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 Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CENTER FOR EQUAL OPPORTUNITY, COMPETITIVE ENTERPRISE INSTITUTE, CATO INSTITUTE, INDIVIDUAL RIGHTS FOUNDATION, REASON FOUNDATION, AND PROJECT 21 IN SUPPORT OF PETITIONERS

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## QUESTIONS PRESENTED

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

2. If disparate impact claims are cognizable under the Fair Housing Act, what are the standards and burdens of proof that should apply?

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## IDENTITY AND INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF), Center for Equal Opportunity (CEO), Competitive Enterprise Institute (CEI), Cato Institute, Individual Rights Foundation (IRF), Reason Foundation, and Project 21 respectfully submit this brief amicus curiae in support of Petitioners.[1]

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has participated as amicus curiae in numerous cases relevant to this case. PLF addressed the cognizability of disparate impact claims under the Fair Housing Act in *Magner v. Gallagher*, 132 S. Ct. 1306 (2012), *cert. dismissed*, and *Township of Mount Holly, New Jersey v. Mt. Holly Gardens Citizens in Action, Inc.*, 134 S. Ct. 636 (2013), *cert. dismissed*. PLF also addressed unjustified applications of disparate impact theory in *Ricci v. DeStefano*, 557 U.S. 557 (2009), and *Alexander v. Sandoval*, 532 U.S. 275 (2001). PLF has participated as amicus curiae in nearly every major racial discrimination case heard by this Court in the past

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

three decades, including *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014); *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013); and *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

CEO is a nonprofit research and educational organization devoted to issues of race and ethnicity, such as civil rights, bilingual education, and immigration and assimilation. CEO supports color-blind public policies and seeks to block the expansion of racial preferences and to prevent their use in, for instance, employment, education, and voting. CEO has participated as amicus curiae in numerous cases concerning equal protection, such as *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013); *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013); *Ricci v. DeStefano*, 557 U.S. 557 (2009); *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006); and *Alexander v. Sandoval*, 532 U.S. 275 (2001).

CEI is a nonprofit public interest organization dedicated to individual liberty and limited government. To that end, CEI has participated as amicus, or counsel for amici, in past cases raising federalism or civil rights issues. *See, e.g., Florida v. United States Dep't of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011) (amicus brief for state legislators); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); and *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007) (representing banking experts in preemption case).

The Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, publishes the annual *Cato Supreme Court Review*, and files amicus briefs.

The IRF was founded in 1993 and is the legal arm of the David Horowitz Freedom Center. The IRF is dedicated to supporting free speech, associational rights, and other constitutional protections. To further these goals, IRF attorneys participate in litigation and file amicus curiae briefs in cases involving fundamental constitutional issues. The IRF opposes attempts from anywhere along the political spectrum to undermine freedom of speech and equality of rights, and it combats overreaching governmental activity that impairs individual rights.

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by developing, applying, and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, www.reason.com and www.reason.tv, and by issuing policy research reports. To further Reason's commitment to "Free Minds and

Free Markets," Reason selectively participates as amicus curiae in cases raising significant constitutional issues.

Project 21 is an initiative of The National Center for Public Policy Research to promote the views of African-Americans whose entrepreneurial spirit, dedication to family, and commitment to individual responsibility has not traditionally been echoed by the nation's civil rights establishment. Project 21 has previously participated as amicus curiae in this Court. *See Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013).

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

This Court has indicated twice before that it finds the issues presented by this case to be of such great importance as to warrant review. In 2011 the Court granted certiorari in *Magner*, 132 S. Ct. 1306, which presented the same questions as this case: Whether disparate impact claims are cognizable under the Fair Housing Act, and if so, what test should be applied. Although the Court took the case and scheduled it for oral argument, the City of St. Paul agreed to dismiss its petition for a writ of certiorari in February, 2012, after being pressured by the Obama administration and its political allies. *See, e.g.*, Joan Biskupic, *Analysis: Rights Groups Try to Avoid US High Court*

*Setback*, Reuters, Mar. 2, 2012;[2] Editorial, *Squeezed in St. Paul*, Wall St. J., Feb. 13, 2012, at A14.[3]

In June, 2013, this Court again granted certiorari to resolve whether the Fair Housing Act encompasses claims for disparate impact. *Township of Mount Holly, N.J. v. Mt. Holly Gardens Citizens in Action, Inc.*, 133 S. Ct. 2824 (2013); Pet. for Cert., *Township of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, No. 11-1507, 2012 WL 2151511 (U.S. June 11, 2012). Like *Magner*, the parties involved in *Mount Holly* settled before oral argument, and the Court dismissed the writ of certiorari without resolving the question presented. *Mount Holly*, 134 S. Ct. 636. This case presents the Court with another opportunity to resolve the questions presented by *Magner* and *Mount Holly*.

