

No. 25-229

In the Supreme Court of the United States

EMIGRANT MORTGAGE COMPANY, INC. ET AL.,
Petitioners,

v.

JEAN ROBERT SAINT-JEAN, ET AL.,
Respondents.

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

**BRIEF OF THE BANK POLICY INSTITUTE,
INDEPENDENT COMMUNITY BANKERS OF
AMERICA, MORTGAGE BANKERS ASSOCIATION,
INDEPENDENT BANKERS ASSOCIATION OF
NEW YORK STATE, INC., AND NEW YORK
BANKERS ASSOCIATION AS *AMICI CURIAE* IN
SUPPORT OF PETITIONERS**

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INTEREST OF *AMICI CURIAE*¹

This brief in support of the petition for a writ of certiorari of Emigrant Mortgage Company, Inc. and Emigrant Bank (together, “Emigrant”) is submitted by the following:

- Bank Policy Institute (“BPI”) is a nonpartisan public policy, research, and advocacy group that represents universal banks, regional banks, and the major foreign banks doing business in the United States. BPI produces academic research and analysis on regulatory and monetary policy topics, analyzes and comments on proposed regulations, and represents the financial services industry with respect to cybersecurity, fraud, and other information security issues. BPI regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation’s banking industry.
- Independent Community Bankers of America (“ICBA”) is a national association with one mission: to create and promote an environment where community banks flourish. ICBA powers the potential of the nation’s community banks through effective advocacy, education, and innovation. ICBA’s membership consists of thousands of community banks located throughout the United States—more than half of the total depository institutions in the country. ICBA’s members

¹ *Amici* notified counsel for all parties of their intention to file this brief more than 10 days prior to filing. S. Ct. R. 37.2. This brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amici* or their counsel have made a monetary contribution to its preparation or submission. S. Ct. R. 37.6.

collectively operate nearly 50,000 locations nationwide, employ nearly 700,000 Americans, hold \$5.8 trillion in assets, hold \$4.8 trillion in deposits, and make \$3.8 trillion in loans to consumers, small businesses, and the agricultural community.

- Mortgage Bankers Association (“MBA”) is the national association representing the real-estate finance industry, an industry that employs more than 275,000 people in virtually every community in the country. Headquartered in Washington, DC, the association works to ensure the continued strength of the nation’s residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real-estate finance employees through a wide range of educational programs and a variety of publications. Its membership of more than 2,000 companies includes all elements of real-estate finance: independent mortgage banks, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life-insurance companies, credit unions, and others in the mortgage-lending field.
- Independent Bankers Association of New York State, Inc. (“IBANYS”) was founded in 1974. IBANYS supports community bankers through representation in legislative and regulatory affairs. In addition, IBANYS sponsors educational programs for its members and provides information about community banking to the public. IBANYS exclusively represents the interest of over 90 independent community banks located throughout New York State. With locally-based

ownership and a commitment to their communities, our member banks are closer to the economic pulse of New York State’s cities, towns, and villages. IBANYS supports and advocates for all community banks in New York State.

- New York Bankers Association (“NYBA”) is a not-for-profit association of more than 100 community, regional, and money center commercial banks and savings associations located throughout New York State. NYBA’s mission is to improve and promote a unified banking industry through educational programs, public relations, advocacy, and other services. NYBA’s members have aggregate deposits of more than \$2 trillion, annually lend more than \$70 billion in home and small business loans, and employ nearly 200,000 people in New York State.

Amici and their members vigorously support the Fair Housing Act (“FHA” or “Act”), are strongly committed to providing lending, servicing, and other financial services to consumers in a nondiscriminatory manner, and have a significant interest in ensuring that the FHA is enforced in a lawful, fair, and reasonable way. The Second Circuit’s divided opinion dramatically expands the doctrine of equitable tolling for mortgage discrimination claims and displaces the FHA’s two-year statute of limitations set by Congress. This case therefore interests *amici* because the majority’s decision creates uncertainty regarding FHA liability in the mortgage industry and presents serious risks of new FHA litigation over historical and time-barred lending and servicing outcomes.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The scope of litigation under the FHA and its statute of limitations is a matter of substantial concern to the residential mortgage lending industry both for lenders and for borrowers, who are *amici's* members' current and prospective customers. The FHA's ability to achieve its anti-discrimination purposes, and the terms and availability of mortgage credit, depend, in part, on the range and scope of litigation under the Act.

