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No. 10-1032

IN THE

# Supreme Court of the United States

STEVE MAGNER, *et al.*,

*Petitioners,*

v.

THOMAS J. GALLAGHER, *et al.*,

*Respondents.*

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

## BRIEF IN OPPOSITION

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## RESPONDENTS' BRIEF IN OPPOSITION

The petition should be denied because it seeks interlocutory review of two issues that were neither "pressed nor passed on" below, see *Delta Airlines, Inc.* v. *August*, 450 U.S. 346, 362 (1981), and that do not merit review in any event. The first issue—whether the Fair Housing Act (FHA) permits disparate impact claims—has generated no conflict in the circuits in over 20 years. The second issue involves differences in the framing of the evidentiary tests for disparate impact claims under the FHA. The lower courts have deemed these differences immaterial, and petitioners do not claim that use of any particular test would alter the outcome of this case.

Petitioners' contention that they preserved both of these issues below is demonstrably false. The real genesis of the petition is the dissent from the denial of rehearing *en banc*, which mused about whether *Smith* v. *City of Jackson*, 544 U.S. 228 (2005), undermined the lower courts' unanimous conclusion that the FHA permits disparate impact claims. But even the *en banc* dissenters did not purport to resolve that issue. Instead, they acknowledged that there has been no discussion in the lower courts of *Smith*'s implications, if any, for the FHA, and that the unanimous view that the FHA permits disparate impact claims may in fact be correct. The dissenters simply noted that the issue deserved careful consideration by the *en banc* court after full briefing.

Because they did not have the benefit of such briefing, the dissenters overlooked the direct parallels between the language of the FHA and the statutory provisions that were held, in *Smith*, to authorize disparate impact claims. Similarly, the dissenters were apparently unaware that Congress has ratified,

through a subsequent amendment, the lower courts' conclusion that the FHA permits disparate impact claims, and that the agency that administers the law has endorsed that reading in an interpretation that is binding under *Chevron, U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

None of this evidence was considered in the proceedings below, and none of it is mentioned in the petition. It should not be analyzed for the very first time in this Court, on review of an interlocutory order, at the behest of a party that never raised the issue, with no lower court ruling on the question, no division among the lower courts, and no prior discussion of the issue in *any* circuit court decision. The petition should be denied.

## COUNTER-STATEMENT OF THE CASE

Respondents are current or former owners of properties rented primarily to low-income residents, most of whom receive federal rent assistance. Pet. App. 8a. Respondents sued petitioners, the City of St. Paul and various of its officers (the "city"), alleging that the city had undertaken extraordinary and improperly aggressive enforcement of its housing code. Respondent property owners alleged, among other things, that these aggressive tactics were undertaken with unlawful discriminatory animus and, in all events, had an unlawful disparate impact on their renters, the majority of whom are protected under the FHA. In the decision below, the Eighth Circuit held that, viewed in the light most favorable to respondents, the unique facts of this case raise disputed issues that are material to a disparate impact claim under the FHA.

The city does not seek review of this fact-bound assessment of the sufficiency of respondents'

evidence. To the contrary, it insists that it seeks review of "purely legal questions." Pet. 22. In its efforts to justify that review, however, the city repeatedly recasts the facts in the very manner that the Eighth Circuit properly rejected—and that Rule 56 does not permit. Thus, it asserts that the "aggressive code enforcement" respondents challenge "has a purposeful, positive impact on those living in neglected rental homes," and that respondents have invoked the FHA simply to "avoid fixing up their properties" so they can maximize "profits" by "renting out dilapidated homes." Pet. 4.

The Eighth Circuit rejected similarly self-serving recitations below. As it explained, the city "fails to appreciate that [respondents] complain about *how* the City enforced the Housing Code." Pet. App. 26a. The city's enforcement practices included "issu[ing] *false* Housing Code violations and punish[ing] property owners without prior notification, invitations to cooperate with [the city], or adequate time to remedy Housing Code violations." *Id.* at 17a (emphasis added). The city claims that such efforts were designed to ensure "that all who live in the City have dwellings that are structurally sound, safe, and provide minimally basic shelter." Pet. 13. But the evidence showed that these draconian tactics were employed selectively against respondents; they were not applied to housing rented or owned by more affluent residents, despite evidence from the city's own studies that as many as 60% of all properties sold in the city in 2005 had serious code violations. Plaintiffs-Appellants Br. at 22 (8th Cir. filed May 14, 2009) ("Pls.-Apps. Br.").

