THE FAIR HOUSING ACT, DISPARATE IMPACT, AND THE ABILITY-TO-REPAY: A COMPLIANCE DILEMMA FOR MORTGAGE LENDERS

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I. Introduction

In the near future, mortgage lenders may be forced to choose between compliance with the anti-discrimination policies of the Fair Housing Act ("FHA"), or the Consumer Financial Protection Bureau's ("CFPB") new "ability-to-repay" rule ("ATR").[1] As a response to the housing crisis of 2008, and in an effort to promote responsible lending, the CFPB instituted the ATR, which forces lenders to perform their due diligence on prospective borrowers to ensure that the borrowers can afford their loans.[2] This rule was finalized on January 10, 2013 and will go into effect in 2014.[3] Meanwhile, the Supreme Court is currently deciding[4] whether to hear *Mount Holly Gardens v. Mount Holly*,[5] a case that could decide whether disparate impact claims would be viable under the FHA. A disparate impact claim allows a plaintiff to challenge certain policies

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[1] Kerri Ann Panchuk, *CFPB, HUD face disparate impact mortgage lending dilemma*, HOUSINGWIRE (Sep. 17, 2012, 8:31 AM), http://www.housingwire.com/news/2012/09/17/cfpb-hud-face-disparate-impact-mortgage-lending-dilemma; *see* CANFIELD PRESS, THE MORTGAGE REPORT: QRM, QM, HOEPA, AND DISPARATE IMPACT: COORDINATION AND CLEAR RULES ARE CRITICAL (2012), *available at* http://www.fed-soc.org/docLib/20120710_TheMortgageReport.pdf.

[2] Ability-to-Repay and Qualified Mortgage Standards under the Trust in Lending Act (Regulation Z), 78 Fed. Reg. 6408 (proposed Jan. 30, 2013) (to be codified at 12 C.F.R. pt. 1026) *available at* http://files.consumerfinance.gov/f/201301_cfpb_final-rule_ability-to-repay.pdf.

[3] *Id*.

[4] Rose Krebs, *U.S. Supreme Court Asks Justice Department to Weigh in on Gardens Case*, PHILLYBURBS.COM (Oct. 30, 2012, 12:00 AM), http://www.phillyburbs.com/news/local/burlington_county_times_news/…ment-to-weigh-in/article_c7b4cd1c-fb43-59be-99a4-4a3cd8a04493.html.

[5] 658 F.3d 375 (3d Cir. 2011).

that are facially neutral in their treatment of different groups but that, in fact, fall more harshly on one group than another.[6]

The FHA applies to mortgage lenders because it clearly prohibits overt discrimination in the granting of home loans.[7] Thus, knowing that they are subject to the FHA, lenders fear that, if the Court hears *Mount Holly* and decides to allow FHA disparate impact claims, they will be unable to comply with both the FHA and the ATR.[8] The lenders' rationale is that the ATR's stricter lending requirements will disproportionately affect certain groups (e.g., racial minorities) because these groups will not be able to meet the heightened financial requirements for borrowers.[9] As a result, lenders who follow the ATR, yet have no discriminatory intent, will still be open to disparate impact claims under the FHA.[10] One attorney has summed up this dilemma nicely: "The ability-to-pay rule says be very conservative (in lending to individuals). But disparate impact [says] make as many loans as possible."[11]

The finalization of the ATR highlights both the uncertainty of the FHA disparate impact issue and the glaring need for the Supreme Court to make a decision in the *Mount Holly* case. The current state of FHA disparate impact law is inconsistent. There are strong arguments for allowing such claims, but there are also sound

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[6] Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) ("Claims of disparate treatment may be distinguished from claims that stress 'disparate impact.' The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.").

[7] 42 U.S.C. § 3605(a) (2006).

[8] Panchuk, *supra* note 1.

[9] Lenders' self-imposed tighter lending standards, in place since at least 2007, have already had a disproportionate impact on minority access to loans. *See* Jann Swanson, *Bernake Says Mortgage Lending Too Tight, Pendulum Swung too Far*, MORTGAGE NEWS DAILY (Nov. 16, 2012, 9:54 AM), http://www.mortgagenewsdaily.com/11162012_ben_bernanke.asp (quoting Ben Bernake as saying that "as a result of the crisis, most or all of the hard-won gains in homeownership made by low-income and minority communities in the past 15 years or so have been reversed").

[10] Brief for Am. Fin. Servs. Ass'n et al, as Amici Curiae Supporting Petitioners, Mount Holly v. Mount Holly Gardens Citizens in Action, 658 F.3d 375 (3d Cir. 2011) (No. 11-1507) at 15. (stating that the Ability to Repay rules might cause disparate impact because of the negative effect the rule would have on minorities).

[11] Panchuk, *supra* note 1.

arguments that militate against the idea that FHA disparate impact claims be allowed.[12] Still, every circuit court has decided to allow disparate impact claims under the FHA, though the standards they have used to evaluate these claims have varied by jurisdiction.[13] The Court seems to recognize the importance of the issue, as it was set to hear a case on the subject in February 2012.[14] However, the petitioners strangely dropped the case at the last moment.[15] Lucky for the Court and mortgage lenders who desire certainty, *Mount Holly*

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[12] *See* Kirk D. Jensen & Jeffrey P. Naimon, *The Fair Housing Act, Disparate Impact Claims and* Magner v. Gallagher*: An Opportunity to Return to the Primacy of the Statutory Text*, 129 BANKING L.J. 99, 133 (2012) (arguing that the FHA does not allow disparate impact claims based on the language of the statute and Congressional intent); *see also* Robert G. Schwemm & Sara K. Pratt, *Disparate Impact Under the Fair Housing Act: A Proposed Approach*, *in* NATIONAL FAIR HOUSING ALLIANCE 8 (2009) (arguing that the FHA does allow disparate impact claims based on the language, purpose, legislative history, Congressional action, and administrative construction of the FHA).

[13] *See, e.g.*, Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66 (1977) (deciding to balance the justification with a competing concern); Betsey v. Turtle Creek Assocs., 736 F.2d 983, 988–89 (4th Cir. 1984) (requiring a business necessity justification); Langlois v. Abington Hous. Auth., 207 F.3d 43, 51 (1st Cir. 2000) (requiring a substantial justification).

[14] *See generally* Gallagher v. Magner, 636 F. 3d 380 (8th Cir. 2010) (concerning a tenant's discrimination suit against the City of St. Paul, Minn. for disparate enforcement of municipal housing codes).

[15] Joe Kimball, *St. Paul Withdraws Supreme Court Appeal on Key Housing Code Case*, MINNPOST (Feb. 10, 2012, 1:09 PM), http://www.minnpost.com/two-cities/2012/02/st-paul-withdraws-supreme-court-appeal-key-housing-code-case (providing St. Paul's reasoning for dropping case, saying that a win by the city could "completely eliminate 'disparate impact' civil rights enforcement, including under the Fair Housing Act and the Equal Credit Opportunity Act"). Some commentators have been unable to rationalize St. Paul's decision to withdraw the case, and now speculate that it was part of a controversial deal with the Justice Department. *See* Frederick Melo, *Justice Department's role in St. Paul's decision to drop Supreme Court case questioned*, PIONEER PRESS (Sep. 25, 2012, 1:08 PM), http://www.twincities.com/stpaul/ci_21629950/justice-departments-role-st-pauls-decision-drop-supreme (reporting that four Republican Congressmen alleged, in a letter to U.S. Attorney General Eric Holder, that St. Paul's true motivation for dropping its appeal to the Court was a deal with the Justice Department, by which the Justice Department would not join two other cases against the city).

provides another opportunity for the Court to speak on the issue and provide clarity to an otherwise ambiguous area of law.

This Note will examine the potential outcomes of *Mount Holly* and argue that the best solution is for the Court to decide that disparate impact claims are permissible under the FHA. This Note will also examine the possibility of a reactionary amendment of the ATR that could be issued by Congress, and which would exempt ATR compliers from FHA disparate impact liability. Furthermore, the Note argues that other alternatives are inferior to permitting disparate impact claims.

Part II reviews the purpose of the FHA and how it applies to mortgage lenders. Next, Part III describes *Mount Holly* and suggests how a potential decision by the Court would not only affect the parties in the case, but all parties who are governed by the FHA, including mortgage lenders. Part IV explains the utility of disparate impact claims, other statutes that have disparate impact claims, the arguments for and against allowing disparate impact claims under the FHA, and the different disparate impact standards that are applied by courts.