The FHA's two-year statute of limitations reflects Congress's determination as to the appropriate balance for litigation. It provides plaintiffs with a meaningful remedy while keeping stale claims out of court, and creates certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities. The congressional judgment defining the FHA's limitations period is especially salient as to disparate-impact claims that this Court has recognized "must be limited so ... regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system" and to avoid "serious constitutional questions." *Texas Dep't. of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 533, 540 (2015).

The erroneous standard for equitable tolling applied by a divided Second Circuit effectively eliminates the FHA's statute of limitations. In the words of Judge Park's dissent, the majority "creates a new fairness-based tolling rule for discrimination claims" and "misapplies equitable tolling by excusing Plaintiffs of their burden to prove the threshold elements of diligence and extraordinary

circumstances” required under this Court’s traditional equitable tolling test. Pet. App. 70a. That “new fairness-based” rule for equitable tolling runs contrary to this Court’s precedent, creates a circuit split, and increases both the risk and cost of FHA litigation far beyond that which *amici’s* members face under this Court’s equitable tolling test.

Replacing the traditional diligence and extraordinary circumstances elements of equitable tolling with a fairness standard is particularly inappropriate and unnecessary in the mortgage context. As Judge Park’s dissent explained, the majority simply assumed that borrowers cannot know of lending discrimination within the FHA’s two-year limitations period and their diligence would have been “futile”—even though the record in this case proves the opposite because “[t]he Saint-Jeans, the original Plaintiffs, closed on their loan in 2008,” “contact[ed] an attorney in 2009,” and thus “*were aware* of potential claims in 2009” prior to the expiration of the two-year period to file FHA claims challenging their loan in 2010. Pet. App. 71a–72a (original emphasis). The robust body of FHA cases that borrowers timely file within two years of their loan originations and modifications further discredits the assumption that borrower diligence is futile.

The majority also circumvented the extraordinary circumstances element of this Court’s test by labeling the challenged conduct “egregious” and concluding that fairness justifies tolling claims for “egregious” conduct. See Pet. App. 28a. “Equitable tolling is a rare remedy to be applied in unusual circumstances,” but the Second Circuit’s analysis creates a limitless standard that could seemingly justify equitable tolling in all FHA cases. *Wallace v. Kato*, 549 U.S. 384, 396

(2007). After all, if even unintentional disparate impacts like those at issue in this case can be labeled “egregious,” all discriminatory lending claims could potentially qualify for equitable tolling under the majority’s reasoning. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 214 (2023) (“racial discrimination is invidious in all contexts” (alterations and quotation marks omitted)). That is not what Congress intended by establishing a two-year statute of limitations that does not vary based on the nature of the underlying conduct. The majority’s flawed “fairness-based approach to equitable tolling will reach far beyond this case” and even beyond the FHA, as it could be applied to other anti-discrimination and consumer protection statutes. Pet. App. 80a; *see also id.* at 62a.

The Second Circuit’s approach displaces congressional judgments and would allow the equitable tolling exception to swallow the statute of limitations rule. Lowering the bar for equitable tolling through a fairness-based standard comes at a steep cost to *amici*’s members and to all residential mortgage industry participants, including borrowers. The limitations period sets the boundary for lender and servicer liability, and eroding that boundary encourages new FHA lawsuits challenging decades-old mortgage loans. Uncertainty about new litigation and the temporal scope of liability may cause mortgage investors to pay less for originated loans in the secondary mortgage market or demand that lenders repurchase loans subject to belated FHA claims years after they are sold. The costs of increased uncertainty will impact consumers. Borrowers will suffer when mortgage credit becomes less affordable as increased

loan origination and litigation defense costs cause higher interest rates or origination charges.

This Court should grant certiorari to resolve the circuit split arising from the Second Circuit’s adoption of an equitable tolling standard that departs from this Court’s precedent and displaces the FHA’s two-year statute of limitations set by Congress.²

ARGUMENT

I. THIS COURT SHOULD CLARIFY THAT THE TRADITIONAL “DILIGENCE” AND “EXTRAORDINARY CIRCUMSTANCES” ELEMENTS OF EQUITABLE TOLLING APPLY TO FHA CLAIMS

Congress established a two-year statute of limitations for FHA claims, which requires private parties to file suit “not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice.” 42 U.S.C. § 3613(a)(1)(A). A “[d]iscriminatory housing practice” is defined as “an act that is unlawful” and violates the FHA. 42 U.S.C. § 3602(f). Under *Inclusive Communities*, that definition includes disparate-impact claims like those at issue in this case. 576 U.S. at 533–38.

