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

BRIEF FOR THE AMERICAN BANKERS ASSOCIATION, THE AMERICAN FINANCIAL SERVICES ASSOCIATION, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE CONSUMER BANKERS ASSOCIATION, THE CONSUMER MORTGAGE COALITION, THE FINANCIAL SERVICES ROUNDTABLE, THE HOUSING POLICY COUNCIL, THE INDEPENDENT COMMUNITY BANKERS OF AMERICA®, AND THE MORTGAGE BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

ANDREW C. GLASS
K&L GATES LLP
State Street Financial Center
One Lincoln Street
Boston, MA 02111
(617) 261-3100

PAUL F. HANCOCK
Counsel of Record
K&L GATES LLP
Southeast Financial Center
Suite 3900
200 South Biscayne Boulevard
Miami, FL 33131
(305) 539-3300
paul.hancock@klgates.com

Counsel for Amici Curiae

253953

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The American Bankers Association ("ABA"), American Financial Services Association ("AFSA"), Chamber of Commerce of the United States of America ("Chamber"), Consumer Bankers Association ("CBA"), Consumer Mortgage Coalition ("CMC"), Financial Services Roundtable ("FSR"), Housing Policy Council ("HPC"), Independent Community Bankers of America® ("ICBA"), and Mortgage Bankers Association ("MBA") (collectively, "*amici*") respectfully submit this brief as *amici curiae* in support of the petition for a writ of certiorari (the "Petition").

- ABA, headquartered in Washington, D.C., is the principal national trade association of the financial services industry. ABA's members, located in fifty states, the District of Columbia, and Puerto Rico, include financial institutions of all sizes and hold a majority of the domestic assets of the U.S. banking industry. ABA frequently submits *amicus curiae* briefs in matters that significantly affect its members and the business of banking.

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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 37.2(a), counsel for *amici* provided counsel of record timely written notice of *amici*'s intent to file this brief. Written consent from counsel of record for the parties to the filing of *amicus* briefs has been filed with the Clerk.

- 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.

- CBA is the only national financial trade group focused exclusively on retail banking and personal financial services, geared toward consumers and small businesses. 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 supercommunity banks that collectively hold two-thirds of the industry's total assets.

- The Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations. Its members include companies and organizations of every size, in every industry sector, and from every region of the country. The Chamber represents its members' interests by participating as *amicus curiae* in cases of concern to the nation's business community.

- 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.

- FSR represents the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Members participate through the Chief Executive Officer and other executives nominated by the CEO. FSR members provide fuel for America's economic engine, accounting for $92.7 trillion in managed assets, $1.2 trillion in revenue, and 2.3 million jobs.

- HPC is a trade association that represents 31 of the leading national mortgage finance companies. HPC members originate, service, and insure mortgages. HPC estimates that its member companies originate approximately 75% of mortgages and service two-thirds of mortgages serviced in the United States.

- ICBA, a national trade association, is the nation's voice for more than 6,500 community banks 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, to expand homeownership, and to extend access to affordable housing. Its membership of over 2,200 companies includes all aspects of real estate finance, including mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, and life insurance companies.

The Fair Housing Act prohibits discrimination in housing, 42 U.S.C. § 3604, and in "residential real estate-related transactions," which include making and purchasing mortgage loans, *id.* § 3605. *Amici*'s members are subject to the Fair Housing Act and related laws that prohibit discrimination in residential real estate lending. *Amici* are committed to supporting the Act and devote substantial resources to the advancement of fair lending practices. *Amici* strongly oppose the disparate treatment of individuals on the bases enumerated in the Fair Housing Act. The main issue presented in the Petition, though, is whether the Fair Housing Act goes beyond prohibiting disparate treatment and creates liability for actions performed without any intent to discriminate simply because they may have a disproportionate effect on groups sharing certain statutorily-defined characteristics such as race or national origin.

