Supreme Court, U.S.
FILED

101032 FEB 14 2011

OFFICE OF THE CLERK

In the

Supreme Court of the United States

STEVE MAGNER, ET AL.,
Petitioners,

v.

THOMAS J. GALLAGHER, ET AL.,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

SARA R. GREWING
City Attorney
LOUISE TOSCANO SEEBA
Counsel of Record
K. MEGHAN KISCH
Assistant City Attorneys
750 City Hall and Court House
15 West Kellogg Boulevard
Saint Paul, MN 55102
(651) 266-8772
louise.seeba@ci.stpaul.mn.us

Counsel for Petitioners

February 14, 2011

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

Blank Page

QUESTIONS PRESENTED

The Fair Housing Act makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer . . . 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). Respondents are owners of rental properties who argue that Petitioners violated the Fair Housing Act by "aggressively" enforcing the City of Saint Paul's housing code. According to Respondents, because a disproportionate number of renters are African-American, and Respondents rent to many African-Americans, requiring them to meet the housing code will increase their costs and decrease the number of units they make available to rent to African-American tenants. Reversing the district court's grant of summary judgment for Petitioners, the Eighth Circuit held that Respondents should be allowed to proceed to trial because they presented sufficient evidence of a "disparate impact" on African-Americans.

The following are the questions presented:

1. Are disparate impact claims cognizable under the Fair Housing Act?

2. If such claims are cognizable, should they be analyzed under the burden shifting approach used by three circuits, under the balancing test used by four circuits, under a hybrid approach used by two circuits, or by some other test?

PARTIES TO THE PROCEEDING

A list of all parties to the proceedings in the court whose judgment is the subject of this petition is as follows:

No. 09-1209

Defendants-Appellees and Petitioners: STEVE MAGNER, individually and as a supervisor of the City of Saint Paul's Department of Neighborhood Housing and Property Improvement, MICHAEL CASSIDY, JOEL ESSLING, STEVE SCHILLER, JOE YANNARELLY, DENNIS SENTY, individually and as code enforcement officers of the City of Saint Paul, MICHAEL URMANN, individually and as a fire inspector of the City of Saint Paul, ANDY DAWKINS, individually and as Director of the City of Saint Paul's Department of Neighborhood Housing and Property Improvement, RANDY KELLY, individually and as Mayor of the City of Saint Paul, JOHN DOE and JANE DOE, individually and in their official capacities as code enforcement officers, law enforcement officers, or other officials or employees of the City of Saint Paul, and the CITY OF SAINT PAUL, a municipal corporation.

Plaintiffs-Appellants and Respondents: THOMAS J. GALLAGHER, JOSEPH J. COLLINS, SR., DADDER'S PROPERTIES, LLC, DADDER'S ESTATES, LLC, DADDER'S ENTERPRISES, LLC, DADDER'S HOLDINGS, LLC, TROY ALLISON, JEFF KUBITSCHEK and SARA KUBITSCHEK.

No. 09-1528

Defendants-Appellees and Petitioners: CITY OF SAINT PAUL, a municipal corporation, RANDY KELLY, individually and as Mayor of the City of Saint Paul, ANDY DAWKINS, individually and as Director of the City of Saint Paul's Department of Neighborhood Housing and Property Improvement, LISA MARTIN, individually and as a code enforcement officer of the City of Saint Paul, STEVEN MAGNER, individually and as a supervisor of the City of Saint Paul's Department of Neighborhood Housing and Property Improvement, DEAN KOEHNEN, individually and as a law enforcement officer of the City of Saint Paul, JOHN DOE and JANE DOE, individually and in their official capacities as code enforcement officers, law enforcement officers, or other officials or employees of the City of Saint Paul.

Plaintiffs-Appellants and Respondents: FRANK J. STEINHAUSER, III, MARK E. MEYSEMBOURG, KELLY G. BRISSON.

No. 09-1579

Defendants-Appellees and Petitioners: STEVE MAGNER, individually and as a supervisor of the City of Saint Paul's Department of Neighborhood Housing and Property Improvement, MICHAEL KALIS, DICK LIPPERT, KELLY BOOKER, JACK REARDON, PAULA SEELEY, LISA MARTIN, individually and as code enforcement officers of the City of Saint Paul, DEAN KOEHNEN, individually and as a law enforcement officer of the City of Saint Paul, ANDY DAWKINS, individually and as Director of the City of Saint Paul's Department of Neighborhood Housing and

Property Improvement, RANDY KELLY, individually and as Mayor of the City of Saint Paul, JOHN DOE and JANE DOE, individually and in their official capacities as code enforcement officers, law enforcement officers, or other officials or employees of the City of Saint Paul, and the CITY OF SAINT PAUL, a municipal corporation.

Plaintiffs-Appellants and Respondents: SANDRA HARRILAL, STEVEN R. JOHNSON, d/b/a Market Group and Properties.