With the background of *Mount Holly* and the FHA in mind, Part V explains the ATR, providing statistics to show that it will have a disproportionate impact on minorities who are trying to obtain a loan. Then, the Note synthesizes the FHA disparate impact and ATR issues, explaining mortgage lenders' compliance dilemma and the reasonableness of their fear. Finally, Part VI examines all of the potential outcomes of a *Mount Holly* decision—or lack thereof—and argues that the most desirable scenario would be for the Court to decide that disparate impact claims are allowed under the FHA, followed by the passage of a reactionary amendment to the ATR by Congress to exempt ATR compliers from FHA disparate impact liability.

II. The FHA and Mortgage Lenders

Lyndon Johnson signed the Fair Housing Act into law as Title VIII of the 1968 Civil Rights Act.[16] The FHA was a response to a variety of circumstances, including the open housing marches in Chicago and the inability of the families of Vietnam veterans to

[16] *History of Fair Housing*, U.S. DEP'T OF HOUS. & URBAN DEV. (last visited Mar. 1, 2013, 1:10 PM), http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/aboutfheo/history.

obtain housing.[17] The stated purpose of the FHA is to "provide, within constitutional limitations, for fair housing throughout the United States."[18] This purpose is especially demonstrated in two statutory provisions. First, section 3604 states that "[i]t shall be 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."[19] Second, section 3605 states that "[i]t shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin."[20]

It is important to note that the definition of residential real estate transaction includes "the making or purchasing of loans or providing other financial assistance for purchasing, constructing, improving, repairing or maintaining a dwelling."[21] It seems that the FHA, pursuant to section 3605, could regulate mortgage lenders. Thus, mortgage lenders have a serious interest in a potential *Mount Holly* decision; they do not want disparate impact claims to be allowed under the FHA. Indeed, since the language of the FHA does not directly address the issue of disparate impact claims, plaintiffs have used this ambiguity as an open invitation to bring claims under the FHA.

III. Mount Holly

The Supreme Court can settle much of the confusion surrounding the FHA disparate impact claims question if it decides to hear *Mount Holly*. The Court is still deciding whether it will hear the case and has recently asked the Solicitor General to provide a brief of the government's views on the subject.[22] Although *Mount Holly* does

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[17] *Id.*
[18] 42 U.S.C. § 3601 (2006).
[19] *Id.* § 3604(a). This is the section that is at issue in the *Mount Holly* case.
[20] *Id.* § 3605(a).
[21] *Id.* § 3605(b)(1)(A).
[22] Ralph Kasarda, *Supreme Court Asks for U.S. Solicitor General's Brief in Disparate Impact* Case, PLF LIBERTY BLOG (Mar. 1, 2013, 1:12 PM),

not involve mortgage lenders, the case is nevertheless important to mortgage lenders as a group insofar as the Court's interpretation of the FHA's statutory language will impact their regulation. If the Court decides that disparate impact claims are not allowed under the FHA, then such an interpretation would protect mortgage lenders, whose compliance with the ATR would otherwise justify a disparate impact claim, from liability or other penalties. Conversely, if the Court decides that disparate impact claims are permitted under the FHA, then mortgage lenders could be subject to numerous FHA disparate impact claims simply for following the ATR.

The Court should hear *Mount Holly* because it provides the perfect opportunity to determine if the FHA allows disparate impact claims.[23] Residents of the Gardens neighborhood in Mount Holly filed suit against the Mount Holly Township for violating section 3604 of the FHA.[24] They are challenging the town's proposed redevelopment plan for the Gardens neighborhood.[25] This neighborhood is comprised mostly of African-American and Hispanic residents, 80% of whom live below the area's median income.[26] The town's proposed plan would replace all of the existing houses in the Gardens with newer, more expensive homes.[27] At the time of the proposal, many of the properties in the area were in a state of disrepair, and there was a disproportionate amount of crime in the neighborhood.[28]

Redevelopment reports had already determined that the Gardens was a prime location for redevelopment.[29] According to a systematic plan, the town offered to buy Gardens homes for between $32,000 to $49,000 each, and even offered no-interest loans for the residents to buy new homes.[30] The problem was that the redeveloped homes would have cost between $200,000 to $275,000, a price well

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http://blog.pacificlegal.org/2012/supreme-court-asks-for-u-s-solicitor-generals-brief-in-disparate-impact-case/.

[23] Greg Stohr, *Racial Bias in Lending, Housing Draws High Court Inquiry*, BLOOMBERG (Oct. 29, 2012, 10:00 AM), http://www.bloomberg.com/news/2012-10-29/racial-bias-in-lending-housing-draws-high-court-inquiry.html.

[24] *Mount Holly*, 658 F. 3d. at 377, 381.

[25] *Id*. at 377.

[26] *Id.* at 377–78.

[27] *Id.* at 377.

[28] *Id.* at 378.

[29] *Id.* at 379.

[30] *Id.* at 380.

outside the affordable price range for the majority of Gardens residents.[31] Moreover, beyond the price impact, the town's proposed redevelopment disproportionate affects minority families; while the plan would affect 22.54% of all African-American households, and 32.31% Hispanic households in Mount Holly, only 2.73% of white households would be effected.[32] Thus, the facts present a classic disparate impact scenario. The residents are not accusing the town of overt discrimination, but are instead challenging a facially neutral proposal because of the consequences it will have on minorities.

The residents first filed suit in District Court in 2008, where Defendants were granted summary judgment.[33] On appeal, the Third Circuit decided that disparate impact claims were viable under the FHA and that the Plaintiffs had established a prima facie case of disparate impact.[34] However, the court ultimately remanded the case for further proceedings so that a more developed factual record could be considered.[35] It is now for the Supreme Court to decide whether to take advantage of the opportunity to decide if the FHA allows for the residents' disparate impact claim.

IV. Disparate Impact

A. Plaintiff's Use of Disparate Impact

The Supreme Court has held that disparate impact claims may be brought under many statutes, including, but not limited to Title VII,[36] the Age Discrimination in Employment Act ("ADEA"),[37] and the Americans with Disabilities Act ("ADA").[38] Under these statutes, plaintiffs can use disparate impact analysis as an effective way to challenge policies that are facially neutral, but which have a disproportionate impact on a certain class.[39] The purpose of a

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[31] *Id.*
[32] *Id.* at 382.
[33] *Id*. at 381.
[34] *Id.* at 382.
[35] *Id*. at 387–88.
[36] Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (stating that the purpose of Title VII is to focus on consequences and not intent).
[37] Smith v. Jackson, 544 U.S. 228, 234 (2005) (citing the similarities in language between ADEA and Title VII).
[38] Raytheon Co. v. Hernandez, 540 U.S. 44, 53 (2003).
[39] *See supra* note 2.

disparate impact claim is to focus on the effect of an action rather than the actor's intent.[40] Disparate impact analysis makes it easier for plaintiffs to prevail in discrimination cases, because disparate treatment cases typically require a showing of intent, which is often hard to prove.[41] In disparate treatment cases, "smoking guns" of deliberate discrimination are rare, forcing plaintiffs to piece together bits of indirect evidence to create an inference of discrimination.[42] In a disparate impact case, however, a plaintiff is not required to show intent but instead may rely on more accessible pieces of information to produce a claim. For example, in a Title VII employment disparate impact case, a plaintiff need only identify a particular practice, provide statistics that show a disparate impact, and demonstrate causation between the practice and the statistics.[43] This information is more objective and accessible than having to prove intent in a disparate treatment case, and therefore disparate impact claims are plaintiff-friendly. This explains why lenders argue vehemently against FHA disparate impact claims.

B. The Supreme Court's Disparate Impact Decisions with Other Stautes

In order to understand the debate over FHA disparate impact, it is important to look at how the Supreme Court has dealt with disparate impact claims in other statutes. *Griggs v. Duke Power Co.*[44] was the first case in which the Court recognized disparate impact claims under Title VII.[45] In *Griggs*, an employer instituted a

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[40] *Griggs*, 401 U.S. at 432 (stating that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability").

[41] Laina Rose Rainsmith, *Proving an Employer's Intent: Disparate Treatment Discriminatio and the Stray Remarks Doctrine After* Reeves v. Sanderson Plumbing Products, 55 VAND. L. REV. 219, 226 (2002) (discussing the difficulty of proving disparate treatment).

[42] *Id.* at 228.