The city's own documents showed, moreover, that these selectively-employed tactics were designed to "force ownership change" and "eviction." Pls.-Apps.

Br. at 7-9. The city's director of Neighborhood Housing and Property Improvement co-authored a bulletin with the Assistant Chief of Police explaining how the police, in responding to nuisance complaints, could use their lawful entry onto premises to obtain bases for subsequent housing code inspections that "could lead to condemnation of the property[,] eviction of the occupants and boarding-up [of] the property." *Id.* "A single nuisance incident,'" the bulletin explained, "'is enough to revoke a landlord's rental registration certificate; enough to start an eviction.'" *Id.*

Respondents' evidence showed that these strategies had the desired effect: By issuing false violations and depriving property owners of opportunities to comply with the code, the city's aggressive practices caused unnecessary "evictions, condemnations, [and] revocation of rental registrations." Pet. App. 17a. Indeed, the city's own reports showed a nearly 300% increase in vacant homes in the city over four years, and that foreclosed properties were disproportionately renter-occupied. Pls.-Apps. Br. at 35; see also Pet. App. 19a. Respondents also submitted direct evidence from tenants who suffered hardship when their homes were condemned for minimal or false violations. Pet. App. 19a. Viewing all of this evidence and reasonable inferences from it in the light most favorable to respondents (as Rule 56 requires), the Eighth Circuit concluded that a jury could find that respondents' evidence gave rise to a *prima facie* showing of disparate impact. Pet. App. 17a-24a.

Conceding that code enforcement serves legitimate, non-discriminatory goals, Pet. App. 24a, respondents submitted a report, prepared by the city and corroborated by its own employees, showing that the city had an alternative, previously-used method of

code enforcement that would meet its legitimate goals while reducing the discriminatory impact on protected persons. That report showed that the city's alternative method "achieved greater code compliance[] and resulted in less financial burdens on rental property owners." *Id.* at 25a-26a. The city contested the import of this evidence below, and continues to do so in this Court. See Pet. 7. But, as the panel explained, this evidence and all reasonable inferences from it must be viewed in respondents' favor. Applying that standard, the panel concluded that this evidence created a reasonable inference that the alternative enforcement technique would have served the city's interests with fewer adverse impacts on protected persons, and thus gave rise to a genuine dispute of fact. Pet. App. 26a.

In its brief to the panel, the city accepted that disparate impact claims are cognizable under the FHA. It never cited *Smith* v. *City of Jackson*, much less suggested that *Smith* casts doubt on the viability of such claims. Nor did the city challenge the Eighth Circuit's burden-shifting test for such claims.

The city likewise did not raise these issues in its petition for rehearing *en banc*. Instead, it raised a single issue concerning the evidentiary showing necessary to establish a *prima facie* case of disparate impact. Specifically, the city asserted that the panel had created a circuit split "by finding a *prima facie* case of disparate impact without any statistical analysis or any other analytical method to show a comparison between African-Americans that are affected by the neutral policy and similarly situated persons unaffected by the policy." Petn. for *En Banc* Rehearing 3 (8th Cir. filed Sept. 15, 2010) ("Rhrg. Petn.") (capitalization altered).

The Eighth Circuit denied the petition. Five judges dissented, identifying several issues that "likely warrant supplemental briefing by the parties and careful consideration by the court." Pet. App. 119a. One issue was whether the FHA permits disparate impact claims. In a brief discussion, the dissenters opined that the language of the FHA "appears similar" to a provision of the Age Discrimination in Employment Act (ADEA) that this Court "in *Smith* said does not support a claim based on disparate impact." *Id.* at 123a. The dissenters, however, did not purport to resolve the issue themselves. They noted that the circuits had uniformly concluded that the FHA does permit disparate impact claims and that "perhaps that approach is justified." *Id.* Noting that "there has been . . . virtually no discussion of the matter by any court of appeals since . . . *Smith*," the dissent suggested that it was an "issue . . . appropriate for careful review by the en banc court." *Id.* at 124a.