The origination of a mortgage loan is an act that occurs and terminates at the loan’s closing, and the two-year statute of limitations for a borrower to file “an FHA claim for issuing a discriminatory loan begins to run from the date that the loan closes.” *City of*

² *Amici* express no opinion as to whether this Court should grant certiorari on the second or third questions presented, though, *amici* agree with petitioners that any disparate-impact liability under the FHA should be properly limited.

Miami v. Bank of Am. Corp., 800 F.3d 1262, 1283 (11th Cir. 2015) (involving disparate-impact claims and intentional-discrimination claims), *rev'd on other grounds*, 581 U.S. 189 (2017); *see also Est. of Davis v. Wells Fargo Bank*, 633 F.3d 529, 532 (7th Cir. 2011) (the “predatory loan was made in 1999, but [plaintiff] did not file this lawsuit until 2007” and the “formation of the mortgage contract in September 1999 fell outside the statute of limitations”); *Silvas v. G.E. Money Bank*, 449 F. App’x 641, 644 (9th Cir. 2011) (plaintiff “obtained the loan at issue in 2006 and did not join the class action suit until 2009, after the statute of limitations had expired” and thus “failed to show a likelihood of success on the merits of her FHA claim because the two-year statute of limitations had run”); U.S. Dep’t of Hous. & Urban Dev., Handbook 8024.01, Title VIII Complaint Intake, Investigation, and Conciliation, Chapter 3 at 3-3 (Sept. 1995) (“The date upon which the statute of limitations begins to run is controlled by the date of the discriminatory act or acts, not by the complainant’s experience of the consequences of the discrimination”).

The FHA’s statute of limitations is “intended to keep stale claims out of the courts.” *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982). It serves the same policies that limitations provisions “characteristically embody”: repose, elimination of stale claims, and certainty about a plaintiff’s opportunity for recovery and a defendant’s potential liabilities. *Lozano v. Montoya Alvarez*, 572 U.S. 1, 14 (2014). While “affording plaintiffs what the legislature deems a reasonable time to present their claims,” statutes of limitations “protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss

of evidence.” *United States v. Kubrick*, 444 U.S. 111, 117 (1979). These concerns are heightened in discrimination cases that involve circumstantial evidence because whether discrimination occurred “can be a subtle determination, and the passage of time may seriously diminish the ability of the parties and the factfinder to reconstruct what actually happened.” *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 632 (2007), *overruled by statute on other grounds*, Lilly Ledbetter Fair Pay Act of 2009, 123 Stat. 5.

A statute of limitations “is the balance struck by Congress” between “the right to be free of stale claims” and “the right to prosecute them.” *Kubrick*, 444 U.S. at 117 (quotation marks omitted). The balance Congress struck for FHA claims provides plaintiffs two years to file suit, and after that the defendant’s right to certainty prevails. The FHA’s legislative history confirms that Congress carefully made this determination. The Act’s statute of limitations originally “require[d] that a civil suit be brought within 180 days after the alleged occurrence of a discriminatory housing practice.” *Havens*, 455 U.S. at 380. In 1988, Congress amended the FHA to, among other things, enlarge the statute of limitations. The House Report that accompanied the Fair Housing Amendments Act of 1988 observed that “[t]he bill strengthens the private enforcement section by expanding the statute of limitations.” H.R. Rep. No. 100-711, at 17 (1988). When Congress expanded the statute of limitations, it did not set an indefinite or indeterminate limitations period. Instead, Congress determined that extending the FHA’s statute of limitations to two years would “provide a meaningful remedy for violations.” 134 Cong. Rec. 19895 (1988).

Because a statute of limitations reflects congressional judgment, courts are “not free to construe it so as to defeat its obvious purpose, which is to encourage the prompt presentation of claims.” *Kubrick*, 444 U.S. at 117. Nonetheless, this Court has recognized that when Congress adopts a statute of limitations, it ordinarily intends certain traditional exceptions to apply. *See Holland v. Fla.*, 560 U.S. 631, 645 (2010). Importantly, this Court does not apply such exceptions “as a matter of some independent authority to reconsider the fairness of legislative judgments balancing the needs for relief and repose,” but instead on the understanding that Congress “so intended.” *Lozano*, 572 U.S. at 18.