[43] Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994–95 (1988) (acknowledging that statistics alone are not enough to prove a prima facie case, but that they are useful).

[44] 401 U.S. at 430–31.

[45] Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(a)(2) (2006) ("It shall be an unlawful employment practice for an employer—(2) to limit, segregate, or classify his employees or applicants for employment in any

requirement that new employees pass multiple aptitude tests before consideration for popular jobs.[46] These tests were facially neutral, but the Court decided they still had a disparate impact because of the long history of inferior education for blacks.[47] It is important to note that the Court did not cite any statistics about the effect of the tests on minority employment, but rather spoke in general terms about the obvious disadvantage to minority applicants.[48]

The Supreme Court decided to allow disparate impact claims in *Griggs* for a few reasons. First, the Court focused on the purpose of Title VII, which was to "remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[49] Focusing on this purpose, the Court determined that it did not matter whether an employer had any intent to put minority employees at a disadvantage; rather, the important fact was that aptitude tests were making it harder for black employees to get jobs.[50] The Court also gave great deference to the interpretation of the enforcing agency, the Equal Employment Opportunity Commission ("EEOC").[51] The EEOC had previously determined that tests resulting in a disparate impact were permissible only if they were job-related; the Court decided to defer to this interpretation.[52] The Court found that the aptitude tests in question were not good predictors of job performance, and therefore did not pass the job-relatedness test.[53] Interestingly, the Court only referenced the language of Title VII,[54] but did not do an analysis to see if that language supported a disparate impact claim by itself.

In 2005, the Court issued another important disparate impact holding in *Smith v. City of Jackson*, in which the Court decided that disparate impact claims would be allowed under the Age

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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 race, color, religion, sex, or national origin.")

[46] *Griggs*, 401 U.S. at 427–28.

[47] *Id.* at 430 (citing Gaston County v. United States, 395 U.S. 285 (1969)).

[48] *E.g.*, *id.*

[49] *Id.* at 429–30.

[50] *Id.* at 432.

[51] *Id.* at 433–34.

[52] *Id.* at 434.

[53] *Id.* at 433.

[54] *Id.* at 429 (stating that the purpose of Congress was evident from the language of Title VII).

Discrimination in Employment Act ("ADEA").[55] Unlike in *Griggs*, where the purpose of Title VII was the focal point of the Court's analysis, the *Smith* Court focused on a comparison of the language in Title VII and the ADEA.[56] The Court, adopting a tradition rule of statutory construction, stated that when two statutes have the same language and a similar purpose, Congress should be understood as having intended the statutes to have the same meaning.[57] In both Title VII and the ADEA, Congress used the language "otherwise adversely affects" in the relevant part of the statute.[58] The Court relied on this "affects" language to determine that "the text focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer."[59] Because the language from the ADEA and Title VII were the same, the Court decided that its decision in *Griggs* should also apply to the ADEA, and disparate impact claims should be permitted thereunder.[60]

The Supreme Court also gave weight to the fact that for two decades lower courts had allowed disparate impact claims under the ADEA.[61] Furthermore, the Court used the interpretations of the EEOC and the Department of Labor in determining which disparate impact claims were viable under the ADEA.[62] In sum, when deciding to allow disparate impact claims under statutes other than the FHA, the Court has tended to focus on the statute's purpose, its plain language, agency interpretations, and lower court decisions.

C. The FHA and Disparate Impact

While there is no doubt that disparate impact claims are allowed under Title VII and the ADEA, there is still much debate about the availability of disparate impact claims under the FHA.[63] Unsurprisingly, both opponents and proponents of FHA disparate

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[55] 544 U.S. 228, 240 (2005).
[56] *Id.* at 235–36.
[57] *Id.* at 233.
[58] Age Discrimination and Employment Act, 29 U.S.C. § 623(a)(2) (1967); Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(a)(2) (1964).
[59] *Smith*, 544 U.S. at 236 (emphasis in original).
[60] *Id.*
[61] *Id.* at 236–37.
[62] *Id.* at 239–40.
[63] Jensen & Naimon, *supra* note 12, at 101 (arguing that the FHA does not allow for disparate impact analysis); Schwemm & Pratt, *supra* note 12, at 16 (discussing the need for disparate impact analysis under the FHA).

impact claims have focused their arguments on many of the factors the Court considered in *Griggs* and *Smith*, including the purpose and language of the statute, lower court decisions, and interpretations by governmental agencies.[64] By considering cases in both 2012[65] and 2013,[66] the Supreme Court has signaled that it is both interested in the issue and willing to clarify the ambiguity. There are numerous arguments for and against disparate impact liability under the FHA; an examination of these arguments shows why the current state of the law is so confusing and uncertain for lenders and borrowers alike.[67]

1. The FHA's Language

Those who argue that disparate impact should not be allowed under the FHA tend to focus on the language of the FHA.[68] The

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[64] *See generally* Jensen & Naimon, *supra* note 12; Schwemm & Pratt, *supra* note 12.

[65] *See generally* Gallagher v. Magner, 636 F.3d 380 (8th Cir. 2010) (discussing the FHA and disparate impact issue as it applied to a St. Paul housing ordinance). The Supreme Court was ready to hear this case on February 2012, but the city of St. Paul dismissed its appeal just before the case was ready to be heard. This left the issue open and is the reason for *Mount Holly* reaching the Court.

[66] *See generally* Mount Holly v. Mount Holly Gardens Citizens in Action, 658 F.3d 375 (3rd Cir. 2011).

[67] *Disparate Impact Under Fair Housing Act Returns to the Supreme Court*, BALLARD SPAHR LLP (June 25, 2012), http://www.ballardspahr.com/alertspublications/legalalerts/2012-06-25-disparate-impact-under-fair-housing-act-returns-to-supreme-court.aspx ("We are hopeful that the opportunity lost in *Magner* will be regained in *Mount Holly* and that the uncertainty about disparate impact claims under the Fair Housing Act and, by analogy, ECOA, will finally be resolved.").

[68] *See id.* ("[I]t was widely believed that the Supreme Court would hold that disparate impact claims were not available under the Fair Housing Act, based on the absence of critical language in the Act authorizing such claims."); *see also* Brief for National Leased Housing Association et al. as Amici Curiae Supporting Petitioners, Mount Holly v. Mount Holly Gardens Citizens in Action, 658 F.3d 375 (3d Cir. 2011) (No. 11-1507) at 4–9, *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2012/07/11-1507-Nat-Leased-Housing-Amicus.pdf (comparing the language from the ADEA, Title VII and the FHA); Jensen & Naimon, *supra* note 12, at 104 (comparing the language of the FHA with other statutes to show the difference in language). It is important to note that many feel the analysis of

Smith Court focused on the "affect" language of Title VII and the ADEA.[69] Opponents are quick to point out that the FHA does not have any language, or similar wording, as "affects,"[70] "effects,"[71] or "results."[72] Instead, the pertinent language from the FHA is found in two sections of the statute. First, section 3604 states that "[i]t shall be 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."[73] Second, section 3605 states that "[i]t shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin."[74] Therefore, opponents argue that the reasoning from *Smith* does not apply to the FHA, since there is no focus on the effects of the action.[75] Instead, they argue that different language in similar statutes should be interpreted as having a different meaning.[76] This proposition gains momentum given the fact that the statutes were enacted closely in time, similar to the statute at play in *Mount Holly*. Indeed, the FHA was enacted only four years after Title VII and one year after the ADEA.[77]

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the FHA will have great impact on the Equal Credit Opportunity Act, as the language in both statutes is identical. *See* BALLARD SPAHR LLP, *supra* (stating that by analogy, the Supreme Court's decision in a FHA case would apply to the ECOA cases).

[69] Smith v. City of Jackson, 544 U.S. 228, 235–36.

[70] Age Discrimination and Employment Act, 29 U.S.C. § 623(a)(2) (2006); Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(a)(2) (2006).

[71] The Americans With Disabilities Act, 29 U.S.C. § 791(g) (disparate impact allowed under this Statute).

[72] The Voting Rights Act, 42 U.S.C. § 1973(a) (disparate impact allowed under this Statute).

[73] *Id.* § 3604(a).

[74] *Id.* § 3605(a).

[75] Brief for Nat'l Leased Hous. Assoc. et al. as Amici Curiae Supporting Petitioners, Mount Holly v. Mount Holly Gardens Citizens in Action, 658 F.3d 375 (3d Cir. 2011) (No. 11-1507) at 6 (citing Justice Stevens's language in *Smith*).