Plaintiffs: BEE VUE, LAMENA VUE.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS v

TABLE OF AUTHORITIES viii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT STATUTORY PROVISION 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 8

I. THIS COURT SHOULD DECIDE THE ISSUE OF WHETHER DISPARATE IMPACT ANALYSIS APPLIES TO FAIR HOUSING ACT CLAIMS. 8

A. The Text Of The Fair Housing Act Does Not Support A Cognizable Disparate Impact Claim. 10

B. The Fair Housing Act Does Not Reach Every Event That Might Conceivably Affect The Availability Of Housing. 12

II. THE COURTS OF APPEALS ARE DIVIDED AS TO WHAT TEST APPLIES TO A FAIR HOUSING ACT CLAIM. 15

A. Balancing Factors Approach. 16

B. Burden Shifting Approach. 19

C. Hybrid Burden Shifting And Balancing Test. 20

III. THIS CASE PROVIDES THE IDEAL VEHICLE FOR RESOLVING IMPORTANT ISSUES REGARDING THE SCOPE OF THE FAIR HOUSING ACT. 21

A. This Case Presents Purely Legal Questions That Should Be Determined By This Court. 21

B. The Application Of Disparate Impact Analysis To A Fair Housing Act Claim Was Raised Below.. 22

C. The Lack Of Uniformity In The Circuits Nationwide Leads To Confusion About Cities' Ability To Enforce Their Housing Codes. 24

CONCLUSION 27

APPENDIX

Appendix A: Opinion and Judgment, United States Court of Appeals for the Eighth Circuit (September 1, 2010) 1a

Appendix B: Order re Summary Judgment, United States District Court, District of Minnesota (December 18, 2008) 48a

Appendix C: Order re Rehearing, United States Court of Appeals for the Eighth Circuit (November 15, 2010) 116a

TABLE OF AUTHORITIES

CASES

2922 Sherman Ave. Tenants' Ass'n v. Dist. of Columbia,
444 F.3d 673 (D.C. Cir. 2006) 16

Alexander v. Sandoval,
532 U.S. 275 (2001) 11

Arthur v. City of Toledo, Ohio,
782 F.2d 565 (6th Cir. 1986) 17, 18

Bangerter v. Orem City Corp.,
46 F.3d 1491 (10th Cir. 1995) 18

Banks v. Perk,
341 F. Supp. 1175 (N.D. Ohio 1972), *aff'd in part and rev'd in part without opinion,* 473 F.2d 910 (6th Cir. 1973) 13

Betsey v. Turtle Creek Assocs.,
736 F.2d 983 (4th Cir. 1984) 17

Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls,
263 F.3d 627 (6th Cir. 2001), *rev'd in part, vacated in part sub nom.* 538 U.S. 188 (2003) . 18

Cox v. City of Dallas, Tex.,
430 F.3d 734 (5th Cir. 2005) 16

Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth.,
417 F.3d 898 (8th Cir. 2005) 19

Griggs v. Duke Power Co.,
401 U.S. 424 (1971) 10, 13

Harris v. Itzhaki,
183 F.3d 1043 (9th Cir. 1999) 19

Huntington Branch, NAACP v. Town of Huntington,
844 F.2d 926 (2d Cir. 1988) 16, 18, 20, 21

Int'l Broth. of Teamsters v. United States,
431 U.S. 324.15 (1977) 9

Jersey Heights Neighborhood Ass'n v. Glendening,
174 F.3d 180 (4th Cir. 1999) 14, 15

Langlois v. Abington Hous. Auth.,
207 F.3d 43 (1st Cir. 2000) 21

Lebron v. Nat'l R.R. Passenger Corp.,
513 U.S. 374 (1995) 22, 23

Mackey v. Nationwide Ins. Cos.,
724 F.2d 419 (4th Cir. 1984) 14

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 17

Medimmune, Inc. v. Genentech, Inc.,
549 U.S. 118 (2007) 24

Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights,
558 F.2d 1283 (7th Cir. 1977) 13, 16, 18

Mitchell v. Forsyth,
472 U.S. 511 (1985) 22

Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev.,
56 F.3d 1243 (10th Cir. 1995) 18

Nixon v. Fitzgerald,
457 U.S. 731 (1982) 22

Oti Kaga, Inc. v. S. Dakota Hous. Dev. Auth.,
342 F.3d 871 (8th Cir. 2003) 19, 20

PGA Tour, Inc. v. Martin,
532 U.S. 661 (2001) 23

Reinhart v. Lincoln Cnty.,
482 F.3d 1225 (10th Cir. 2007) 5, 18

Resident Advisory Bd. v. Rizzo,
564 F.2d 126 (3d Cir. 1977) 16, 19, 20

Schwarz v. City of Treasure Island,
544 F.3d 1201 (11th Cir. 2008) 16

Smith v. City of Jackson, Miss.,
544 U.S. 228 (2005) 2, 10, 11, 12, 25

Smith v. Town of Clarkton, N.C.,
682 F.2d 1055 (4th Cir. 1982) 17

Southend Neighborhood Imp. Ass'n v. St. Clair Cnty.,
743 F.2d 1207 (7th Cir. 1984) 14

Town of Huntington, N.Y. v. Huntington Branch, NAACP,
488 U.S. 15 (1988) 10

United States v. City of Black Jack, Missouri,
508 F.2d 1179 (8th Cir. 1974) 13

Vill. of Belle Terre v. Boraas,
416 U.S. 1 (1974) 13

Virginia Bankshares, Inc. v. Sandberg,
501 U.S. 1083 (1991) 23

Washington v. Davis,
426 U.S. 229 (1976) 17

Yee v. City of Escondido, Cal.,
503 U.S. 519 (1992) 23

STATUTES

20 U.S.C. § 1681 11

42 U.S.C. § 2000d 11

42 U.S.C. § 3601 12

42 U.S.C. § 3604(a) ..... i, 2, 9, 12

42 U.S.C. § 3604(b) 2, 9

St. Paul, Minn., Legislative Code § 34.01 3

Blank Page

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The district court's order granting summary judgment in favor of Petitioners dated December 18, 2008, is published at 595 F. Supp. 2d 987. Pet. App. 48a-115a. The opinion of the United States Court of Appeals for the Eighth Circuit reversing the district court on the issue of disparate impact and dated September 1, 2010, is published at 619 F.3d 823. Pet. App. 1a-42a. The order of the United States Court of Appeals for the Eighth Circuit denying Petitioners' petition for rehearing *en banc* was filed on November 15, 2010. Pet. App. 116a-125a.

