Written Statement of
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Racial Justice Program
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Submitted to the Subcommittee on Oversight and Investigations
of the U.S. House of Representatives Committee on Financial Services

For a Hearing on

"A General Overview of Disparate Impact Theory"

November 19, 2013

Good morning Chairman McHenry, Ranking Member Green and distinguished members of the Subcommittee. My name is Dennis Parker, and I am the Director of the Racial Justice Program of the American Civil Liberties Union. By way of disclosure, I am also one of the lawyers in the *Adkins v. Morgan Stanley* case, a case brought under the Fair Housing Act charging Morgan Stanley with practices connected with its role in encouraging the creation of toxic, highly risky mortgages which resulted in disparate rates of foreclosure for African Americans in Detroit.

Congress passed the Fair Housing Act nearly fifty years ago to address problems of residential segregation and conditions of poverty which blocked access to opportunity to communities of color and led to bitterness, frustration and civil unrest.

From the outset, the bipartisan sponsors and supporters of the Fair Housing Act recognized that, given the pervasiveness and complexity of housing discrimination, it was necessary to prohibit all forms of discrimination including that resulting from discriminatory intent, as well as acts neutral on their face which had a discriminatory effect[1].

In order to achieve the broad anti-discrimination goals of the act, Congress, the government agencies charged with enforcing the act, and each of the courts which have interpreted the act have recognized that the disparate impact standard is a necessary tool in fighting discrimination in all of its forms and that, without the disparate impact standard, practices that have the same discriminatory consequences as intentional discrimination would be shielded from the reach of the law. That recognition was so strong that both at the time that the statute was passed and on subsequent occasions, Congress has resisted attempts to limit the application of the law only to instances of intentional discrimination.

Further evidence of the legality and the efficacy of the disparate impact standard can be seen in the fact that between the enactment of the Fair Housing Act in 1968 and the time when Congress made significant amendments to the act in 1988, all nine courts of appeals which considered the issue, concluded that the act permitted the use of disparate impact claims to fight discrimination in all of its forms.

In 1988, against the backdrop of the unanimous approval of disparate impact claims by all courts, Congress extended the coverage of the act to prohibit discrimination based on familial status and disability. At the same time, Congress added specific exemptions relating to convictions for certain narcotics offenses, regarding the maximum number of occupants permitted to occupy a dwelling and an exemption specifying that nothing in the act prohibits appraisers from taking factors into consideration other than race, color, religion, national origin, sex, handicap, or familial status. Given the absence of any language in the statute that would

[1] Senator Edward W. Brook, a co-sponsor of the Fair Housing Act observed that the Act "recognize[d] the manifold and insidious ways in which discrimination works its terrible effects," and aimed to undo the "practical result" of discriminatory policies and break the "dreary cycle of the middle-class exodus to the suburbs and the rapid deterioration of the central city." 114 Cong. Rec. 2085 (1968) at 2279-80. For a detailed discussion of the legislative history of the Act, see Brief of Current and Former Members of Congress as *Amici Curiae* in Support of Respondents, Township of v. Mt. Holly Garden Citizens in Action, Inc., (2013) (No.11-1507), available at: https://www.aclu.org/racial-justice-womens-rights/township-mt-holly-v-mt-holly-gardens-citizens-action-inc-amicus-brief.

prohibit discrimination for any of the actions covered by the exemptions, the inclusion of the language specifying the exemptions would only make sense if those actions would otherwise be barred on a disparate-impact theory. Congress also enhanced the Department of Housing and Urban Development's authority to interpret the Fair Housing Act by giving the agency the power to conduct formal adjudications and to issue regulations interpreting the Act.

Given the history of acceptance of the disparate impact standard, it was no surprise that in the years following the amendments, the Department of Housing and Urban Development (HUD), the Justice Department and the agencies charged with enforcing the fair housing and fair lending laws have interpreted the fair housing laws to permit disparate impact claims, have trained their employees to use disparate impact analysis, and have brought enforcement actions relying on disparate impact. During that same period, the two remaining circuit courts which had not previously addressed the question of the validity of the disparate impact standard joined the other nine circuits in approving of it.

On February 15, 2013, HUD reaffirmed the decades-long recognition of the availability of the disparate impact standard after going through a period of formal notice and comment. The regulation formally recognized the disparate impact standard as one way of proving discrimination. At the same time in the new regulation, HUD emphasized that this rulemaking did not propose new law.

The need for the disparate impact standard as a tool in fighting discrimination is as great or greater now than it has ever been. Problems of residential segregation and the accompanying limitation on access to fine schools, transportation, healthy environments and employment continue to plague the nation.

One striking example of the continuing need for an effective way of addressing the increasingly subtle way in which protected classes are denied access to fair housing can be seen in the wake of the economic crisis of 2008. Discriminatory lending practices, which included providing high risk subprime loans to members of communities of color became increasingly prevalent. Despite repeated attempts to blame the recipients of these mortgages for these loans with the suggestion that a combination of their greed and their lack of creditworthiness was the cause of their problems, the evidence shows that in 2005, 55 percent of subprime borrowers had sufficiently high credit scores to qualify for prime loans. [2] People of color were disproportionately included in that number. A joint report from HUD and the Department of the Treasury found that, as of 2000, "borrowers in black neighborhoods [were] five times as likely to refinance in the subprime market than borrowers in white neighborhoods," even when controlling for income[3]. Even more striking was that "[b]orrowers in *upper-income* black neighborhoods were twice as likely as homeowners in *low-income* white neighborhoods to refinance with a subprime loan." [4]

These communities had previously experienced a long history of intentional

[2] Rick Brooks & Ruth Simon, *Subprime Debacle Traps Even Very Credit-Worthy*, Wall St. J., Dec. 3, 2007.
[3] U.S. Department of Housing and Urban Development. *Curbing Predatory Home Mortgage Lending* (2000) at 47-48, available at: http://www.huduser.org/Publications/pdf/treasrpt.pdf.
[4] Stephen L. Ross & John Yinger. *The Color of Credit: Mortgage Discrimination, Research Methodology, and Fair-Lending Enforcement*, 24-25 (2002).

discrimination in the form of racial steering, redlining and lack of access to financial institutions offering fair borrowing options. The new practice of extending predatory terms of mortgages added new injury to the old. The combination of the new abusive lending practices and the history of discrimination resulted in a foreclosure crisis which had a particularly serious impact on communities of color and reversed many of the economic gains which had been realized by those communities over the past half century. The nature of the policies that had such a serious impact is such that they could only be addressed by disparate impact claims since no individual would be able to demonstrate the discriminatory consequences of the policies which fueled the subprime bubble without relying on evidence of the broad impact of those policies. Cases challenging the lending practices which brought about the economic crisis that threatened the economy as a whole, but had particularly serious consequences on individuals and communities of color illustrate that the disparate impact standard is a careful, measured way of protecting all Americans from discrimination. After plaintiffs have shown that a policy or practice has a disproportionate impact on protected classes, defendants are permitted the opportunity to demonstrate that there is a substantial legitimate reason for the practice and policy. The practice will only violate the fair housing act if its justification is not legitimate or if there is a less discriminatory way to achieve the same purpose.

By permitting the consideration of the multiple factors of impact, goals and the means of achieving those goals, the disparate impact standard permits challenges to barriers which prohibit equal opportunity to fair housing. It is common sense that any policy that unnecessarily excludes people from housing because of their race, gender, ethnicity, disability or any other protected class should be set aside in favor of one that serves everyone's needs fairly, effectively, and without discrimination.

The use of disparate impact is a common sense way of assuring effective and equal fair housing opportunity and should be protected. To do otherwise would undercut decades of progress and betray the efforts of the people nearly half a century ago who sought to assure fairness and equality in housing.

Thank you.

WASHINGTON
LEGISLATIVE OFFICE

November 18, 2013

The Honorable Patrick T. McHenry
Chairman
Subcommittee,
Oversight and Investigations
Committee on Financial Services
U.S. House of Representatives
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The Honorable Al Green
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TREASURER

Re: Financial Services Subcommittee on Oversight and Investigations Hearing on the Fair Housing Act

Dear Chairman McHenry and Ranking Member Green:

On behalf of the American Civil Liberties Union ("ACLU"), its over half a million members, 53 affiliates nationwide, and countless additional supporters and activists, we urge you to preserve the federal Fair Housing Act (FHA) in its entirety. The FHA is an indispensable tool that prohibits discrimination in the sale or rental of housing. Since its passage forty-five years ago, every court of appeals that has addressed the question, as well as the Department of Housing and Urban Development, has interpreted the Act to prohibit policies that have a discriminatory impact, regardless of whether they were adopted with a discriminatory intent. While a recent case before the U.S. Supreme Court, *Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, threatened disparate impact claims under the FHA, the case was settled, leaving in place the well-established understanding that the FHA prohibits discrimination in practice, as well as discrimination by design. By maintaining the disparate impact standards of the FHA, Congress would help to ensure basic American values of equal opportunity and to protect against arbitrary and unnecessary barriers to fair housing, particularly for racial minorities and victims of domestic violence.