[76] Jensen & Naimon, *supra* note 12, at 110.

[77] *Id.* (quoting Justice Roberts in a 2004 concurrence).

Proponents of allowing disparate impact claims have attempted to use statutory language in their favor.[78] Similar to the *Griggs* Court, proponents have argued that understanding the purpose of the statute will allow the Court to read the language broadly.[79] Proponents point to the stated purpose of the FHA: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."[80] In fact, the Supreme Court has already held that the FHA should be given a "generous construction."[81] The FHA does not explicitly reject disparate impact claims, and proponents argue that the disparate impact claims need to be allowed in order to serve the purpose of the law.[82]

2. Agency Interpretation

Like the *Griggs* and *Smith* Courts, proponents of disparate impact claims use favorable agency interpretations to support their argument that the FHA be construed as permitting disparate impact claims.[83] In 2011, the Department of Housing and Urban Development ("HUD") offered a proposed rule that would have allowed disparate impact claims under the FHA.[84] Congress gave HUD the "authority and responsibility for administering this Act,"[85] a fact that militates in favor of giving HUD's statutory interpretation special weight. HUD cites Congress's "broad remedial intent" in the FHA as the primary reason to allow disparate impact claims, but the Department also relies on the circuits that have allowed for disparate

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[78] Schwemm & Pratt, *supra* note 12, at 9.
[79] Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971) (looking at the statute to determine the purpose of the law and then deciding that disparate impact was necessary to achieve the purpose).
[80] 42 U.S.C. § 3601 (2006).
[81] Edmonds v. Oxford House, Inc., 514 U.S. 725, 731 (1995).
[82] Schwemm & Pratt, *supra* note 12, at 9.
[83] *Id*. at 13.
[84] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. 70,865, 70,921 (proposed Nov. 16, 2011) (to be codified at 24 C.F.R. pt. 100).
[85] 42 U.S.C. § 3608 (2006).

impact claims.[86] Eventually, HUD hopes to establish a uniform standard for all courts.[87]

HUD's proposed rule would work as follows: (a) the FHA is violated when housing practices have a discriminatory effect, regardless of whether those practices were adopted for a discriminatory purpose; (b) the practice may still be lawful if the defendant can show that the practice has a "necessary and manifest" relationship to the defendant's "legitimate, non-discriminatory" interests; and (c) the plaintiff has the burden to show that those interests could be served by a less discriminatory alternative.[88] Yet this proposed rule is not yet finalized, perhaps because HUD is waiting for the Supreme Court to decide the issue.[89]

HUD's proposed rule gives firepower to proponents of FHA disparate impact claims, who argue that Congress gave control of FHA enforcement to HUD, and HUD's interpretation of the statute deserves "substantial deference."[90] The Supreme Court gave similar deference to the enforcing regulatory agencies' interpretations in *Griggs* and *Smith*.[91] An agency's interpretation of a statute typically receives deference from the Court when a statute is ambiguous; however, this level of deference is unclear and changing.[92] Opponents point to a recent Supreme Court case that rejected a HUD policy statement interpreting statutory language, in large part because it strayed too far from the plain language in the statute.[93]

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[86] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. at 70,922–23.
[87] *Id.*
[88] *Id.* at 70,924–25.
[89] Panchuk, *supra* note 1.
[90] Schwemm & Pratt, *supra* note 12, at 13.
[91] Smith v. City of Jackson, 544 U.S. 228, 243 (2005); Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1971).
[92] Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 845 (1984) (holding that an agency's interpretation of an ambiguous statute is controlling so long as the interpretation was reasonable); *see also* U.S. v. Mead Corp., 533 U.S. 218, 229–30 (2001) (suggesting that *Chevron* deference will only apply when the agency has gone through some sort of formal process, as opposed to a interpretation letter; and deciding that in non-Chevron situations, it is best to simply give *Skidmore* weight to the Agency's interpretation).
[93] Freeman v. Quicken Loans, 132 S. Ct. 2034, 2039–40 (2012) (stating that HUD's policy statement "goes beyond the meaning that the statute can bear").

While this argument might have some validity, it is important to realize that the HUD's interpretation was part of a proposed rule, rather than a policy statement. Courts are likely to give a formal proceeding like the proposed rule more weight than a mere policy statement,[94] and so the situations are not analogous. Moreover, the statute explicitly gives HUD authority over the FHA, and so the FHA's interpretation of the statute is likely to have a strong influence on the Court.[95]

3. Legislative History

Proponents also use the FHA's legislative history to show that Congress intended for the FHA to allow for disparate impact claims.[96] The FHA was enacted in 1968, and was substantially amended in 1988.[97] From 1968 through 1988, nine circuit courts decided that the FHA permitted disparate impact claims.[98] With knowledge of those interpretations, Congress chose to leave the FHA's language unchanged and therefore, the proponents argue, implicitly adopted the rulings of the nine circuits.[99] It does seem significant that with the knowledge of the nine circuit decisions, Congress still did not make any amendment to the FHA that clearly condemned disparate impact. However, opponents point to a statement made by President Ronald Reagan in 1988, wherein he stated that the 1988 amendments were in no way an endorsement of disparate impact liability under the FHA.[100]

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[94] *Mead Corp.*, 533 U.S. at 219. ("Thus, the overwhelming number of cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication.")

[95] *See* Schwemm & Pratt, *supra* note 12, at 4 (stating that the Supreme Court has already determined that the HUD's interpretation of the FHA deserves "great weight").

[96] Brief for the United States as Amicus Curiae in Support of Neither Party, Magner v. Gallgher, 636 F.3d 380 (8th Cir. 2010) (No.10-1032), at 17, *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2012/01/10-1032-SG-amicus-brief.pdf.

[97] *Id.*

[98] *Id.*

[99] *Id*.

[100] Remarks on Signing the Fair Housing Amendments Act of 1988, 24 WEEKLY COMP. PRES. DOC. 1140, 1141 (Sept. 13, 1988).

4. Circuit Decisions

Circuit courts across the country have balanced the arguments for and against disparate impact claims under the FHA, and all twelve circuits have decided to allow them.[101] While the circuits have no official influence on the Supreme Court's ultimate decision, the fact that all twelve have recognized disparate impact claims is substantial.[102] Furthermore, as mentioned in the previous section, Congress has failed to amend the FHA after at least nine of these circuits decided to allow disparate impact claims, thus giving their holdings greater weight. The earlier circuit court decisions focused on the purpose of the FHA, going so far to say that a plaintiff did not have to show that there was a disparate impact on a racial group, but instead only need to show that there was a discriminatory effect in the community that would perpetuate segregation.[103] Other older cases were concerned about the ability of people to mask their discriminatory intent under the guise of a facially neutral statute.[104] While recent courts have demanded specifics from plaintiffs,[105] the recent decisions seem most comfortable basing their reasoning on the broad purpose of the FHA.[106] Courts often do this by analogizing to the Title VII line of cases, which relied heavily on the broad purpose of Title VII.[107] Since HUD's proposed rule came out in 2011, it does not appear that a court has relied on HUD's interpretation. While many of these circuit courts have looked at the language, analogized to Title VII,

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[101] For a comprehensive list of cases that have allowed disparate impact claims under the FHA, see Schwemm & Pratt, *supra* note 12, at 6–7.

[102] *See* Smith v. City of Jackson, 544 U.S. 228, 236–37 (2005) (citing the influence of lower courts' decisions).

[103] *See* Metro. Hous. Dev. Corp. v. Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977) (stating that there are two types of discriminatory effects: those that have disparate impacts on racial groups, and those that perpetuate discriminatory feelings).

[104] United States v. Black Jack, 508 F.2d 1179, 1185 (8th Cir. 1974) (stating that "clever men may easily conceal their motivations").

[105] *See* Mountain Side Estates P'ship v. Sec'y of Hous. & Urban Dev., 56 F.3d 1243, 1251 (10th Cir. 1995) (stating that a plaintiff must show a specific policy that caused a disparate effect).

[106] *See* Affordable Hous. Dev. v. Fresno, 433 F.3d 1182, 1194–95 (9th Cir. 2006).