SUMMARY OF ARGUMENT

In each of the last two terms, this Court granted certiorari on petitions raising the same issue presented in the Petition now before the Court. In *Magner v. Gallagher*, No. 10-1032 ("*Magner*"), this Court granted certiorari to review whether the Fair Housing Act

encompasses disparate-impact liability and if so, what standard and burden of proof apply. *Magner* was briefed and set for argument, but the petitioners withdrew the matter just prior to argument.[2] In *Township of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, No. 11-1507 ("*Mount Holly*"), the Court again granted certiorari to review whether the Fair Housing Act permits disparate-impact claims. *Mount Holly* was briefed and set for argument, but in a remarkably similar scenario, the petitioners again withdrew the matter just prior to argument.[3] Granting the current Petition would provide the Court the opportunity to address the questions that it believed worthy of consideration in *Magner* and *Mount Holly*, including whether the plain meaning of the language of the Act allows a disparate-impact theory of liability.

The question of whether the Fair Housing Act encompasses disparate-impact claims has never been settled, with the different branches of the federal government providing conflicting answers. In enacting

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2. *See* Stip. to Dismiss Writ of Certiorari, *Magner* v. *Gallagher* (Feb. 14, 2012) (No. 10-1032). In a letter to the U.S. Attorney General, congressional leaders requested the Department of Justice to respond as to whether it had sought dismissal of the *Magner* petition in exchange for dismissal of False Claims Act cases the Department was pursuing against certain *Magner* petitioners. *See* Press Release, U.S. House of Representatives Comm. on the Judiciary, Members Probe Justice Dep't on Lawsuit Quid Pro Quo Arrangement (Sept. 27, 2012), *available at* http://judiciary.house.gov/index.cfm/2012/9/membersprobejusticedeptonlawsuitquidproquoarrangement.

3. *See* Stip. to Dismiss Writ of Certiorari, *Township of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.* (Nov. 15, 2013) (No. 11-1507).

the Fair Housing Act, Congress only barred actions taken "because of" certain factors and did not include language creating liability for the "effect" of actions performed without any intent to discriminate. Nevertheless, the language of the Act has continually perplexed enforcement officials. The Department of Housing and Urban Development ("HUD"), charged with enforcing the Act, recognized the importance of the issue of whether the Act encompasses disparate-impact claims when it promulgated its 1989 official notice-and-comment rule. Nevertheless, HUD specifically decided not to address the issue in the 1989 rule that remained in effect for 23 years. *See* Implementation of Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232, 3234-35 (Jan. 23, 1989). During that period, despite HUD's official position of neutrality, some administrations stated the Act only recognizes disparate treatment, and others have applied disparate impact in enforcing the Act. Then in 2011, just days after the Court granted certiorari in *Magner*, HUD proposed amending its Fair Housing Act regulations to expressly provide for disparate-impact liability – for the first time – in a rule that went into effect in March 2013. Meanwhile, lower federal courts have applied disparate impact to Fair Housing Act claims, although recent decisions of this Court interpreting related anti-discrimination statutes instruct that language similar to that found in the Fair Housing Act does *not* support disparate-impact claims. This Court has never directly addressed the question under the Fair Housing Act.

The risk of disparate-impact lawsuits, in the absence of guidance from the Court, pressures the residential mortgage lending industry to arrive at particular outcomes and end numbers to avoid such lawsuits. Yet,

such incentives run counter to the purpose of the Fair Housing Act. The Court's guidance is necessary so that businesses subject to the Act can determine the proper focus for compliance. The Petition presents the Court with the opportunity to provide such guidance, an opportunity that was denied when the *Magner* and *Mount Holly* petitioners withdrew their cases from consideration. Accordingly, and for the reasons set forth below, the Court should grant certiorari.