This important legal tool remains vital for combating and deterring contemporary forms of discrimination in housing. For example, disparate impact analysis provides an essential tool for remedying the widespread racial discrimination that defined the subprime lending boom, during which borrowers of color were disproportionately offered higher-rate loans than white borrowers. Disparate impact doctrine makes it possible to uncover disparities and determine whether racial disparities exist that cannot be justified by credit risk or any other legitimate business considerations.

Similarly, disparate impact analysis confronts structural and institutional barriers to fair housing, such as zoning ordinances that prohibit the building of smaller homes or apartments that working people can afford, which in many places excludes most people of color. In fact, the redevelopment plan in the

Mount Holly case would have demolished the only predominantly minority neighborhood to build new dwellings that few of the current residents would have been able to afford, thus excluding most of the town's minority residents.

Furthermore, disparate impact analysis under the FHA offers crucial legal protection to women who face eviction or housing denials based on zero-tolerance policies that exclude any member of a household where a crime has taken place. These policies are often used to evict or exclude survivors of domestic and sexual violence, the majority of whom are women and girls. Because zero tolerance policies are facially neutral, disparate impact claims are indispensable in eradicating this devastating form of discrimination.

For these reasons, disparate impact analysis can root out harmful patterns of discrimination that might otherwise remain invisible and go unredressed, and it remains indispensable today in fulfilling Congress' promise to eradicate such discrimination in housing. The FHA's disparate impact standard is consistent with both Congressional intent and necessary to address critical and current issues, such as predatory lending and discrimination against domestic violence victims. It recognizes that actions that have the consequence of perpetuating exclusion and unequal access to housing can be just as harmful to society as intentionally discriminatory acts.

These issues are discussed in more detail in the attached amicus brief, which we recently filed with the Supreme Court in the *Mt. Holly* case. We urge Congress to protect equal opportunity and freedom from discrimination for all by preserving the Fair Housing Act and maintaining its position that disparate impact is important and critical. Please contact Legislative Counsel Jennifer Bellamy with any questions at jbellamy@dcaclu.org.

Sincerely,

Laura W. Murphy
Director, Washington Legislative Office

Jennifer Bellamy
Legislative Counsel

Cc: Members of the Subcommittee on Oversight and Investigations of the House Financial Services Committee.

No. 11-1507

IN THE

Supreme Court of the United States

TOWNSHIP OF MOUNT HOLLY, ET AL.,

Petitioners,

—v.—

MT. HOLLY GARDENS CITIZENS IN ACTION, INC., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF NEW JERSEY, THE NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, THE NATIONAL COMMUNITY REINVESTMENT COALITION, THE NATIONAL CONSUMER LAW CENTER, THE NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY, THE NATIONAL HOUSING LAW PROJECT, PUBLIC JUSTICE, P.C., AND THE NATIONAL WOMEN'S LAW CENTER, IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

Amici curiae are organizations that provide representation, advocacy, and services to victims of housing discrimination, as well as to victims of domestic and sexual violence. In furtherance of their respective missions, each organization has direct experience with the importance of maintaining disparate impact claims under the Fair Housing Act, and thus each organization has a direct interest in the proper resolution of the question presented in this case. A full statement of interest for each of the *amici* is set forth in an appendix to this brief.

SUMMARY OF ARGUMENT

The Fair Housing Act (FHA), interpreted for nearly forty years by federal appellate courts to authorize disparate impact claims, has proven transformative in combating housing discrimination. Nonetheless, discriminatory barriers to equal housing opportunity remain deeply entrenched. This brief focuses on two contemporary forms of housing discrimination that have had particularly devastating consequences: race discrimination in subprime mortgage lending and sex discrimination against victims of domestic and sexual violence. For the same reasons that disparate impact analysis has

[1] The parties have submitted blanket letters of consent to the filing of *amicus curiae* briefs. This brief was not authored in whole or in part by counsel for any party, and no party paid for the preparation or submission of this brief other than *amici*, their members, or their counsel.

been a critical weapon in the statute's anti-discrimination arsenal for over forty years, it remains indispensable today in fulfilling Congress' promise to eradicate discrimination in housing.

1. The foreclosure crisis, which continues to batter communities across the country, was precipitated and exacerbated by widespread abuses on the part of subprime lenders. These abuses were inextricably linked to racial discrimination. A history of lending discrimination created lasting disparities in access to credit opportunities, leaving a vacuum in predominantly African American and Latino communities that was filled by subprime specialists who operated without competition. Subprime lenders set up alternative business channels, through which minority communities had access only to the riskiest and most expensive loan products. Recipients of those products, in turn, faced a severely increased risk of foreclosure. Rigorous economic and statistical analyses have repeatedly shown that racial disparities appear even when holding income and creditworthiness constant – in other words, minority borrowers received riskier loan products than similarly situated whites, leaving minority communities with significantly higher rates of foreclosure.

Disparate impact analysis provides an essential tool for remedying the widespread discrimination that defined the subprime lending boom. Courts considering disparate impact claims examine aggregate data collected by lenders, allowing them to uncover disparities and determine whether or not those disparities can be justified by credit risk or any other legitimate business

considerations. Indeed, discriminatory mortgage lending is particularly susceptible to disparate impact analysis, because lenders collect extensive financial data from borrowers. Legitimate lending decisions reflect algorithmic analysis of objective financial information, so disparities that persist when controlling for legitimate factors expose unlawful discrimination. Disparate impact analysis is thus uniquely powerful as a means of smoking out illegitimate discrimination that would otherwise remain unredressed.

2. Disparate impact analysis has also been critical in addressing housing discrimination against women who have been victims of domestic and sexual violence. The problem arises in a number of contexts, including zero tolerance policies that subject every member of a household to eviction if any member of the household has committed a crime, and municipal nuisance ordinances that subject tenants to eviction if they call the police too frequently. Although neutral on their face, these policies have a disproportionate impact on women, who are substantially more likely than men to suffer from domestic and sexual violence, and thus are substantially more likely to be evicted from their homes because of the violence committed against them.

In addition to being transparently unfair, such policies undermine law enforcement by deterring victims of domestic and sexual violence from reporting crimes, often leaving them trapped in violent situations that they cannot escape. By recognizing disparate impact claims, the FHA has offered legal redress to women in these

circumstances so that they are not faced with the Hobson's choice of risking eviction for themselves and their children, or remaining silent in the face of potentially life-threatening violence.

ARGUMENT

I. DISPARATE IMPACT IS A VITAL TOOL FOR REMEDYING THE DISCRIMINATORY LENDING PRACTICES THAT FUELED THE SUBPRIME LENDING BUBBLE AND CONTRIBUTED TO THE CURRENT FORECLOSURE CRISIS

A. Discriminatory Subprime Lending Was a Major Cause of the Foreclosure Crisis

1. *Roots of Subprime Lending*

Over the last two decades, many subprime lenders engaged in predatory practices, charging excessive fees, imposing overly risky terms, and frequently layering multiple risks in a single transaction. The impact of these practices has fallen disproportionately on minority borrowers. Subprime lenders marketing to minority communities exploited the absence of conventional lending institutions, which was the product of a history of housing discrimination. *See, e.g.*, U.S. DEP'T OF HOUS. & URBAN DEV. & U.S. DEP'T OF THE TREASURY, CURBING PREDATORY HOME MORTGAGE LENDING 18, 47-49 (2000) [hereinafter CURBING PREDATORY HOME MORTGAGE LENDING]; Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American*

Foreclosure Crisis, 75 AM. SOC. REV. 629, 630-31 (2010).

The historical roots of contemporary disparities in access to credit can be traced to the 1930s, when the federal government developed a rating system purporting to assess risks associated with lending in specific neighborhoods. On rating system maps, integrated or predominately black neighborhoods were marked in red. *See* ALYS COHEN, CREDIT DISCRIMINATION (5th ed. 2009); Douglas S. Massey, *Origins of Economic Disparities: The Historical Role of Housing Segregation*, *in* SEGREGATION: THE RISING COST FOR AMERICANS 40, 69-73 (James H. Carr & Nandinee K. Kutty, eds., 2008). Loans were virtually never made in these "redlined" communities. Massey, *Origins of Economic Disparities*, *supra*, at 69. Federal courts have long recognized that the practice of redlining – i.e., basing refusals to extend credit on the racial composition of neighborhoods – violates the Fair Housing Act. *See, e.g.*, *Nationwide Mutual Ins. Co. v. Cisneros*, 52 F.3d 1351, 1359-60 (6th Cir. 1995); *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489, 493 (S.D. Ohio 1976).