The court of appeals below allowed a "disparate impact" claim to proceed under the Act against the Texas Department of Housing and Community Affairs. *Inclusive Communities Project, Inc. v. Texas Dep't of Hous. & Cmty. Affairs*, 747 F.3d 275, 276-77 (5th Cir. 2014). For such a claim, the plaintiffs need not allege, nor prove, that individuals were treated differently because of their race. Instead, plaintiffs may merely show that a neutral practice has a disproportionate effect—that is, a disparate impact—on some racial group. For two decades the circuits have assumed that disparate impact analysis applies to the Fair Housing Act, but they apply different analyses and achieve

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[2] *Available at* http://www.reuters.com/article/2012/03/02/us-usa-court-civil-rights-idUSTRE82117X20120302 (last visited June 9, 2014).

[3] *Available at* http://online.wsj.com/article/SB10001424052970203824904577215514125903018.html (last visited June 9, 2014).

inconsistent results. This Court should grant certiorari to clarify that disparate impact claims are not cognizable under the Act.

The text of the Fair Housing Act, as expressed by its proponents in Congress, establishes that the Act was intended to apply solely to disparate treatment, not to acts having a disparate impact on protected classes. The Court has never interpreted the Act as permitting the disparate impact doctrine. In *Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005), this Court interpreted the text of the Age Discrimination in Employment Act of 1967 (ADEA) as permitting disparate impact claims. In doing so, however, the Court clearly identified phrasing in one section of the ADEA that permits claims without proving discriminatory intent, and another section that prohibits such claims. *Compare* 29 U.S.C. § 623(a)(2) (Section 4(a)(2) of the ADEA) (language allowing disparate impact claims), *with* 29 U.S.C. § 623(a)(1) (Section 4(a)(1) of the ADEA) (language that does not allow disparate impact claims); and *Smith*, 544 U.S. at 236 n.6. The relevant language of the Fair Housing Act is textually similar to the specific section in the ADEA that requires proof of disparate treatment, not the language in a different section of the ADEA and in Title VII that permits disparate impact claims. 42 U.S.C. § 2000e-2(a)(2) (Title VII); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

Amici contend that review is further warranted in this case to resolve whether disparate impact claims are constitutional at all. Subjecting government defendants to disparate impact claims leads them to engage in unconstitutional race-conscious decision-making to avoid liability for such claims. *See*

*Ricci*, 557 U.S. at 582 ("employer could discard test results (or other employment practices) with the intent of obtaining the employer's preferred racial balance"). This Court's decision in *Ricci* highlights the conflict between disparate impact doctrine and the constitutional guarantees of equal protection. *See id.* (allowing employers to violate the disparate treatment prohibition to avoid disparate impact liability could lead to a de facto quota system). The extension of the disparate impact doctrine to the Fair Housing Act leads to substantially adverse results. *See A General Overview of Disparate Impact Theory: Hearing Before the Subcommittee on Oversight and Investigations*, 113th Cong. 110-133 (2013) (testimony of National Association of Mutual Insurance Companies providing a comprehensive discussion of the legal and policy problems with the disparate-impact approach generally, and in the fair housing context in particular).[4] This case is the perfect vehicle to decide these important issues.

## REASONS FOR GRANTING THE PETITION

### I

### THIS COURT HAS NEVER DETERMINED WHETHER DISPARATE IMPACT ANALYSIS APPLIES TO FAIR HOUSING ACT CLAIMS

Although this Court has never held that disparate impact analysis applies to claims brought pursuant to the Fair Housing Act, courts of appeals permit such claims using vastly different analyses to achieve

[4] *Available at* http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg86686/pdf/CHRG-113hhrg86686.pdf (last visited June 9, 2014).

completely different results. Review by this Court is necessary to consider the threshold question of whether disparate impact claims are even cognizable under the Fair Housing Act.

