

No. 11-1507

**In The
Supreme Court of the United States**

TOWNSHIP OF MOUNT HOLLY, TOWNSHIP COUNCIL OF
TOWNSHIP OF MOUNT HOLLY, KATHLEEN HOFFMAN, AS
TOWNSHIP MANAGER OF THE TOWNSHIP OF MOUNT
HOLLY, JULES THIESSEN, AS MAYOR OF THE TOWNSHIP
OF MOUNT HOLLY,

Petitioners,

v.

MT. HOLLY GARDENS CITIZENS
IN ACTION, INC., *et al.*,

Respondents.

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

**BRIEF OF THE CONSUMER DATA INDUSTRY
ASSOCIATION; CONTEMPORARY INFORMATION
CORPORATION; NATIONAL CONSUMER
REPORTING ASSOCIATION; NATIONAL
ASSOCIATION OF PROFESSIONAL
BACKGROUND SCREENERS AS *AMICI CURIAE* IN
SUPPORT OF PETITIONERS**

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IDENTITY OF THE *AMICI*¹

The *amici* are companies or associations of companies that provide residential screening services to owners and managers of housing properties, including individual landlords, large multifamily apartment complexes, religious organizations providing housing services, assisted living and other vulnerable population housing providers, and public housing authorities. The *amici* are:

- **The Consumer Data Industry Association** (CDIA), an international trade association that represents some 200 consumer data companies, who use lawfully obtained information such as unlawful detainer records, criminal record information, and credit reports to screen tenants for landlords.
- **Contemporary Information Corporation** (CIC), a privately held business that provides tenant and background screening services as well as other public record information to both private landlords (for profit and not for profit alike) and public housing authorities.

¹ All parties consent to the filing of this brief, and consent to its filing has been lodged with the Clerk. No counsel for a party wrote this brief in whole or in part and neither a party nor counsel for a party has made a monetary contribution intended to fund its submission.

- **The National Consumer Reporting Association** (NCRA), a national trade organization of consumer reporting agencies and associated professionals that provide products and services to credit grantors, employers, landlords and all types of general businesses. NCRA's membership includes 70 percent of the mortgage credit reporting agencies in the United States that can produce a credit report meeting Fannie Mae, Freddie Mac and HUD requirements for mortgage lending.
- **The National Association of Professional Background Screeners** (NAPBS), an association of over 700 employment and tenant background screening firms that search publicly available state criminal background and other information to enable employers and landlords to provide their customers with safe places to live and work.

SUMMARY OF ARGUMENT

Amici are entities or associations of entities that perform residential screening. The services they provide enable landlords and property managers to ensure safe, healthy, and economically sustainable living spaces for individuals and families. They agree with petitioners that the text of the Fair Housing Act (FHA) does not permit disparate impact claims to lie. Unlike similar statutes in the voting rights and employment areas, the Fair Housing Act does not contain “effects” language permitting a cause of action to lie in the absence of purposeful discrimination. Here, Congress used the phrase “because of,” a phrase which has a readily definable and understood meaning requiring a direct relationship between intent and result. To the extent legislative history is relevant in this circumstance, it is only to demonstrate the absence of congressional debate and scrutiny that typically accompanies the insertion of an effects standard into the civil rights laws.

The canons of statutory construction, such as the plain language rule, exist to prevent the courts from usurping the role of the legislature. When the courts do usurp that role, a standards-free miasma of conflicting authority results. That is exactly what has happened under the FHA, where the Circuit Courts of Appeal have adopted a variety of analytically incompatible tests for determining whether disparate impact exists and how to apply it. Thus, in this instance, the haphazard manner in which the courts of appeal have applied disparate impact serves only to demonstrate the impropriety of its existence.

Amici write because of the negative practical impact that this Court's ratification of FHA disparate impact liability will have on responsible tenant screening. *Amici* provide landlords and property managers with race-neutral predictive information about whether a particular housing applicant is likely to meet his economic obligations, or whether that applicant poses a risk of harm to others. The combination of a recently promulgated rule by the Department of Housing and Urban Development (HUD) and a decision by this Court in favor of respondents creates a Hobson's choice for *amici's* customers, forcing them to choose between limiting their use of crucial credit and criminal record information that *amici* provide, or facing the prospect of extensive administrative and civil litigation under the FHA for their neutral, non-discriminatory tenant screening policies. Implementation of that standard will have profoundly negative policy consequences—consequences that this Court should not infer Congress intended to inflict in the absence of express statutory language.