ARGUMENT

I. WHETHER THE FAIR HOUSING ACT RECOGNIZES DISPARATE IMPACT LIABILITY IS AN IMPORTANT FEDERAL QUESTION WHICH IS UNSETTLED AND RIPE FOR REVIEW

A. The Branches of the Government Have Taken Conflicting Views on the Availability of Disparate Impact under the Fair Housing Act, and Lower Court Decisions Contradict this Court's Related Jurisprudence

The questions presented in the Petition, namely, whether the Fair Housing Act recognizes a disparate-impact theory of liability and if so, the applicable standard of proof, have received remarkably conflicting treatment by the branches of the federal government. Most importantly, when it enacted the Act in 1968,[4] Congress barred actions taken "because of" certain factors, such as race and

4. *See* Civil Rights Act of 1968, Pub. L. No. 90-284, Title VIII, 82 Stat. 73, 81-89 (1968).

national origin, but did not include language creating liability for the "effect" of actions performed without any intent to discriminate. When Congress amended the Act in 1988,[5] and even though disparate-impact law was well defined in related jurisprudence under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e, *et seq.*, Congress did not add language to the Fair Housing Act providing for a disparate-impact cause of action.[6]

The Executive Branch previously has taken the position that the Act does not encompass disparate impact. In 1988, the Solicitor General submitted an *amicus* brief to the Court asserting that a plaintiff must prove *intentional* discrimination to establish a violation of the Fair Housing 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 [Fair Housing Act]'s language and legislative history show that a violation of [the Act] requires intentional discrimination, substantial practical problems result if this requirement is discarded"), *available at* http://www.justice.gov/osg/briefs/1987/sg870004.txt. That same year, in signing the Fair Housing Amendments Act, the President stated 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

5. *See* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988).

6. Nor did Congress add such language to the Fair Housing Act when, in 1991, it amended Title VII to better articulate the disparate-impact cause of action available under that statute. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

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, Ronald Reagan Presidential Library (Sept. 13, 1988), *available at* http://www.reagan.utexas.edu/archives/speeches/1988/091388a.htm.

Meanwhile, in notice-and-comment rulemaking under the Fair Housing Act, HUD stated that its "regulations are *not* designed to answer the question of whether intent is or is not required to show a violation" of the Act and that it would "maintain a *neutral* position on the issue of whether discriminatory intent is necessary for advertising to be considered violative." Implementation of Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232, 3234-35, 3275 (Jan. 23, 1989) (emphasis added). 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 approach, 59 Fed. Reg. 18,266, 18,269 (Apr. 15, 1994),[7] HUD did not change its neutral rule until 17 years later.

In November 2011, HUD abandoned its past rulemaking position. Nine days after the Court granted certiorari in *Magner*, HUD proposed amending its Fair Housing Act regulations to expressly provide for disparate-impact liability. *See* Implementation of Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. 70,921, 70,926-27 (Nov. 16, 2011). HUD's final rule became effective in March 2013. *See* Implementation of

7. This Policy Statement was not subject to the notice-and-comment rulemaking process.

Fair Housing Act's Discriminatory Effects Standard: Final Rule, 78 Fed. Reg. 11,460, 11,478 (Feb. 15, 2013). In promulgating the final rule, HUD not only implemented disparate impact but did so to the extreme. For instance, the rule does not require a plaintiff to isolate the specific policy that gives rise to the alleged disparate impact. *See id.* at 11,469; *see also* 24 C.F.R. § 100.500(c). The concurring opinion below noted that the lack of such a requirement runs contrary to this Court's delineation of what is required to make a *prima facie* showing of disparate-impact discrimination. *See Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, 747 F.3d 275, 283-84 (5th Cir. 2014) (Jones, J., concurring) (citing *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657 (1989)). Further, the rule (1) requires a *defendant* to establish "the challenged practice is *necessary* to achieve one or more substantial, legitimate, nondiscriminatory interests of the ... defendant," and even if the defendant does so, (2) permits a plaintiff to prevail by demonstrating only that a less-discriminatory alternative exists that *might* serve the defendant's business interests. *See* 24 C.F.R. § 100.500(c) (emphasis added).[8]

Moreover, in *amicus* briefs submitted to the Court in *Magner* and in *Mount Holly*, the current administration raised novel arguments, in support of disparate impact under the Fair Housing Act, that run counter to the plain language of the Act and rely upon propositions which find no support in this Court's precedent or that of the courts of appeals. *See* Brief for United States as *Amicus Curiae*, *Magner v. Gallagher* (Dec. 29, 2011) (No.