The Fair Housing Act makes it unlawful "to refuse to sell or rent . . ., 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). The Act further prohibits "discriminat[ion] against any person in the terms, conditions, or privileges of sale or rental of a dwelling . . . because of race." 42 U.S.C. § 3604(b). Most of the 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 race, color, religion, sex, or national origin. "Proof of discriminatory motive is critical." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). Undoubtedly, the obvious evil Congress had in mind when it enacted the Fair Housing Act was the intentional refusal to sell or rent a home because of the race of the buyer or renter. "The bill simply reaches the point where there is an offering to the public and the prospective seller refused to sell to someone solely on the basis of race." 114 Cong. Rec. 4974 (Mar. 4, 1968) (Statement of Senator Mondale).

In comparison, disparate impact claims 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, different circuits have applied at least four distinct tests to Fair Housing Act disparate impact analysis, including one test, followed by the Fourth and Seventh

Circuits, that factors in discriminatory intent. *See Smith v. Town of Clarkton, N.C.*, 682 F.2d 1055, 1065 (4th Cir. 1982) (four-part balancing test includes consideration of discriminatory intent); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977) (same). This means that, unlike Texas, states within those jurisdictions acting with nondiscriminatory motives may implement the Federal Low-Income Housing Tax Credit Program, 26 U.S.C. § 42, with relative confidence that their race-neutral actions will not subject them to liability for disparate impact claims. *See Inclusive Communities Project*, 747 F.3d at 279 (district court below dismissed plaintiff's intentional discrimination claim, but the Fifth Circuit allowed the disparate impact claim to proceed without an intent inquiry).

The courts' discussions on that test highlight why disparate impact theory should not be used at all. The balancing test allows courts in the jurisdictions of the Fourth and Seventh Circuits to use common sense when determining whether or not a violation of the Fair Housing Act has occurred. In *Arlington Heights*, the Seventh Circuit noted that not "every action which produces discriminatory effects is illegal." 558 F.2d at 1290. Similarly the Fourth Circuit holds that the Fair Housing Act does not reach every event "'that might conceivably affect the availability of housing.'" *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 192 (4th Cir. 1999) (citation omitted).

However, the Sixth and Tenth Circuits have also omitted consideration of discriminatory intent from their disparate impact balancing tests. *See Arthur v. City of Toledo, Ohio*, 782 F.2d 565, 574-75 (6th Cir. 1986) (discriminatory intent removed from balancing

test); *Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev.*, 56 F.3d 1243, 1252 (10th Cir. 1995) (same). Without having to show discriminatory intent, plaintiffs may bring disparate impact claims against private defendants whose race neutral business policies have a disproportionate impact on certain races. *See Lumpkin v. Farmers Grp., Inc.*, No. 05-2868 Ma/V, 2007 WL 6996777 (W.D. Tenn. July 6, 2007) (court allowed plaintiffs' disparate impact claim under the Fair Housing Act to proceed against an insurance company where the plaintiff alleged the company's policy rates, based on applicants' credit scores, disproportionately affected minorities).

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. *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 148 (3d Cir. 1977). The First and Second Circuits apply this burden shifting approach, and then two of the parts from the balancing test from the Fourth and Seventh Circuits. *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49 (1st Cir. 2000); *Huntington Branch, NAACP v. Town of Huntington, N.Y.*, 844 F.2d 926, 934 (2d Cir. 1988). Although the plaintiff is not required to show discriminatory intent to establish a prima facie case under the burden shifting approach, these courts first look to see whether there is any evidence of discriminatory intent on the part of the defendant. *Id.* at 936. "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.* It is imperative that discriminatory intent be considered, because it "is the rare case when a housing measure

that causes a disparate racial impact cannot plausibly be regarded as 'discriminatory' under a conceptualization of discrimination endorsed either in housing cases or in Title VII cases." *Langlois*, 207 F.3d at 54 (Stahl, J., dissenting). The Eighth and Ninth Circuits conduct disparate impact analysis using a modified burden shifting framework that does not include discriminatory intent. *Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth.*, 417 F.3d 898, 902-03 (8th Cir. 2005); *Harris v. Itzhaki*, 183 F.3d 1043, 1051 (9th Cir. 1999).