ARGUMENT

I. THE TEXT OF THE FAIR HOUSING ACT DOES NOT PERMIT DISPARATE IMPACT CLAIMS

The text of the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, prohibits anyone from refusing “to sell or rent after the making of a bona fide offer . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.” 42 U.S.C. § 3604(a). The issue in this case is whether that language gives plaintiffs the right to bring lawsuits not based on intentional discrimination, but on so-called “disparate impact” theory. Such suits generally enable plaintiffs to prevail on a claim of discrimination under the FHA when a neutral policy, adopted without prohibited intent, has a disproportionately adverse effect on members of a protected class. *See, e.g., Fair Hous. in Huntington Comm. Inc. v. Town of Huntington*, 316 F.3d 357, 366 (2d Cir. 2003) (stating that a plaintiff must only demonstrate that an outwardly neutral practice actually or predictably has a disproportionate effect on a protected class); *Gallagher v. Magner*, 619 F.3d 823, 833 (8th Cir. 2010) (indicating that a showing of intent is not necessary to establish a disparate impact claim), *cert. granted*, 132 S. Ct. 548 (2011), *cert. dismissed*, 132 S. Ct. 1306 (2012).

Amici are in the business of screening potential tenants to enable landlords to provide safe and economically viable living spaces. Like petitioners, *amici* do not dispute that the FHA embodies

Congressional intent to ban disparate treatment of individuals because they belong to a particular race, religion, color, or other protected class, and endorse both the ends that the direct prohibition advances and the means Congress chose to advance it. The means Congress chose, however, does not include disparate impact suits.

A. The Plain Language of the Statute Does Not Permit Disparate Impact Suits.

Like any statute, the interpretation of the FHA begins with its plain language. “Statutory construction must begin with the language employed by Congress and the assumption that ordinary meaning of the language accurately expresses the legislative purpose.” *Gross v. FBL Fin. Servs. Inc.*, 557 U.S. 167, 175 (2009) (quoting *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004)). *Amici* agree with the thorough construction of the statute that Petitioners provide in their brief. (See Pet. Br. 17-26.) The phrase “because of” has a readily discernible, historically consistent and well-understood meaning: “on account of,” or as the direct, “but for” cause of a given condition. *Gross*, 557 U.S. at 176; see also Bryan A. Garner, *Garner’s Modern American Usage* 91 (3d ed. 2009) (describing “because” in a similar way). Congress’s use of the words “refuse” or “otherwise deny,” require the link between intent and discrimination to be a direct one.

Disparate impact suits, by their nature, involve practices that are both adopted with legitimate intent, and whose discrimination is unintentional and therefore *indirect*. They require a court to unravel “the myriad of innocent causes that may lead to statistical imbalances.” *Smith v. City of Jackson*, 544 U.S. 228, 241 (2005) (internal citations omitted) (interpreting effects-based disparate impact language in the Age Discrimination in Employment Act). When Congress intends to create effects-based liability, it has done so with particular language found, for example, in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(2), or in section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973(a). In each of these instances, Congress chose tell-tale phrases such as “adversely affect” or “in a manner which results in” to indicate that it wished to create liability based on disparate impact. The FHA does not contain that language.

B. The Congressional Debate that Historically Accompanies Enactment of Effects-Based Liability is Missing in This Instance.

There is no need to refer to the legislative history to determine the meaning of statutory language that does not exist. To the extent that the FHA’s history is relevant, it serves to demonstrate that the inclusion of disparate impact liability is also missing from the FHA’s Congressional consideration. In both the Title VII and Voting Rights Act context, the existence and scope of effects-based liability repeatedly engendered vigorous Congressional debate

over the fundamental policies behind the civil rights laws, and the best ways to achieve those policies. *See, e.g., Local 28 of the Sheet Metal Workers' Int'l Assoc. v. EEOC*, 478 U.S. 421, 452-53 (1986) (recounting the House and Senate statements designed to reassure Title VII opponents that racial quotas would not be required to avoid liability); Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 Wash. & Lee L. Rev. 1347, 1389-96 (1983) (describing controversy of section 2's legislative history from its critics' perspective); Eang L. Ngov, *When "The Evil Day" Comes, Will Title VII's Disparate Impact Provision be Narrowly Tailored to Survive an Equal Protection Clause Challenge?*, 60 Am. U. L. Rev. 535, 548 (2011) (legislators vehemently questioned, both during the initial passage of the Civil Rights Act of 1964 and during the two-year battle over the 1991 amendments, whether a racially imbalanced workforce would create the need for a racial quota); Compare Peter M. Leibol *et al.*, *Civil Rights Act of 1991: Race to the Finish—Civil Rights, Quotas, and Disparate Impact in 1991*, 45 Rutgers L. Rev. 1043, 1085-86 (1993) (criticizing administration's interpretation of legislative compromise of Civil Rights Act of 1991 from perspective of bill authors), with Roger Clegg, *The Civil Rights Act of 1991: A Symposium: Introduction*, 54 La. L. Rev. 1459, 1461, 1466-67 (1994) (disparaging the premise of disparate impact as "poisonous policy" and "ridiculous jurisprudence").