8. As discussed below in Section II.B, these requirements are at odds with the *Wards Cove* test.

10-1032), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2012/01/10-1032-SG-amicus-brief.pdf; Brief for United States as *Amicus Curiae*, *Township of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.* (Oct. 28, 2013) (No. 11-1507), *available at* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/11-1507_resp_amcu_usa.authcheckdam.pdf. The fact that HUD, the agency charged with promulgating rules to enforce the Act, *see* 42 U.S.C. §§ 3610, 3614a, has vacillated regarding its meaning demonstrates the need for the Court to provide a clear answer.[9]

Although the Court has examined whether other federal anti-discrimination statutes recognize disparate impact, various lower federal courts have incorrectly applied the Court's analysis of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621, *et seq.*, and Title VII to conclude that the Fair Housing Act encompasses disparate-impact liability.[10] In particular,

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9. The Court has never addressed if the Fair Housing Act even permits a rule such as the one HUD promulgated. Thus, whether the HUD rule passes the first part of the test under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) – assessing if an agency's interpretation is contrary to unambiguous statutory language – remains unresolved and presents an additional reason to grant the Petition.

10. See, *e.g.*, *Graoch Assocs. # 33, L.P. v. Louisville/Jefferson County Metro Human Relations Comm'n*, 508 F.3d 366, 372 (6th Cir. 2007); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 146 (3d Cir. 1977). *But see Latimore v. Citibank Fed. Sav. Bank*, 151 F.3d 712, 714 (7th Cir. 1998) (cautioning against the "wholesale transposition" of discrimination theories and standards of proof from the Title VII context to the unique area of "credit discrimination").

lower courts have improperly relied on *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), in concluding that the "because of" language in Title VII supports a disparate-impact approach.[11] As the Court has more recently made clear, this is not the proper lesson of *Griggs*. *See Smith v. City of Jackson, Miss.*, 544 U.S. 228, 235-36 & n.6 (2005) (plurality op.); *Ricci v. DeStefano*, 557 U.S. 557, 577-78 (2009). *Smith* and *Ricci* each confirm that the "because of" language, including such language in Title VII, does not permit a disparate-impact approach. *See Smith*, 544 U.S. at 235-36 & n.6 (plurality op.);[12] *Ricci*, 557 U.S. at 577-78. Specifically, the Court has held that certain provisions of

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11. *See, e.g., Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1288-90 & n.6 (7th Cir. 1977); *Rizzo*, 64 F.2d at 146-48; *see also United States v. City of Black Jack, Mo.*, 508 F.2d 1179, 1184-85 (8th Cir. 1974); *United States v. Mitchell*, 580 F.2d 789, 791 (5th Cir. 1978); *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1311 (9th Cir. 1982); *Smith v. Town of Clarkton, N.C.*, 682 F.2d 1055, 1065 (4th Cir. 1982); *Arthur v. City of Toledo, Ohio*, 782 F.2d 565, 574-75 (6th Cir. 1986); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934-35 (2d Cir. 1988); *Mountain Side Mobile Estates P'ship v. Secretary of HUD*, 56 F.3d 1243, 1250-51 (10th Cir. 1995); *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49 (1st Cir. 2000). *But see Keller v. City of Fremont*, 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 FHA") (emphasis in original).

12. On this point, the *Smith* Court was unanimous. *See* 544 U.S. 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., dissenting) ("[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").

the ADEA and Title VII, *not* found in the Fair Housing Act, recognize disparate-impact claims because those statutes contain language directed to the "*effects*" of discrimination. *See Smith*, 544 U.S. at 235-36 (plurality op.); *Ricci*, 557 U.S. at 577-78.[13] By contrast, the Fair Housing Act does *not* contain language concerned with the "effects" of the challenged action but proscribes only conduct undertaken "because of" certain factors. *See* 42 U.S.C. §§ 3604, 3605.[14]

By granting the Petition in this matter, the Court will again have the opportunity to address the question that it twice found worthy of consideration,[15] and to resolve more than four decades of conflicting positions adopted by the branches of the federal government.