[107] *Id.* at 1195; *see also* Gallagher v. Magner, 636 F.3d 380, 382–83 (8th Cir. 2010).

and considered the broad purpose of the FHA, it is possible that many circuit courts have simply relied on the building consensus among circuits instead of doing an independent investigation of the issue.[108]

5. Summary of Disparate Impact Arguments

As the previous sections demonstrate, there are strong arguments on both sides of the FHA disparate impact debate. The Court needs to make a decision on this issue so that lenders and borrowers are operating in a more stable environment. Disparate impact claims would allow the purpose of the FHA—creating fair housing for all—to be better enforced. Yet, it is possible that the Court could decide it cannot justify allowing disparate impact without more affirmative language in the statute. Either way, a definitive decision would at least give lenders and borrowers certainty and an opportunity for lawmakers to correct the statute if they do not agree with the Court's decision.

D. Differing Disparate Impact Standards

While the general idea of disparate impact analysis is the same for statutes like Title VII and the ADEA, the Court's requirements for proving a disparate impact claim differs depending on the statute. Under Title VII, the plaintiff must first prove a prima facie case of disparate impact.[109] If the plaintiff can prove a prima facie case, then the defendant has the opportunity to provide evidence that the challenged policy was a business necessity.[110] If the defendant can prove that the challenged practice was part of a business necessity, the plaintiff can show that there were less discriminatory alternatives.[111]

By comparison, the ADEA has the same prima facie standard, but it only requires that the defendant provide a

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[108] *See* Langlois v. Abington Hous. Auth., 207 F.3d 43, 49 (1st Cir. 2000) (relying on the "consensus" in other circuits that disparate impact should be allowed in FHA cases).
[109] 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).
[110] *Id.*
[111] *Id.* § 2000e-2(k)(1)(A)(ii).

"reasonable factor" for its challenged practice.[112] Furthermore, so long as the defendant provides a reasonable factor, the plaintiff does not get the opportunity to argue for less discriminatory alternatives.[113] Therefore, the defendant has a much harder time defending against a disparate impact claim under Title VII than under the ADEA. In sum, the Supreme Court has applied different standards to a disparate impact challenge depending on the statute, which leads one to wonder what the standard would be for the FHA.

The different circuits have failed to come up with a consensus on the right type of standard to enact for FHA disparate impact claims, yet all agree that the plaintiff must first establish a prima facie case. To do this, there are varying opinions on what level of evidence the plaintiff must provide. For example, the 10th Circuit has acknowledged that in Title VII cases statistics alone are normally not sufficient.[114] However, the court went on to infer that, in FHA cases, statistics may be sufficient.[115] It does appear, however, that most circuits would allow a plaintiff to prove a prima facie case with statistics "regarding the narrowly defined area in question."[116] Once the plaintiff establishes a prima facie case, the standard gets even more uncertain. Courts generally agree that the defendant is allowed to assert some sort of justification for its policy that has created a disparate impact, but exactly what kind of justification is sufficient has been a source of confusion: some courts believe that the court itself should balance a defendant's justifications;[117] others have held that the defendant needs to present a business necessity;[118] and some have even ruled that the defendant needs to present a "substantial" and "legitimate" justification.[119] Courts have even decided that if there is no attempt to justify a facially neutral action by the

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[112] Smith v. City of Jackson, 544 U.S. 228, 241 (2005).
[113] *Id.* at 243.
[114] Mountain Side Estates P'ship v. Sec'y of Hous. & Urban Dev., 56 F.3d 1243, 1251 (10th Cir. 1995).
[115] *Id.* at 1252.
[116] *Id.* at 1251.
[117] *See* Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66 (1977).
[118] *See* Betsey v. Turtle Creek Assocs., 736 F.2d 983, 988–89 (4th Cir. 1984).
[119] Langlois v. Abington Hous. Auth., 207 F.3d 43, 51 (1st Cir. 2000).

defendant, a prima facie showing of disparate impact by the plaintiff can be sufficient for a plaintiff victory.[120]

The consequences of these different standards are significant. For one, the ability to define a "business necessity" in housing cases is more difficult than in the employer context.[121] The balancing approach and the business necessity requirement appear to be the two methods that would be hardest for the defendant to satisfy. With the balancing approach, a court might decide that the defendant had a rational justification for allowing the disparate impact, but may still decide that the need to stop that disparate impact outweighs the justification.[122] A business necessity, however, is a tougher requirement for defendants to meet rather than a vague "substantial interest" requirement because it requires the action to be "necessary" rather than merely to have a "substantial" justification.[123] The "substantial" and "legitimate" justification standard is best for defendants. Although not always worded the same, it appears to be the most prevalent standard across the circuits.[124] Yet, there is also the opportunity for a plaintiff to show that there was a less discriminatory alternative to the discriminatory practice.[125] Even if the defendant is able to show a justification, the

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[120] *See* Mountain Side Estates P'ship v. Sec'y of Hous. & Urban Dev., 56 F.3d 1243,1252 (10th Cir. 1995).

[121] Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 148–59 (3d Cir. 1977) (stating that it is easier to determine what a business necessity is in the employer context than in the landlord context).

[122] *Langlois*, 207 F.3d at 50 (describing how the lower court did its balancing test); *see also* Metro. Hous. Dev. v. Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977) (listing four factors to consider, one of which is the employer's justification).

[123] *Betsey*, 736 F.2d at 988 ("The burden confronting defendnats faced with a prima facie showing of discriminatory impact is different and more difficult than what they face when confronted with a showing of discriminatory intent.").

[124] *See Langlois*, 207 F.3d at 51 ("[T]he few later circuit court decisions on point come closer to a simple justification test . . . and we think this is by far the better approach."); *see also* Huntington Branch, N.A.A.C.P. v. Huntington, 844 F.2d 926, 939 (2d Cir. 1988); *Resident Advisory Bd.*, 564 F.2d at 149.

[125] *See Huntington Branch*, 844 F.2d at 939 ("'Plan-specific' problems can be resolved by the less discriminatory alternative of requiring reasonable design modifications.").

presence of a less discriminatory alternative might result in a plaintiff victory.[126]

Without a Supreme Court ruling, courts are not confident in declaring what the proper disparate impact standard should be, and, as a result, sometimes blend the different standards together.[127] Indeed, circuit courts have expressed frustration with the Supreme Court's decision not to address this issue on previous occasions.[128] Lenders and borrowers would also benefit from a clearer standard. *Mount Holly* provides an opportunity for the Court to clear things up.

V. The Ability to Re-Pay Rule

A. The ATR Explained

If and when the Court decides *Mount Holly*, its decision will have a direct effect on lenders' ability to comply with the ATR. Starting on January 10, 2014, under the terms of the ATR, creditors will have to make a "reasonable and good faith determination" to ensure that the consumer has a "reasonable ability" to repay home loans that the creditor extends.[129] The ATR was an obvious reaction to the "reckless lending"[130] that contributed to the economic collapse of 2008. It puts the burden on the lenders to determine who can afford a mortgage, and aims to ensure that "lenders [do] not set up consumers to fail."[131] At the very least, the ATR requires creditors to examine the following factors before deciding that a borrower has

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[126] *See id.*

[127] *See* Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev., 56 F.3d 1243, 1254–55 (10th Cir. 1995) (blending the business necessity and "manifest relationship" standards together).

[128] *See Langlois*, 207 F.3d at 49 (pointing out that the Supreme Court has had a chance to set the standard in Arlington Heights but refused to do so).

[129] Jann Swanson, *CFPB Releases Final Rule on Ability to Repay, Leaves Back Door Open on DTI*, MORTGAGE NEWS DAILY (Jan. 10, 2013, 7:51 AM), http://www.mortgagenewsdaily.com/01092013_dodd_frank_qa_rule.asp.

[130] Tim Manni, *What the 'QM' Definition Means for You*, HSH BLOG (Jan. 11, 2013), http://blog.hsh.com/index.php/2013/01/what-the-%E2%80%98qm%E2%80%99-definition-means-for-you/.