Even though redlining was found to be illegal, credit opportunities remained scarce in African American and Latino communities throughout the 1970s and 80s. *See* Kathleen C. Engel & Patricia A. McCoy, *From Credit Denial to Predatory Lending: The Challenge of Sustaining Minority Homeownership*, *in* SEGREGATION: THE RISING COSTS FOR AMERICANS, *supra*, at 81, 85. A series of Pulitzer Prize-winning newspaper articles examining lending practices in Atlanta illustrated the persistence of

neighborhood-based racial discrimination during that period. The investigation found that "[r]ace – not home value or household income – consistently determine[d] the lending patterns of metro Atlanta's largest financial institutions," and that "[a]mong stable neighborhoods of the same income, white neighborhoods always received the most bank loans per 1,000 single family homes," while black neighborhoods "always received the fewest." Bill Dedman, *Atlanta Blacks Losing in Home Loans Scramble*, ATLANTA JOURNAL-CONSTITUTION, May 1, 1988, at A1. Similarly, a study by the Federal Reserve Bank of Boston found that, even after controlling for creditworthiness, blacks and Hispanics were more likely than whites to be turned down for credit. Alicia H. Munnell et al., *Mortgage Lending in Boston: Interpreting HMDA Data*, 86 AMER. ECON. REV. 25, 26 (1996).

Redlining, and the disparities in access to credit it created, set the stage for new forms of discriminatory lending arising in the 1990s and cresting in the years leading up to the 2008 financial crisis. As the 1990s progressed, the advent of subprime lending and mortgage securitization created the tools and incentives that led subprime specialists to focus on communities previously denied access to conventional credit. Subprime products "originally were extended to customers primarily as a temporary credit accommodation in anticipation of early sale of the property or in expectation of future earnings growth." Statement on Subprime Mortgage Lending, 72 FED. REG. 37569-01 (Dep't of the Treas. et al. June 28, 2007). However, lenders also extended these high-cost loans to people who qualified for prime loans and to credit-impaired

borrowers who could not afford the loans. *See, e.g.*, CURBING PREDATORY HOME MORTGAGE LENDING, *supra*, 2; IRA GOLDSTEIN WITH DAN UREVICK-ACKELSBERG, THE REINVESTMENT FUND, SUBPRIME LENDING, MORTGAGE FORECLOSURES AND RACE: HOW FAR HAVE WE COME AND HOW FAR HAVE WE TO GO? 10 (2008). Indeed, an analysis conducted for the *Wall Street Journal* found that, in 2005, 55 percent of subprime borrowers had sufficiently high credit scores to qualify for prime loans. Rick Brooks & Ruth Simon, *Subprime Debacle Traps Even Very Credit-Worthy*, WALL ST. J., Dec. 3, 2007, at A1.

Lenders intensified these unscrupulous practices in response to explosive demand from financial firms that bundled subprime mortgages into securities products. *See, e.g.*, *Adkins v. Morgan Stanley*, -- F.3d --, 2013 WL 3835198, at *2 (S.D.N.Y. July 25, 2013); *see also* KATHLEEN C. ENGEL & PATRICIA A. MCCOY, THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE, AND NEXT STEPS 56-58 (2011). In contrast to traditional lending – where banks held onto mortgages, bearing the risk and reward of payment obligations for the life of the loan – securitization allowed lenders to quickly dispose of loans, selling them to investment banks (which, in turn, sold investment interests in large pools of loans). *Id.* at 40-41; *see also* William Apgar & Allegra Calder, *The Dual Mortgage Market: The Persistence of Discrimination in Mortgage Lending*, *in* THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 101, 104 (Xavier De Souza Briggs, ed., 2005). This process allowed lenders to rapidly replenish their funds, enabling a cycle of origination, sale, and securitization. Because these loans could be quickly

sold, and because the secondary market incentivized origination of loans with the riskiest terms over prime loans, lenders changed their focus from quality to quantity, emphasizing volume in risky loans that generated the largest profits. ENGEL & MCCOY, THE SUBPRIME VIRUS, *supra*, at 28-29, 32-33. "Rather than simply search for the best loan product for the customer," the secondary market created incentives to "'push market' particular products to the extent that the market [would] bear." REN S. ESSENE & WILLIAM APGAR, JOINT CTR. FOR HOUS. STUDIES, HARVARD UNIV., UNDERSTANDING MORTGAGE MARKET BEHAVIOR: CREATING GOOD MORTGAGE OPTIONS FOR ALL AMERICANS 8 (2007) (citation omitted). For these reasons, the "invention of securitized mortgages . . . changed the calculus of mortgage lending and made minority households very desirable as clients." Rugh & Massey, *supra*, at 631.

2. *Subprime Lending Practices Resulted in Widespread Racial Disparities*

The subprime lending boom and race were inextricably linked from the outset. A joint report from the U.S. Department of Housing and Urban Development (HUD) and the U.S. Department of the Treasury found that as of 2000, "borrowers in black neighborhoods [were] five times as likely to refinance in the subprime market than borrowers in white neighborhoods," even when controlling for income. CURBING PREDATORY HOME MORTGAGE LENDING, *supra*, 47-48. Moreover, "[b]orrowers in *upper-income* black neighborhoods were twice as likely as homeowners in *low-income* white neighborhoods to refinance with a subprime loan." *Id.* at 48; *see also* STEPHEN L. ROSS & JOHN YINGER, THE COLOR OF

CREDIT: MORTGAGE DISCRIMINATION, RESEARCH METHODOLOGY, AND FAIR-LENDING ENFORCEMENT 24-25 (2002) (summarizing research on minority access to credit). In effect, a "dual mortgage market" took root, in which different communities were offered "a different mix of products and by different types of lenders" and subprime lenders "disproportionately target[ed] minority, especially African American, borrowers and communities, resulting in a noticeable lack of prime loans among even the highest-income minority borrowers." Apgar & Calder, *supra*, at 102; *see also* Binyam Appelbaum et al., *New Industry Fills Void in Minority Lending: Critics Say Borrowers Turn to High-Rate Lenders Because Bank Loans Too Often Not Available*, THE CHARLOTTE OBSERVER, Apr. 29, 2005, at 1A (describing institutions with high-cost units focused on predominately minority borrowers).

Other studies uncovered stark disparities as subprime lending expanded. One study found that, within the subprime market, "borrowers of color . . . were more than 30 percent more likely to receive a higher-rate loan than white borrowers, even after accounting for differences in risk." DEBBIE GRUENSTEIN BOCIAN ET AL., CTR. FOR RESPONSIBLE LENDING, UNFAIR LENDING: THE EFFECT OF RACE AND ETHNICITY ON THE PRICE OF SUBPRIME MORTGAGES 3 (2006). Another study found that African Americans and Latinos were much more likely to receive subprime loans, and that "the disparities were especially pronounced for borrowers with higher credit scores." DEBBIE GRUENSTEIN BOCIAN ET AL., CTR. FOR RESPONSIBLE LENDING, LOST GROUND, 2011: DISPARITIES IN MORTGAGE LENDING AND FORECLOSURES 5 (2011). That study also found

"evidence that higher-rate loans were often inappropriately targeted: as many as 61 percent of borrowers who received subprime loans had credit scores that would have enabled them to qualify for a prime loan." *Id.* at 17 (citation omitted). These practices also meant that "borrowers in minority groups were much more likely to receive loans with product features associated with higher rates of foreclosure," i.e., loans with higher interests rates or with risky terms, like ballooning interest rates. *Id.* at 21. These high disparities persisted even after controlling for credit score. *Id.*

Disparities in subprime lending have led to high levels of foreclosure among borrowers of color, devastating black and Latino communities. "African Americans and Latinos are, respectively, 47% and 45% more likely to be facing foreclosure than whites." DEBBIE GRUENSTEIN BOCIAN ET AL., CTR. FOR RESPONSIBLE LENDING, FORECLOSURE BY RACE AND ETHNICITY 10 (2010). These disparities persist even within income categories. *Id.* at 9-10. The Center for Responsible Lending estimates that "the spillover wealth lost to African-American and Latino communities between 2009 and 2012 as a result of depreciated property values alone will be $194 billion and $177 billion, respectively." *Id.* at 11; *see also* JAMES H. CARR ET AL., NAT'L COMMUNITY REINVESTMENT COAL., THE FORECLOSURE CRISIS AND ITS IMPACT ON COMMUNITIES OF COLOR: RESEARCH AND SOLUTIONS 31 (Sept. 2011) (discussing the racial wealth gap).