B. Uncertainty Concerning Disparate-Impact Litigation under the Act Pressures Businesses to Consider Prophylactic Measures That Run Counter to the Act's Purpose

While a disparate-treatment theory is well suited to rooting out discrimination, uncertainty concerning the

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13. *See also* Kirk D. Jensen & Jeffrey P. Naimon, *The Fair Housing Act, Disparate Impact Claims, and* Magner v. Gallagher: *An Opportunity to Return to the Primacy of the Statutory Text*, 129 BANKING L.J. 99, 101-110 (2012).

14. *See also Gross v. FBL Fin. Servs.*, 557 U.S. 167, 174-75 (2009) (Congress is presumed to act intentionally where it does not add language to one statute that it has included in another statute).

15. In *Magner* and *Mount Holly* combined, the Court received 48 merits *amicus* briefs, expressing a wide range of views, which further demonstrates the importance of the issues presented.

application of a disparate-impact theory under the Fair Housing Act creates compliance difficulties and pressures businesses to consider prophylactic measures to minimize risk that may run counter to the purpose of the Act. The threat of disparate-impact litigation arises when the end results of a business's operations have different demographic effects, despite the uniform application of sound, neutral standards. In lending, generally-accepted credit assessment standards, which themselves raise no inference of discrimination, may produce differential results that can be correlated with factors such as race or national origin. Down-payment requirements, debt-to-income requirements, loan-to-value requirements, and other neutral, risk-based underwriting requirements can all affect various racial and ethnic groups differently.[16] If the differences produced by neutral policies are deemed statistically significant (i.e., cannot be attributed to mere chance), the lender faces the prospect of a disparate-impact lawsuit.

Like most businesses, lenders strive to minimize the risk of even facing a disparate-impact challenge because a lawsuit alleging discrimination on the basis of race, national

16. For instance, down-payment requirements have differing effects on racial groups because of the disparity between the average wealth of white households and of minority households. The Census Bureau has reported that the median wealth of white households was approximately 17.5 times that of African-American households and 14 times that of Hispanic households. U.S. Census Bureau, Table 1. Median Value of Assets for Households, by Type of Asset Owned and Selected Characteristics: 2011 (median net worth for white households – $110,500, African-American households – $6,314, and Hispanic households – $7,683), *available at* http://www.census.gov/people/wealth/files/Wealth_Tables_2011.xlsx.

origin, or another statutorily-defined characteristic can occasion immediate reputational injury and business disruption. Disparate-impact claims under the Act have the potential to impact thousands of lenders represented by *amici*.[17] The allegation of a statistical impact on a group is newsworthy and can bring reputational harm even if there is no reasonable inference of impermissible discrimination. And, importantly, defending allegations of discrimination based solely on outcomes – even if the assertion of discrimination is meritless – is very expensive. In these circumstances, it is not surprising that to avoid legal risk, some businesses may feel pressure to manage end numbers or at least place a "racial thumb on the scales."[18] *Ricci*, 557 U.S. at 594 (Scalia, J., concurring). The Court, however, has expressed concern that such efforts to avoid a disparate-impact legal challenge may themselves constitute intentional unlawful discrimination. *See, e.g., id.* at 563 (considering race "is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have

17. Under the federal Home Mortgage Disclosure Act, 12 U.S.C. §§ 2801, *et seq.*, approximately 8,000 lenders – ranging from national enterprises to local operations with limited resources – are required to report information regarding their residential mortgage lending activities, 12 U.S.C. § 2803; *see* 12 C.F.R. § 203.4, which disclosures are subject to intense public scrutiny. Such scrutiny itself leads to a threat of Fair Housing Act disparate-impact claims.