The United States Department of Housing and Urban Development (HUD) issued a regulation purporting to establish standards for proving disparate impact claims under the Fair Housing Act. 24 C.F.R. § 100.500. Those standards do not include the consideration of discriminatory intent. HUD's regulation provides that the plaintiff should bear the burden of proving that the challenged practice has a "discriminatory effect." 24 C.F.R. § 100.500(c)(1). If the plaintiff meets this initial burden, then the defendant must prove that the challenged practice is "necessary to achieve one or more substantial, legitimate, nondiscriminatory interests." 24 C.F.R. § 100.500(c)(2). If the defendant meets that burden of proof, then the plaintiff would bear the burden of proving that those substantial, legitimate, and nondiscriminatory interests "could be served by another practice that has a less discriminatory effect." 24 C.F.R. § 100.500(c)(3).[5]

[5] HUD's interpretation of the Fair Housing Act is not entitled to deference, because its interpretation raises serious race-conscious constitutional issues. *See Miller v. Johnson*, 515 U.S. 900, 923 (1995) (Court explaining an agency's interpretation of a statute is

(continued...)

The D.C. Circuit has not determined whether disparate impact analysis applies to a claim brought under the Fair Housing Act at all. *Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep't of Hous. & Urban Dev.*, 639 F.3d 1078, 1085 (D.C. Cir. 2011). In light of the statutory analysis this Court relied upon in *Smith*, 544 U.S. 228, it is possible that the D.C. Circuit would find that there is no basis for a disparate impact analysis in a Fair Housing Act claim. However, it is just as possible that it would adopt the test from HUD, or from any of the other circuits that interpret the Fair Housing Act as encompassing disparate impact claims, or create its own test as the Third Circuit did in *Rizzo*.

Resolution of the questions presented by this case would end the diversity of results that occur when different jurisdictions analyze substantially similar disparate impact claims. For instance, municipalities in the Eighth and Ninth Circuits, such as Los Angeles, Seattle, Minneapolis, Phoenix, and San Francisco, cannot make race-neutral decisions concerning housing matters free from the threat of disparate impact claims under the Fair Housing Act. In contrast, the four-part balancing test employed by the Fourth and Seventh Circuits does not allow for such a draconian disparate impact result, because discriminatory intent is a factor in the analysis. The three-part balancing test in the Sixth and Tenth Circuits may be more likely than the modified burden shifting framework of the Eighth and Ninth Circuits to allow municipalities to make

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[5] (...continued)
not entitled to deference if it raises serious constitutional questions, such as the use of race.). Section III of this brief explains how interpreting the Fair Housing Act to allow disparate impact claims conflicts with constitutional guarantees of equal protection.

race-neutral decisions without inviting disparate impact discrimination claims. Plaintiffs under a modified burden shifting framework always have the last opportunity to show that a less discriminatory policy would accomplish the defendants' objectives. *Oti Kaga, Inc. v. S.D. Hous. Dev. Auth.*, 342 F.3d 871, 883 (8th Cir. 2003). That would leave cities such as Denver and Columbus less likely to be sued for disparate impact under the Fair Housing Act than comparable cities in the Eighth or Ninth Circuits.

It makes absolutely no sense for cities with similar demographics to have different standards concerning the distribution of federal tax credits, or other housing matters, because of varying judicial interpretations of a federal statute. Likewise, it would be very odd to interpret a national civil rights statute in a way that makes conduct in one city illegal while allowing exactly the same conduct in another city, just because of the different racial makeup of the two cities. But that is what even a uniform application of the disparate impact approach does. This issue must be resolved for the benefit of all American cities.

Although this Court has decided two cases that raised disparate impact claims under the Fair Housing Act, it has never explicitly considered the preliminary question of whether the Act actually allows for recovery based on a disparate impact theory, or what standard should be applied to such claims. *See Town of Huntington, N.Y. v. Huntington Branch, NAACP*, 488 U.S. 15, 18 (1988) (the parties conceded the applicability of the disparate impact theory and the Court did not reach the question about the appropriateness of the test used); *City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found.*, 538 U.S.

188, 199-200 (2003) (vacating the FHA claim because it was abandoned on appeal). As a result, the issue of whether a disparate impact analysis applies to the Fair Housing Act remains unresolved. This issue is ripe for review given the deep splits between the circuits concerning the applicability of disparate impact claims.