Examined in the aggregate, the connection between race, subprime lending, and foreclosures is starkly apparent. Researchers at Princeton

University, for example, studied the relationship between neighborhood racial composition, subprime lending, and foreclosure rates, and found strong statistical links. *See* Rugh & Massey, *supra*, at 644. "Simply put, the greater the degree of Hispanic and especially black segregation a metropolitan area exhibits, the higher the number and rate of foreclosures it experiences." *Id.*

B. Disparate Impact Analysis Plays a Vital Role in Combating Lending Discrimination

Disparate impact analysis provides an indispensable framework for remedying discriminatory lending practices.[2] When focusing on

[2] *Amici* note that lending cases typically arise under 42 U.S.C. § 3605 (prohibiting discrimination in mortgage lending and other "residential real estate-related transactions"), while the specific question before the Court in this case relates to 42 U.S.C. § 3604(a). *But see, e.g.*, *Barkley v. Olympia Mortg. Co.*, 2010 WL 3709278, at *18 (E.D.N.Y. Sept. 13, 2010) (noting that "predatory lending connected to the purchase of a home can form the basis of a claim under either § 3604(b) or § 3605(a)."); *Nat'l Comm. Reinvestment Coal. v. Novastar Fin., Inc.*, 2008 WL 977351 at *3 (D.D.C. Mar. 31, 2008) (holding "that 42 U.S.C. § 3604 applies to discrimination in the availability of mortgage financing."). Accordingly, even a ruling for petitioners would not automatically apply to lending cases brought under § 3605, contrary to the suggestion of Petitioners' *amici*. *See* Br. for Am. Fin. Servs. Ass'n et al. as *Amici Curiae* in Supp. Of Pet'r at 26-29. Nonetheless, discriminatory subprime lending illustrates the critical role of disparate impact analysis in combating current and pervasive forms of discrimination in housing, and should therefore inform the Court's disposition of this case.

individual lending transactions, disparities in the availability and terms of credit are easily masked by the complexity of the loan process.[3] Yet lenders collect highly detailed data relevant to the creditworthiness of individual loan applicants. Disparate impact doctrine sets out a method for examining that data on a large scale and determining whether racial disparities exist that cannot be accounted for by credit risk or any other legitimate business considerations. For that reason, disparate impact analysis can root out harmful patterns of discrimination that might otherwise remain invisible and go unredressed.

Since it was first articulated by this Court in the employment context, disparate impact analysis has provided a means to combat "practices that are fair in form, but discriminatory in operation." *Griggs*

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[3] This was particularly true in the years before the housing market collapse. For borrowers offered prime loans, published rates and terms were readily available, lenders gave free quotes, and lock-in commitments were common, enabling borrowers to shop for the best deal. Patricia A. McCoy, *Rethinking Disclosure in a World of Risk-Based Pricing*, 44 HARV. J. ON LEGIS. 123, 124 (2007). In contrast, although subprime lenders had the technology and information needed to provide firm price quotes to customers at minimal cost, these lenders typically "entice[d] customers with rosy prices that [were] not available to weaker borrowers, hike[d] the price after customers [paid] a hefty application fee, then raise[d] the price again at closing, often with no advance notice." *Id.* at 124. "[P]rices in the subprime market [were] only partly based on differences in borrowers' risk. Other factors, including mortgage broker compensation, discrimination, and rent-seeking, [could] and [did] push up subprime prices." *Id.* at 127.

v. Duke Power Co., 401 U.S. 424, 431 (1971). In effectuating that standard, this Court has explained that the evidence in disparate impact cases "usually focuses on statistical disparities, rather than specific incidents, and on competing explanations for those disparities" because this mode of analysis exposes practices that, while "adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988). Aggregate analysis is at times necessary to achieve the purpose of the civil rights laws, which are directed foremost at "the consequences of [ ] practices, not simply the motivation." *Griggs*, 401 U.S. at 432. As Congress found and this Court has recognized, discrimination is a "complex and pervasive phenomenon" most accurately described "in terms of 'systems' and 'effects' rather than simply intentional wrongs." *Connecticut v. Teal*, 457 U.S. 440, 447 n.8 (1982) (quoting S. REP. NO. 92-415, at 5 (1971)).

In the mortgage lending context, the key question is whether the availability or terms of credit vary according to race in a manner that cannot be justified by credit risk or any other legitimate business consideration. Typically, this inquiry proceeds by applying statistical regression analysis to a large sample of a defendant's loans, comparing the availability or terms of credit to borrowers of different races while controlling for factors that would legitimately affect lending outcomes. The critical ingredient in making this analysis probative of discrimination is selecting the right control variables. "[L]egitimate controls are those associated with a person's qualifications to rent or buy a house."

John Yinger, *Evidence of Discrimination in Consumer Markets*, 12 J. OF ECON. PERSP. 23, 27 (1998). Regression analysis of aggregate data allows a court to discern pricing disparities between white and minority borrowers that cannot be justified by legitimate factors, a situation that one district court referred to as "a classic case of disparate impact," *Miller v. Countrywide Bank, N.A.*, 571 F.Supp. 2d 251, 254 (D. Mass. 2008) ("If the facts alleged in the complaint are to be believed – which they must at this point in the litigation – the net effect of Countrywide's pricing policy is a classic case of disparate impact: White homeowners with identical or similar credit scores pay different rates and charges than African American homeowners . . . .").[4]

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[4] *Amici* are not aware of any court that has yet adjudicated the merits in a case alleging unjustified statistical disparities in subprime lending. Several cases pressing such allegations are currently pending or have closed prior to adjudication on the merits. *See, e.g.*, *Adkins*, -- F.3d --, 2013 WL 3835198, *2 (denying motion to dismiss; pending); *City of Memphis v. Wells Fargo Bank, N.A.*, No. 09-2857, 2011 WL 1706756 (W.D. Tenn. May 4, 2011) (denying motion to dismiss; subsequently settled); *In re Wells Fargo Mortg. Lending Practices Litig.*, No. 3:08-md-01930 (N.D. Cal. Apr. 10, 2008) (dismissed pursuant to settlement); *Mayor of Baltimore v. Wells Fargo Bank, N.A.*, No. 1:08-CV-00062, 2011 WL 1557759 (D. Md. Apr. 22, 2011) (denying defendants' motion to dismiss; subsequently settled); Final Approval Order, *Ramirez v. Greenpoint Mortg. Funding, Inc.*, No. 3:08-cv-00369 (N.D. Cal. Apr. 12, 2011) (approving class settlement); *Guerra v. GMAC, LLC*, No. 2:08-cv-01297, 2009 WL 449153 (E.D. Pa. Feb. 20, 2009) (denying motion to dismiss; pending); *Barrett v. H&R Block, Inc.*, 652 F.Supp. 2d 104 (D. Mass. 2009) (granting defendant parent company's motion to dismiss for lack of personal jurisdiction and denying subsidiaries' motion to dismiss; subsequently dismissed by

Indeed, disparate impact analysis is particularly well suited for the mortgage lending context, because allegations of mortgage discrimination can be tested in a highly sophisticated manner. Raw disparities in loan terms can be rigorously examined to determine whether they reflect objective factors related to creditworthiness – e.g., credit score, the ratio of a loan to a home's value, an applicant's total debt obligations, etc. *See generally* Class Certification Report of Howell E. Jackson at ¶ 36, *In re Wells Fargo Mort. Lending Practices Litig.*, No. 08-CV-01930 (N.D. Cal. Sept. 1, 2010) ("Loan pricing decisions are made en masse by automated systems of regularly updated rate sheets" and are "based on the formulaic application of objective, statistically-validated criteria."). If a lending policy leads to disparities even after controlling for legitimate factors, and if the policy cannot otherwise be justified as a business necessity, those disparities reveal illicit discrimination.

This mode of analysis is uniquely effective in uncovering unjustified disparities. One recent HUD study focused specifically on whether racial disparities in rates of subprime lending could be explained by factors related to creditworthiness, concluding that "the inclusion of credit score measures did not explain away the troubling finding

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stipulation); Order Granting Voluntary Dismissal, *Garcia v. Countrywide Fin. Corp.,* No. 5:07-cv-1161, 2008 WL 7842104 (C.D. Cal. Jan. 17, 2008) (denying motion to dismiss as to plaintiffs' disparate impact claims; subsequently consolidated into multi-district litigation and settled); Memorandum and Order, *Hargraves v. Capital City Mortg. Corp.*, No. 1:98-cv-01021 (D.D.C. Mar. 27, 2002) (dismissing in light of settlement).

that even after years of public policy efforts, race and ethnicity remain important determinants of the allocation of mortgage credit in both home purchase and home refinance markets." WILLIAM APGAR ET AL., U.S. DEP'T OF HOUS. & URBAN DEV., RISK OR RACE: AN ASSESSMENT OF SUBPRIME LENDING PATTERNS IN NINE METROPOLITAN AREAS 45 (2009); *see also* Complaint at ¶ 3, *United States v. Countrywide Fin. Corp.,* No. CV11 10540 (C.D. Cal. Dec. 21, 2011) ("As a result of Countrywide's policies and practices, more than 200,000 Hispanic and African-American borrowers paid Countrywide higher loan fees and costs for their home mortgages than non-Hispanic White borrowers, not based on their creditworthiness or other objective criteria related to borrower risk, but because of their race or national origin."); Apgar & Calder, *supra*, at 111-15 (summarizing research of subprime lending designed to "control[] for neighborhood and borrower characteristics, including several measures of risk" and concluding that those studies "confirm[] that race remains a factor").