JURISDICTION

The judgment of the Court of Appeals was entered on September 1, 2010. Pet. App. 43a-47a. On November 15, 2010, the Court of Appeals opinion denying Petitioners' request for rehearing *en banc* was entered. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

The Fair Housing Act provides in relevant part:

[I]t shall be unlawful --

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of the services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

42 U.S.C. § 3604(a)-(b).

STATEMENT OF THE CASE

The issue of whether disparate impact analysis applies to the Fair Housing Act has been percolating among the circuits for two decades. In 2005, this Court provided guidance to the question in *Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005). In *Smith*, a disparate impact theory of liability was found cognizable under the Age Discrimination in Employment Act (ADEA) based on the "identical text" found in § 703(a)(2) of Title VII and § 4(a)(2) of the ADEA. In the case at bar, the petition for rehearing *en banc* was denied, but the five judge dissent recognized this important and timely issue and found that the text in both the ADEA and Title VII contains triggering language for a disparate impact analysis

application based on "a prohibition on 'limiting, segregating, or classifying employees in any way which would . . . adversely affect [an individual's] status as an employee, because of such individual's' race or age." Pet. App. 122a. The *en banc* dissent recognized that this language is not part of the applicable Fair Housing Act language and instead recognized the language similarities between Title VI, which does not allow a disparate impact claim, and the Fair Housing Act.

Only two circuits have applied a disparate impact analysis since *Smith*; in addition there has been "virtually no discussion of the matter by any court of appeals since the Court in *Smith* explained how the text of Title VII justified the decision [applying disparate impact analysis in the *Griggs* Title VII case]." Pet. App. 123a. Because there has been virtually no discussion, and because this Court has not decided the issue, the circuits that have found disparate impact analysis applies have used conflicting tests with differing results. This case is the perfect vehicle to decide these important and impactful issues.

Respondents collectively are owners or former owners of approximately 120 rental properties within the City of Saint Paul. All properties in the City, whether owner occupied, renter occupied, publicly owned, or privately owned, are subject to the City's housing code. The code was enacted "to protect the public health, safety and welfare in all structures and on all premises." St. Paul, Minn., Legislative Code § 34.01. The City's housing code requires that properties meet minimum maintenance standards such as requiring the property be free from rodent infestation, have an operable toilet and a safely

maintained heating facility. If the properties do not meet the housing code, owners are subject to the City's code enforcement wherein owners are required to bring their properties into compliance with the housing code. Respondents claim that the City's aggressive housing code enforcement has a disparate impact on African-Americans.

The aggressive code enforcement that Respondents challenge has a purposeful, positive impact on those living in neglected rental homes; concentrating services on those properties that are in most disrepair. Respondents seek to use the Fair Housing Act to thwart City enforcement of its housing code and therefore to prevent the City from protecting those residents who need it most. Respondents seek to avoid fixing up their properties to meet the minimum housing code because it will cut their profits and prevent them from renting out dilapidated homes. This defeats the goal of the Fair Housing Act.

Below, the district court granted Petitioners' motion for summary judgment under a disparate impact claim by applying a three part burden shifting test. The court found that Respondents must show that a facially neutral policy results in, or can be predicted to result in, disparate impact on protected classes compared to a relevant population. If Respondents make that showing, Petitioners must be able to show that the objected to policy has a "manifest relationship" to legitimate, common, non-discriminatory policy objectives and "is justifiable on the ground it is necessary to" the attainment of those objectives. Pet. App. 61a. If Petitioners make that showing, the court stated the burden shifts back to Respondents to show that a viable alternative means

is available to achieve the legitimate policy objective without discriminatory impact. Pet. App. 61a.

The district court found that Respondents did not show that the City's aggressive code enforcement had a disparate impact on African-Americans. The district court, relying on the Tenth Circuit, found "[Respondents] must do more than show that the housing code increases the cost of low-income housing and that minorities tend to have lower incomes."[1] Pet. App. 63a. Furthermore, the district court found, even had Respondents made a *prima facie* case of disparate impact, the City put forth evidence that enforcement of the housing code had a manifest relationship to a legitimate, nondiscriminatory policy objective which was to maintain minimum property standards for properties within the City. Respondents argued that a previous, and limited, City enforcement program named "PP2000"[2] would achieve the City's objectives without discriminatory impact. The district court rejected this argument because PP2000 did not change minimum maintenance requirements or excuse

---

[1] The Tenth Circuit does not apply the three part burden shifting test to a Fair Housing Act disparate impact analysis that the district court applied here. It applies a three part balancing test derived from a four part balancing test from the Seventh Circuit. *Reinhart v. Lincoln Cnty.*, 482 F.3d 1225, 1229 (10th Cir. 2007).

[2] In fall 1999, the City began a program known as PP2000, short for problem properties 2000. As part of the program, a limited number of landlords in the City who owned some of the most Problematic Properties -- properties that violated the City's housing code frequently and in many areas -- worked with a specified housing inspector. The program lasted approximately one year and had 12-15 participating landlords and two inspectors assigned to it.

property owners from compliance with the housing code. The program required the same costs to bring the property up to the minimum standards and therefore had the same effect on African-Americans.