[131] Richard Cordray, *Assuring consumers have access to mortgages they can trust*, CONSUMER FINANCIAL PROTECTION BUREAU BLOG (Jan. 10 2013), http://www.consumerfinance.gov/blog/assuring-consumers-have-access-to-mortgages-they-can-trust/.

the "reasonable" ability to repay his loan: (1) the borrower's current or reasonably expected income or assets; (2) his current employment status; (3) the monthly payment on the covered transaction; (4) the monthly payment on any simultaneous loan; (5) the monthly payment for mortgage-related obligations; (6) the borrower's current debt obligations, alimony, and child support; (7) his monthly debt-to-income ratio or residual income; and (8) the borrower's credit history.[132]

As part of the ATR, there is a safe harbor given to certain qualified mortgages.[133] If the mortgage is deemed to be a qualified mortgage, courts will presume it was reasonable for the creditor to think that the borrower could repay the loan.[134] To have a qualified mortgage and gain the protection of the safe harbor, the creditor must look at the eight factors listed above, in addition to ensuring that the loan: (1) has documentation; (2) is not negatively amortized; (3) does not have interest-only payments; (4) does not have balloon payments; (5) does not have terms longer than thirty years; and, (6) does not have a debt-to-income ratio above forty-three percent.[135] While the qualified mortgage safe harbor does provide some protection and certainty for lenders, it does not change the fact that the ATR heightens the requisite financial position for borrowers.[136]

B. The Effect of ATR on Minority Borrowers

Those lenders who follow the ATR should expect disparate impact claims because the ATR is likely to have a disproportionate effect on certain groups and thus might violate the fair-lending

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[132] ABILITY-TO-REPAY AND QUALIFIED MORTGAGE STANDARDS UNDER THE TRUTH IN LENDING ACT (REGULATION Z), 78 Fed. Reg. 6408, 6408 (Jan. 30, 2013).

[133] *Id.*

[134] Nick Timiraos, *Ten Questions on the New Mortgage Rules*, THE WALL STREET JOURNAL (Jan 10, 2013, 1:18 PM), http://blogs.wsj.com/developments/2013/01/10/ten-questions-on-the-new-mortgage-rules/.

[135] Manni, *supra* note 130.

[136] *Compare* CANFIELD PRESS, *supra* note 1 (stating that a clear definition of a qualified mortgage could help lenders avoid liability because it provides clear guidelines), *with* Panchuk, *supra* note 1 ("[W]ill the two agencies create a safe harbor protection and coordinate the two laws? . . . [I]f the rules are not coordinated, the ambiguitiy between discriminatory lending laws and ability-to-repay provisions will encourage overly cautious lending.").

policies of the FHA.[137] For the purposes of this note, racial minorities will be used as an example of a group that is disproportionately affected, but one could imagine the ATR having a similar disparate impact on other classes. As the wealth gap widens between whites and certain minorities, the concern about the disparate impact of the ATR will grow.[138] In 2010, the median household net worth for whites was $110,729; it was $4,995 for blacks and $7,424 for Hispanics.[139] These numbers are troublesome for lenders who must comply with the ATR yet face potential disparate impact liability, as any lender who tries to comply with the ATR will be unlikely to avoid a disparate impact on certain minorities.

As previously shown, the ATR provides eight clear-cut factors to help a lender determine if the borrower has the "ability to repay"; these factors will disproportionately affect minorities because of their weaker economic position in this country. First, lenders must consider the borrower's current or reasonably expected income or assets.[140] After the 2010 census, the median household income for whites was $54,620; $32,068 for blacks; and $37,759 for Hispanics.[141] Second, lenders must consider the current employment status of the borrower.[142] In 2011, the unemployment rate for whites was 7.9%; 15.8% for blacks; and 11.5% for Hispanics.[143] The third factor, the monthly payment on the mortgage, is unlikely to cause a disparate impact on minorities itself, although this may be an area where lenders could require a higher monthly payment for minorities

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[137] Center for Responsible Lending et al., Ability-to-Repay Analysis and Qualified Mortgage Determination 1 (Mar. 7, 2012) (discussion draft), *available at* http://www.consumerfed.org/pdfs/QM_Term_Sheet_3-7-12.pdf.

[138] Tami Luhby, *Worsening Wealth Inequality by Race*, CNNMONEY (June 21, 2012, 1:09 PM), http://money.cnn.com/2012/06/21/news/economy/wealth-gap-race/index.htm (stating that whites have twenty-two times more wealth than blacks in America, a gap that has widened since 2008).

[139] *Id.*

[140] 12 C.F.R. § 1026.34 (2012).

[141] Press Release, U.S. Census Bureau, Income, Poverty and Health Ins. Coverage in the U.S.: 2010 (Sept. 13, 2011), *available at* http://www.census.gov/newsroom/releases/archives/income_wealth/cb11-157.html#tablea.

[142] 12 C.F.R. § 1026.34.

[143] U.S. BUREAU OF LABOR STATISTICS, LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY, 2011, at 3 (2012), *available at* http://www.bls.gov/cps/cpsrace2011.pdf.

than they do for whites, which would indeed be a disparate treatment case.[144]

The fourth and fifth factors—the monthly payment on any simultaneous loan and the monthly payment for mortgage-related obligations—are likely race-neutral.[145] The sixth factor, current debt obligations, might have a disproportionate impact on minorities; in 2010, the average leverage-ratio for whites was 14.4%, whereas for non-whites and Hispanics it was 29.1%.[146] The seventh factor, the monthly debt-to-income ratio is closely tied to the sixth factor, and therefore is also likely to have a disparate impact on minorities. Finally, the eighth factor, credit history, might tend to favor whites over minorities. Multiple reports have determined that credit scores are significantly lower in zip codes "with high minority populations."[147] A summary of the eight factors from the ATR shows us that certain minorities are likely to be treated disproportionately by at least five of the factors and that the remaining three factors are, at best, race-neutral.

After reviewing the eight factors of the ATR, there is a real possibility that its standards will cause certain minorities to receive substantially fewer loans than whites. In fact, even without the ATR, minorities may have already begun to feel the effects of more

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[144] Charlie Savage, *Wells Fargo Will Settle Mortgage Bias Charges*, N.Y. TIMES, July 12, 2012, http://www.nytimes.com/2012/07/13/business/wells-fargo-to-settle-mortgage-discrimination-charges.html (showing one example of discriminatory lending in the mortgage market where "Wells Fargo had charged higher fees and rate to more than 30,000 minority borrowers across the country than they had to white borrowers who posed the same credit risk").

[145] BD. OF GOVERNORS OF THE FED. RESERVE SYS., *Changes in U.S. Family Finances from 2007 to 2010: Evidence from the Survey of Consumer Finances*, FED. RESERVE BULLETIN, June 2012, at 1, 66, *available at* http://www.federalreserve.gov/pubs/bulletin/2012/pdf/scf12.pdf (stating that Hispanics and other non-whites have reduced some of their debt obligations in recent years).

[146] *Id*. at 56.

[147] Robert B. Avery et al., *Credit Scoring: Statistical Issues and Evidence from Credit-Bureau Files*, 28 REAL EST. ECON. 523, 537 (2000), *available at* http://www.areuea.org/publications/ree/articles/V28/REE.V28.3.7.PDF; *Study: Lower Credit Scores in Minority Communities (Chicago Tribune)*, WOODSTOCK INST., http://www.woodstockinst.org/press-clips/access-to-banking-services/study%3A-lower-credit-scores-in-minority-communities-(chicago-tribune)/ (last visited Mar. 17, 2013).

cautious lending by lenders in the wake of the 2008 crisis.[148] Lenders have heightened their own lending standards *sua sponte* in order to avoid the problems that led to the 2008 crisis.[149] Since its peak in 2006, mortgage lending to African-Americans and Hispanics has dropped 65%, as compared to only 50% for whites.[150] While there is no doubt that some of this decline has been caused by a lack of willing buyers and borrowers, Ben Bernanke, Chairman of the Federal Reserve, believes an important factor may also have been a lack of available creditors.[151]

It is important to remember that this lack of available credit of which Bernanke speaks is the result of *voluntary* action by lenders who are simply trying to protect themselves from the uncertainty of the economy, among other factors.[152] Yet, these voluntary practices have produced a disparate impact on minorities. Lenders' compliance with the ATR will maintain—if not exacerbate—the inability of minorities to obtain mortgages since the tighter lending standards are no longer products of lenders' own volition, but will instead be required by the CFPB. The housing market has already seen a disparate impact on minorities, and, as the statistics seem to demonstrate, the new ATR factors will accelerate this trend.

C. The ATR, the FHA, and Disparate Impact

Having seen the effect that the ATR will likely have on minority borrowers, the concern should be that compliance with both the ATR and the FHA is impossible for lenders.[153] The language of the FHA clearly applies to mortgage lenders, as they are "any person or other entity whose business includes engaging in residential real estate-related transactions."[154] If, as previously discussed, the Court

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[148] Liz Peek, *New Mortgage Rules Threaten Minority Home Ownership*, FISCAL TIMES (Jan. 16, 2013), http://www.thefiscaltimes.com/Columns/2013/01/16/New-Mortgage-Rules-Threaten-Minority-Home-Ownership.aspx#page1.