## I. THE COURT SHOULD NOT REVIEW AN INTERLOCUTORY DECISION TO ADDRESS ISSUES THAT WERE NEVER "PRESSED OR PASSED ON" BELOW.

The petition should be denied, first and foremost, because it seeks review of an interlocutory order that does not address either of the issues the city asks this Court to review—because the city never raised those issues below.

Because this Court does not review interlocutory rulings except in "extraordinary cases," the interlocutory nature of the decision below is, "itself alone . . . sufficient ground for the denial of the [petition]." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). See also *Am. Constr. Co.* v. *Jacksonville, Tampa & Key W. Ry.*, 148 U.S.

372, 384 (1893) (requiring "extraordinary inconvenience and embarrassment" for such review). No extraordinary factors justify interlocutory review here: The city will have a full and fair opportunity to persuade a jury to reject respondents' claim—a result that would moot the need for review by this Court.

Indeed, interlocutory review would be especially inappropriate here, as the city seeks review of issues that were never even raised, much less decided, below. See *Delta Airlines*, 450 U.S. at 362 ("question was not raised in the Court of Appeals and is not properly before us"); *Pa. Dep't of Corrs.* v. *Yeskey*, 524 U.S. 206, 212-13 (1998) ("'[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them'") (quoting *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147, n.2 (1970)) (citations omitted). The city's claims to the contrary, Pet. 22-24, are not only wrong, they are disingenuous.

The city asserts that "the application of disparate impact analysis to a Fair Housing Act claim was raised below." Pet. 22 (capitalization altered). This is false. The city's merits brief below and its petition for rehearing *en banc* never questioned the availability of disparate impact under the FHA. Instead, as the *en banc* dissent noted, the parties "have taken disparate-impact analysis as a given." Pet. App. 124a.

The city asserts that it "continuously argued that Respondents did not present evidence to support a Fair Housing Act claim analyzed under disparate impact analysis." Pet. 22. But the argument that respondents failed to show a *prima facie* case of disparate impact is not an argument that the FHA does not *permit* such claims. Similarly, the city contends that its petition for rehearing *en banc*

identified a circuit split created by the panel decision. *Id.* But the alleged split concerned the same issue: the evidentiary showing necessary to make out a *prima facie* case of disparate impact. See *supra*, at 5 (quoting Rhrg. Petn. at 3). That argument—that respondents' disparate impact claim should fail on the merits for lack of evidence—does not "properly preserve[]," Pet. 22, either the question whether the FHA permits disparate impact claim or the question whether those claims are properly analyzed under a balancing or burden-shifting test. See *id.* at i.[1]

Nor were these issues "addressed" below. Pet. 23. For purposes of the "pressed or passed on" rule, a lower court "addresses" an issue by actually deciding it. See *Va. Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) (lower court addressed issue by "conclud[ing] that [minority shareholders] were entitled to sue"); *Stevens* v. *Dep't of Treasury*, 500 U.S. 1, 8 (1991) (lower court "decided the substantive issue presented" and "answered the timeliness question"). Here, neither the panel nor full court ruled on either issue the city seeks to raise.

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[1] The city claims it would have been futile to raise the issues on which it now seeks review. Pet. 24. But in the case it cites to support this claim, the party *did* raise the issue, devoting "a few pages" to it in its appellate brief, despite contrary circuit precedent. *See Medimmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 125 (2007). Moreover, an *en banc* court is free to reconsider circuit precedent, yet the city did not ask it to do so. Indeed, if the city believed that this Court's decision in *Smith* undermined circuit precedent recognizing a disparate impact claim under the FHA, it could and should have raised the claim even before the panel. *See Hulteen* v. *AT&T Corp.*, 441 F.3d 653 (9th Cir. 2006) (panel declined to follow binding precedent in light of intervening Supreme Court authority), *rev'd*, 498 F.3d 1001 (9th Cir. 2007), *rev'd*, 129 S. Ct. 1962 (2009).