Expert witness analysis in several recent lawsuits demonstrates that, when subject to regression analyses designed to account for legitimate markers of creditworthiness, the practices of many leading subprime lenders reveal significant unjustified racial disparities. *E.g.*, Class Certification Report of Howell E. Jackson at ¶ 53, *In re Wells Fargo Mort. Lending Practices Litig.*, No. 08-CV-01930 (N.D. Cal. Sept. 1, 2010) ("even when a comprehensive list of risk-based characteristics are controlled for, African Americans' APRs are 10.1 basis points greater than whites' APRs, and Hispanics' APRs are 6.4 basis points greater than

whites' APRs"); Class Certification Report of Ian Ayres at ¶ 69, *Barrett v. Option One Mortg., Corp.*, No. 08-10157 (D. Mass. Sept. 24, 2010) ("even when a comprehensive list of risk-based characteristics are controlled for, African Americans' APRs are 8.6 basis points greater than whites' APRs"); Class Certification Report of Howell E. Jackson at ¶ 52, *Ramirez v. Greenpoint Mortg. Funding, Inc.*, No. 3:08-cv-00369 (N.D. Cal. Apr. 1, 2010) ("even when a comprehensive list of risk-based characteristics are controlled for, African Americans' APRs are 9.4 basis points greater than whites' APRs, and Hispanics' APRs are 7.6 basis points greater than whites' APRs").

Given the effectiveness of disparate impact analysis in identifying unjustified disparities, it is unsurprising that the federal agencies charged with enforcing the Fair Housing Act have embraced disparate impact analysis in combating discriminatory lending. Most recently, HUD promulgated a rule codifying the disparate impact standard. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013). In instituting that rule, the agency explicitly contemplated its application to facially neutral lending practices that resulted in an unjustified disparate impact. *Id.* at 11,475-76. This understanding, moreover, long predated the recent HUD rule. A 1994 interagency Policy Statement on Discrimination in Lending explains that the "existence of disparate impact" is frequently established "through a quantitative or statistical analysis" that may focus on a challenged practice's "effect on an applicant pool." Policy Statement on Discrimination in Lending, 59 FED. REG. 18266-01,

18,269 (Dep't of Hous. & Urban Dev. et al. Apr. 15, 1994).[5]

Amicus briefs filed by the lending industry assert that the disparate impact standard impedes legitimate business practices, but those arguments ignore the fact that disparate impact liability will not attach to policies that are shown to be legitimate and necessary to originate safe loans. For example, in arguing against the disparate impact standard, those *amici* point to government data showing that, in 2011, "African-American applicants for conventional home-purchase loans were rejected at a rate more than twice the rate at which white applicants were rejected . . . . [and] Hispanic applicants were rejected at a rate more than 1.6 times the rate at which white applicants were rejected." Br. for Am. Fin. Servs. Ass'n et al. as *Amici Curiae* in Supp. Of Pet'r at11 n.18. But if such disparities arise from facially neutral policies that are legitimate and necessary to

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[5] Congress has endorsed the application of disparate impact analysis to the lending context through its regulation of the secondary mortgage market. In delegating authority to HUD to regulate entities like Fannie Mae and Freddie Mac – the so-called Government Sponsored Enterprises that purchase pools of mortgage loans – Congress directed the agency to issue regulations that "prohibit each enterprise from discriminating in any manner in the purchase of any mortgage because of race, color, religion, sex, handicap, familial status, age, or national origin, including any consideration of the age or location of the dwelling or the age of the neighborhood or census tract where the dwelling is located in a manner that has a *discriminatory effect*." 12 U.S.C. § 4545(1). Significantly, this mandate appears in the same statute that requires HUD to ensure that the enterprises "comply with the Fair Housing Act." *Id.* at 4545(2).

originate safe loans, there is no threat of disparate impact liability. Conversely, in the absence of such justification, it is hard to see how the disparities cited by *amici* operate as an argument *against* the disparate impact standard – to the contrary, they provide evidence of the problem disparate impact is designed to address. Those *amici* also argue that "[u]nder a disparate-impact theory, lenders would face the double bind of incurring increased litigation risk simply by complying with government directives and sensible lending standards."[6] *Id.* at 4. The "double bind" threat, however, is an illusion: any lender that adopted a practice that was in fact mandated by a government directive would prevail in litigation challenging the practice because compliance with relevant legal requirements is a "substantial and legitimate" interest, and would therefore constitute a defense to a disparate impact claim. *See* 24 C.F.R. § 100.500(b).[7]

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[6] *Amici* do not adduce any evidence of such a "double bind" actually occurring, even though disparate impact has been the law of the land under prevailing circuit court precedent for decades, and all lenders are on notice of the Justice Department's 1994 fair lending guidance. *See* Policy Statement on Discrimination in Lending, 59 Fed. Reg. at 18,269.

[7] *Amici* representing the banking industry concede that, under HUD's regulations, lenders have an opportunity to avoid disparate impact liability by demonstrating a legitimate business interest. Br. for Am. Fin. Servs. Ass'n et al. as *Amici Curiae* in Supp. Of Pet'r at 12. But they dismiss the significance of that clear legal principle with the unsupported assertion that "virtually every lender in the United States could be sued for using non-discriminatory credit standards simply because variations in economic and credit characteristics produce different credit outcomes among racial and ethnic

The same *amici* also misleadingly assert that it is somehow inconsistent with responsible underwriting practices to avoid disparate impact. *See* Br. for Am. Fin. Servs. Ass'n et al. as *Amici Curiae* in Supp. Of Pet'r at 18-19. To the contrary, it was the subprime lending industry's *abandonment* of sound underwriting that resulted in a disparate impact on minority borrowers. With the proliferation of loan products that required no information on borrower income or assets, subprime lenders eviscerated sound underwriting. *See, e.g.*, Engel & McCoy, The Subprime Virus, *supra*, at 33, 35-39 (describing lenders using slogans like "a thin file is a good file," and "Did You Know NovaStar Offers to Completely Ignore Consumer Credit!"); *Testimony Before the S. Comm. on Banking, Hous., and Urban Affairs*, 110th Cong. 10-11 (Mar. 4, 2008) (statement of John C. Dugan, Comptroller of the Currency) (recounting how the pressures from securities market led to loosened underwriting standards); Christopher L. Peterson, *Predatory Structured Finance*, 28 Cardozo L. Rev. 2185, 2214-15 (2007) (observing that in "the rush to originate new loans" to be securitized "some lenders have even disregarded their *own* underwriting guidelines"). Minority borrowers absorbed the consequences of lenders' shoddy underwriting because they were targeted for a disproportionate share of the high-cost, risk-layered loans. Thus, the deterioration of underwriting standards in the lead-up to the foreclosure crisis was a tactic of discriminatory lending, not a product of anti-discrimination law.

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groups." *Id.* at 12-13. That conclusory assertion should not obscure the actual operation of the disparate impact standard.

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The cascading effects of the foreclosure crisis touch every community in America. But African American and Latino communities disproportionately suffered the consequences of abusive lending practices. In light of those disparities, there remains an urgent need for effective means to address past abuses and deter future ones. For the reasons explained above, disparities in lending outcomes can be rigorously analyzed to control for legitimate factors related to a lender's business necessity. It is hard to fathom any argument in favor of insulating lenders from liability when they systematically provide credit on less favorable terms because of race and in the absence of any legitimate justification. Disparate impact analysis is the principal tool for policing these abuses.

II. DISPARATE IMPACT ANALYSIS IS A CRUCIAL TOOL FOR ADDRESSING HOUSING DISCRIMINATION AGAINST DOMESTIC AND SEXUAL VIOLENCE VICTIMS

Disparate impact analysis under the FHA offers crucial legal protection to women who face eviction or housing denials based on domestic and sexual violence perpetrated against them. Domestic and sexual violence is a primary cause, and consequence, of homelessness and housing instability for women and girls. *See, e.g.*, 42 U.S.C. § 14043e (congressional finding that domestic violence causes homelessness and that an estimate of 92 percent of homeless mothers have experienced severe physical and/or sexual assault at some time, 60 percent of all

homeless women and children have been abused by age 12, and 63 percent have been victims of intimate partner violence as adults); U.S. CONF. OF MAYORS, HUNGER AND HOMELESSNESS SURVEY 26 (Dec. 2012) (reporting that over a quarter of cities surveyed in 2011-12 cited domestic violence as one of the three main causes of family homelessness).