The intense debate that occurred in these contexts is missing from consideration of the FHA. No Committee reports for the FHA exist, as it was

introduced as an amendment. *See* 114 Cong. Rec. 2,270 (1968) (Sen. Mondale’s introduction of Amendment number 524). Statements by the sponsors indicated that intent was the key element of an FHA claim. Senator Mondale urged his colleagues to adopt the bill because it permitted a homeowner to sell or rent property in any way he wished, “except refuse to sell it to a person solely on the basis of his color.” *Id.* at 5,643; *see also id.* at 2,283 (remarks of Sen. Brooke) (“A person can sell his property to anyone he chooses, as long as it is by personal choice and not because of motivations of discrimination.”). As introduced, the FHA applied to all homeowners. *Id.* at 2,270. The FHA was amended on the floor not to allow disparate impact, but to narrow the reach of the statute by permitting homeowners to engage in purely private discrimination as long as they owned less than three homes, did not use real estate agents and did not advertise their illegitimate racial preferences. *See* 42 U.S.C. § 3603(b) (existing statutory language, codifying the so-called “Dirksen amendment”); 114 Cong. Rec. at 5,710 (providing the text of Sen. Dirksen’s amendment in the nature of a substitute). The Senate rejected a broader amendment that would have allowed homeowners to discriminate against buyers using real estate agents, and the opponent of that amendment viewed the language that appears in existing law as a “reasonable compromise.” *See* 114 Cong. Rec. at 5,214 (Baker amendment No. 555); *id.* at 5,216 (Sen. Percy, an opponent of the broader Baker amendment, viewing existing language as both a “reasonable approach” and a “reasonable compromise”); *see also*,

id. at 5,217 (Sen. Baker discussing the differences between the Dirksen and Baker amendments).

It is not difficult to imagine the kinds of Congressional debate that would have ensued if the words “quota,” “proportional representation” or similar language became entwined with a landlord’s economic decision to lease a property, or a local zoning commission’s land use decision, especially if that decision formed the basis for criminal liability. *See* 42 U.S.C. § 3631, 42 U.S.C. § 3617. This national conversation did not occur because Congress did not include the language that would have triggered it: the FHA’s legislative history is the dog that did not bark.

C. The Disarray in the Court of Appeals is Evidence of Improper Construction of the FHA.

The lack of the requisite Congressional authorization has engendered analytically inconsistent and irreconcilable approaches in the Courts of Appeal. In their opposition to the petition for certiorari, respondents argue that the fact that every court of appeals has found disparate impact liability to lie means that such liability exists under the statute. (*See* BIO at 27-28.) This Court, however, has never addressed the question. *See Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15, 18 (1988) (per curiam) (because the appellants did not challenge the applicability of a disparate impact test, the Court “d[id] not reach the question whether that test is the appropriate one”).

Both respondents and the Department of Housing and Human Development dismiss the variations among the courts of appeal as insignificant. *See, e.g.*, Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,460 (Feb. 12 2013) [hereinafter Final Rule] (describing "small degree of variation"); (BIO at 28.) Respondent's characterization of these approaches as reflecting "some confusion" (BIO at 27) or as "slightly different" (U.S. Opp. at 17) ignores the reality that the qualitative difference between disparate impact and disparate treatment claims revolves around the nature of the burden placed on the plaintiffs, and the manner in which it shifts. In order to establish a prima facie case of disparate treatment, the plaintiffs must only establish that they belong to a protected class and that they were treated differently from members of a non-protected class. *See Graoch Assocs. # 33, L.P. v. Louisville/Jefferson County Metro Human Rels. Comm'n*, 508 F.3d 366, 371-372 (6th Cir. 2007); *cf. McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973) (defendant avoids title VII liability only if the criteria is applied to all applicants alike).² The burden then shifts to the defendant to offer a racially neutral reason for that treatment. Once that showing occurs, the burden

² Indeed, it is certainly common for plaintiffs to allege both. *E.g.*, *Arthur*, 782 F.2d at 568); *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1499 (10th Cir. 1995); *United States v. City of Black Jack*, 508 F.2d 1179, 1182 (8th Cir. 1974). *See also Watson v. Fort. Worth Bank & Trust*, 487 U.S. 977, 983 (1988).