Indeed, even the *en banc* dissenters did not purport to decide that issue. They noted that "most of the circuits have applied disparate-impact analysis under the FHA, and *perhaps that approach is justified.*" Pet. App. 123a (emphasis added). They then simply opined that the issue was "appropriate for careful review by the en banc court," *id.* at 124a, and thus "warrant[ed] supplemental briefing," *id.* at 119a. The dissent did not even mention the second issue the city seeks to raise (since it was never raised below).

No case the city cites justifies review of issues that no party briefed and no judge purported to decide below. The absolute immunity question presented in *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982), had been briefed in the lower court and decided by that court—in an earlier decision, which the lower court had relied upon in dismissing the appeal by former President Nixon. See *id.* at 743 n.23 (declining to remand "in light of the Court of Appeals' now-binding decision of the issue presented"). And, in *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995), the lower court decided that Amtrak was not a government entity, even though the petitioner had not argued the point below. *Id.* at 378-79.

In *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), the parties briefed in the lower court all three issues raised in this Court, and the lower court decided two of those issues. In deciding to address the third issue, this Court did not create an exception to the "pressed or passed on" requirement for all "purely legal questions." Pet. 22. Given this Court's docket, such an exception would swallow the rule. Instead, the Court acted on obvious considerations of judicial economy: reversing a district court ruling that was incorrect under existing circuit precedent, see *Mitchell*, 472 U.S. at 519, on an immunity question

whose resolution was both inevitable and time-sensitive, *id.* at 526 (stressing that qualified immunity is not "a mere defense" but "an *immunity from suit*" that is "lost if a case is erroneously permitted to go to trial").

No such factors are present here. The city is not immune from suit under the FHA. There has been no briefing in the lower courts of either of the issues the city seeks to raise. And, most importantly, the only issue resolved below—*i.e.*, whether the evidence in this case raises a triable claim of disparate impact—is a fact-bound question that, as the city apparently recognizes, is not worthy of review. Thus, this is not one of the rare cases (like those cited in the petition) where review of an independently "certworthy" issue that was briefed and resolved below makes it appropriate for the Court to address a closely related issue that was not briefed and resolved in the lower courts.[2] Instead, the city improperly seeks to obtain review based solely on issues that were never raised or decided by the lower courts—and that are not in any event deserving of review. See *infra*, § II.

The requirement that issues be "pressed or passed on" below is not a technicality that can be jettisoned for "purely legal questions." Like the rationale for allowing conflicts to "percolate," this requirement helps ensure that the Court decides cases with the

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[2] *Lebron*, 513 U.S. 374, *Yee* v. *City of Escondido*, 503 U.S. 519 (1992), and *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661 (2001), reflect the principle that, "'once a federal claim is *properly presented*, a party can make any argument in support of that claim.'" *Lebron*, 513 U.S. at 379 (quoting *Yee*, 503 U.S. at 534) (emphasis added). In each case, the Court granted *certiorari* based on issues that independently merited review and that had been briefed and decided below; it then entertained other arguments that had either not been raised or decided below.

benefit of lower court analysis and insights, see *McCray* v. *New York*, 461 U.S. 961, 963 (1983) (Stevens, J., joined by Blackmun, J., and Powell, J., respecting denial of *certiorari*), which can "yield a better informed and more enduring final pronouncement by this Court," *Arizona* v. *Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting). As the dissent below recognized, there has been "*virtually no discussion . . . by any court of appeals*" of the disparate impact issue that the dissenters raised *sua sponte*. Pet. App. 123a (emphasis added). That discussion should not occur for the very first time in this Court.

## II. THE QUESTIONS PRESENTED DO NOT MERIT REVIEW.

In all events, the issues the city seeks to raise are not worthy of review.

1.a. As the city concedes, there is no circuit conflict concerning the cognizability of disparate impact claims under the FHA. Eleven circuits have found that the FHA authorizes such claims; none has disagreed. Pet. 10. The city contends that this unanimity shows that the issue is a "fully developed, twenty year old question." *Id.* at 9. But the absence of any circuit conflict over two decades makes an expenditure of this Court's resources wholly unnecessary.

