the Title VII context, the Court has identified at least two advantages to a burden-shifting approach. First, it offers "a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). Second, burden shifting is the best available "safeguard[] against the danger" that public and private entities fearing legal liability will resort to "inappropriate prophylactic measures," *Watson*, 487 U.S. at 992–93, such as *de facto* quota systems favoring minorities, *Ricci*, 129 S. Ct. at 2675. These advantages are equally applicable in the context of housing discrimination.

Although most lower courts have applied a burden-shifting approach in the FHA context, they generally have failed to adhere to the instruction of *Wards Cove*—most notably by mistakenly shifting the burden of *persuasion*, as opposed to the burden of *production*, to the defendant at the second step in the analysis. *See, e.g.*, *Oti Kaga*, 342 F.3d at 883. The Department of Housing and Urban Development ("HUD"), in a recently proposed rule under the FHA, has made the same error. *See* Implementation of the

Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. 70,921, 70,923–24 (Nov. 16, 2011) (to be codified at 24 C.F.R. pt. 100).[6]

"Where the statutory text is 'silent on the allocation of the burden of persuasion,' [the Court] 'begin[s] with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims.'" *Gross*, 129 S. Ct. at 2351 (quoting *Schaffer v. Weast*, 546 U.S. 49, 56 (2005)); *see Smith*, 544 U.S. at 240. The FHA is silent on this burden, and thus a plaintiff invoking the statute bears the burden of persuasion at all stages of the case.

The lower courts that have placed the burden of persuasion on the defendant during the burden-shifting analysis have relied incorrectly on Title VII, which expressly provides that the defendant bears the burden of persuasion after the plaintiff presents a *prima facie* case of a disparate impact. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i). HUD, in its proposed rule, likewise wrongly relies on Title VII's unique burden-shifting provision. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 76

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[6] *Amici* agree that HUD's proposed rule is not entitled to deference. *See* Pet. Br. 36–37. HUD does not meaningfully interpret any part of the FHA's statutory text or distinguish between Sections 3604 and 3605. *See generally* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. at 70,922–25. If adopted, HUD's proposed rule would not, as HUD suggests, "simply 'further' the purpose of [the FHA]; [it would] go well *beyond* that purpose." *Guardians Ass'n v. Civil Serv. Comm'n of N.Y.*, 463 U.S. 582, 613 (1983) (O'Connor, J., concurring) (construing regulations under Title VI). Nor does HUD analyze the policy benefits and disadvantages of recognizing disparate-impact liability under the FHA. *See* Implementation of the Fair Housing Act's Discriminatory Effect's Standard, 76 Fed. Reg. at 70,923 & nn.16–17.

Fed. Reg. at 70,924 & n.33. But the FHA contains no similar burden-allocating provision. Thus, the default rule that the plaintiff always bears the burden of persuasion applies under the FHA.

B. The *Wards Cove* Framework Provides the Applicable Burden-Shifting Standards

In *Wards Cove*, the Court articulated the elements of the burden-shifting framework for disparate-impact claims under Title VII as it then existed. 490 U.S. at 658–61. Congress subsequently altered the Title VII burden-shifting framework in the Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074–75 (codified at 42 U.S.C. § 2000e-2(k)), including with respect to the burden of persuasion. However, that modification affected Title VII cases only.

In *Smith*, this Court recognized that the burden-shifting framework outlined in *Wards Cove* remains viable to the extent non-Title VII statutes borrow from the pre-1991 Title VII tradition. 544 U.S. at 240; *see Meacham*, 554 U.S. at 97–101. Specifically, in addressing the ADEA claims in *Smith*, the Court held that, "[w]hile the relevant 1991 amendments expanded the coverage of Title VII, they did not amend the ADEA . . . . Hence, *Wards Cove's* pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA." 544 U.S. at 240.

As explained above, the language of the FHA significantly differs from that of Title VII. *See supra* Part I.A. However, to the extent that the FHA permits disparate-impact claims, there is no reason to believe that Congress would have intended courts

to use any analytical framework other than the traditional *Wards Cove* burden-shifting approach.

The *Wards Cove* burden-shifting framework involves three steps. First, the plaintiff must make a *prima facie* showing that a specific practice of the defendant causes a "significantly disparate impact" on a protected class. *Wards Cove*, 490 U.S. at 658. Second, if the plaintiff makes this showing, the defendant must come forward with evidence that the "challenged practice serves, in a significant way, [its] legitimate . . . goals." *Id.* at 659. Third, the plaintiff must then prove that the defendant refused to adopt an alternative practice that would have served its goals equally as effectively without causing the disparate impact. *Id.* at 660–61.

This Court should clarify the specific considerations applicable at each step in this process for any disparate-impact claims cognizable under the FHA. If the elements of the burden-shifting analysis are imprecise, courts and litigants will be embroiled in unnecessary, prolonged litigation, with potentially inconsistent and unfair results.