## II

## THE TEXT OF THE FAIR HOUSING ACT DOES NOT SUPPORT A COGNIZABLE DISPARATE IMPACT CLAIM

The Fair Housing Act prohibits discrimination because of race in the sale, rental, and financing of dwellings, and in other housing-related transactions. The principal operative provision of the Fair Housing Act makes it unlawful

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

42 U.S.C. § 3604(a).[6] Although proscribing a broad range of conduct, Congress limited Section 3604(a)'s proscription to action taken "because of" race. The words "because of" plainly connote a purposeful, causal connection between the housing related action and the person's race or color. The proscribed action must have been caused, at least in part, by the individual's race, which strongly suggests a requirement of discriminatory motivation. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (explaining that discriminatory purpose implies a course of action taken "because of," not merely "in spite of," its adverse effects upon an identifiable group).

In *Smith*, 544 U.S. 228, the Court held that disparate impact claims were cognizable under the ADEA. The Court clearly identified statutory language that would support such claims, and language that would not. The phrasing that this Court interprets as allowing disparate impact claims can be found in 29 U.S.C. § 623(a)(2) (Section 4(a)(2) of the ADEA), which makes it unlawful for an employer

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[6] Three of the other prohibitions set forth in the Fair Housing Act also pertain to actions taken "because of" race. *See* 42 U.S.C. § 3604(b) (terms or conditions of sale or rental), 42 U.S.C. § 3604(d) (representation of unavailability of property for sale or rental), and 42 U.S.C. § 3605 (denial of financial assistance). One section, pertaining to real estate advertising, bars any indication of "preference, limitation, or discrimination based on race," (42 U.S.C. § 3604(c)), and another, relating to participation in multiple listing services, prohibits discrimination "on account of" race (42 U.S.C. § 3606). A final section makes it illegal to attempt to induce any person to sell or rent "by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race." 42 U.S.C. § 3604(e).

> to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

*Id.* This language creates "an incongruity" between an employer's actions that are focused on his employees generally, and the individual employee who is impacted "because of those actions." *Smith*, 544 U.S. at 236 n.6. Thus, even an employer who classifies his employees without age considerations may be liable under this language if such classification adversely affects the employee because of that employee's age. *Id.* This is the "very definition of disparate impact." *Id.*; *see Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 991 (1988) (citation omitted) (explaining that in disparate impact cases, "the employer's practices may be said to 'adversely affect [an individual's] status as an employee'").[7] Text that focuses on the effects of the action on the employee rather than the motivation for the action of the employer encompasses disparate impact claims.

On the other end of the spectrum, 29 U.S.C. § 623(a)(1) (Section 4(a)(1) of the ADEA) provides an example of statutory text identified by this Court that does not allow disparate impact claims. *Smith*, 544 U.S. at 248. That section makes it unlawful for an employer

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[7] A separate portion of the holding in *Watson* was superseded by the 1991 amendments to the Civil Rights Act, but the holding and reasoning remain good law. *See Phillips v. Cohen*, 400 F.3d 388, 397-98 (6th Cir. 2005); 42 U.S.C. § 2000e-2(k).

> to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

*Id.* (citation omitted). The focus of 29 U.S.C. § 623(a)(1) is on "an employer's actions with respect to the targeted individual." *Smith*, 544 U.S. at 236 n.6. A claim brought pursuant to this section requires proof of discriminatory intent.

The Fair Housing Act's "because of" language is textually similar to the language of Section 4(a)(1) of the ADEA, which the Court interpreted as prohibiting disparate impact claims. Both 42 U.S.C. § 3604(a) and the comparable language of Section 4(a)(1) prohibit a course of action taken "because of," not merely "in spite of," its adverse effects upon a identifiable group. The focus of both sections "is on the employer's actions with respect to the targeted individual." *Smith*, 544 U.S. at 236 n.6; Roger Clegg, *Home Improvement: The Court Should Kill an Unfair Housing Strategy With No Basis in Law*, Legal Times, Vol. 25, Issue 39 (Oct. 7, 2002).[8]

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 nondiscriminatory motive that have a disparate impact on racial groups. *Alexander*, 532 U.S. at 280-81. In contrast to Title VII and the ADEA, the text of Title VI does not proscribe activities

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[8] *Available at* http://www.nationallawjournal.com/id=900005532645/Home Improvement (last visited June 9, 2014).