Moreover, the real basis for the city's first question is the theory that the decision in *Smith* somehow cast doubt on the lower courts' unanimous conclusion that the FHA permits disparate impact claims. *This* question is neither "fully developed" nor long-standing. Instead, as the dissent below noted, there has been "*virtually no discussion* of the matter by any court of appeals since . . . *Smith*." Pet. App. 123a

(emphasis added). The actual question the city seeks to raise, therefore, is unripe. And that question, too, has engendered no lower court divisions: The few post-*Smith* cases that have addressed such claims have all ruled that disparate-impact analysis still applies under the FHA. See *id.* at 123a (citing *Nat'l Cmty. Reinvestment Coal.* v. *Accredited Home Lenders*, 573 F. Supp. 2d 70, 77-79 (D.D.C. 2008) (collecting district court decisions expressly recognizing FHA disparate impact liability after *Smith*)); Pet. 3 (noting two appellate rulings after *Smith*).

This continued unanimity is hardly surprising. This Court long ago explained that the FHA must be given a "generous construction" in light of its "broad and inclusive" language. *Trafficante* v. *Metro. Life Ins. Co.*, 409 U.S. 205, 209, 212 (1972). The lower courts have relied in part on this instruction, as well as on the Act's broad policy "to provide, within constitutional limitations, for fair housing throughout the United States," 42 U.S.C. § 3601, in concluding that the FHA reaches disparate impact. See, *e.g.*, *Huntington Branch, NAACP* v. *Town of Huntington*, 844 F.2d 926, 935 (2d Cir.), *aff'd*, 488 U.S. 15 (1988) (per curiam); *Metro. Hous. Dev. Corp.* v. *Vill. of Arlington Heights*, 558 F.2d 1283, 1289-90 (7th Cir. 1977). In addition, courts have relied on Congress's rejection of an amendment that would have exempted homeowners from liability if they hired real estate agents and acted without intent to discriminate. See *Huntington*, 844 F.2d at 934-35; *Resident Advisory Bd.* v. *Rizzo*, 564 F.2d 126, 147 (3d Cir. 1977).

*Smith* casts no doubt on the lower courts' uniform interpretation of the FHA. In that case, this Court recognized that a provision of the ADEA that had been modeled on Title VII authorized disparate

impact claims. In his plurality opinion, Justice Stevens noted that the Court had recognized disparate impact under Title VII in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). He observed that, "[w]hile our opinion in *Griggs* relied primarily on the purposes of the Act, buttressed by the fact that the EEOC had endorsed the same view, we have subsequently noted that our holding represented the better reading of the statutory text as well." *Smith*, 544 U.S. at 235.

Seizing on this statement, the city argues that *Smith* "*justified* [the] decision in *Griggs*" based on the text of Title VII, Pet. 12 (emphasis added); see also *id.* at 3 (same). The city thereby implies that the *Smith* plurality disavowed all other aspects of *Griggs*' reasoning. But Justice Stevens simply made clear that the Court's subsequent textual analysis *bolstered Griggs*' conclusion; it did not undermine the rest of its reasoning. See *Smith*, 544 U.S. at 235 (observing that "our holding represented the better reading of the statutory text *as well*") (emphasis added).

Nor do "'key textual differences'" in provisions of Title VII and the ADEA, Pet. 11 (quoting *Smith*, 544 U.S. at 236 n.6), provide a basis for concluding that 11 courts of appeals have misconstrued the FHA. The *Smith* plurality noted that the language in § 703(a)(2) of Title VII and § 4(a)(2) of the ADEA prohibits various actions "that 'deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's' race or age." 544 U.S. at 235. Thus, this text "focuses on the *effects* of the action on the employee," and confirms that the provisions authorize disparate impact claims. *Id.* at 236. By contrast, § 4(a)(1) of the ADEA makes it unlawful for an employer "'to fail or refuse to hire . . . *any*

*individual* . . . because of *such individual's* age.'" *Id.* at 236 n.6. This text "focus[es] . . . on the employer's actions with respect to the targeted individual," thus indicating that it does not authorize disparate impact claims. *Id.*

Without the benefit of any briefing, the dissenters below opined that the language of the FHA "appears similar to § 4(a)(1) of the ADEA," which does not permit disparate impact claims. Pet. App. 123a. The city bases its first question presented on that suggestion. Pet. 2-3, 10-12. But the suggestion is mistaken.