18. The Court has cautioned against this result even as it has permitted the use of a disparate-impact approach based on particular language in other federal anti-discrimination statutes. *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").

been liable under the disparate-impact statute"); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499-500 (1989) ("an amorphous claim that there has been past discrimination ... cannot justify the use of an unyielding racial quota").

The congressional and regulatory response to the recent financial crisis exacerbates lenders' conundrum by creating a double-bind between complying with new, neutral lending regulations and risking disparate-impact lawsuits under the Fair Housing Act, thus increasing the need for the Court to consider the question presented. For instance, the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank Act"), and the Ability-to-Repay ("ATR") and Qualified Mortgage ("QM") standards promulgated under the Truth in Lending Act's Regulation Z require that residential mortgage lenders, when considering a loan application, evaluate several factors, including income and assets, monthly debt obligations, and credit history, to determine that the consumer can repay the loan. *See* 12 C.F.R. § 1026.43(c); *see also* 15 U.S.C. § 1639c(a)(3). Loans that satisfy certain strict underwriting requirements, fee limitations, and restrictions on certain terms and conditions qualify as QMs and are presumed to comply with the ATR requirements.[19] Because failure

19. *See* 12 C.F.R. § 1026.43(e); *see also* 15 U.S.C. § 1639c(b). Standard QMs, for example, (1) require that the consumer have a DTI ratio no higher than 43%, a characteristic unlikely to be distributed evenly across all demographic groups, or (2) must be eligible for purchase or guarantee by GSEs such as Fannie Mae or Freddie Mac, or for insurance or guarantee by federal agencies such as the Federal Housing Administration or Department of Veterans Affairs, which eligibility may also produce results susceptible to disparate-impact challenge. *See* 12 C.F.R. § 1026.43(e)(2)(vi), (4)(ii).

to comply with the ATR requirements may result in substantial liability, the number of lenders willing to make, and investors willing to purchase, non-QM loans is expected to be limited for quite some time.[20]

Whether a particular loan qualifies as a QM necessarily includes consideration of debt-to-income ratio and other factors comprising the risk profile of both the consumer and the loan. Consumers with greater income, lower debt, and other positive credit factors are more likely to be eligible for loans because they are more likely to meet the QM qualifications. Individuals with less income or wealth are more likely to be declined for QMs. As discussed above, however, because generally-accepted neutral credit assessment standards may produce differential results that can be correlated with factors such as race or national origin, complying with the QM standards may give rise to disparate-impact claims. And a lender's decision to originate *only* QMs might also face a challenge alleging that the disparate-impact theory of liability requires the lender, notwithstanding public policy, to offer other loan products aimed at those who might not satisfy the QM requirements.[21]

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20. Indeed, the Federal Housing Finance Agency ("FHFA") directed Fannie Mae and Freddie Mac to "limit their future mortgage acquisitions to loans that meet the requirements for a qualified mortgage, including those that meet the special or temporary qualified mortgage definition, and loans that are exempt from the 'ability to repay' requirements under ... Dodd-Frank." *See* 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.

21. Recently, five federal agencies, including the Consumer Financial Protection Bureau, jointly stated that "a creditor's decision to offer only [QMs] would [not], absent other factors,

Because the application of the disparate-impact theory to the Act creates incentives that run counter to the Act, the Court should grant the Petition to remove the uncertainty as to the scope of Fair Housing Act liability.

II. THE FIFTH CIRCUIT'S DISPOSITION OF THE QUESTIONS PRESENTED CONFLICTS WITH THE RELEVANT JURISPRUDENCE OF THIS COURT

Because this Court has yet to address the questions presented by the Petition, and because the courts of appeals have rendered myriad decisions that conflict with related Court precedent, the Court should grant the Petition to resolve the questions presented.