Equitable tolling is one exception that, in limited circumstances, can “preserve ... claims not timely presented” within the applicable statute of limitations. *Menominee Indian Tribe of Wisconsin v. United States*, 577 U.S. 250, 251 (2016). The doctrine “effectively extends an otherwise discrete limitations period set by Congress.” *Arellano v. McDonough*, 598 U.S. 1, 6 (2023) (quotation marks omitted).

“Equitable tolling is a rare remedy to be applied in unusual circumstances, not a cure-all.” *Wallace*, 549 U.S. at 396. When a plaintiff attempts to save time-barred claims through equitable tolling, this Court has applied a two-part test: “a litigant is entitled to equitable tolling of a statute of limitations only if the litigant establishes two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.” *Menominee*, 577 U.S. at 255 (quotation marks omitted); *see also Lozano*, 572 U.S. at 10.

This Court’s two-part test for equitable tolling preserves time-barred claims in rare exceptional cases while preventing an overbroad application of the doctrine that would defeat the core purposes of statutes of limitations. As the *en banc* Eleventh Circuit (Pryor, J.) explained in rejecting a “special test” for equitable tolling under an anti-discrimination statute, applying this Court’s “general test” for equitable tolling accords with the maxim that “strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.” *Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 971 (11th Cir. 2016) (quoting *Baldwin Cty. Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984)).

The Second Circuit’s approach to equitable tolling of mortgage discrimination claims ignores the elements of this Court’s traditional test and upends the FHA’s deliberate congressional balance between a plaintiff’s opportunity for recovery and a defendant’s certainty about potential liability. In the words of Judge Park’s dissent, by “excusing Plaintiffs of their burden to prove the threshold elements of diligence and extraordinary circumstances,” the majority’s decision “breaks with other circuits” that have applied this Court’s two-part test for equitable tolling to anti-discrimination claims. Pet. App. 62a, 70a; *see also* Pet. 16–18. This case provides an ideal vehicle to resolve the circuit split and clarify that this Court’s equitable tolling standard applies to FHA claims.

II. THE ERRONEOUS “FAIRNESS-BASED” EQUITABLE TOLLING RULE IS PARTICULARLY INAPPROPRIATE AND UNNECESSARY IN THE MORTGAGE CONTEXT

In this case, respondents did not file their FHA claims until 2011 and 2014, even though they closed on their mortgage loans three to ten years earlier between 2004 and 2008. Pet. App. 64a-65a, 72a. The two-year statute of limitations to challenge the loans had long expired by the time respondents filed suit. The Second Circuit preserved the untimely claims by, as Judge Park’s dissent put it, creating an erroneous and unprecedented “fairness-based” standard for equitable tolling. *Id.* at 70a. That standard is inappropriate and unnecessary for enforcement of private FHA claims in the residential mortgage context, and the majority’s justifications for concluding otherwise fall flat.

First, as noted in Judge Park’s dissent, the majority based its new standard on an assumption that diligence would have been “futile.” *Id.* at 71a. Despite a record that extends through two jury trials, the Second Circuit did not find that any of the respondents diligently pursued their rights either during the two-year limitations period or after it expired. Instead, the Second Circuit eliminated the diligence requirement, determining that “Plaintiffs did not learn of their cause of action, and could not reasonably be expected to do so with the exercise of due diligence, within the limitations period” because “reasonable borrowers in Plaintiffs’ position could not have known that they were victims of discrimination at signing, closing, default, or even foreclosure.” *Id.* at 27a, 35a.

That reasoning hinges on a fallacy because the FHA’s statute of limitations does not require borrowers to know immediately at the time of signing or closing or default that a loan origination or servicing act was discriminatory. Potential FHA plaintiffs, including potential borrower plaintiffs, have two years to evaluate the facts and determine whether to pursue alleged violations in court. *See* 42 U.S.C. § 3613(a)(1)(A).