The FHA makes it unlawful to "refuse to sell or rent . . . 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, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a). The phrase "*or otherwise make unavailable or deny*[] a dwelling to any person because of [protected status]" directly parallels the phrase "or *otherwise adversely affect* his status as an employee, because of such individual's [protected status]" in Title VII and the ADEA. Both phrases serve the same purpose: They are catch-alls that ensure that the substantive prohibition captures all actions that produce the discriminatory effects Congress sought to eradicate.

Contrary to the dissenters' tentative view, there is nothing talismanic about the words "adversely affect." Congress used this generic wording in the employment context because facially neutral policies can have a wide range of discriminatory impacts beyond outright denial of employment. These include reduced wages or benefits, deprivation of training opportunities or seniority, or assignment to less attractive or more dangerous tasks. The phrase "or otherwise adversely affect his status as an employee"

was necessary to capture these and other possible discriminatory harms. In the housing setting, by contrast, the phrase "or otherwise make unavailable or deny[] a dwelling" is sufficiently generic to capture facially neutral policies that result in the discriminatory impacts the FHA was designed to prevent—*i.e.*, lack of housing for protected persons. The presence of these catch-all phrases in § 3604 and Title VII, moreover, plainly distinguishes these provisions from Title VI, which lacks a comparable catch-all and does not recognize disparate impact liability. See Pet. App. 122a-123a (discussing the supposed import of Title VI for § 3604).

Unaided by any briefing, the dissenters overlooked this parallelism in the language of the FHA and the provisions of Title VII and the ADEA that recognize disparate impact claims. But the lack of briefing skewed their discussion of the FHA in other ways as well. Most critically, while focusing on *Smith*'s analysis of other statutes, the dissenters were apparently unaware of congressional and administrative evidence that confirms that the FHA permits such claims.

First, Congress rejected an amendment that would have exempted homeowners who hired real estate agents from liability if they acted without discriminatory intent. See *Huntington*, 844 F.2d at 934-35; *Rizzo*, 564 F.2d at 147. Second, Congress ratified disparate impact claims when it passed the Fair Housing Amendments Act of 1988. After eight circuits had construed the FHA to reach disparate impacts, Congress used the same language found in § 3604(a) to prohibit discrimination because of familial status or handicap. Compare 42 U.S.C. § 3604(a), *with id.* § 3604(f)(1), (2). The legislative history shows that Congress was aware of this

precedent. H.R. Rep. No. 100-711, at 21 n.52, 90 (1988) (citing disparate impact cases from several circuits). The House also rejected an amendment that would have immunized zoning decisions from liability under the FHA unless they were "made with the *intent* to discriminate." See *id.* at 89 (emphasis added). And the House Report stated that the ban on discrimination against handicapped persons—which is identical in all material respects to § 3604(a)—was "not limited to blatant, intentional acts of discrimination" because acts "that have the *effect of causing discrimination* can be just as devastating as intentional discrimination." *Id.* at 25 (emphasis added).

Finally, the Department of Housing and Urban Development, which administers the FHA, has endorsed disparate impact liability. See *Secretary ex rel. VanLoozenoord* v. *Mountain Side Mobile Estates P'ship*, Fair Hous.-Fair Lend. (P-H) ¶ 25,053, 1993 WL 307069, at *5 (HUD Sec'y July 19, 1993)[3]; HUD, No. 8024.01, *Title VIII Complaint Intake, Investigation & Conciliation Handbook*, 2-28 (REV-2 2005), *available at* www.hud.gov/offices/adm/hudclips/handbooks/fheh/80241/index.cfm (select "search" and 8024.01) ("a discriminatory impact claim may result in a finding of liability"). This interpretation is entitled to deference under *Chevron, U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See, *e.g.*, *NAACP* v. *Am. Family Mut. Ins. Co.*, 978 F.2d 287, 300 (7th Cir. 1992) (deferring to HUD's conclusion that the FHA applies to discriminatory mortgage underwriting

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[3] Although the Tenth Circuit reversed this decision on other grounds, it endorsed the conclusion that the FHA reaches disparate impact. *Mountain Side Mobile Estates P'ship* v. *Sec'y of HUD*, 56 F.3d 1243, 1250-51 (10th Cir. 1995).

practices) (Easterbrook, J.). In *Smith*, Justice Scalia deferred to a comparable interpretation of § 4(a)(2) of the ADEA by the Equal Employment Opportunity Commission. See 544 U.S. at 243 (Scalia, J., concurring).