1. A plaintiff's *prima facie* case typically begins with a statistical showing that the defendant's conduct causes a substantial adverse impact on a protected class. *See Watson*, 487 U.S. at 987. This showing must consist of properly circumscribed comparisons. For example, in the context of FHA claims against lenders, the relevant statistical comparison is between the composition of home loan recipients and the composition of the *qualified* population of home loan applicants in the relevant market. *See Wards Cove*, 490 U.S. at 650–53; *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 (1977); *Griggs*, 401 U.S. at 431–35.

But the plaintiff cannot simply recite statistics. *Watson*, 487 U.S. at 994–95. Rather, the plaintiff is responsible for isolating and identifying a specific practice of the defendant and demonstrating that the disparity at issue is *statistically significant* and the result of that *specific practice*. *Id.* at 994; *Wards Cove*, 490 U.S. at 657.

If the plaintiff succeeds in making the initial, two-part showing, the case proceeds to a probing analysis of the defendant's conduct. *See Wards Cove*, 490 U.S. at 658. The plaintiff's initial, *prima facie* requirement under the burden-shifting framework must therefore be sufficiently stringent to guard against the unwarranted expense, time, and diversion of party and judicial resources entailed in litigating meritless claims. *See Meacham*, 554 U.S. at 100; *see also Simms*, 83 F.3d at 1555.

2. The lower courts also have diverged with respect to the nature of the defendant's burden at the second step of the burden-shifting analysis. Some lower courts require private defendants to show a "business necessity sufficiently compelling to justify the challenged practice." *Betsey*, 736 F.2d at 988. Other courts require defendants to demonstrate a "legitimate, bona fide . . . interest." *Salute*, 136 F.3d at 302 (internal quotation marks omitted). Similarly distinct standards have emerged in cases involving public defendants. *Compare City of Fresno*, 433 F.3d at 1195, *with Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 575 (2d Cir. 2003).

Wards Cove requires the defendant to offer evidence that the challenged practice did not cause a significantly disparate impact or that the "challenged practice serves, in a significant way, the [defendant's] legitimate . . . goals." 490 U.S. at 659. This does not

mean that the defendant must show "that the challenged practice [is] 'essential' or 'indispensable' to the [defendant's] business," as such a "degree of scrutiny would be almost impossible . . . to meet and would result in a host of evils," such as quotas. *Id*. And, as explained above, although the defendant has the burden to produce evidence, "[t]he burden of persuasion . . . remains with the disparate-impact plaintiff" at all times. *Id.*; *accord Watson*, 487 U.S. at 997. At step two, the plaintiff carries the burden of persuasion to demonstrate affirmatively that the challenged practice did not significantly serve the defendant's legitimate business goals.

3. At the third step, the plaintiff must affirmatively show that the defendant could have undertaken viable measures as an alternative to the challenged practice without causing a significantly disparate impact. *Wards Cove*, 490 U.S. at 660.

The circuits also are divided on the standards applicable at this step. A majority of the circuits properly place the step-three burden on the plaintiff. *See, e.g.*, *Oti Kaga*, 342 F.3d at 883; *Harris v. Itzhaki*, 183 F.3d 1043, 1051 (9th Cir. 1999). But at least one circuit has placed this burden on the defendant, *see Tsombanidis*, 352 F.3d at 575, and other courts do not clearly allocate the burden, *see Langlois*, 207 F.3d at 51; *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 149 & n.37 (3d Cir. 1977).

To resolve the circuit conflict, the Court should confirm that the plaintiff bears the burden to identify an alternative that is "'equally as effective as the challenged practice in serving the [defendant's] legitimate business goals'" and "reduce[s] the . . . disparate impact of practices currently being used." *Wards Cove*, 490 U.S. at 661 (quoting *Watson*, 487 U.S. at

998). This standard conforms to the Court's instruction that the burden of persuasion "remains with the disparate-impact plaintiff" at all times. *Id.* at 659. Moreover, "[r]equiring the plaintiff to identify a specific less restrictive alternative is more efficient and fair than requiring the defendant to guess at and eliminate all possible alternatives." *Villas W. II of Willowridge Homeowners Ass'n v. McGlothin*, 885 N.E.2d 1274, 1283 (Ind. 2008) (internal quotation marks omitted).

Further, the viability of an alternative practice identified by the plaintiff must be evaluated in light of factors the defendant itself would consider. *See Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth.*, 417 F.3d 898, 906 (8th Cir. 2005); *Langlois*, 207 F.3d at 50 & n.6; *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 289–90 (W.D. Tex. 2007). Any proffered alternative to a challenged practice must have been available and knowable to the defendant at the time the challenged practice created a disparate impact. *See Ricci*, 129 S. Ct. at 2680; *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). The plaintiff may prevail only by pointing to options that the defendant reasonably could have known were viable.