An equitable tolling standard that assumes borrowers who exercise diligence still cannot know of their FHA claims within the limitations period effectively eliminates the two-year boundary that Congress deemed sufficient to provide “a meaningful remedy for violations.” 134 Cong. Rec. 19895, *supra*. The consequences are compounded in disparate-impact cases like this one. An equitable tolling standard that ignores a disparate-impact plaintiff’s diligence based on an assumption of futility works against this Court’s directive that “prompt resolution of these cases is important.” *Inclusive Communities*, 576 U.S. at 543.³

In practice, the Second Circuit’s assumption is flatly contradicted by a robust body of timely FHA claims in the residential mortgage context. Mortgage borrowers regularly file FHA lawsuits within two years of their loan originations and modifications. *See, e.g., Gorham-DiMaggio v. Countrywide Home Loans, Inc.*, 421 F. App’x 97, 99–100 (2d Cir. 2011) (plaintiff

³ While *amici* take no position on petitioners’ second and third questions presented concerning the scope of disparate-impact liability, to the extent the Second Circuit and other courts do not obey the guardrails this Court set out in *Inclusive Communities*, the flawed FHA statute of limitations holding here becomes even more destabilizing.

defaulted on a mortgage loan in spring 2007 and filed FHA claims in January 2008 challenging alleged discriminatory practices in servicing her loan); *Stefanowicz v. SunTrust Mortg.*, 765 F. App'x 766, 767–72 (3d Cir. 2019) (plaintiff filed FHA claims in March 2016 challenging, among other things, loan modification decisions in 2014 and 2015; affirming dismissal of timely loan modification claims for failure to state a claim); *Rodriguez v. Nat'l City Bank*, 726 F.3d 372, 374–75 (3d Cir. 2013) (plaintiffs obtained mortgage loans in 2006 or 2007 and filed FHA claims in May 2008 challenging loan origination pricing terms); *Ray v. U.S. Bank Nat'l Ass'n*, 627 F. App'x 452, 453, 457 (6th Cir. 2015) (plaintiffs filed FHA claims in February 2014 challenging denial of home loan modification in April 2012); *Est. of Davis*, 633 F.3d at 532, 539–41 (plaintiff filed FHA claims in May 2007 challenging, among other things, loan modification and servicing acts in September 2005 and March 2007); *Molina v. Aurora Loan Servs., LLC*, 635 F. App'x 618, 620–21, 625–26 (11th Cir. 2015) (plaintiff began mortgage loan modification process in 2012 and filed FHA claims in March 2014 challenging loan modification denial); *Steed v. EverHome Mortg. Co.*, 477 F. App'x 722, 724 (11th Cir. 2012) (plaintiff's mortgage foreclosure sale occurred on February 5, 2008 and plaintiff filed FHA claims on February 25, 2008). This routine FHA litigation shows that borrowers who diligently pursue their rights can and do develop knowledge of their mortgage discrimination claims within two years.

Second, the Second Circuit claimed that the “egregious nature of [the] discriminatory lending practice [] makes this case extraordinary” and thus justifies equitable tolling. Pet. App. 28a. That is a non

sequitur under this Court’s traditional equitable tolling test. As Judge Park said in dissent, “the nature of the claim has no bearing on whether an extraordinary circumstance stood in Plaintiffs’ way and prevented timely filing”—and thus no bearing on whether an equitable tolling exception might be warranted under this Court’s precedent. Pet. App. 72a n.3 (alterations and quotation marks omitted). Nor can the Second Circuit’s decision be squared with the statute Congress enacted, which does not vary the limitations period by the degree or type of conduct allegedly violating the FHA.⁴

The majority’s approach of equitably tolling claims that challenge purportedly “egregious” conduct would create a boundless standard that eviscerates the FHA’s statute of limitations. “Equitable tolling is a rare remedy to be applied in unusual circumstances.” *Wallace*, 549 U.S. at 396. But under the majority’s flawed logic, all claims for discriminatory lending could apparently be considered sufficiently “egregious” to justify equitable tolling—as this Court has held, “racial discrimination is invidious in all contexts.” *Students for Fair Admissions*, 600 U.S. at 214 (alterations and quotation marks omitted). After all, if the claims at issue here can be labeled “egregious,” it is hard to discern what FHA claims would *not* be founded on “egregious” conduct and automatically eligible for equitable tolling. The essence of disparate impact is that the plaintiff need not show that the defendant had any intent to discriminate. *See Inclusive Communities*, 576 U.S. at 524 (“In contrast

⁴ Moreover, alleged victims of “egregious” conduct may be the least likely to require equitable tolling exceptions because the very nature of such conduct may render it “unmistakable ... racial bias.” *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 226 (2017).

to a disparate-treatment case,” disparate-impact liability does not require the plaintiff to “establish that the defendant had a discriminatory intent or motive”). Unintentional disparate-impact discrimination is antithetical to the unfounded label the majority applied to justify equitable tolling and directly contrary to this Court’s precedent.