A panel of the Court of Appeals reversed and found that Respondents offered evidence to support the following conclusions: a) the City experienced a shortage of affordable housing, b) racial minorities, especially African-Americans, made up a disproportionate percentage of lower income households in the City that rely on low income housing, c) the aggressive housing code enforcement practices increased costs for property owners that rent to low income tenants, d) the increased burden on rental property owners from aggressive code enforcement resulted in less affordable housing in the City. The panel acknowledged that "[t]hough there is not a single document that connects the dots of [Respondents'] disparate impact claim, it is enough that each analytic step is reasonable and supported by the evidence." Pet App. 20a.

In making this finding, the panel applied a "three-step analysis to [Respondents'] disparate impact claim." Pet App. 16a. The panel identified the first step as requiring Respondents to show that the objected to conduct resulted in a disparate impact on protected classes as compared to a relevant population. The panel found that the burden then shifts to Petitioners to show that housing code enforcement has a manifest relationship to legitimate, non-discriminatory objectives. Pet App. 24a. Respondents conceded that the City's housing code enforcement has a manifest relationship to legitimate, non-discriminatory objectives. Pet App. 24a. The panel

then found that the burden shifts back to Respondents to offer a viable alternative that satisfies the City's legitimate, policy objectives while reducing the discriminatory impact of the City's housing code enforcement. Pet App. 24a. The panel found that Respondents identified PP2000 as a viable alternative to citywide code enforcement.

The panel did not identify any evidence that the PP2000 program satisfies the City's legitimate policy objectives while reducing the discriminatory impact of the City's code enforcement practices. The panel relied on a report that found that the program was effective in reducing complaints against participating owners. There was no evidence that it reduced any maintenance costs of the participating owners, or that the limited program met Petitioners' legitimate policy objectives of keeping all properties (not just participants' properties) in the City maintained to minimum property standards and safe for the inhabitants.

Petitioners requested a rehearing *en banc* arguing, *inter alia,* that applying a disparate impact analysis to housing codes would in effect prevent racially diverse municipalities with a shortage of affordable housing from enforcing their housing codes. Petitioners highlighted that under the panel's analysis, a per se case of disparate impact exists when neglectful landlords fail to meet minimum maintenance standards in a racially diverse municipality. Furthermore, the panel did not require that Respondents offer any statistical information or show how the City's housing code enforcement affected those tenants not in protected classes. The impact of the

City's enforcement on unprotected classes versus protected classes was not shown and is still unknown.

The Eighth Circuit denied Petitioners' request for a rehearing *en banc* with five of the eleven judges dissenting. Those dissenting were Chief Judge Loken and Circuit Judges Colloton, Riley, Gruender, and Shepherd. The dissent recognized that this Court has not yet decided whether the Fair Housing Act allows for recovery based on a disparate impact theory. Also, the dissent found that there exists an important undecided question of "whether 'aggressive' enforcement of a housing code is the sort of facially neutral policy that can trigger disparate impact analysis under the [Fair Housing Act]. . . ." Pet. App. 118a. "Second, if disparate impact analysis should be applied to claims under the [Fair Housing Act] based on the 'purpose' of the statute, then it seems appropriate to consider whether the purpose of the statute extends to declaring a city liable for disparate impact caused by its 'aggressive' enforcement of a housing code." Pet. App. 124a (internal citation omitted).

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD DECIDE THE ISSUE OF WHETHER DISPARATE IMPACT ANALYSIS APPLIES TO FAIR HOUSING ACT CLAIMS.

Most courts of appeals permit disparate impact claims under the Fair Housing Act, but the circuits that have decided to apply that analysis are divided on the approach for resolving these claims. Before this Court reaches the issue of which test should be applied to a Fair Housing Act disparate impact claim, the

Court should first consider the threshold question of whether disparate impact claims are cognizable under the Fair Housing Act at all. This Court has specifically recognized that this is an open question, and as the dissent to the Order denying the petition for rehearing *en banc* has made clear, there is a serious question as to whether disparate impact claims challenging a city's code enforcement should be recognized. Deciding the threshold question may obviate the need to decide which test to apply and provide a definitive answer to the circuits on this important and fully developed, twenty year old question.

The Fair Housing Act makes it unlawful "to refuse to sell or rent . . . or otherwise make available or deny, a dwelling to any person because of race, color, religion, sex, familial status or national origin." 42 U.S.C. § 3604(a). Or, "to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling . . . because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(b). District and circuit courts have interpreted this language to encompass both a disparate treatment and a disparate impact theory of liability.

Disparate treatment claims allege intentional discrimination on the basis of a protected characteristic. Proof of discriminatory purpose is crucial for a disparate treatment claim. *Int'l Broth. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). Applied to housing code enforcement, a plaintiff would have to show that the action or policy she challenged had the purpose of discriminating against those in a protected class.

In comparison, disparate impact claims usually do not depend on the intent of the action or policy. However, the circuits have applied conflicting tests to Fair Housing Act disparate impact analysis. Currently, courts in all eleven circuits and the D.C. Circuit have applied at least four distinct tests to Fair Housing Act disparate impact analysis. At least one test, followed by the Fourth and Seventh Circuits (two of the circuits relied upon by the panel) and various district courts, factors in discriminatory intent.

This Court has not yet decided whether the Fair Housing Act allows for recovery based on a disparate impact theory. In *Town of Huntington, N.Y. v. Huntington Branch, NAACP*, 488 U.S. 15, 18 (1988) (per curium) this Court specifically recognized that it had not yet decided the question of whether a disparate impact analysis is appropriate in a Fair Housing Act claim. However, this Court did not decide the issue in *Town of Huntington* because the parties conceded its applicability. 488 U.S. at 18. As a result, the issue of whether a disparate impact analysis applies to the Fair Housing Act remains unresolved and has been ripe for review for over two decades.

