IN THE

Supreme Court of the United States

TOWNSHIP OF MOUNT HOLLY, *et al.*,
Petitioners,

v.

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

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

BRIEF *AMICI CURIAE* OF NATIONAL LEASED HOUSING ASSOCIATION, NATIONAL MULTI HOUSING COUNCIL, NATIONAL APARTMENT ASSOCIATION, NEW JERSEY APARTMENT ASSOCIATION, PUBLIC HOUSING AUTHORITIES DIRECTORS ASSOCIATION, NATIONAL AFFORDABLE HOUSING MANAGEMENT ASSOCIATION, AND COUNCIL FOR AFFORDABLE AND RURAL HOUSING IN SUPPORT OF PETITIONERS

JOHN C. HAYES, JR.
Counsel of Record
NIXON PEABODY LLP
401 Ninth Street, N.W.
Washington, D.C. 20004
(202) 585-8000
jhayes@nixonpeabody.com

Of Counsel:
HARRY J. KELLY
BRIAN J. WHITTAKER

Attorneys for Amici Curiae National Leased Housing Association, National Multi Housing Council, National Apartment Association, New Jersey Apartment Association, Public Housing Authorities Directors Association, National Affordable Housing Management Association, and Council for Affordable and Rural Housing

September 3, 2013

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Page

STATUTES, LEGISLATIVE AND ADMINISTRATIVE MATERIALS

Page

OTHER MATERIALS

Cited Authorities

I. INTEREST OF *AMICI CURIAE*[1]

The *amici curiae* – National Leased Housing Association, National Multi Housing Council, National Apartment Association, New Jersey Apartment Association, Public Housing Authorities Directors Association, National Affordable Housing Management Association, and Council for Affordable and Rural Housing (jointly, the "*Amici*") – file this brief in support of the Petitioners. As explained below, the *Amici* represent the interest of developers, owners, managers, investors, and other persons interested in multifamily housing and speak on behalf of housing providers, who have daily experience in dealing with rules prohibiting discrimination in housing.

The National Leased Housing Association ("NLHA") is a national organization dedicated to the provision and maintenance of affordable rental housing for all Americans. NLHA is a vital and effective advocate for nearly 500 member organizations, including developers, owners, managers, public housing authorities, nonprofit sponsors and syndicators involved in government related rental housing.

Based in Washington, DC, the National Multi Housing Council ("NMHC") is a national association representing the interests of the larger and most prominent apartment firms in the U.S. NMHC's members are the principal

1. The parties consented to the filing of amicus curiae briefs generally in this case. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae* has made a monetary contribution to the preparation or submission of this brief.

officers of firms engaged in all aspects of the apartment industry, including ownership, development, management, and financing. NMHC advocates on behalf of rental housing, conducts apartment-related research, encourages the exchange of strategic business information, and promotes the desirability of apartment living. One-third of American households rent, and over 14 percent of households live in a rental apartment (buildings with five or more units).

The National Apartment Association ("NAA") is the leading national advocate for quality rental housing. NAA is a federation of 170 state and local affiliated associations, representing more than 55,000 members responsible for more than 6.2 million apartment units nationwide. NAA is the largest broad-based organization dedicated solely to rental housing. In addition to providing professional industry support and education services, NAA and its affiliated state and local associations advocate for fair governmental treatment of multi-family residential businesses nationwide.

The New Jersey Apartment Association ("NJAA") (and its predecessor the Multihousing Industry of New Jersey) is a not-for-profit association that has represented the interest of multifamily property houses through New Jersey since 1987. The NJAA is a statewide organization of apartment owners, managers, builders and others involved in allied industries, who are dedicated to maintaining and improving existing properties and producing new and affordable apartments throughout New Jersey.

Founded in 1979, the Public Housing Authorities Directors Association ("PHADA") represents the

professional administrators of approximately 1,900 housing authorities throughout the United States. PHADA works closely with members of Congress in efforts to develop sensible and effective public housing statutes and obtain adequate funding for low-income housing programs. The association also serves as an advocate before the U.S. Department of Housing and Urban Development ("HUD") on a variety of regulations governing public housing nationwide.

Founded in 1990, the National Affordable Housing Management Association ("NAHMA") is the leading voice for affordable housing management, advocating on behalf of multifamily property managers and owners whose mission is to provide quality affordable housing. NAHMA supports legislative and regulatory policy that promotes the development and preservation of decent and safe affordable housing, is a vital resource for technical education and information, fosters strategic relations between government and industry and recognizes those who exemplify the best in affordable housing. NAHMA's membership today includes the industry's most distinguished multifamily owners and management companies, as well as nineteen regional, state and local affordable housing management associations ("AHMAs") nationwide. Through its AHMA and direct membership rosters, NAHMA represents about seventy-five percent (75%) of the affordable multifamily portfolio, based on the 2013 NAHMA Affordable One Hundred (100) List (*i.e.*, the top 100 largest affordable multifamily property management companies in the Nation).

For over 30 years, the Council for Affordable and Rural Housing ("CARH") has served as the Nation's

premier advocate for participants in the affordable rural housing industry. CARH represents the interests of over 300 companies that develop, finance, manage, own and supply goods and services to affordable rural housing providers and complexes. The association, headquartered in Alexandria, VA, has members in over 40 states whose mission is to provide new and preserve existing multifamily housing for low and moderate income residents throughout rural America.

II. BACKGROUND

In 1968, Congress adopted the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601, *et seq.* (the "FHA"), to address persistent problems of discrimination in housing. The FHA initially prohibited discrimination on the basis of race, color, national origin and religion, but was expanded to prohibit sex-based discrimination in 1974 and to prohibit discrimination on the basis of familial status and disability in 1988. *See* Housing and Community Development Act of 1974, Pub. L. 93-383, § 808, 88 Stat. 633, 729 (1974); Fair Housing Amendments Act of 1988, Pub. L. 100-430, 102 Stat. 1619-39 (1988).