Finally, the Second Circuit argued that fairness requires equitable tolling of respondents’ claims because they supposedly could not have known they were “part of a larger pattern of discrimination.” Pet. App. 31a. Congress did not create a separate statute of limitations that provides private plaintiffs more time to sue when they assert a “pattern or practice” of discrimination. Instead, Congress addressed this by creating additional statutory protections empowering the Attorney General to file FHA “pattern or practice cases” and authorizing courts in such cases to award “monetary damages to persons aggrieved.” 42 U.S.C. § 3614(a), (d)(1)(B). Backed by the full force of the United States Department of Justice, the Attorney General has the resources and ability to identify and vindicate FHA pattern or practice cases and to recover monetary relief for injured private parties. As such, maintaining equitable tolling’s traditional limits works no unfairness in FHA cases.

III. THE LIMITLESS EQUITABLE TOLLING STANDARD APPLIED BELOW INVITES LITIGATION OVER DECADES-OLD MORTGAGE PRACTICES

In a prior mortgage lending FHA case before this Court, the Government argued that the two-year statute of limitations imposes a “limit” that protects defendants against “infinite liability.” Brief for United

States as *Amicus Curiae*, *Bank of Am. Corp. v. City of Miami* (Oct. 7, 2016) (Nos. 15-1111, 15-1112), <https://perma.cc/X5Y8-DBHJ>. The majority's interpretation of equitable tolling renders that limit illusory by dramatically expanding the ability of borrowers to pursue relief for untimely FHA claims, no matter how long ago their loans closed.

Lowering the bar for equitable tolling comes at a steep cost to residential mortgage industry participants, including prospective borrowers. The statute of limitations defines the period within which mortgage lenders and servicers are subject to FHA liability. Eroding those boundaries to broadly permit claims based on conduct occurring outside the two-year window creates uncertainty that will trigger cascading consequences in the primary and secondary mortgage markets, which together comprise the two major components of the housing finance system.

In the primary mortgage market, lenders originate mortgage loans directly to borrowers. *See, e.g.*, Off. of the Comptroller of the Currency, Comptroller's Handbook, Mortgage Banking, 2–3 (2014). In the secondary mortgage market, lenders sell the originated mortgage loans to investors, like government-sponsored enterprises Fannie Mae and Freddie Mac (together, the “Enterprises”). *See id.* Then, “[l]enders use the cash raised by selling mortgages to the Enterprises to engage in further lending” directly to borrowers. Fed. Hous. Fin. Agency, *About Fannie Mae & Freddie Mac*, <https://perma.cc/CZ55-ENDX>. By purchasing loans in the secondary mortgage market, the Enterprises “provide liquidity (ready access to funds on reasonable terms) to the thousands of banks, savings and loans, and mortgage companies that make loans” and

“expand[] the pool of funds” for lenders to originate new mortgage loans to borrowers. *Id.*

However, secondary market investors commonly require lenders “to indemnify or repurchase loans that were inappropriately underwritten or serviced.” OCC, *supra*, at 13. Fannie Mae requires lenders to repurchase mortgage loans that violate representations and warranties made in connection with the loan sale, and lenders are liable for repurchase demands pertaining to noncompliance with laws and responsible lending practices for the life of the loan. *See* Fannie Mae, Selling Guide, *Section A2-3.2-01, Loan Repurchases and Make Whole Payments Requested by Fannie Mae* (Aug. 29, 2017), <https://perma.cc/FMZ8-JE7U>; Fannie Mae, Selling Guide, *Section A2-2-07, Life-of-Loan Representations and Warranties* (Aug. 2, 2023), <https://perma.cc/AQ3B-KF95>. The prices at which lenders sell and investors purchase mortgage loans in the secondary market reflect the scope of potential liability.