[149] *Id.*

[150] Ben Bernanke, Chairman, Fed. Reserve, Address at the Operation HOPE Global Financial Dignity Summit, Atlanta, Georgia: Challenges in Housing and Mortgage Markets (Nov. 15, 2012), *available at* http://www.federalreserve.gov/newsevents/speech/bernanke20121115a.htm.

[151] *Id.*

[152] *Id.*

[153] *See* Panchuk, *supra* note 1.

[154] 42 U.S.C. § 3605(b)(1)(A) (2006).

decides in *Mount Holly* that FHA disparate impact claims are valid, those lenders who comply with ATR could become defendants in disparate impact claims brought by potential borrowers who are unable to obtain a loan due to the heightened ATR requirements.[155] Adding to the likelihood of this dilemma is the CFPB's declaration that it supports allowing disparate impact claims for unintentionally discriminatory lending practices.[156] While a decision in *Mount Holly* is necessary to clarify an ambiguous area of law—namely, disparate impact claims under the FHA—if the Court decides to allow FHA disparate impact claims without any change in the ATR, lenders complying with the ATR will likely be stuck in limbo between compliance with the ATR and the FHA.

Yet how credible is the concern of mortgage lenders that they will be subject to disparate impact liability under the FHA for complying with the ATR?[157] It does appear that mortgage lenders will have a couple of strong defenses against FHA disparate impact claims, but the concern is nevertheless legitimate because, even if lenders defeat the claims, there are litigation costs associated with such defenses. First, lenders might contest the composition of the relevant applicant pool. In the context of a Title VII action, for example, the *Hazelwood* case stated that only "qualified" applicants should be considered when determining if there was a disparate impact on a protected class.[158] Thus, lenders might argue that when looking at loan recipient statistics, the percentage of minorities who receive a loan should take into account which applicants were at least *qualified* to receive such a loan. If lenders could convince a court to

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[155] Panchuk, *supra* note 1.

[156] Press Release, Consumer Financial Protection Bureau, *Consumer Financial Protection Bureau to Pursue Discriminatory Lenders* (Apr. 18, 2012), http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-to-pursue-discriminatory-lenders/.

[157] Letter from Am. Bankers Assoc. et al., to Monica Jackson, Bureau of Consumer Fin. Prot., at 24–25 (July 9, 2012), http://www.cfpbmonitor.com/files/2012/07/MBA-Ability-to-Repay-Comment-Letter-July-20121.pdf (stating that mortgage lenders will be stuck between choosing one regulation or another).

[158] Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308 (1977) (stating that the proper comparison to establish a prima facie disparate impact case was not the Hazelwood teacher population against the Hazelwood student population, but rather the teacher population at Hazelwood compared to the qualified teacher population in the labor market).

make this distinction, they might be able to prevent plaintiffs from establishing a prima facie case of disparate impact.[159]

Although it is unclear exactly what the second step of the FHA disparate impact standard may be, it is safe to presume that lenders would have the opportunity to justify their policy in some way.[160] Here, the lenders would have another strong defense; they could simply say, "The policy we follow is the ATR. This rule is designed to prevent lenders like us from giving loans to people who cannot afford them." This seems like a legitimate justification that a court would have a hard time rejecting, since this is not a voluntary action by a lender but rather a mandatory policy. Still, despite these arguments for the lenders, the fact remains that without an explicit ATR exemption, lenders will still have the burden of defending against FHA disparate impact claims. Furthermore, until the Court actually hears these arguments in the FHA context, it is impossible to know whether it will accept them.

The lenders' compliance dilemma has not been addressed in either the ATR or the FHA. Notably absent from the ATR final rule is a safe harbor provision that exempts from disparate impact liability lenders who are trying to comply with the ATR. Similarly, there is no provision in the FHA to provide safe harbor for ATR compliers.[161] A clear exemption from disparate impact liability has been done before; seniority systems, for example, are exempt from disparate impact challenges under Title VII.[162] And some commentators think that the CFPB will create exemptions in the ATR for those who lend to low-income borrowers.[163] However, such an exemption would only save certain lenders from disparate impact liability. Those lenders who do not typically lend to low-income borrowers would not be protected by this proposed exemption

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[159] For example, if plaintiffs argued that only 50% of minority applicants received a loan, but 75% percent of white applicants did, that would be a strong case of disparate impact. But if defendants argued that ninety-five percent of *qualified* applicants received a loan, regardless of race, that would be a strong defense.

[160] For a discussion of different disparate impact standards, see *supra* Part IV.d.

[161] *See* Panchuk, *supra* note 1.

[162] 42 U.S.C. § 2000e-2(h) (2006).

[163] *See, e.g.*, Mandi Woodruff, *New Rule Lets Lenders Judge Whether People Can Actually Afford Mortgages*, BUS. INSIDER (Jan. 10, 2013 12:54 AM), http://www.businessinsider.com/cfpb-new-ability-to-pay-mortgage-rule-2013-1.

because they would still be maintaining disproportionate lending practices. This is because these lenders will have strict lending requirements that will disparately impact minorities. All other things being equal, lenders who comply with the ATR will be in a "Catch-22" situation if disparate impact claims are allowed under the FHA. Again, this highlights the need for Congress to closely monitor the Court's handling of the *Mount Holly* decision so that it can amend the ATR to allow the FHA and the ATR to coexist.

VI. Some Possible Outcomes

With the passage of the final ATR rule, there is a strong possibility that lenders who comply with the ATR will be subject to disparate impact liability under the FHA—depending on the result of *Mount Holly*. This Note argues that the best outcome would be for the Court to hear the *Mount Holly* case, to decide that disparate impact claims are allowed under the FHA, and to provide a clear standard. Meanwhile, Congress should amend the ATR to explicitly state that compliance with the ATR will not subject lenders to a viable disparate impact claim. This Part explains why other alternatives are not desirable.

A. The Supreme Court Allows FHA Disparate Impact Claims and Congress Reacts

The best scenario would be for the Supreme Court to allow disparate impact cases under the FHA and to provide a clear standard for how to analyze a disparate impact claim under the FHA. Meanwhile, Congress should react to the Supreme Court's decision by amending the ATR to exempt compliers from disparate impact liability under the FHA.[164] This is the optimal outcome because it will allow for the preservation of the FHA's original purpose while also providing certainty of process and permitting lenders to be smart about their lending practices. By allowing disparate impact claims under the FHA, there is a better chance that the purpose of the FHA—that is, fair housing throughout the United States[165]—will be

[164] *See* Letter from Am. Bankers Assoc. et al., *supra* note 157, at 24–25 (suggesting an exemption in the Qualified Mortgage section of the Ability to Repay rule).

[165] 42 U.S.C. § 3601(a) (2006).

carried out because disparate impact claims will force decision-makers to be more aware of the *effect* of their lending policies.[166]

Congress should amend the ATR to exempt lenders who comply with the ATR from disparate impact liability.[167] Otherwise, it is likely that lenders will be forced to choose between violating the ATR or dealing with disparate impact claims.[168] If Congress fails to react and allows disparate impact under the FHA without restriction, some argue that this will make lenders even more conservative in making loans.[169] On the other hand, allowing disparate impact under the FHA might increase the availability of credit to minority borrowers, since lenders would want to avoid disparate impact liability.[170] But this would defeat the purpose of the ATR, which is to ensure that borrowers are able to pay for the loans they receive.[171]

In order to justify a decision leading to this ideal outcome, the Court could rely on many of the same arguments that were used in *Griggs* and *Smith*. First, the Court should give Chevron deference[172] to HUD's interpretation of the FHA,[173] just as it did in *Griggs* and *Smith*. The Court should also give weight to the overwhelming consensus of the circuit courts, as every circuit has decided that FHA disparate impact claims are viable. Finally, the Court should point out that the FHA is ultimately concerned about the *effects* of housing policies, not the *intent* behind them. Therefore, disparate impact gives regulators and plaintiffs another tool to get closer to fairness.

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[166] Ricci v. DeStefano, 557 U.S. 557, 562 (2009) (showing that employers are aware of disparate impact analysis, as employer discarded test results that had disparate impact on minority employees).

[167] The CFPB had the authority to amend the ATR, as the ATR itself was an amendment of Regulation Z. 78 Fed. Reg. 6408, 6408 (Jan. 30, 2013) (codified at 12 C.F.R. pt. 1026).

[168] Panchuk, *supra* note 1.