A. The Text Of The Fair Housing Act Does Not Support A Cognizable Disparate Impact Claim.

In 2005, this Court analyzed disparate impact as it applies to claims brought under the ADEA. *Smith*, 544 U.S. 228. In *Smith,* this Court held that a disparate impact theory is cognizable under the ADEA. In doing so, this Court emphasized that § 703(a)(2) of Title VII at issue in *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-431 (1971), and the comparable language

in the ADEA "prohibits such 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." *Smith*, 544 U.S. at 235 (plurality opinion).

This Court recognized "key textual differences" between § 4(a)(1) of the ADEA, which makes it unlawful "to fail or refuse to hire . . . any individual . . . because of such individual's age," which does *not* encompass disparate impact liability, and § 4(a)(2), which does authorize recovery based on disparate impact. *Id.* at 236 n.6 (omissions in original) (internal quotations omitted). This Court has found that another important civil rights statute, Title VI of the Civil Rights Act, forbids only intentional discrimination and does not prohibit actions taken with a non-discriminatory motive that have a disparate impact on racial groups. *See Alexander v. Sandoval*, 532 U.S. 275, 280-81 (2001). In contrast to Title VII and the ADEA, the text of Title VI does not proscribe activities that would "adversely affect" a person because of a protected characteristic. *See* 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."). Four years later, this Court analyzed Title IX which states that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681. This language was found, like *Alexander*, to allow a cause of action

premised on intentional discrimination but did not permit a cause of action premised on disparate impact.

Similarly, the Fair Housing Act does not include text comparable to that relied on in *Smith* and appearing in § 703(a)(2) of Title VII, and § 4(a)(2) of the ADEA. Rather, the text of 42 U.S.C. § 3604(a) makes it unlawful to ". . . make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." This language is similar to § 4(a)(1) of the ADEA, which the Court in *Smith* said does not support a claim based upon disparate impact alone. *Smith*, 544 U.S. at 236 n.6 (plurality opinion).

However, most circuit courts have found that disparate impact analysis applies to Fair Housing Act claims. They have done this although there has been no consideration by this Court of the textual basis for disparate impact's application to Fair Housing Act claims. Furthermore, since the *Smith* Court explained how the text of Title VII justified its decision in *Griggs*, there has been nearly no discussion of the matter by any court of appeals. Accordingly, certiorari should be granted so that this Court can decide this important question: Does a disparate impact analysis apply to Fair Housing Act claims?

B. The Fair Housing Act Does Not Reach Every Event That Might Conceivably Affect The Availability Of Housing.

Congress has declared that the purpose of the Fair Housing Act is "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. As recognized as early as

1977, in one of the first cases to permit a Fair Housing Act disparate impact claim, the Seventh Circuit emphasized not "every action which produces discriminatory effects is illegal." *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977) (*Arlington Heights II*). Indeed, here Petitioners, like cities throughout the United States, are enforcing a municipality's housing code citywide. The housing code undisputedly applies to all properties, both rental and owner occupied properties, without regard to the race of the tenants or the property owners. The City is enforcing minimum property standards so that all who live in the City have dwellings that are structurally sound, safe, and provide minimally basic shelter. Any municipality enforcing its housing codes does so in part to protect residents from structurally unsound or unsafe dwellings. It is a welcome consequence that renters are protected from neglectful landlords and landlords are required to meet minimum property maintenance standards.

In *United States v. City of Black Jack, Missouri*, 508 F.2d 1179 (8th Cir. 1974), the Eighth Circuit reasoned by analogy to this Court's decision in *Griggs,* 401 U.S. at 430-431, that the discretion of local zoning officials recognized in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), must be curbed where "the clear result of such discretion is the segregation of low income Blacks from all White neighborhoods." (*Citing Banks v. Perk*, 341 F. Supp. 1175, 1180 (N.D. Ohio 1972) *aff'd in part and rev'd in part without opinion,* 473 F.2d 910 (6th Cir. 1973). The purpose of the Fair Housing Act, to provide fair housing throughout the United States, is not different from what a municipality is doing when it applies a race neutral

minimum maintenance standard to properties within a city. It is a city's housing code that protects the very same individuals that the Fair Housing Act was meant to protect. Members of protected classes should not be forced to live in properties that are neglected and do not meet minimum standards. To prevent this, cities must be allowed to enforce their housing codes.

In *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180 (4th Cir. 1999), minority landowners challenged the placement of a highway in Maryland claiming disparate impact under the Fair Housing Act. The placement of the highway, they argued, violated the purpose of the Fair Housing Act. The court found that the Fair Housing Act did not apply to plaintiff's claims challenging a highway placement. The court held that the Fair Housing Act does not reach every event "that might conceivably affect the availability of housing." *Id.* at 192 (*citing Mackey v. Nationwide Ins. Cos.*, 724 F.2d 419, 423 (4th Cir. 1984)). "Section 3604(a) is designed to ensure that no one is denied the right to live where they choose for discriminatory reasons." *Id.* (*citing Southend Neighborhood Imp. Ass'n v. St. Clair Cnty.*, 743 F.2d 1207, 1210 (7th Cir. 1984)). The landowners argued they were more burdened by the highway than others, but as the court explained under this theory

> [H]ow is a multicultural society ever to locate a highway? Suppose a roadway runs by a neighborhood that is thirty-five percent Anglo, forty-five percent Latino, and twenty-percent African-American. Does the predominant ethnic group have a disparate impact claim? . . . Will planners have to relocate the corridor to ensure that it affects each ethnicity

> proportionally? Simply to pose these questions is to demonstrate the absurdity of the result: a twisting, turning roadway that zigs and zags only to capture equally every ethnic subset of our population.