shifts back to the plaintiff to demonstrate that the offered reason is nothing more than a pretext, for example, by indicating that other applicants received different treatment. *See Gamble v. City of Escondido*, 104 F.3d 300, 304-05 (9th Cir. 1997) (citing *McDonnell Douglas*, 411 U.S. 792 (1973)). Proving a disparate impact case, as this Court is well aware, is a far more complex task, but one also subject to an established general structure. *E.g.*, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

Respondents' position ignores the profound analytical conflicts in these decisions, which exemplify the cacophony one would expect when the courts create a cause of action not contemplated by the statutory text. The Courts of Appeal differ not only on whether burden-shifting even exists, but also on the nature of those burdens, which entities they apply to, and how they ought to shift. For example, the Fourth Circuit requires plaintiffs suing public entities to show some evidence suggesting discriminatory intent before the burden shifts to the defendant. *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982). Those suing private defendants need not make that showing, and the defense burden for private entities is "different and more difficult." *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 988 & n.5 (4th Cir. 1984). Upon that showing, the burden shifts back to the defendant to justify its actions. *See id.* at 988. This distinction between public and private defendants appears absolutely nowhere in the statute.

The Seventh Circuit, in contrast, has created a multi-factor test that requires some showing of intent

against every defendant, but the burden of production always resides with the plaintiff. *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977). The Sixth Circuit adopted three of those factors, but does not shift the burden from the plaintiff. *Arthur v. Toledo*, 782 F.2d 565, 575 (6th Cir. 1986). The First Circuit allows the defeat of a prima facie case of disparate impact upon the defendant's offering of a legitimate business justification, but does not require that the justification be narrowly tailored. *Compare Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 51 (1st Cir. 2000), *with* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (requiring the defendant demonstrate that the employment practice is narrowly tailored and consistent with business necessity). In other words, when a defendant establishes a legitimate business reason for its action, a plaintiff's disparate impact claim fails. *See Langlois*, 207 F.3d at 51. These diverging interpretations represent each Circuit's attempt to legislate its version of the congressional policy in the absence of statutory text. *Cf. Cent. Bank of Denver v. Denver*, 511 U.S. 164, 186 (1994) (noting comparable inconsistency in the courts of appeal regarding aiding and abetting liability under the securities laws, and finding that no such liability exists).³

³ It is therefore no answer to suggest, as the government did at the petition stage, that HUD's development of regulations and "reasonable interpretations" will solve the problems with inconsistent standards, and that the court should defer to the agency's interpretation of legislative silence. (*See* U.S. BIO at 9). Executive agencies enforcing a policy in the absence of

II. THIS COURT'S RATIFICATION OF DISPARATE IMPACT LIABILITY WILL INTERFERE WITH THE RESPONSIBLE USE OF TENANT SCREENING.

This Court's ratification of disparate impact liability would have profound effects on *amici* and their customers. Rental decisions differ materially from decisions to hire a particular employee. A prospective tenant's "curriculum vitae" for a particular dwelling generally consists of only the following objective, race-neutral factors: the applicant's ability to pay a given rent, the applicant's history of payment (or non-payment) and the likelihood that the applicant poses an unreasonable risk of harm to property or persons. Those factors inform the conditions that may be placed on their tenancy, including: additional security deposits, additional pre-payment of rent requirements or even adding as a co-applicant a rental payment guarantor. This Court's affirmance of the lower court would disrupt *amici's* ability to help both public and private

statutory authority is no different than legislating from the bench: either result improperly diminishes the power of the legislative branch. In the absence of sufficient Congressional intent, the agency interpretation is entitled to no deference. See *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (finding that an agency is not entitled to deference unless the traditional devices of judicial construction yield no "clear sense of congressional intent"); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

landlords evaluate these valid considerations and mitigate legitimate business risks.