This necessarily brief overview of the evidence that supports the unanimous interpretation of the FHA by 11 courts of appeals underscores the importance of the "pressed or passed on" rule, and the impropriety of the city's cavalier disregard of that rule. None of the foregoing evidence was aired below, nor has it been aired in any other appellate court since *Smith* was decided. It manifestly should not be addressed for the very first time in this Court.

b. The city devotes nearly four pages of its petition to arguing that, even if the FHA permits disparate impact liability, such liability cannot be recognized "[i]n code enforcement cases." Pet. 15. This issue is not fairly subsumed by the question presented. Because it assumes that the FHA *allows* disparate impact claims, this issue is not a "predicate to an intelligent resolution of the" question *whether* the FHA allows disparate impact claims. *Vance* v. *Terrazas*, 444 U.S. 252, 258 n.5 (1980) (deeming such a predicate question subsumed by question presented in petition); see also *Lebron*, 513 U.S. at 381-82 (whether Amtrak was a government entity was "a *prior* question" to whether it had engaged in state conduct, and thus was encompassed by the question presented).

Nor was the issue "pressed or passed on" below. The city argued below that respondents had not made out a *prima facie* case of disparate impact because they had not offered "any statistical analysis or any other analytical method to show a comparison between African-Americans that are affected by the

neutral policy and similarly situated persons unaffected by the policy." Rhrg. Petn. 3 (capitalization altered). It did not argue that, even if such a showing had been made, housing code enforcement could not provide the basis for disparate impact liability. Nor did it cite *Jersey Heights Neighborhood Ass'n* v. *Glendening*, 174 F.3d 180 (4th Cir. 1999). Instead, it was the *en banc* dissenters who first raised the question whether disparate impact analysis should apply "to a city's aggressive housing code enforcement." Pet. App. 125a. And they offered no view on the question, noting only that it is "an important question of first impression." *Id.* Thus, this issue is neither properly before the Court nor within the scope of any question presented.

In all events, it does not independently merit review. The city identifies no circuit split on this question. Indeed, it identifies no other case that has ever even considered the issue.

Its contention, moreover, that recognition of respondents' claim will "[b]ar[] municipalities from enforcing housing codes in homes because they are occupied by protected class members," Pet. 15, is patently false. First, the claim in this case is not based on the mere fact that the city is enforcing a code in "urban neighborhoods" where housing is "disproportionately occupied by protected class members." *Id.* Instead, the claim arises from the city's novel and extremely aggressive approach to enforcing its code. See *supra*, at 3-4.

Second, plaintiffs challenging aggressive code enforcement must shoulder the not insubstantial burden of showing that the legitimate objectives served by housing codes can be satisfied through other, equally effective means that do not have the same impact on housing. Respondents were able to

raise a triable issue of fact on this issue in large measure because the city's own study demonstrated that there was an equally effective and less harmful method of code enforcement that the city itself had previously used. Pet. App. 25a-26a. This unique evidence, along with the city's unique enforcement approach, will hardly arise in cities around the nation. Thus, the city's attempt to conjure a parade of horribles in which "neglectful landlords" invoke the FHA to thwart legitimate efforts to ensure compliance with "minimum property maintenance standards," Pet. 13, is groundless.

2. The second question the city seeks to present likewise does not merit review. As noted, it was not pressed or passed on below. Nor is it independently worthy of review.

The petition identifies no distinction between the circuits' burden-shifting and factor-balancing tests that would affect this case. This is not surprising: The various tests for FHA disparate impact claims overlap significantly. All emphasize the degree of disparate impact, the interest of the defendant in the challenged conduct, and the burden of the proffered alternative conduct. Compare, *e.g.*, *Vill. of Arlington Heights*, 558 F.2d at 1291-93 (balancing test examines, *inter alia*, "showing of discriminatory effect", "interest of the defendant in taking the action," and "nature of the relief"), with *Darst-Webbe Tenant Ass'n Bd.* v. *St. Louis Hous. Auth.*, 417 F.3d 898, 902-03 (8th Cir. 2005) (burden-shifting test examines actual or predictable "discriminatory impact", the action's "'manifest relationship' to the [defendant's] legitimate, non-discriminatory housing objectives", and "viable alternative means" available

to provide relief).[4] Moreover, the distinctions that do exist are unlikely to prove outcome-determinative. See, *e.g.*, *Rizzo*, 564 F.2d at 148 n.32; Robert G. Schwemm, *Housing Discrimination* § 10:6, at 10-51 (2001) ("It seems unlikely that these differences in terminology will produce substantially different results in actual cases.").