Discriminatory housing policies contribute to and exacerbate the housing crises faced by victims. 42 U.S.C. § 14043e(3) (congressional finding that "[w]omen and families across the country are being discriminated against, denied access to, and even evicted from public and subsidized housing because of their status as victims of domestic violence"). However, many of the housing policies that can punish victims – such as zero tolerance-for-crime policies (sometimes referred to as one-strike policies), or policies that explicitly target victims of domestic and sexual violence – are facially neutral. Disparate impact analysis reveals how these policies adversely impact women and girls, who make up the vast majority of victims of domestic and sexual violence. It also allows survivors to challenge housing policies that, when enforced against them, eliminate housing options and endanger their safety.

The legal protection offered to survivors by disparate impact analysis under the FHA was first established in 2001, after Tiffani Ann Alvera sought redress when she faced eviction from her Seaside, Oregon apartment pursuant to a zero tolerance policy. *See* Determination of Reasonable Cause, *Alvera v. Creekside Village Apartments*, No. 10-99-

0538-8 (Dep't of Hous. & Urban Dev. Apr. 13, 2001).[8] After she was assaulted by her husband and he was imprisoned, Ms. Alvera provided a copy of the restraining order she obtained to her property manager. *Id.* at 1-2. She was then served with a 24-hour eviction notice based on the incident of domestic violence she had experienced. It stated: "You, someone in your control, or your pet, has seriously threatened to immediately inflict personal injury, or has inflicted personal injury upon the landlord or other tenants." *Id.*

Ms. Alvera filed a complaint with HUD, which found that taking action against all members of a household after an incident of domestic violence "has an adverse impact based on sex, because of the disproportionate number of women victims of domestic violence." *Id.* at 4. HUD noted that there were no similarly situated male tenants. *Id.* at 3. Accordingly, the case could best be understood through the lens of disparate impact. After reviewing the available statistics on intimate partner violence and gender and the arguments presented by the management company, HUD concluded that discrimination had occurred: "The evidence taken as a whole establishes that a policy of evicting innocent victims of domestic violence because of that violence has a disproportionate adverse impact on women and is not supported by a valid business or health or safety reason." *Id.* at 6. The Department of Justice subsequently filed suit, leading to a consent decree

[8] HUD's Determination of Reasonable Cause is available at http://www.nhlp.org/files/6a.%20Alvera%20reasonable%20cause%20finding_0.pdf.

that mandated the adoption of a housing policy prohibiting discrimination against victims of violence. Consent Decree, *United States ex rel. Alvera v. The C.B.M. Group, Inc.*, No. 01-857-PA (D. Or. Nov. 5, 2001).

Since *Alvera*, other women facing eviction following a domestic violence incident and the abuser's arrest or removal from the home have invoked disparate impact analysis under the FHA. For example, in 2003, Quinn Bouley and her two children faced eviction from their St. Albans, Vermont home. After her husband physically attacked her, Ms. Bouley called the police and fled. *Bouley v. Young-Sabourin*, 394 F. Supp. 2d 675, 677 (D. Vt. 2005). St. Albans police arrested her husband, who pled guilty to several criminal charges related to the incident, and Ms. Bouley obtained a restraining order. *Id.* Three days later, her landlord gave Ms. Bouley a 30-day notice to vacate, quoting a provision in the lease that stated: "Tenant will not use or allow said premises or any part thereof to be used for unlawful purposes, in any noisy, boisterous or any other manner offensive to any other occupant of the building." *Id.* In other words, violence directed *against* Ms. Bouley was cited as a predicate for evicting her pursuant to a facially neutral policy. Ms. Bouley filed a federal lawsuit, including allegations that the landlord's policy of evicting the victims of domestic violence had an adverse, disparate impact on women. Complaint at ¶¶ 26-28, *Bouley v. Young-Sabourin*, 394 F. Supp. 2d 675 (D. Vt. Nov. 24, 2003) (No. 1:03-cv-320). The case settled after the court denied the defendants' motion for summary judgment. *Bouley*, 394 F. Supp. 2d at 678.

In 2006, Tanica Lewis and her two daughters were evicted from their Detroit home after her abusive ex-partner, who had never lived at the residence, broke through the windows, kicked in her door, and was arrested for home invasion. Complaint, *Lewis v. North End Village*, No. 2:07-cv-10757 (E.D. Mich. Feb. 21, 2007). Although Ms. Lewis previously had provided a copy of a current protection order to her management company, she received a 30-day notice of eviction, stating that she had violated the portion of her lease that held her liable for any damage resulting from lack of proper supervision of her guests. *Id.* at ¶¶ 22, 32. As a result, Ms. Lewis was forced to remain in a shelter with her daughters, although it was safe to return to their home given her ex-partner's incarceration. Santiago Esparza, *Landlord, Victim Settle*, DETROIT NEWS, Feb. 27, 2008. She subsequently filed a federal lawsuit that included disparate impact claims. Ultimately, she obtained a settlement that required the management company to adopt a policy prohibiting discrimination based on domestic and sexual violence and compensated her for the financial losses she had suffered. Stipulated Order of Dismissal as to Tanica Lewis, *Lewis v. North End Village*, No. 2:07-cv-10757 (E.D. Mich. Feb. 26, 2008).

In 2007, Kathy Cleaves-Milan was evicted from her Elmhurst, Illinois apartment complex after calling the police to remove her fiancé, who was threatening to shoot her and himself with a gun. Complaint, *Cleaves-Milan v. AIMCO Elm Creek LP*, No. 1:09-cv-06143 (N.D. Ill. Oct. 1, 2009). She explained the circumstances and provided her protective order to the management company, yet was told that "anytime there is a crime in an

apartment the household must be evicted." *Id.* at ¶ 31. She was compelled to move, forcing her daughter to transfer to a substandard school, and was charged a $3180 lease termination fee by the management company. *Id.* at ¶¶ 34-35, 37; *see also* Sara Olkon, *Tenant Reported Abuse – Then Suffered Eviction*, CHI. TRIB., Oct. 13, 2009 (quoting Cleaves-Milan as stating, "I was punished for protecting myself and my daughter").

This recurring fact-pattern places the importance of the disparate impact standard in stark relief. As in *Alvera*, the seminal challenge to a zero tolerance policy disproportionately affecting women, the lawsuits discussed above have challenged facially neutral policies that are applied overwhelmingly against women.

In addition, local governments across the country are increasingly passing ordinances that are neutral on their face but have a devastating impact on domestic violence victims. Often known as chronic nuisance ordinances, these laws impose penalties on landlords based on a tenant's repeated calls to the police. Cari Fais, Note, *Denying Access to Justice: The Cost of Applying Chronic Nuisance Laws to Domestic Violence*, 108 COLUM. L. REV. 1181, 1187 (2008). Many landlords seek to avoid these sanctions and eliminate the "nuisance" by evicting the unit's tenants, including victims of domestic violence who may need to reach out to police repeatedly due to the conduct of their abusers. *See* EMILY WERTH, SARGENT SHRIVER NAT'L CTR. ON POVERTY LAW, THE COST OF BEING "CRIME FREE": LEGAL AND POLITICAL CONSEQUENCES OF CRIME FREE RENTAL HOUSING AND NUISANCE PROPERTY ORDINANCES 8-9 (2013). Indeed,

a study by a Harvard scholar established that survivors of domestic violence are regularly evicted under this type of ordinance, forcing victims to choose between calling the police and maintaining their home. Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOC. REV. 117, 125-127, 130 (2012) (reporting that domestic violence was the third most cited nuisance activity under a Milwaukee ordinance, that properties in black neighborhoods were more than twice as likely to be cited, and surveying 59 other ordinances).

Without disparate impact analysis, even the most extreme disparities in the effect of policies that punish survivors for the violence perpetrated against them would likely lie beyond the reach of anti-discrimination law, and survivors of domestic and sexual violence deprived of housing would lack legal redress.

This reasoning was embraced by HUD in recently-issued guidance to all fair housing staff addressing the applicability of disparate impact analysis in situations involving domestic violence. *See* SARA K. PRATT, U.S. DEP'T OF HOUS. & URBAN DEV., OFFICE OF FAIR HOUS. & EQUAL OPPORTUNITY, ASSESSING CLAIMS OF HOUSING DISCRIMINATION AGAINST VICTIMS OF DOMESTIC VIOLENCE UNDER THE FAIR HOUSING ACT AND THE VIOLENCE AGAINST WOMEN ACT (2011) [hereinafter HUD MEMO]. The guidance notes that an estimated 1.3 million women are the victims of assault by an intimate partner each year, that about one in four women will experience intimate partner violence in her lifetime,

and that 85 percent of victims of domestic violence are women. *Id.* at 2 (citing U.S. DEP'T OF HEALTH & HUMAN SERVICES, COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES (2003); CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, CRIME DATA BRIEF: INTIMATE PARTNER VIOLENCE, 1993-2001 (2003)).[9] Because "statistics

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[9] More recent statistics confirm that although the prevalence of domestic violence against men has increased, women still experience extremely high, and disproportionate, rates of domestic and sexual violence. M.C. BLACK ET AL., CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 18, 38-39, 54-55 (2011) (reporting that more than one in three women has experienced rape, physical violence, and/or stalking by an intimate partner in her lifetime, that nearly five times more women, compared to men, need medical care from domestic violence, and that thirteen times more women than men have been raped). Intimate partner violence, rape, and stalking are even more prevalent among African American women, American Indian women, and multiracial women. *Id.* at 20, 31.