A. The Use of *Amici's* Consumer Reports Advances Important and Legitimate Interests.

Amici conduct residential screening pursuant to the terms of the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*,⁴ and typically involve the provision of three different kinds of information: financial information, including a credit score, credit report, income verification and rent payment history; eviction information, consisting of unlawful detainer records; and criminal background information consisting of damage to persons (including sex offender information) and property. Each of these categories of information provides the landlord with reliable predictors regarding the tenant's ability to pay and general suitability for a particular property. *Cf.* Bd. of Governors of the Fed. Reserve Sys., *Report to the Congress on Credit Scoring and Its Effects on the Availability and Affordability of Credit* S1-S2 (2007) [hereinafter Fed Reserve Report] (noting that credit scores act as predictors of default and not as proxies for race). For example, individuals who have

⁴ In general terms, the FCRA regulates consumer information and sets the terms under which such information (including public record information) can be used. *See* 15 U.S.C. § 1681a(d), (f) (defining consumer report and consumer reporting agency, respectively). *See generally* ABA Section of Antitrust Law, *Consumer Law Developments* 117-19 (2009) (describing function and scope of FCRA in general terms).

not skipped or been late in rent payments have a roughly six percent rate of default; prospects with a rental debt default at a rate of nearly one in four.⁵ A member of two *amici* trade associations, CoreLogic SafeRent, estimates the cost of eviction as roughly two and a half times the monthly rent, and NAPBS's members have found that amount to average about \$2,500-3000 per apartment in the less expensive markets in the middle of the country. This figure does not include the soft costs of lost rental time, impact to property reputation and recruiting of an additional qualified tenant. Landlords looking to maintain viable properties properly seek to avoid these costs, and *amici*'s services help them do so.

Residential screening also advances public safety, and the government's interest in providing safe housing through a state housing authority, is no different than that of a private landlord. *E.g.*, *HUD v. Rucker*, 535 U.S. 125, 134-35 (2002) (affirming the ability of public housing authorities to have no-fault evictions to protect health and safety interests); *see also* Preventing Crime in Federally Assisted Housing—Denying Admission and Terminating Tenancy for Criminal Activity or Alcohol Abuse, 24 C.F.R. § 5.850 *et seq.* (2013) (defining times when public housing authorities may or must terminate tenants involved in particular types of criminal

⁵ See Experian, *Risk versus Reward: Identifying the Highest Quality Resident Using Rental Payment History* 4 (2013), <http://www.experian.com/assets/rentbureau/white-papers/experian-rentbureau-rental-history-analysis.pdf>.

activity); *cf. NASA v. Nelson*, 131 S. Ct. 746, 758 (2011) (acknowledging the legitimate needs of the government as employer to screen employees for drug use and other elements of their background). Many of *amici's* clients are state and local public housing authorities, all of whom have to comply not only with Federal guidelines (to the extent that they receive federal funding), but also with their own local requirements. In addition, under the so-called “Address Discrepancy” rule, users of consumer reports must take reasonable steps to prevent identity theft when address or other discrepancies appear between a tenant’s application and the information provided by the consumer reporting agency. *See* Duties of Users Regarding Address Discrepancies, 12 C.F.R. § 41.82 (2013); *see also* Identity Theft Red Flags and Address Discrepancies, 72 Fed. Reg. 63,718, 63,718 (Nov. 9, 2007) (setting forth rationale for the so-called “Address Discrepancy” rule implementing the Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108–159, 117 Stat. 1952).⁶ The use of tenant screens

⁶ The presence of robust tenant screening serves broader ends. In 2001, President Bush signed Executive Order 13,224, which prohibits U.S. citizens and businesses from entering into “any transaction or dealing” with anyone on the Treasury’s Office of Foreign Asset Control’s (OFAC’s) watch list. Exec. Order No. 13,224, 3 C.F.R. 786, 788 (2002). As a result, *amici's* tenant screens routinely include checks of this database for their client landlords. While the requirement would still legally exist, as a practical matter in many instances the OFAC search may well not be run if *amici* do not do it.

advances all of these interests—economic stability, protection from identity theft, and general public safety. Indeed, some evidence exists that the use of a background screen may actually *reduce* the incidence of racial discrimination by shattering subconscious stereotypes. See Harry J. Holzer *et al.*, *Perceived Criminality, Criminal Background Checks and the Racial Hiring Practices of Employers*, 49 J. Law & Econ. 451, 452 (2006).

This Court’s blessing of a “disparate impact” cause of action here will, as a practical matter, discourage the use of *amici*’s screening products and interfere with the important interests their responsible use advances.

B. Respondent’s Position Ignores the Dramatic Effect That This Court’s Imprimatur on Disparate Impact Liability will have on *Amici*’s Valuable Activities.

In their oppositions to the petition, Respondents and the government rely on the history of appellate decisions as a means to denigrate the effects of affirmance and preclude this Court’s review. (See BIO at 20-21; U.S. Opp. at 15-16.) That affected nonchalance is belied by the fact that, shortly after this Court granted *certiorari* in *Magner v. Gallagher* on the same question presented here, 132 S. Ct. 548 (2011) (*cert. granted* on Nov. 7, 2011), the Department

of Housing and Urban Development serendipitously decided that the three decades of confusion in the lower courts had gone on long enough, and indicated its desire to formulate a uniform standard, *see* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. 70,921, 70,921 (Nov. 16, 2011).