The city attempts to manufacture a meaningful conflict by asserting that, under a burden-shifting approach, any convergence of housing scarcity, statistical racial disparities, and increased costs due to code enforcement amounts to a *per se* violation of the FHA. Pet. 25. But the lower court found no "*per se* violation." It simply held that respondents' evidence raises questions for a jury to decide, not that the jury must accept that evidence.

The city nowhere explains why or how this result differs from the result that would obtain under any other approach. Indeed, it never identifies *any* decisions whose results conflict *at all*; the city merely ascribes a "lack of uniformity" and "confusion" to the circuits' differing articulations. Pet. 24 (capitalization altered).[5]

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[4] *See also* Austin K. Hampton, *Vouchers as Veils*, 2009 U. Chi. Legal F. 503, 512 ("The exact analysis for [FHA] disparate impact claims varies among the circuits, but the different analyses fall within a similar framework."); Rebecca Tracy Rotem, *Using Disparate Impact Analysis in Fair Housing Act Claims*, 78 Fordham L. Rev. 1971, 1985 (2010) ("The exact parts of the disparate impact test vary in different jurisdictions but the basic idea remains the same.").

[5] The International Municipal Lawyers Association (IMLA) manufactures yet another false conflict. IMLA claims that in three other circuits that apply a factor-balancing test, policies that increase housing costs have been held not to present cognizable disparate impact claims—creating a split with the

Even where, unlike here, a petition identifies a clear conflict, if the resolution of that conflict "is irrelevant to the ultimate outcome of the case before the Court," review is unwarranted. Eugene Gressman et al., *Supreme Court Practice* 248 (9th ed. 2007) (citing *Sommerville* v. *United States*, 376 U.S. 909 (1964)). Otherwise the Court risks issuing advisory opinions. Were the Court to resolve the circuit split the city purports to identify, the effect on this litigation would be wholly speculative. Thus even if the city's arguments were pressed and passed on below, the petition should still be denied.

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Eighth Circuit's burden-shifting approach in the decision below. But the choice of tests does not explain this purported distinction. The Fourth Circuit case IMLA cites applied the burden-shifting test. *See Williams* v. *5300 Columbia Pike Corp.*, 1996 U.S. App. LEXIS 31004, at *10-12 & n.5 (4th Cir. Dec. 3, 1996) (per curiam); *see generally* Pet. 17 (Fourth Circuit applies burden-shifting to private-defendant cases). Because the Tenth Circuit case found no *prima facie* showing of disparate impact, it never conducted the factor-balancing IMLA argues is dispositive. *Reinhart* v. *Lincoln Cnty.*, 482 F.3d 1225, 1229 (10th Cir. 2007). And in *Hemisphere Building Co.* v. *Village of Richton Park*, 171 F.3d 437 (7th Cir. 1999), the Seventh Circuit expressly refused to balance any factors. Thus, the "circuit split" IMLA seeks to inject is not implicated by petitioners' "burden-shifting versus balancing test" question. *See* Pet. i.

More fundamentally, IMLA's assertion that the petitioners could not face liability in other circuits is pure speculation based on the trivialization of respondents' claim. Respondents' suit is not based on mere increased costs that flow from "provid[ing] deadbolts, exterminat[ing] rodents, and fix[ing] broken windows." IMLA Br. at 7. The city's aggressive code enforcement included issuing "*false*" code violations, failing to provide adequate notice or time for compliance, and punishing non-compliance with, *inter alia*, "evictions, condemnations, [and] revocation of rental registrations." Pet. App. 17a (emphasis added). These actions clearly reduce housing access through means other than mere increased costs.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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