While the HUD Memo focused on domestic violence, studies document the devastating impact of both domestic and sexual violence on women. The most recent Department of Justice study examining intimate partner violence found that, from 1994 to 2010, about 4 in 5 victims of intimate partner violence were female. SHANNAN CATALANO, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: INTIMATE PARTNER VIOLENCE, 1993-2010, at 3 (2012). Women also made up 70 percent of all domestic violence homicide victims in 2007, a percentage that has not changed significantly over time. SHANNAN CATALANO, U.S. DEP'T OF JUSTICE, FEMALE VICTIMS OF VIOLENCE 1, 3 (revised Oct. 2009). Likewise, women are far more likely to be victimized by rape, sexual assault, and stalking, whether or not they know the perpetrator. JENNIFER L. TRUMAN, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION, 2010 9 (2011) (finding that women experienced over 169,000 rapes and sexual assaults,

show that discrimination against victims of domestic violence is almost always discrimination against women," the HUD Memo stated that a disparate impact analysis is appropriate when a facially neutral housing policy disproportionately affects victims. *Id.* at 2, 5. According to the guidance: "Disparate impact cases often arise in the context of 'zero tolerance' policies, under which the entire household is evicted for the criminal activity of one household member. . . . [A]s the overwhelming majority of domestic violence victims, women are often evicted as a result of the violence of their abusers."[10] *Id.* at 5.

Other laws do not provide comprehensive protection against housing discrimination. The federal Violence Against Women Act ("VAWA"), which contains targeted housing protections for victims of domestic violence, sexual assault, dating violence, and stalking, applies only to specific federally-funded housing programs and does not provide victims with an explicit administrative or judicial remedy.[11] 42 U.S.C. § 14043e-11; HUD MEMO, *supra*, at 4.

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compared to approximately 15,000 experienced by men); SHANNAN CATALANO, U.S. DEP'T OF JUSTICE, STALKING VICTIMS IN THE UNITED STATES - REVISED 4 (2012) (finding that women are stalked at nearly three times the rate of men).

[10] In the memo, HUD stated that the application of zero tolerance policies to domestic violence victims, while not per se unlawful, may be illegal and is subject to a disparate impact analysis. HUD MEMO, *supra*, at 2, 5.

[11] Contrary to the suggestion of *amici* National Leased Housing Association et al., fair housing obligations are consistent with

Only a handful of states have enacted laws specifically prohibiting discrimination against victims of domestic or sexual violence when they both apply for and live in rental housing. *See* NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, THERE'S NO PLACE LIKE HOME: STATE LAWS THAT PROTECT HOUSING RIGHTS FOR SURVIVORS OF DOMESTIC AND SEXUAL VIOLENCE 18-20 (2013) (including Arkansas, District of Columbia, Indiana, North Carolina, Oregon, Rhode Island, Washington, Wisconsin). *See also* NAT'L HOUSING LAW PROJECT, HOUSING RIGHTS OF DOMESTIC VIOLENCE SURVIVORS: A STATE AND LOCAL LAW COMPENDIUM (2013); Br. of Amici Curiae Legal Momentum et al. Moreover, the few states that have interpreted how their state fair housing laws apply when victims face housing discrimination have relied, in part, on their understanding that the federal FHA allows for disparate impact claims. 1985 N.Y. Op. Att'y Gen. 45 (1985), 1985 WL 194069 at *3-4 (citing the FHA in finding that the practice of denying housing to domestic violence victims has a disparate impact on women in violation of state human rights law); *Winsor v. Regency Prop. Mgmt., Inc.*, No. 94 CV 2349 (Wis. Cir. Ct. Oct. 2, 1995) (holding that the state fair housing law, which is modeled on the federal FHA, prohibits housing

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VAWA and HUD policy. While HUD authorizes evictions from public housing based on criminal activity, VAWA prohibits application of such policies based on domestic violence, dating violence, sexual assault, and stalking. 42 U.S.C. § 14043e-11. Interpreting the FHA to prohibit evictions of victims based on the violence perpetrated against them is consistent with HUD's requirements for public housing authorities, which must comply with VAWA's protections for victims of violence.

discrimination against victims, using a disparate impact theory). A ruling that disparate impact claims are foreclosed under the FHA would mean that most survivors of domestic and sexual violence would have severely limited recourse when subjected to eviction or housing denials simply because they were victimized by violence.

The persistence of housing discrimination against victims of domestic and sexual violence only reinforces the importance of disparate impact analysis as a legal tool. The practice of evicting victims based on their abusers' criminal activity,[12] or the noise disturbance and property damage they cause, is widespread. *See* NAT'L LAW CTR. ON HOMELESSNESS & POVERTY & NAT'L NETWORK TO END DOMESTIC VIOLENCE, LOST HOUSING, LOST SAFETY: SURVIVORS OF DOMESTIC VIOLENCE EXPERIENCE HOUSING DENIALS AND EVICTIONS ACROSS THE COUNTRY 7-9 (2007) [hereinafter LOST HOUSING, LOST SAFETY]; NAT'L SEXUAL VIOLENCE RESOURCE CTR., NATIONAL SURVEY OF ADVOCATES ON SEXUAL VIOLENCE, HOUSING & VIOLENCE AGAINST WOMEN ACT 17-18 (2011). A national survey of service providers showed that approximately 30 percent had represented domestic violence victims who were either threatened with eviction or evicted due to the violence or noise, calls to the police, or physical

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[12] Landlords are especially likely to become aware of these crimes because such a significant percentage occurs at home. *See, e.g.*, SHANNAN CATALANO, U.S. DEP'T OF JUSTICE, CRIME DATA BRIEF: INTIMATE PARTNER VIOLENCE IN THE UNITED STATES 24 (revised Dec. 19, 2007) [hereinafter INTIMATE PARTNER VIOLENCE IN THE U.S.].

damage directly resulting from the violence. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, DOMESTIC VIOLENCE PROGRAM, INSULT TO INJURY: VIOLATIONS OF THE VIOLENCE AGAINST WOMEN ACT, at v, 12 (2009) [hereinafter INSULT TO INJURY]; LOST HOUSING, LOST SAFETY, *supra*, at 2-4, 7-9.

Domestic and sexual violence survivors are also frequently subjected to discrimination when they apply for housing, simply because they have experienced violence. This can occur when, for example, their past history of victimization may become known to landlords because they are applying for housing from domestic violence or emergency shelters. *See* EQUAL RIGHTS CTR., NO VACANCY: HOUSING DISCRIMINATION AGAINST SURVIVORS OF DOMESTIC VIOLENCE IN THE DISTRICT OF COLUMBIA (2008) (finding significant discrimination against victims applying for housing, despite the District's anti-discrimination law); LOST HOUSING, LOST SAFETY, *supra*, at 3, 5, 9-10; ANTI-DISCRIMINATION CTR. OF METRO NY, ADDING INSULT TO INJURY: HOUSING DISCRIMINATION AGAINST SURVIVORS OF DOMESTIC VIOLENCE (2005); s*ee also* INSULT TO INJURY, *supra*, at iv, 10 (reporting that more than a third of surveyed advocates had worked with victims who were denied housing for reasons directly related to domestic violence, dating violence, or stalking).

Discriminatory evictions and denials thus give rise to a double victimization, imperiling the housing options and safety of a victim when she is most in

need of secure housing.[13] Housing discrimination based on violence compounds the safety risks because it can further trap victims, who often have few resources due to their abuse and isolation, in dangerous situations. *See also* Br. of Amici Curiae Legal Momentum et al. Congress has recognized that "[v]ictims of domestic violence often return to abusive partners because they cannot find long-term housing." 42 U.S.C. § 14043e(7); *see also* WILDER RESEARCH CTR., HOMELESSNESS IN MINNESOTA 2012 STUDY: INITIAL FINDINGS-CHARACTERISTICS AND TRENDS, PEOPLE EXPERIENCING HOMELESSNESS IN MINNESOTA 2 (2013) (48 percent of homeless women reported staying in an abusive situation due to lack of housing alternatives); TK Logan et al., *Barriers to Services for Rural and Urban Survivors of Rape*, 20 J. INTERPERSONAL VIOLENCE 591, 600, 611 (2005) (rural women who had been sexually assaulted stated that, without housing, other services were not likely to be helpful); AM. BAR ASSOC., COMMISSION ON

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[13] Many victims already lose their homes due to violence. *See, e.g.*, KATRINA BAUM ET AL., U.S. DEP'T OF JUSTICE, STALKING VICTIMIZATION IN THE UNITED STATES 6 (2009) (stating that one in seven stalking victims reported they moved as a result of stalking); JANA L. JASINSKI ET AL., THE EXPERIENCE OF VIOLENCE IN THE LIVES OF HOMELESS WOMEN: A RESEARCH REPORT 2, 65 (2005) (finding that one out of every four homeless women is homeless because of violence committed against her); WILDER RESEARCH CTR., HOMELESS ADULTS AND THEIR CHILDREN IN FARGO, NORTH DAKOTA, AND MOORHEAD, MINNESOTA: REGIONAL SURVEY OF PERSONS WITHOUT PERMANENT SHELTER 39 (2010) (similar); CTR. FOR IMPACT RESEARCH, PATHWAYS TO AND FROM HOMELESSNESS: WOMEN AND CHILDREN IN CHICAGO SHELTERS 3 (2004) (similar).