During that rulemaking, HUD heard concerns from a number of different public and private interests about the disparate impact standard that it promulgated. *See* Final Rule, 78 Fed. Reg. at 11,464. These industries all gave examples of the harm that they feared the rule would cause.⁷ Each of these industries also recommended approaches differing from those suggested by HUD, and many of these could claim support in different decisions of the courts

⁷ *See, e.g.*, Comment Submitted by Rebecca L. Peace, Chief Counsel, Pa. Pub. Hous. Auth. (Jan. 17, 2012), <http://www.regulations.gov/#!documentDetail;D=HUD-2011-0138-0053>. (arguing that use of credit scores could lead to disparate impact liability and reduce lending in lower income areas); Comment Submitted by Robert W. Woody, Senior Counsel, Prop. Cas. Indus. of Am. (Jan. 17, 2012), <http://www.regulations.gov/#!documentDetail;D=HUD-2011-0138-0084> (arguing that disparate impact liability would have an adverse impact on race-neutral insurance underwriting); Comment Submitted by Dennis E. Nixon, President and CEO, Int'l Bancshares Corp. (Jan 13, 2012), <http://www.regulations.gov/#!documentDetail;D=HUD-2011-0138-0030> (arguing that rule creates uncertainty in risk of loan underwriting).

of appeal.⁸ HUD dismissed these concerns, including specifically rejecting a request that the rule codify examples of presumed legitimate screening criteria, such as rental history, credit checks, and court information. Final Rule, 78 Fed. Reg. at 11,471. Instead, the agency decided to leave that legitimacy to be determined on a “case by case” basis. *Id.* These rejections all were premised on the notion that the existence of the prior court of appeal decision rendered nothing new about its rule. *See id.* at 11,467, 11,469-70.

In *amici*’s view, the varying standards in courts of appeal, and the complexity of unraveling the strands of causation in a disparate impact case has historically caused a certain level of diffidence in potential FHA plaintiffs. Both HUD and respondent ignore the “dramatic change” that an adverse ruling by this Court will have on the litigation climate. *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1366 (2013) (noting that a court should consider the litigation consequences of adopting an unsettled interpretation among the circuits, even if those consequences have not yet occurred); *see also Cent. Bank of Denver*, 511 U.S. at 188-89 (noting the

⁸ Compare Peace comment, *supra* note 7 (arguing for no burden shifting) with the Fourth, Sixth, Seventh and Ninth Circuits that apply a multi-factor test without burden shifting. *See, e.g., Town of Clarkton*, 682 F.2d at 1065; *Arthur*, 782 F.2d at 576; *Metro. Hous.*, 558 F.2d at 1290; *Keith v. Volpe*, 858 F.2d 467, 483 (9th Cir. 1988) (noting that the district court found liability under both a Third/Eighth and Fourth/Seventh Circuit test because the 9th Cir. had yet to adopt a standard).

particularly thorny litigation problems attending aiding and abetting liability in the absence of authorizing statutory language); Final Rule, 78 Fed. Reg. at 11,472 (rejecting concerns over frivolous litigation). As this Court has noted, defense against a government investigation or charge of a disparate impact is notoriously expensive and complex. See *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 993 (1988) (plurality opinion) (noting the expense of litigation of disparate impact suits, and the potentially ruinous liability). This Court's ratification of disparate impact liability will open a floodgate of potentially ruinous litigation over a variety of routine tenant screening practices, as well as the legal requirements that engender them, simply on the agency's subjective evaluation of the FHA's purposes.⁹

⁹ Recent results under Title VII are not encouraging. See *EEOC v. Freeman*, No. RWT 09cv2573, 2013 U.S. Dist. LEXIS 112368, at *53 (D. Md. Aug. 9, 2013); *EEOC v. Peoplemark, Inc.*, No. 1:08-CV-907, 2011 U.S. Dist. LEXIS 154429, at *4 (W.D. Mich. Oct. 17, 2011) (noting the EEOC's failure to conduct a "reasonable investigation" before filing suit against Peoplemark: "Had the EEOC conducted a reasonable investigation in the years leading up to filing its lawsuit, or had it reviewed the evidence provided to it throughout the course of discovery, it would have quickly realized its theory of liability as pled was untenable.").