Id. at 194.

In code enforcement cases, recognizing disparate impact claims would be just as illogical as building a zig-zagging highway. Barring municipalities from enforcing housing codes in homes because they are occupied by protected class members "would lead to race-based decision making of the worst sort. We do not think the drafters of the Fair Housing Act ever contemplated such a reading." *Id.* This inability to enforce health and safety codes would eventually result in exactly what the Fair Housing Act was historically enacted to eliminate, urban neighborhoods rife with substandard housing, disproportionally occupied by protected class members. This would prevent any municipality with a diverse population of renters from enforcing housing codes on rental properties neglected by their owners.

II. THE COURTS OF APPEALS ARE DIVIDED AS TO WHAT TEST APPLIES TO A FAIR HOUSING ACT CLAIM.

This Court has not addressed the issue of what test would apply to a Fair Housing Act disparate impact analysis. Without given any guidance from this Court

on how to do so, nine circuits[3] have developed their own approaches which relate back to three early Fair Housing Act disparate impact cases. *Arlington Heights II*, 558 F.2d at 1283; *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 148 (3d Cir. 1977); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988). The test each circuit uses generally falls into one of two categories, either a burden shifting or balancing approach. Each circuit then modifies their approach and has formulated a specific test for their circuit.

A. Balancing Factors Approach.

The Seventh Circuit was one of the first circuits to hold that claims of disparate impact are cognizable under the Fair Housing Act. *Arlington Heights II*, 558 F.2d at 1283. In doing so, the court emphasized that not every action that results in a discriminatory impact is a violation of the Fair Housing Act. *Id.* 1290. "Such a per se rule would go beyond the intent of Congress and would lead courts to untenable results in specific cases." *Id.* The court developed a balancing test and identified four factors to consider when determining whether the conduct that produces the disparate impact violates the Fair Housing Act: (1) the

---

[3] The Fifth Circuit has held that actions causing discriminatory impact can violate the Fair Housing Act, but has not decided what analysis to use after a plaintiff establishes disparate impact. *Cox v. City of Dallas, Tex.*, 430 F.3d 734, 746 (5th Cir. 2005). The Eleventh and D.C. Circuits have not yet decided the threshold question of whether such claims can be brought. *Schwarz v. City of Treasure Island*, 544 F.3d 1201 (11th Cir. 2008); *2922 Sherman Ave. Tenants' Ass'n v. Dist. of Columbia*, 444 F.3d 673, 679 (D.C. Cir. 2006).

strength of the plaintiff's showing of discriminatory impact; (2) evidence of discriminatory intent, though not enough to satisfy the constitutional standard of *Washington v. Davis*, 426 U.S. 229, 239 (1976); (3) the defendant's interest in the challenged conduct; and (4) whether the plaintiff seeks affirmative relief or merely to restrain the defendant from interfering with individual property owners who wish to provide housing. *Id.*

The Fourth Circuit has also recognized disparate impact claims under the Fair Housing Act. *Smith v. Town of Clarkton, N.C.*, 682 F.2d 1055, 1065 (4th Cir. 1982). However, the Fourth Circuit is unique in that it applies two different tests. When the case involves a public defendant, the court balances the four factors listed above in *Arlington Heights II*. E.g., *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 989 n.5 (4th Cir. 1984). When the case includes a private defendant, the court uses the burden shifting test developed for employment discrimination cases by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (once the plaintiff makes a *prima facie* showing, the private defendant must articulate "a compelling business necessity exists, sufficient to overcome the showing of disparate impact").

The Sixth Circuit uses an *Arlington Heights II* analysis, but does not require any showing of discriminatory intent and therefore only weighs three of the four *Arlington Heights II* factors. *Arthur v. City of Toledo, Ohio*, 782 F.2d 565, 574-575 (6th Cir. 1986). The court held that only the following factors should be considered: (1) how strong is the plaintiff's showing of discriminatory impact; (2) what is the defendant's interest in taking the action complained of; and

(3) does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing. *Id.*, *cited by Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 263 F.3d 627, 640 (6th Cir. 2001), *rev'd in part, vacated in part sub nom.* 538 U.S. 188 (2003). "We adopt three of the four factors pronounced in *Arlington [Heights] II*. Under the second factor, the Seventh Circuit inquired whether plaintiffs introduced some evidence of discriminatory intent. The court, however, concluded that this factor was 'the least important of the four factors.' We agree and additionally decide not to consider this factor in our analysis." *Arthur*, 782 F.2d at 575 (*citing Arlington Heights II,* 558 F.2d at 1292).

The Tenth Circuit, like the Sixth Circuit, applies a modified *Arlington Heights II* test which includes only the first, third, and fourth factors of *Arlington Heights II*. *Reinhart v. Lincoln Cnty.*, 482 F.3d 1225, 1229 (10th Cir. 2007); *see Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev.*, 56 F.3d 1243, 1252 (10th Cir. 1995). In eliminating the 'intent' requirement, the court explained that intent is required only in claims for disparate treatment. *Reinhart*, 482 F.3d at 1229; *see Bangerter v. Orem City Corp.,* 46 F.3d 1491, 1501 (10th Cir. 1995). In contrast, in disparate impact claims, the plaintiff need not show that the policy was formulated with discriminatory intent because the plaintiff is challenging a facially neutral policy that "actually or predictably results in . . . discrimination." *Reinhart*, 482 F.3d at 1229 (*citing Huntington Branch, NAACP*, 844 F.2d at 934 (internal quotation marks omitted), *aff'd sub nom.*, 488 U.S. 15 (1988)).