The foregoing *Wards Cove* standards should be extended to any FHA disparate-impact claims.

C. The Other Approaches Applied by Lower Courts Are Unsound and Inappropriate for Private Defendants

In contrast to the familiar burden-shifting approach, several circuits apply either a balancing approach or a hybrid approach (which merges the balancing and burden-shifting approaches) to evaluate disparate-

impact claims under the FHA. These alternative approaches introduce improper considerations and unnecessary complexity into a court's analysis of disparate-impact claims.

The balancing approach considers three factors: (1) the strength of the plaintiff's showing of discriminatory impact; (2) the defendant's interest in taking the challenged action; and (3) the nature of the relief requested, *i.e.*, whether the plaintiff seeks to compel the defendant to take affirmative steps to provide housing or merely to remove obstacles to such housing. *See Arthur v. City of Toledo*, 782 F.2d 565, 575 (6th Cir. 1986); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982); *Arlington Heights*, 558 F.2d at 1290. Some courts also consider whether the plaintiff has offered any evidence of discriminatory intent. *See Town of Clarkton*, 682 F.2d at 1065; *Arlington Heights*, 558 F.2d at 1290.

These amorphous and subjective factors make the balancing test generally unworkable and pose particular problems for private defendants. One court applying the balancing test has stated that courts should take care not to be "overly solicitous" to a defendant "seeking to protect private rights." *Arlington Heights*, 558 F.2d at 1293. But private rights are obviously important, and a burden-shifting approach properly accommodates competing interests.

Specifically, the final factor in the balancing approach—the nature of the housing-related relief the plaintiff seeks—has questionable application to claims against private defendants, who, unlike public defendants, "lack the authority to control third-party behavior." *Graoch Assocs. #33, L.P. v. Louisville/Jefferson Cnty. Metro Human Relations Comm'n*, 508 F.3d 366, 373 (6th Cir. 2007). Recognizing this

limitation, two circuits that previously adopted the balancing approach have subsequently rejected its application to claims against private defendants. *Id.*; *Betsey*, 736 F.2d at 988 n.5.

Over the past two decades, the balancing approach has become increasingly disfavored. "[R]ecently, most federal circuits have abandoned the *Arlington Heights* . . . factors altogether." *McGlothin*, 885 N.E.2d at 1281. The widespread abandonment of this approach—a framework that provides courts with little guidance as to how to evaluate the interests presented in a given case—is understandable. *See Langlois*, 207 F.3d at 51. This Court should confirm that the balancing approach is inappropriate, at least with respect to claims against private defendants.

The hybrid approach also is inferior to the traditional burden-shifting approach. Some courts incorporate "balancing" factors into the burden-shifting framework. *See Graoch Assocs.*, 508 F.3d at 373; *Reinhart v. Lincoln Cnty.*, 482 F.3d 1225, 1229 (10th Cir. 2007); *Huntington Branch*, 844 F.2d at 936. This hybrid approach suffers from the same deficiencies (especially with respect to private defendants) as the balancing approach.

Furthermore, "mixing the [balancing] factors with the burden-shifting framework produces an unnecessarily complex process." *McGlothin*, 885 N.E.2d at 1282. The disagreement among circuits over the specific factors to be balanced has led to variance in the elements considered in the hybrid approach as well. *Compare Graoch Assocs.*, 508 F.3d at 373–74, *with Huntington Branch*, 844 F.2d at 936–37. Even within a single circuit, the opinions have not identified those factors consistently. *Compare Reinhart*, 482 F.3d at 1229, *with Mountain Side Mobile Estates*

P'ship v. Sec'y of Hous. & Urban Dev., 56 F.3d 1243, 1252 (10th Cir. 1995). This complexity reduces efficiency and predictability, and results in a lengthy, laborious decision-making process for courts. *See, e.g.*, *Mountain Side*, 56 F.3d at 1253–57; *Huntington Branch*, 844 F.2d at 937–41. The hybrid approach, like the balancing approach, should be rejected.

CONCLUSION

The Court should reverse the decision below and hold that disparate-impact claims are not cognizable under the FHA. If the Court holds otherwise, it should endorse the *Wards Cove* burden-shifting analysis for such claims.

Respectfully submitted,

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APPENDIX

	No "effects" language	"Effects" language
Title VII, Sec. 703(a)	It shall be an unlawful employment practice for an employer— (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]	It shall be an unlawful employment practice for an employer— (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
ADEA, Sec. 4(a)	It shall be unlawful for an employer— (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age[.]	It shall be unlawful for an employer— (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age[.]
FHA, 42 U.S.C. Sec. 3604(a)	[I]t shall be unlawful—[t]o 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.	**None.**