1. ***Amici* have Developed Race-Neutral Tools to Help Property Owners Evaluate Tenants and Comply with Fair Housing Laws.**

Amici have developed objective tools to aid landlords in both making rental decisions and complying with fair housing laws. *Amici* frequently implement tenant scoring models on behalf of their clients that are designed to balance different risks of default against the ability of an applicant to pay and public safety. In these models, each landlord decides its tolerance for different categories of risk, but they typically work the same way: upon *amici*'s supply of particular information about an individual applicant (none of which is race-specific), the presence or absence of certain factors will dictate their suitability on an objective scale.

For example, a landlord might score prospective tenants on a hundred-point scale, and only rent to those who score above seventy, based on the variables selected by the landlord. *Amici* would then provide the landlord with consumer report information, and the model would evaluate a variety of information in accordance with the logic supplied by the landlord. The landlord could decide how many points to allocate for particular rent or debt to income ratios, and balance that risk against other positives, such as a good credit history and no history of late rental payments. Rent default models also weigh other risk factors, such as past evictions for nonpayment of rent, history of filing for bankruptcy, tax liens, and collections activity.

Other landlords might try a different approach, in which they rely on a score like that provided by CoreLogic SafeRent's tenant screening score—an empirically derived and statistically validated measure of a person's likelihood to meet their rental obligations. *See generally Scoring and Analytics, Resident Scoring*, CoreLogic SafeRent, <http://www.corelogic.com/products/saferent-scoring-analytics.aspx?industry=3210&solution=3291#container-ResidentScoring> (last visited Aug. 29, 2013). In a way similar to the other model discussed above, the landlord would then determine which score would trigger risk mitigation measures.

An analogous process occurs with respect to past criminal activity, again depending on the landlord's tolerance for risk. Arson convictions or convictions for violent crimes have a different effect on a rental decision than nonviolent drug possession. Some landlords will not take ex-offenders with particular kinds of criminal pasts; others are barred by law from renting to those persons. In each instance, the landlord's calibration of these specific criteria depends on a variety of factors, including state law requirements, the rent needed to turn a profit, the class of property in question, the type of tenant being served (i.e. students seeking university-area group housing, seniors seeking assisted living or retirement housing, families seeking housing near a school or education facility, etc.) and its own judgment about the demands of a particular property or market. Dozens, if not hundreds, of potential criteria can appear in a given screening model.

To ensure compliance with fair housing laws, the landlord applies its criteria without consideration or even knowledge of race as a factor, and they are applied uniformly to all applicants. These kinds of models exist for the purpose of establishing objective, uniformly-applied criteria for a particular property during a specified time period (i.e. so long as the factors for that property have not changed). Once these risks have been accounted for, the landlord can ameliorate the risk of default by taking certain steps. A landlord might, for example, require an additional security deposit of the first and last month's rent, or require a co-applicant to guarantee the lease obligations. If the tenant cannot or will not comply with these conditions, the application will be denied.

C. This Court's Endorsement of Disparate Impact Liability Will Cast a Pall over the Legitimate Use of Credit and Criminal Record Information.

Disparate impact liability under the FHA, especially as interpreted by HUD, places these kinds of objective tests in legal jeopardy. Indeed, while claiming Title VII as inspiration, *see* Final Rule, 78 Fed. Reg. at 11,466, the test created by HUD appears materially more stringent. Title VII requires that the defendant offer a legitimate business justification "consistent with business necessity" for a practice that is discriminatory in effect, but consistency does not require perfection. 42 U.S.C. § 2000e-2(k)(1)(A)(i); *see also, e.g., Griggs*, 401 U.S. at 436 (stating that nondiscrimination never requires an employer to hire a less qualified employee); *El v. Se. Pa. Transp. Auth.*,

479 F.3d 232, 242 (3d Cir. 2007) (upholding transit authority policy of not hiring those with criminal records). The burden then shifts to the plaintiff to show the availability of a less discriminatory means that protects the legitimate interest in the same way. *See Watson*, 487 U.S. at 998 (O'Connor, J.) (plurality opinion) (“Factors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals.”).

The HUD rule triggers a different, more difficult burden-shifting standard. Under the final rule, “any facially neutral action . . . including those that allow for discretion” may result in a discriminatory effect actionable under the Fair Housing Act and this rule.” Final Rule, 78 Fed. Reg. at 11,479. The plaintiff must show that a facially-neutral practice “actually or predictably” results in a disparate impact on a protected class or “the community as a whole.” *Id.* at 11,482. The burden then shifts to the defendant to offer proof that the challenged practice is “necessary” to achieve one or more “substantial, legitimate, nondiscriminatory” interests. *Id.* HUD rejected requests to remove the word “necessary” from the rule. *See id.* at 11,471-72. Upon the “necessary” showing, the burden then shifts again to the plaintiff to demonstrate a policy that has a less discriminatory effect. *Id.* at 11,482.