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."). This language allows a cause of action premised on intentional discrimination, but does not permit a cause of action premised on disparate impact. *Alexander*, 532 U.S. at 285. The applicable language of the Fair Housing Act is textually similar. *See* 42 U.S.C. § 3604(a) (making it unlawful to "make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin").

Most circuit courts have found that disparate impact analysis applies to Fair Housing Act claims although there has been no consideration by this Court of the textual basis for this. Furthermore, the circuits are unlikely to ever consider Smith's identification of text that does not support disparate impact claims, because they are bound by their own precedent. *See Inclusive Communities Project*, 747 F.3d at 280 n.4 (refusing to reconsider whether the Fair Housing Act allows disparate impact claims in light of *Mount Holly* and *Magner*, because it was bound by circuit precedent). Accordingly, certiorari should be granted so that this Court can decide whether disparate impact analysis applies to Fair Housing Act claims.

## III

## REVIEW IS NEEDED TO RESOLVE THE CONFLICT BETWEEN DISPARATE IMPACT AND EQUAL PROTECTION

### A. This Court Has Identified a Conflict Between Disparate Impact and Equal Protection

Review is needed to resolve the conflict this Court has identified between disparate impact claims and equal protection. This Court's rulings have made clear that distinctions between persons based solely upon their ancestry "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 214 (1995) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). All racial classifications by government are "inherently suspect," *id.* at 223 (citation omitted), and "presumptively invalid." *Shaw v. Reno*, 509 U.S. 630, 643-44 (1993) (citation omitted). Accordingly, the core purpose of the Equal Protection Clause is to eliminate governmentally sanctioned racial distinctions. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989).

This Court's decision in *Ricci*, 557 U.S. 557, strongly suggests that disparate impact doctrine directly conflicts with constitutional guarantees of equal protection. Subjecting government defendants to disparate impact claims pressures them into engaging in unconstitutional race-conscious decisionmaking to avoid liability for such claims. Ilya Shapiro & Carl G. DeNigris, *Occupy Pennsylvania Avenue: How the Government's Unconstitutional Actions Hurt the 99%*, 60 Drake L. Rev. 1085, 1117-19 (2012). In *Ricci*, white

and Hispanic firefighters brought actions against New Haven, Connecticut, following the city's refusal to certify promotion examination results because of its disparate racial impact on minority firefighters. Nonminority firefighters achieved the top ten test scores. *Ricci*, 557 U.S. at 561. The firefighters who would have been promoted on the basis of the examination alleged the City discriminated against them on the basis of race by refusing to promote them. *Id.* The Second Circuit disagreed, and affirmed the district court's grant of summary judgment for the City. *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008). Reversing the court of appeals, this Court declared that the City's race-based decisionmaking violated Title VII. *Ricci*, 557 U.S. at 561. Allowing the City to take race-based actions on a "good faith belief" that its actions are necessary to avoid disparate impact claims would "amount to a de facto quota system, in which a 'focus on statistics . . . could put undue pressure on employers to adopt inappropriate prophylactic measures.'" *Id.* at 581 (quoting *Watson*, 487 U.S. at 992 (plurality opinion)).

Although the majority opinion did not address the tension between equal protection and disparate impact doctrine, Justice Scalia observed in his concurrence that the Court was "merely postpon[ing] the evil day" when the Court must decide "[w]hether, or to what extent, are the disparate-impact provisions . consistent with the Constitution's guarantee of equal protection." *Ricci*, 557 U.S. at 594 (Scalia, J., concurring) (Interpreting the Fair Housing Act to encompass disparate impact claims conflicts with equal protection). *See* Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2009 Cato

Sup. Ct. Rev. 53, 61-74 (2009) (analyzing the conflict between equal protection and disparate impact theory).

A disparate impact provision "not only permits but affirmatively requires" race-conscious decision making "when a disparate-impact violation would otherwise result." *Ricci*, 557 U.S. at 594 (Scalia, J., concurring). "But if the Federal Government is prohibited from discriminating on the basis of race, then surely it is also prohibited from enacting laws mandating that third parties—e.g., . . . whether private, state, or municipal—discriminate on the basis of race." *Id.* (citation omitted). The danger is that "disparate-impact provisions place a racial thumb on the scales, often requiring" state or municipal governments "to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes." *Id.* Where the government proposes to ensure participation of

> some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected . . . as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.