A. This Court's Jurisprudence Regarding Disparate Impact under Other Anti-Discrimination Statutes Does Not Support the Existence of Disparate-Impact Liability under the Fair Housing Act

The Fifth Circuit below stated the Fair Housing Act recognizes disparate-impact claims notwithstanding the plain language of the statute that only conduct undertaken "because of" certain enumerated characteristics is actionable. *See Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, 747 F.3d 275, 280 & n.4 (5th

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elevate a supervised institution's fair lending risk," including risk under the Fair Housing Act. *See* Interagency Statement on Fair Lending Compliance and the Ability-to-Repay and Qualified Mortgage Standards Rule (Oct. 22, 2013), *available at* http://files.consumerfinance.gov/f/201310_cfpb_guidance_qualified-mortgage-fair-lending-risks.pdf. Notably, HUD did *not* join the statement.

Cir. 2014) ("violation of the FHA can be shown either by proof of intentional discrimination or by proof of disparate impact").[22] The appeals court's decision directly conflicts with this Court's ADEA and Title VII jurisprudence recognizing the availability of disparate-impact claims based on language that is not found in the Fair Housing Act. As discussed above, *Smith* and *Ricci* hold that only if a statute "focuses on the *effects* of the action on the [protected individual] rather than the motivation for the action of the [defendant]" does the statute prohibit disparate impact. *Smith*, 544 U.S. at 236 (emphasis in original) (plurality op.); *see Ricci*, 557 U.S. at 577-78. By granting the Petition, the Court can resolve the conflict between its precedent and decisions of the courts of appeals regarding the availability of a disparate-impact theory under the Fair Housing Act.

B. The Fifth Circuit Applied a Standard of Proof That Finds No Support in the Court's Disparate-Impact Jurisprudence

Even if it were correct that the Fair Housing Act recognizes disparate-impact claims, the Fifth Circuit applied a standard of proof that conflicts with this Court's jurisprudence. Specifically, the appeals court adopted the HUD rule's "burden-shifting approach," under which "[i]f the plaintiff makes a prima facie case, the defendant must then prove 'that the challenged practice is necessary to achieve one or more substantial,

22. While noting that this Court had agreed to hear the issue in both *Magner* and *Mount Holly*, the Fifth Circuit concluded it was "bound to follow [its] precedent even when the Supreme Court grants certiorari on an issue," if the grant does not result in "an intervening [decision] overruling prior precedent." *See* 747 F.3d at 280 n.4.

legitimate, nondiscriminatory interests,'" and "[i]f the defendant meets its burden, the plaintiff must then show that the defendant's interests 'could be served by another practice that has a less discriminatory effect.'" *Inclusive Cmtys. Project, Inc.*, 747 F.3d at 282 (citing 24 C.F.R. § 100.500(c) and stating that the standards in the HUD rule "are in accordance with disparate impact principles and precedent").[23]

In reaching its decision, the Fifth Circuit contended that "the three-step burden-shifting test contained in the HUD regulations is similar to settled precedent concerning Title VII disparate impact claims in employment discrimination cases." *Inclusive Cmtys. Project, Inc.*, 747 F.3d at 282-83 (citing *Ricci*). It required an act of Congress, however, to devise an approach to disparate-impact liability under Title VII that differed from this Court's articulation of the standard in *Wards Cove*. *See* Civil Rights Act of 1991, § 105, Pub. L. No. 102-166, 105 Stat. 1071, 1074-75 (enacting 42 U.S.C. §§ 2000e-2(k)(1)(A)-(B)). That law did not impact the Fair Housing Act in any manner, and *Wards Cove* still provides the governing standard to the extent that *any* disparate-impact theory is applicable under the Fair Housing Act. *See Smith*, 544 U.S. at 240 ("While the relevant 1991 amendments expanded the coverage of Title VII, they did not amend the ADEA or speak to the subject of age discrimination.").

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23. That other courts of appeals have applied a variety of standards of review to disparate-impact claims under the Fair Housing Act, *see* Pet. at 21-23, alone warrants granting the Petition as to the second question presented.