Ambiguity regarding the period in which borrowers may file FHA claims and lenders may be held liable for FHA violations impacts market calculations of potential liability by inviting a flood of litigation challenging mortgage origination and servicing acts that occurred years or even decades ago. Such a concern is far from speculative or hypothetical, as this case confirms. This suit was initiated by two respondents who (1) received their loan in January 2008 through a loan program that was discontinued later that year, and (2) were “aware of the possibility that the loans were discriminatory” in “May 2009” and “met with a lawyer about their potential claims in July 2009” *within the two year limitations period*, but (3)

“did not file this suit until April 2011—more than three years after closing on their loan” in January 2008 and 21 months after meeting with counsel in July 2009. Pet. App. 10a, 13a, 64a. Two other respondents received their loan through the same loan program in 2006 and filed their FHA claims in May 2012. *See id.* at 14a, 64a-65a. The remaining four respondents also received their loans through the same loan program between 2004 and 2008, were “approached” by counsel in 2013 about potential claims, but did not file suit until October 2014. *Id.* at 14a–15a, 63a–65a, 72a. Under the Second Circuit’s limitless approach, nothing prevents other borrowers who received loans under the long-extinguished loan program in 2008 or earlier from approaching, or being approached by, counsel and then filing FHA claims now or in the future. *See id.* at 65a (respondents “Howell, Commodore, and the Smalls joined only after the Saint-Jeans’ lawyer approached them in 2013”).

To counteract increased exposure to liability, investors may reduce the prices they are willing to pay lenders for originated loans and demand that lenders repurchase loans that they originated and sold as many as 30 years ago (a common mortgage loan repayment term), all of which would impact market liquidity. Ultimately, the costs of increased uncertainty would flow downstream and borrowers would suffer. When “the secondary mortgage market [is] more liquid,” it “helps lower the interest rates paid by homeowners and other mortgage borrowers.” FHFA, *About Fannie Mae & Freddie Mac*, *supra*. If investors pay lenders less for originated loans or loan repurchase demands increase, lenders’ increased costs would cause higher interest rates or other origination charges for borrowers. A “direct consequence of higher

interest rates is the higher monthly payments borne by borrowers” and less affordable mortgage credit. CFPB, *2023 Mortgage Market Activity and Trends* 56 (Dec. 2024), <https://perma.cc/48LH-AXNG>. “Rising interest rates also affect whether consumers qualify for mortgage loans,” and some borrowers will be priced out of homes entirely. *Id.* at 58.

There are other costs to consider. Legal defense expenditures in discrimination cases are significant in the ordinary course, but substantial additional attorney time would be required to defend decades-old lending practices and defense costs would spike in tandem. For example, due to normal employee turnover, corporate representative witnesses would be unlikely to have first-hand knowledge of historical business practices and would require education on all aspects of discontinued loan programs to present competent testimony. Lenders would also be required to divert employees from current business and retain specialized third-party electronic discovery vendors to search for, collect, validate, interpret, and produce historical electronically-stored loan data and emails from cold storage vaults and other offline or archived data storage systems.

The costs would be even higher in disparate-impact cases, as this Court has previously recognized in cautioning that disparate-impact litigation may “cause[] private developers to no longer construct or renovate housing units for low-income individuals,” may prevent entities “from achieving legitimate objectives,” and otherwise “might displace valid governmental and private priorities.” *Inclusive Communities*, 576 U.S. at 544. Disparate-impact liability therefore must be paired with safeguards and limits—among them, recognition that “prompt

resolution of these cases is important.” *Id.* at 543. Weakening the FHA’s statute of limitations would have the opposite effect of encouraging plaintiffs or their counsel to mine years-old mortgage data for statistical variations in lending outcomes that might suggest a prior disparate impact. Meanwhile, evidence of the “valid interest served” by a discontinued policy could easily be lost to time as, for example, business practices transition and employees depart. *Id.* at 541. All of this undermines the key policy purposes advanced by statutes of limitations of protecting “defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence.” *Kubrick*, 444 U.S. at 117.

As the circumstances of this case show, these material costs come with only minimal benefits. This Court emphasized that “[r]emedial orders in disparate-impact cases should concentrate on the elimination of the offending practice.” *Inclusive Communities*, 576 U.S. at 544. The majority’s equitable tolling standard cannot be reconciled with that directive, as this case proves: Respondents’ disparate-impact claims relate to a mortgage loan program that was discontinued in 2008 and has not been in effect for the past 17 years. Pet. App. 10a. With no “offending practice” to eliminate, no remedial order could achieve its purpose and have any positive impact on borrowers moving forward.

CONCLUSION

This Court should grant certiorari on the first question presented in the petition.

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