B. Burden Shifting Approach.

Soon after the Seventh Circuit developed its test in *Arlington Heights II,* the Third Circuit developed its own completely different test based on a burden shifting framework similar to what had been used in Title VII employment cases. *Rizzo*, 564 F.2d at 148. Under the *Rizzo* approach, the plaintiff can make a *prima facie* case by showing that the defendant's action has a discriminatory impact. *Id.* at 148. The defendant can rebut this by showing a justification which "serve[s], in theory and in practice, a legitimate, bona fide interest" and by showing that "no alternative course of action could be adopted that would enable the interest to be served with less discriminatory impact." *Id.* at 149.

The Eighth and Ninth Circuits both recognize disparate impact claims under the Fair Housing Act but apply a modified burden shifting framework that includes three steps. *Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth.*, 417 F.3d 898, 902-903 (8th Cir. 2005); *Harris v. Itzhaki*, 183 F.3d 1043, 1051 (9th Cir. 1999). Using this approach, plaintiffs still carry the first burden of showing a discriminatory impact, but to rebut defendants need only provide a bona fide, non-discriminatory justification. The burden then shifts back to the plaintiffs to show an alternative that is less discriminatory but that also serves the defendants' interest. *Darst-Webbe Tenant Ass'n Bd.*, 417 F.3d at 902-903, *Oti Kaga, Inc. v. S. Dakota Hous. Dev. Auth.*, 342 F.3d 871, 883 (8th Cir. 2003).

> To prove discrimination under a disparate impact analysis [plaintiff] must show a facially neutral policy has a significant adverse impact

> on members of a protected minority group. The burden then shifts to [defendant] to show the policy has a manifest relationship to the [action that produces the discriminatory impact] and is justifiable on the ground it is necessary to [defendant's action]. If [defendant] is able to show the policy is justified, [plaintiff] may nonetheless prevail by showing another policy would accomplish [defendant's] objectives without the discriminatory effects.

Oti Kaga, Inc., 342 F.3d at 883.

C. Hybrid Burden Shifting And Balancing Test.

Ten years after the decision in *Arlington Heights II*, the Second Circuit developed a third test by merging the burden shifting test in *Rizzo* with the balancing test in *Arlington Heights II*. *Huntington Branch, NAACP*, 844 F.2d 926. The *Huntington Branch, NAACP* court held that the plaintiff must first establish a *prima facie* case of discriminatory impact by showing that the "challenged practice of the defendant actually or predictably results in racial discrimination." *Huntington Branch, NAACP*, 844 F.2d at 934 (*citing Rizzo*, 564 F.2d at 148-149). The burden then shifts to the defendant to rebut this case by showing that its "actions furthered, in theory and in practice, a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect." *Id.* After the burden shifting test is applied, the Second Circuit balances two of the *Arlington Heights II* factors (numbers 2 and 4) before making an ultimate determination on the merits. *Id.* Although the plaintiff is not required to

show it to establish a *prima facie* case, the court first looks to see whether there is any evidence of discriminatory intent on the part of the defendant. *Id.* "Though we have ruled that such intent is not a requirement of the plaintiff's *prima facie* case, there can be little doubt that if evidence of such intent is presented, that evidence would weigh heavily on the plaintiff's side of the ultimate balance." *Id.* The second factor weighed is "whether the plaintiff is suing to compel a governmental defendant to build housing or only to require a governmental defendant to eliminate some obstacle to housing that the plaintiff itself will build." *Id.*

The First Circuit, in choosing the *Huntington Branch, NAACP* hybrid burden shifting approach over any sort of balancing test, explained, "[W]e do not think that the courts' job is to 'balance' objectives, with individual judges deciding which seem to them more worthy. True, one circuit court decision did refer to balancing . . . but the few later circuit court decisions on point come closer to a simple justification test . . . and we think this is by far the better approach." *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49 (1st Cir. 2000) (internal citations omitted).

III. THIS CASE PROVIDES THE IDEAL VEHICLE FOR RESOLVING IMPORTANT ISSUES REGARDING THE SCOPE OF THE FAIR HOUSING ACT.

A. This Case Presents Purely Legal Questions That Should Be Determined By This Court.

It is appropriate for this Court to hear cases that present purely questions of law. Whether disparate impact analysis applies to Fair Housing Act claims

squarely fits that category as the question presented is entirely a legal question. The specific facts involved here are immaterial to the resolution of the questions presented and therefore the issues presented are appropriate for this Court's review. *Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23 (1982); and *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (both holding that purely legal questions presented in a petition for certiorari may be appropriate for decision even if not addressed by the lower court).

B. The Application Of Disparate Impact Analysis To A Fair Housing Act Claim Was Raised Below.

In the motion for summary judgment to the district court, the brief to the Eighth Circuit Court of Appeals, and in the petition for rehearing *en banc*, Petitioners continuously argued that Respondents did not present evidence to support a Fair Housing Act claim analyzed under disparate impact analysis. Furthermore, in the petition for rehearing *en banc* Petitioners argued that the Eighth Circuit panel created a circuit split by its decision which was in direct conflict with law in other circuits cited by the panel. As correctly recognized by the dissent "the petition raises important questions concerning whether 'aggressive' enforcement of a housing code is the sort of facially neutral policy that can trigger disparate-impact analysis under the [Fair Housing Act]. . . ." Pet. App. 118a. Petitioners properly preserved the claim for Supreme Court review by consistently challenging Respondents' Fair Housing Act claim and the panel's application of the law. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("in our view [the argument that Amtrak was part of the government is] not a new

claim . . . but a new argument to support what has been his consistent claim: that Amtrak did not accord him the rights it was obliged to provide by the First Amendment"); *see also Yee v. City of Escondido, Cal.*, 503 U.S. 519, 535 (1992) (since petitioners "raised a taking claim in the state courts," they "could have formulated any argument they liked in support of that claim here"); *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 678 n.27 (2001) (where Americans with Disabilities Act coverage issue was raised below, the Court would entertain a new argument regarding the statute's scope).