Again, even assuming that the Fair Housing Act recognizes a disparate-impact theory, HUD went well beyond the limits of its regulatory authority in adopting the congressionally-enacted Title VII standard and ignoring this Court's standard as described in *Wards Cove*.[24] Indeed, the HUD rule varies from the *Wards Cove* standard in several, significant ways:

- *Wards Cove* requires a plaintiff to identify the specific policy that is challenged and to demonstrate a casual connection between the challenged practice and the statistical outcomes. The HUD rule allows a plaintiff to challenge an amalgamation of business practices and to simply describe rough statistical outcomes to avoid dismissal;

- *Wards Cove* places the burden of proof on the plaintiff at all stages of a disparate-impact legal challenge. The HUD rule places the burden of proof, and a substantial one at that, on the defendant to explain the myriad of innocent causes for the alleged differential racial or ethnic results; and

- *Wards Cove* requires the plaintiff to demonstrate, at the third stage of proof, that a *known* alternative *would* have caused less disparate outcomes. Under the HUD rule, the plaintiff

24. This Court has expressed a belief that an agency acts beyond the scope of its delegated authority in promulgating disparate-impact regulations where the operative statute does not encompass disparate impact. *See Alexander v. Sandoval*, 532 U.S. 275, 285-86 & n.6 (2001).

> may prevail merely by articulating an alternate policy, including one *not even known* at the time of the action, that *might* have resulted in more equal racial outcomes.

Compare Wards Cove, 490 U.S. at 656-60, *with* 24 C.F.R. § 100.500(c).

In sum, while *Wards Cove* articulates a standard for challenging specific business practices that may cause unequal racial or ethnic results, the focus of the HUD rule is almost exclusively on the outcomes of an amalgamation of practices. And under the HUD rule, expensive and reputation-damaging litigation can be avoided only by addressing those outcomes, rather than a specific, identifiable business practice.[25] The Fifth Circuit erred in following the HUD rule rather than *Wards Cove* in articulating a disparate-impact theory under the Fair Housing Act. Thus, the Court should grant certiorari to correct that error.

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25. In recent years, most Fair Housing Act disparate-impact claims have not challenged a specific business practice but rather the use of *discretion* in making business decisions. In commentary to the 2013 rule, HUD inexplicably stated that *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2554 (2011) (holding that discretion is "the *opposite* of a uniform ... practice"), is inapplicable to those types of challenges under the Fair Housing Act. *See* 78 Fed. Reg. at 11,468. Under the rule, a plaintiff need not show that a person exercising discretion treated consumers differently because of an impermissible reason, but rather, businesses face legal risk from the use of discretion merely where there are different racial or ethnic outcomes among consumers. Thus, the impact of the HUD rule is to endorse managing end numbers rather than eliminating discrimination.

CONCLUSION

For the above reasons, the Petition presents important federal questions that necessitate final resolution by this Court. The resolution is of vital importance to the residential mortgage lending industry, as it would remove the uncertainty concerning the Act's scope and would allow *amici*'s members, and businesses generally, to determine the proper focus for compliance with the Act. The underlying goals of the Act are furthered by concerted efforts to ensure the fair and equal treatment of all consumers, but the goals are subverted by an undue focus on the racial and ethnic outcomes of nondiscriminatory business policies.

Moreover, a decision could resolve the conflict between disparate-impact liability and the Dodd-Frank Act's new, express requirements that mortgage lenders consider factors which can be expected to have a disproportionate effect on groups sharing certain statutorily-defined characteristics.

All of these issues are as important today as they were at the time that the Court sought to resolve them in *Magner* and *Mount Holly*.

Respectfully submitted,

ANDREW C. GLASS
K&L GATES LLP
State Street Financial Center
One Lincoln Street
Boston, MA 02111
(617) 261-3100

PAUL F. HANCOCK
Counsel of Record
K&L GATES LLP
Southeast Financial Center
Suite 3900
200 South Biscayne Boulevard
Miami, FL 33131
(305) 539-3300
paul.hancock@klgates.com

Counsel for Amici Curiae

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