[169] *Id.*

[170] *See* Ricci v. DeStefano, 557 U.S. 557, 562 (2009) (demonstrating employer taking corrective measures to avoid disparate impact liability).

[171] Cordray, *supra* note 131.

[172] *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 851 (1984) (stating that if Congress has not spoken directly on the issue, an agency's interpretation is acceptable if it is based on a permissible construction of the statute).

[173] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. 70921 (proposed Nov. 16, 2011).

The Court also needs to set out a defined standard for FHA disparate impact liability. As discussed previously, disparate impact analysis is a multi-step process that allows lenders to provide some sort of justification for their action in the second step. The Court should define exactly what this standard for the second step is, as lower courts have ranged from business necessity[174] to a legitimate justification.[175] The choice of *which* standard is not as important as simply making the choice—whatever it may be—clear so that certainty is provided to all parties.

If the Court decides to allow disparate impact claims under the FHA, then Congress should amend the ATR to explicitly exclude disparate impact claims against ATR compliers. This is the best solution because an explicit exemption in the rule will provide the most certainty to lenders and allow them to avoid litigation defense costs. It seems highly unlikely that Congress intended to create a rule that would potentially subject its compliers to liability, so a simple addition of language is an easy, quick, and agreeable solution.

B. The Supreme Court Allows Disparate Impact Claims and Congress Fails to React

A less-desirable possibility is that the Court hears the *Mount Holly* case and decides that FHA disparate impact claims are viable, but Congress takes no reactionary step. While this option would be beneficial to FHA enforcement for the reasons previously discussed, a lack of Congressional action would fail to address the compliance dilemma that lenders would face. However, at least lenders apparently would still have a defense. As discussed under this scenario, lenders might be able to assert either the "qualified borrower defense" or the "compliance with the ATR defense" as their justification for the disparate impact.

Since *Mount Holly* does not involve mortgage lending or the ATR, the Court will not have the opportunity to decide whether either of these defenses rises to the level of a satisfactory justification. While lenders might prevail on disparate impact claims even without a Congressional amendment to the ATR, lenders would still prefer an outright exemption because if they were forced to rely on the justification defense, they would still have to deal with litigation costs. A Congressional amendment exempting those who

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[174] Betsey v. Turtle Creek Assocs., 736 F.2d 983, 988–89 (4th Cir. 1984).
[175] *See* Langlois v. Abington Hous. Auth., 207 F.3d 43, 49 (1st Cir. 2000).

comply with the ATR from FHA disparate impact claims is a superior solution to relying on the justification defense, since lenders should not be forced to defend against claims that arise out of necessary adherence to the ATR.

C. The Supreme Court Decides Disparate Impact Is Not Allowed Under the FHA

If the Court were to hear *Mount Holly* and decided that FHA disparate impact claims were invalid, this would still be preferable to the Court not hearing the case at all, but would nevertheless frustrate the purpose of the FHA. Certainly, lenders would be satisfied if the Court decided that FHA disparate impact claims were disallowed, as this would not only protect them against compliance with the ATR, but against a wide range of litigation.[176] In order to justify its position, the Court would likely rely on the plain language of the FHA. The Court would probably use the language of the *Smith* case that focused on the word "affect."[177] The "affect" language is notably absent from the FHA, so the Court would need to highlight the differences between the FHA, Title VII, the ADEA and other statutes that have allowed for disparate impact.[178] This would follow the reasoning of a recent Supreme Court decision, *Freeman v. Quicken Loans, Inc.*,[179] where the Court decided to rely on the plain language of the statute.[180] One bonus of this approach is that lenders would be able to comply with the ATR without any fear of disparate impact claims. Therefore, they would feel less pressure to extend loans to unqualified borrowers just to avoid disparate impact liability. The purpose of the ATR would be served in this scenario.

However, if the Court rejected all FHA disparate impact claims, it could seriously undermine the enforcement of the FHA. While consideration of the ATR is appropriate, and some kind of

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[176] Brief for Pacific Legal Foundation et al. as Amici Curiae Supporting Petitioners at 23–24, Magner v. Gallgher, 636 F.3d 380 (8th Cir. 2010) (No.10-1032), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2012/01/10-1032-PLF-amicus.pdf.

[177] Smith v. Jackson, 544 U.S. 228, 235–36 (2005).

[178] *Compare* 42 U.S.C. § 2000e-2(a)(2) (2012), *with* 42 U.S.C. § 3604–05 (2006).

[179] 132 S. Ct. 2034 (2012).

[180] *Id.* at 2042–43 (stating that following the plain language of the statute was better than following HUD's interpretation).

exemption for ATR compliance seems ideal, there are a number of other scenarios where a disparate impact claim under the FHA should be allowed. For example, if a landlord had a requirement that "all tenants must be college graduates," this could disproportionately impact certain groups and have nothing to do with the tenants' finances. The landlord might have made the rule without any discriminatory intent, yet the goal of the FHA—fair housing across the United States—would be seriously undermined by this kind of requirement. Without disparate impact liability, prospective tenants would have no way of challenging such a rule. The existence of disparate impact claims forces people of power in the housing market (i.e., lenders, landlords, cities, and towns) to be aware of their policies and the effect it has on different groups. The availability of these claims encourages the inclusion of historically disadvantaged groups in the housing market. The Court should not completely deny plaintiffs the opportunity to bring disparate impact claims under the FHA, as these claims are important enforcement mechanisms to help promote the purpose of the FHA.

D. The Supreme Court Decides Not to Hear *Mount Holly*

Perhaps the worst-case scenario would be if the Supreme Court were to deny *certiorari* to hear the *Mount Holly* case. This would leave borrowers and lenders in the same state they are in now—confused and uncertain about the state of the law. When the Supreme Court was unable to hear a similar case on the same issue in 2012, it was also a lost opportunity to clarify an ambiguous part of the law.[181] Now, if the Court fails to hear *Mount Holly*, it would be a major mistake since there is understandable concern, particularly from lenders, about the uncertainty of their potential liability.[182] Without clarification, it seems likely that lenders who follow the ATR could be subject to disparate impact claims under the FHA, since every circuit has ruled that disparate impact claims are allowed, and HUD desires to use disparate impact to limit discriminatory housing practices.

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[181] Consumer Fin. Servs. Grp., *Disparate Impact Under Fair Housing Act Returns to the Supreme Court*, BALLARD SPAHR LLP (June 25, 2012), http://www.ballardspahr.com/alertspublications/legalalerts/2012-06-25-disparate-impact-under-fair-housing-act-returns-to-supreme-court.aspx.

[182] *Id.*; Panchuk, *supra* note 1.

However, it would be surprising if the Supreme Court decided not to hear this case for a few reasons. First, the Court did not hear *Gallagher v. Magner* only because one party decided to drop its appeal; it was not the Court's decision not to hear the case.[183] Second, the Court has now expressed great interest in two FHA disparate impact cases in back-to-back years, suggesting that it recognizes the need to clarify this statutory ambiguity.[184] Finally, the Court invited the Solicitor General to file a brief on *Mount Holly*, a sign that it views this as a worthwhile issue.[185]

The Supreme Court should decide to hear *Mount Holly*. If it does not, it will perpetuate the uncertainty of the disparate impact issue, and will make compliance with the ATR difficult for lenders because they will likely have to deal with disparate impact claims arising from their compliance with the ATR.

VII. Conclusion

The Court's potential decision in *Mount Holly* would have an enormous impact on both the enforcement of the FHA and the amount of disparate impact litigation against mortgage lenders. The introduction of the ATR into the regulatory landscape makes the *Mount Holly* decision even more important for mortgage lenders, as they are unlikely to be able to comply with the ATR and also comply with the FHA. The best way to solve this compliance dilemma is to allow for disparate impact claims under the FHA, while also carving out an exemption from disparate impact liability in the ATR for ATR compliers. This decision allows the purpose of both the FHA and ATR to survive without making mortgage lenders choose between the two.

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[183] Corey Mitchell, *Congressional leaders raise questions about Supreme Court case dropped by the City of St. Paul*, STARTRIBUNE (Sept. 25, 2012, 9:12 PM), http://www.startribune.com/printarticle/?id=171271521.

[184] *See* Consumer Fin. Servs. Grp., *supra* note 181.

[185] *Supreme Court shows interest in Mount Holly suit*, BLOOMBERG NEWS (Oct. 29, 2012, 10:37 AM), http://www.nj.com/business/index.ssf/2012/10/supreme_court_shows_interest_i.html.