DOMESTIC VIOLENCE, REPORT TO THE HOUSE OF DELEGATES 2 (2003); AMY CORREIA & JEN RUBIN, VAWNET APPLIED RESEARCH FORUM, HOUSING AND BATTERED WOMEN 1-3 (2001); Joan Zorza, *Woman Battering: A Major Cause of Homelessness*, 25 CLEARINGHOUSE REV. 420 (1991). Tragically, the shortage of housing alternatives has been found to be a major contributing factor to fatalities. *See, e.g.*, JAKE FAWCETT, WASHINGTON STATE COALITION AGAINST DOMESTIC VIOLENCE, UP TO US: LESSONS LEARNED AND GOALS FOR CHANGE AFTER THIRTEEN YEARS OF THE WASHINGTON STATE DOMESTIC VIOLENCE FATALITY REVIEW 44-45 (2010).

Disparate impact analysis is therefore a crucial tool for preserving the housing and enhancing the safety of survivors of domestic and sexual violence that would otherwise be jeopardized by facially neutral policies that discriminate against victims. The eradication of that legal remedy would escalate both the risk of homelessness for victims and their children and the likelihood that they are forced to remain in dangerous living situations.

CONCLUSION

Amici respectfully urge this Court to affirm the judgment below, and hold that disparate impact claims can be brought under the Fair Housing Act.

Respectfully Submitted,

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APPENDIX

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. **The American Civil Liberties Union of New Jersey** is one of its statewide affiliates. Since its founding in 1920, the ACLU has appeared before this Court in numerous cases, both as direct counsel and *amicus curiae*. Of particular relevance to this case, the ACLU's Racial Justice Program engages in a nationwide program of litigation and advocacy on behalf of people who have been historically denied their constitutional and civil rights on the basis of race in housing and other areas. The ACLU's Women's Rights Project has, among other things, worked to improve access to housing for survivors of domestic and sexual violence and their children, including litigating cases on behalf of battered women who faced eviction based on the abuse they experienced**.**

MFY Legal Services, Inc. (MFY), a nonprofit organization, envisions a society in which no one is

denied justice because he or she cannot afford an attorney. To make this vision a reality, for 50 years MFY has provided free legal assistance to residents of New York City on a wide range of civil legal issues, prioritizing services to vulnerable and underserved populations, while simultaneously working to end the root causes of inequities through impact litigation, law reform and policy advocacy. MFY provides advice and representation to more than 8,500 New Yorkers each year. In September 2008, with the implosion of the housing market, MFY created its Foreclosure Prevention Project. Over the past five years, MFY has been on the frontlines of the foreclosure crisis, providing services to more than 2,700 individuals, saving hundreds of homes from unnecessary foreclosures. MFY attorneys have witnessed first-hand the devastating and discriminatory impact of predatory mortgage lending, and, through both defensive and affirmative litigation, MFY has sought to combat its effects and preserve homeownership in New York City. MFY's Mental Health Law Project and Disability and Aging Rights Project also regularly litigates

Fair Housing Act claims on behalf of people with disabilities who live in private apartments, public housing, and facilities such as adult homes**.**

The National Coalition Against Domestic Violence (NCADV), based in Colorado since 1992, was formed in 1978 to create a national network of programs serving victims of domestic violence. There are over 2,000 domestic violence programs currently in the United States. NCADV provides technical assistance, general information and referrals, and community awareness campaigns, and does public policy work at the national level. NCADV has participated in many amicus briefs over the years on issues relating to domestic violence victims, for whom obtaining and keeping safe housing is a major and pressing concern. It is critical that survivors have access to legal remedies through the Fair Housing Act when they experience housing discrimination based on the violence perpetrated against them.

The National Community Reinvestment Coalition (NCRC) is a

nonprofit public interest organization founded in 1990. NCRC, both directly and through its network of six hundred community-based member organizations, works to increase access to basic banking services including credit and savings, and to create and sustain affordable housing, job development and vibrant communities for America's working families. NCRC, through its National Neighbors civil rights program, seeks to advance fair lending and open housing practices nationwide and actively assists in efforts to affirmatively further fair housing and eliminate discrimination that is detrimental to the economic growth of low to moderate income and traditionally underserved communities.

The National Consumer Law Center (NCLC) is a national research and advocacy organization focusing on justice in consumer financial transactions, especially for low income and elderly consumers. Since its founding as a nonprofit corporation in 1969, NCLC has been a resource center addressing numerous consumer finance issues affecting equal access to

fair credit in the marketplace. NCLC publishes a 20-volume Consumer Credit and Sales Legal Practice Series, including Credit Discrimination, Sixth Ed., and has served on the Federal Reserve System Consumer-Industry Advisory Committee and committees of the National Conference of Commissioners on Uniform State Laws. NCLC has also acted as the Federal Trade Commission's designated consumer representative in promulgating important consumer-protection regulations.

The National Housing Law Project (NHLP) is a private, nonprofit, national housing and legal advocacy center established in 1968. Its mission is to advance housing justice for poor people by increasing and preserving the supply of decent, affordable housing; improving existing housing conditions, including physical conditions and management practices; expanding and enforcing low-income tenants' and homeowners' rights; and increasing housing opportunities for racial and ethnic minorities. Through policy advocacy and litigation, NHLP has been responsible for many

critically important changes to federal housing policy and programs that have resulted in increased housing opportunities and improved housing conditions for poor people. NHLP has worked with hundreds of advocates, attorneys and agencies throughout the country on cases involving tenants and homeowners in foreclosure as well as cases involving housing and domestic violence. In addition, NHLP has advocated for policies that help victims of domestic violence to access and maintain safe and decent housing. The present case involves a critical remedy for the widespread discrimination experienced by victims of subprime lending and victims of domestic and sexual violence. Disparate impact analysis provides an essential tool for identifying and ending these patterns, practices and policies that illegitimately and disproportionately discriminate against protected groups of people. Without this important enforcement tool, it will be extremely difficult, if not impossible, to address pervasive and covert housing discrimination.

The National Law Center on Homelessness & Poverty (the "Law Center") was founded in 1989. The mission of the Law Center is to prevent and end homelessness by serving as the legal arm of the nationwide movement to end homelessness. To achieve its mission, the organization pursues three main strategies: impact litigation, policy advocacy, and public education. Over more than a decade, the Law Center has devoted significant attention to protecting the housing rights of victims of domestic violence, thereby preventing them and their family members from becoming homeless. The Law Center has done this work through legislation such as the Violence Against Women Act, administrative advocacy with agencies such as HUD and the U.S. Department of Justice, and litigation. The Law Center joins this brief in order to emphasize the importance of disparate impact analysis in the ability of survivors to vindicate these important rights.

The National Women's Law Center is a nonprofit legal advocacy organization dedicated to the

advancement and protection of women's legal rights and opportunities since its founding in 1972. The Center focuses on issues of key importance to women and their families, including economic security, employment, education, health, and reproductive rights, with special attention to the needs of low-income women, and has participated as counsel or *amicus curiae* in a range of cases before this Court to secure the equal treatment of women under the law, including cases challenging practices that have a discriminatory impact on women, even in the absence of proof of discriminatory animus. The Center has long sought to ensure that rights and opportunities are not restricted for women based on arbitrary practices or policies not justified by compelling interests.

Public Justice, P.C., is a national public interest law firm dedicated to pursuing justice for the victims of corporate and government abuses. Throughout its history, Public Justice has participated in cases that highlight the importance of the role that disparate impact claims play in

ensuring the effectiveness of our nation's federal civil rights statutes. For example, Public Justice joined in an *amici* brief in *Smith v. City of Jackson*, urging this Court to hold, as it ultimately did, 544 U.S. 228 (2005), that the Age Discrimination in Employment Act prohibits not only disparate treatment discrimination, but also disparate impact discrimination. Public Justice is gravely concerned that the arguments advanced by petitioner in this case, if adopted, would eviscerate the effectiveness of the Fair Housing Act.