The increased burden of defending a disparate impact claim will engender uncertainty over legitimate tenant screening practices. A plaintiff challenging objective scoring models or reliance on other economic data only has to allege the disparate impact that will in many cases exist due to unfortunate, but nonetheless race-neutral realities. *See* Federal Reserve Report, *supra*, at S4, S6 (noting lower credit scores among certain populations but indicating that these scores indicate risk, not race). The users of race-neutral objective scoring models will be in no position to make subjective judgments that are impermissibly based on race. Moreover, even though the purpose of considering credit and criminal record information is unquestionably legitimate, making a showing that each of these variables is completely “necessary” to achieve the same predictive results will be impossible. The rule presents the landlord with a Hobson’s choice: either refrain from the prudent use of historical credit, civil and criminal record information in an objective scoring model, or expose itself to claims that it violated the Fair Housing Act.¹⁰ Administrative overreach has already occurred in the employment context. *See EEOC v. Freeman*, 2013 U.S. Dist. LEXIS 112368 at *54 (D. Md. 2013) (noting that “[t]he story of the present action has been that of a theory in support of facts to support it” and that agency overreach puts employers in the impossible position of either “ignoring criminal history and credit background, thus exposing themselves to potential liability for criminal and fraudulent acts committed by employees, on the one hand, or incurring the wrath of the EEOC for having

utilized information deemed fundamental by most employers”).

Application of disparate impact to the use of criminal records is particularly troubling from a public safety perspective. HUD has indicated that it is considering recommending additional restrictions on their use beyond the provisions of its recently promulgated rule. *See* Final Rule, 78 Fed. Reg. at 11,478 (referring to “recent guidance” issued by the EEOC, namely EEOC, No. 915.002, *EEOC Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (Apr. 25, 2012), available at http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf). Today, property owners and managers rely on the provisions of state laws to make decisions regarding the use of criminal records. For example, some states give landlords broad discretion to evict tenants involved in criminal activity.¹¹ Other states make property

¹⁰ The landlord or manager cannot insulate itself from liability by *actively* considering race to defend against a disparate impact suit, as that practice violates the Act. *See Ricci v. DeStefano*, 557 U.S. 557, 579 (2009) (reversing district court for allowing disparate treatment to avoid disparate impact liability, and noting that the argument “turn[s] upon the City’s objective — avoiding disparate-impact liability — while ignoring the City’s conduct in the name of reaching that objective.”).

¹¹ *E.g.*, N.J. Stat. § 2A:18-61.1 (providing broad grounds for eviction of tenants with criminal convictions); Fla. Stat § 760.29(5)(d) (clearly stating that the State’s Fair Housing Act doesn’t prohibit “conduct against a person because such person

managers liable for allowing criminality to persist on their premises.¹² If the lower court is correct, the landlord relies on those state laws at its peril. A HUD enforcement policy akin to that described by the EEOC and apparently pursued in *Freeman*, 2013 U.S. Dist. LEXIS 112368, and *Peoplemark*, 2011 U.S. Dist. LEXIS 154429, will only further discourage landlords and property managers from relying on racially-neutral screening tools to protect persons and property.

III. CONCLUSION

Affirming the lower court's decision will engender an onslaught of administrative and private litigation, wreaking havoc on landlords and tenants in communities where objective screening practices have helped to ensure safe, healthy and affordable

has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance"); Ga. Code Ann. § 8-3-205(B)(4) ("Nothing in this [State Fair Housing] article prohibits conduct against a person because such person has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance."); 310 Ill. Comp. Stat. 10/25(a) (the housing projects Authority may consider "convict[ions] of a criminal offense relating to the sale or distribution of controlled substances" when making tenant selections); Wash. Rev. Code § 59.20.080(1) (allowing landlords to proceed directly with an unlawful detainer action against mobile home tenants allegedly engaged in criminal activity).

¹² *E.g.*, *Beatty v. NAACP*, 194 A.D.2d 361, 364 (N.Y. App. Div. 1993) (management liable for breaching duty under N.Y. Real Prop. Law § 231 for allowing drug dealers on premises).

housing. Had Congress intended to thrust disparate impact considerations into the use of legitimate, race-neutral criteria in residential screening, land use, and a variety of other areas, *amici* respectfully suggest that it would have said so explicitly.

For the foregoing reasons, the judgment of the Court of Appeals should be REVERSED.

Respectfully submitted,

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