Furthermore, the threshold issue, whether or not disparate impact analysis applies to a Fair Housing Act case at all, was specifically discussed by the *en banc* dissent. Pet. App. 119a–120a. Therefore, the issue, as discussed by the *en banc* dissent, is particularly well suited for this Court's review. *Virginia Bankshares, Inc. v. Sandberg,* 501 U.S. 1083, 1099 n.8 (1991) (raising such an issue before the Court is particularly appropriate where the question (1) is in "a state of evolving definition and uncertainty," and (2) is "one of importance to the administration of federal law"); *see also Lebron*, 513 U.S. at 379 ("even if this were a claim not raised by petitioner below, we would ordinarily feel free to address it, since it was addressed by the court below").

Finally, Petitioners challenged the disparate impact claim based on Eighth Circuit precedent, and other circuit court cases that applied disparate impact analysis to Fair Housing Act claims. That Petitioners may not have directly challenged the application of disparate impact analysis to the Fair Housing Act claims does not preclude review of that threshold issue

by this Court. Petitioners' approach to challenging disparate impact analysis and the application chosen by the panel reflects Petitioners' assessment that an argument to the Eighth Circuit to ignore Eighth Circuit precedent would be futile. *See, e.g., Medimmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007) (limiting contract argument to a few pages does not suggest waiver but reflects counsel's sound assessment that the argument would be futile).

C. The Lack Of Uniformity In The Circuits Nationwide Leads To Confusion About Cities' Ability To Enforce Their Housing Codes.

The way the law stands, cities with a diverse population located in the Fourth and Seventh Circuits (which apply a four part balancing test) can enforce their housing codes where protected class individuals live in properties subject to the housing code at a rate greater than those non-protected class individuals. The balancing test allows courts in those jurisdictions to use common sense when determining whether or not a violation of the Fair Housing Act has occurred.

Likewise, those in the Sixth and Tenth Circuits may be able to enforce the housing codes in a racially diverse municipality depending on how the modified *Arlington Heights II* approach (three part balancing test) is applied.

The First and Second Circuits apply the burden shifting test from the Third Circuit and then two of the parts from the balancing test from the Fourth and Seventh Circuits. This hybrid test, depending on how applied, may also allow courts in the Second Circuit to

use common sense when deciding whether or not there was a violation of the Fair Housing Act.

In the Eighth and Ninth Circuits, applying housing codes in a diverse municipality when protected class individuals live in properties violating the housing code at a higher rate than non-protected class individuals, would be a per se violation of the Fair Housing Act.

The Eleventh and D.C. Circuits have not determined whether disparate impact analysis applies to a claim brought under the Fair Housing Act at all. In light of the analysis this Court relied upon in *Smith*, 544 U.S. 228, it is possible that these circuits would find that there is no basis for a disparate impact analysis in a Fair Housing Act claim.

As it stands today, Los Angeles, Minneapolis, Phoenix, San Francisco, and all other municipalities in the Eighth and Ninth Circuits cannot enforce minimum maintenance standards on properties within the municipality without inviting a claim brought under the Fair Housing Act. All that the burden shifting in those circuits requires, under the panel's analysis, is a showing that there is a shortage of affordable housing, racial minorities make up a disproportionate number of low income individuals who rely on affordable housing, code enforcement increases costs to landlords who rent to low income individuals, and because of the increased cost to those landlords there will be a decrease in the amount of affordable housing available. Every municipality in the Eighth and Ninth Circuit with a racially diverse population falls into that category.

In contrast, the four part balancing test employed by Fourth and Seventh Circuits may not allow for such a draconian disparate impact analysis. If you are a protected class individual in Chicago or Raleigh, or any other municipality in those circuits, you can expect that city's code enforcement will be allowed to function and code enforcement will be applied to provide minimally safe properties for all residents. The three part balancing test in the Sixth and Tenth Circuits is more likely to allow code enforcement that will ensure that all properties, no matter the race of the resident, meet minimum maintenance standards. That would leave cities such as Denver and Columbus more likely than Minneapolis to enforce minimum maintenance standards without the threat of a Fair Housing Act claim.

The possibility of such divergent results is untenable. It makes absolutely no sense for cities with similar demographics to have different standards in enforcing housing codes. Some municipalities would be in violation of the Fair Housing Act in their enforcement while others, providing the same code enforcement, would not run afoul of the Fair Housing Act. Clearly, this issue must be resolved for the benefit of all American cities. Should landlords be choosing a business location because the Fair Housing Act in some cities will prevent code enforcement against their neglected properties? It is doubtful that the drafters of the Fair Housing Act ever contemplated such a twisted result.

CONCLUSION

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

Respectfully submitted,

SARA R. GREWING
City Attorney
LOUISE TOSCANO SEEBA
Counsel of Record
K. MEGHAN KISCH
Assistant City Attorneys
750 City Hall and Court House
15 West Kellogg Boulevard
Saint Paul, MN 55102
(651) 266-8772
louise.seeba@ci.stpaul.mn.us

Attorneys for Petitioners

Blank Page