*Regents of Univ. of California v. Bakke*, 438 U.S. 265, 307 (1978).

Even before *Ricci*, this Court expressed concern that extension of the disparate impact doctrine could lead to the adoption of racial quotas. In *Watson*, the Court noted that "preferential treatment and the use of quotas by public employers subject to Title VII can

violate the Constitution." 487 U.S. at 993 (citation omitted) (plurality opinion). The Court warned that "[i]f quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted." The evolution of disparate impact analysis leading to this result would be contrary to Congress' clearly expressed intent. *Id.*

### B. The Extension of Disparate Impact Doctrine to the Fair Housing Act Leads to Substantially Adverse Results

Not only does the statute's language show that a violation of the Fair Housing Act requires intentional discrimination, substantial practical problems result if this requirement is discarded.[9] For instance, if a landlord refuses to rent to people who are unemployed, and it turns out that this excludes a higher percentage of whites than renters of other races, then a white would-be renter could sue under a disparate impact claim. It would not matter that the reason for the landlord's policy was race-neutral and had nothing to do with hostility toward renters of any particular race. The landlord would be liable, unless he could show some "necessity" for the policy. This, in turn, would depend on whether the landlord could convince a judge or jury that the economic reasons for preferring to rent to the gainfully employed were not only

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[9] For a discussion of adverse and unintended consequences of disparate impact doctrine in general, *see* Roger Clegg, *Disparate Impact in the Private Sector: A Theory Going Haywire*, Briefly, Perspectives on Legislation, Regulation, and Litigation, Vol. 5, No. 12 (Dec. 2001), *available at* http://www.aei.org/files/2001/12/01/Briefly-Disparate-Impact.pdf (last visited on June 10, 2014).

nondiscriminatory but essential. *A General Overview of Disparate Impact Theory*, *supra*, 113th Cong. 111-112. Similar results could occur if a landlord required renters to have good credit.

Section 3605 of the Fair Housing Act prohibits discrimination in the granting of home loans. 42 U.S.C. § 3605. Recognition of a disparate impact cause of action under the Act would require imprudent mortgage eligibility determinations to avoid racial disproportionalities. The pressure on banks and mortgage companies to grant loans to applicants with poor credit may have played a key role in triggering the mortgage crisis of 2007-2008. Hans Bader, *Justice Department's Witch Hunt Against Banks Will Harm Economy*, Competitive Enterprise Institute (July 11, 2011);[10] Patric H. Hendershott & Kevin Villani, *The Subprime Lending Debacle: Competitive Private Markets Are the Solution, Not the Problem*, Policy Analysis No. 679, Cato Institute (June 20, 2011).[11] Requiring banks and mortgage companies to grant loans to unqualified applicants in order to avoid disparate impact liability under the Fair Housing Act would result in an increase of foreclosures, depriving lenders of capital needed to operate and expand, causing a recession and higher unemployment. Bader, *supra*. Moreover, it is immoral to encourage people to assume debt they have no hope of paying off, especially when it ties them to a particular place so that they

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[10] *Available at* http://cei.org/content/justice-departments-witch-hunt-against-banks-will-harm-economy (last visited on June 10, 2014).

[11] *Available at* http://www.cato.org/publications/policy-analysis/subprime-lending-debacle-competitive-private-markets-are-solution-not-problem (last visited on June 9, 2014).

cannot easily relocate to find employment. Home ownership under these conditions puts low income families "squarely on the road to personal and financial ruin." Gretchen Morgenson & Joshua Rosner, *Reckless Endangerment* 4 (2011). These consequences are certainly not an expressed intent of Congress. *See* Testimony of Roger Clegg Before the House Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Civil Liberties (Apr. 29, 2010) (explaining how the use of disparate impact civil rights enforcement to pressure lenders is unwise).[12]

[12] *Available at* http://judiciary.house.gov/_files/hearings/pdf/Clegg100429.pdf (last visited on June 10, 2014).

## CONCLUSION

For the foregoing reasons, Amici Curiae respectfully request that this Court grant the petition for a writ of certiorari.

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