The Petition raised a crucial question about the scope of the FHA and, in particular, whether it creates liability with respect to facially-neutral policies that have a disproportionate effect – or "disparate impact" – on members of the classes protected by the FHA. Federal district and appellate courts have, by analogy to other federal antidiscrimination laws, concluded that the FHA recognizes disparate impact liability when, in the absence of evidence of intent to discriminate, neutral policies and practices have a harsher impact on members of classes

protected by the FHA than on the population at large. *See, e.g., Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 987-88 (4th Cir. 1983) (analogizing Title VII and VIII disparate impact claims). Disparate impact cases are distinguished from "disparate treatment" cases that normally require a showing of actual intent to discriminate against members of protected classes.

Earlier this year, the Court accepted the Petition. The *Amici* submit this brief in support of the Petitioners' position that the FHA does not recognize disparate impact claims, and to provide additional insights based on their experience providing and managing housing for millions of persons across the United States.

III. SUMMARY OF ARGUMENT

Disparate impact liability is a judge-made rule that is not supported by the text of the FHA. As applied, disparate impact liability has created a series of intractable problems in practice that underscore how inappropriate it is in the context of combatting housing discrimination. Moreover, disparate impact liability distorts the clear language of the FHA, which prohibits only intentional discrimination, and is at odds with this Court's holdings in other cases that have construed federal antidiscrimination laws and that have scrutinized the text of those statutes to determine whether Congress actually intended to create disparate impact liability. As a result, disparate impact liability effectively creates a series of *de facto* protected classes, beyond those intended by Congress.

Rather than allow disparate impact analysis to water down the standard of liability under the FHA, the Court should use this opportunity to reaffirm that statute's focus

on intentional acts of discrimination while making clear that such intent can be demonstrated by long-standing and persistent policies that promote segregation and exclusionary zoning. Finally, the Court should not defer to recently adopted regulations issued by HUD establishing a disparate impact standard because HUD cannot create liability that was not expressly included in the FHA by Congress.

IV. ARGUMENT

A. DISPARATE IMPACT THEORY PRESENTS UNIQUE PROBLEMS IN THE HOUSING CONTEXT THAT MAKE IT INAPPROPRIATE AS A BASIS FOR LIABILITY

The *Amici* represent the developers, owners, and managers of multifamily housing and public housing agencies throughout the United States, who are at the frontline of the Nation's ongoing effort to prevent housing discrimination and to assure that housing is made available to all, without regard to race, color, national origin, religion, sex, familial status, and disability. As a result, the *Amici* are in a unique position to comment on the unintended consequences that current disparate impact rules have had on the housing industry.

As housing providers, their members often are called upon to develop rules or policies that facilitate the operation of their properties. These policies deal with all aspects of their operations, including, among many others, tenant screening, credit scoring, maintenance of waiting lists, and security procedures. Additionally, they are required to adhere to governmental rules that affect

the location and zoning of their developments, the choice of their tenants, and the terms of tenancy.

In these situations, housing providers often find themselves facing claims that their policies, or policies they are required to follow, have a harsher impact on protected classes than on others, even though the policies are neutral on their face. This is almost inevitable: given the wide economic and demographic disparities in the Nation's population, it is difficult to construct a policy, even the most benevolent and useful, that does not have an impact on some persons different from the impact it has on others. Unfortunately, to the extent that housing practices or actions disproportionately affect a protected class of persons under the FHA, they may become actionable under the FHA by applying a disparate impact standard of liability.

Although far from exhaustive, the following list provides examples of problems that disparate impact liability presents to housing providers:

- Many private owners and public agencies participate in the Section 8 rental assistance program. 42 U.S.C. § 1437f. Pursuant to this program, HUD pays a portion of tenant rents for lower income families, either to owners directly or through vouchers provided to tenants. Initially, HUD adopted a policy – dubbed "take-one, take-all" – requiring that an owner must accept all Section 8 tenants if it accepted any. Before repeal of the "take-one, take-all" requirement, plaintiffs successfully argued in some courts that refusing to rent to some Section 8 tenants constituted discrimination prohibited by statute (§ 1437f(t)).

Although Congress subsequently repealed the "take-one, take-all" requirement, some courts have continued to permit disparate impact claims against owners under the FHA, including claims against owners that withdraw from the Section 8 program after initially accepting Section 8 tenants. *See, e.g., Graoch Assocs. v. Louisville/Jefferson County Metro Human Relations Comm'n*, 508 F.3d 366, 376-77 (6th Cir. 2007) (permitting disparate impact from withdrawal of Section 8 program but finding no liability based on the facts); *Green v. Sunpointe Assocs., Ltd.*, No. C96-1542C, 1997 WL 1526484 (W.D. Wash. May 12, 1997) (recognizing disparate impact liability from owner's withdrawal from Section 8 program). Of course, to prevail, plaintiffs must show sufficient statistical evidence to support a disparate impact claim. *See, e.g., Wadley v. Park at Landmark, LP*, No. 1:06cv777 (JCC), 2007 Dist. LEXIS 5029, *9-12 (E.D. Va. Jan. 24, 2007) (finding insufficient statistical evidence to show a disparate impact). And owners can rebut these claims with legitimate business justifications. *See Groach Assocs.*, 508 F.3d. at 376 (identifying Section 8 program costs as legitimate justification).

But these requirements simply highlight the problem with disparate impact analysis: a housing provider cannot determine whether any policy it adopts – no matter how neutral in form or benevolent in intent – is consistent with the FHA until a court or HUD administrative law judge has determined if it has a disparate impact on a protected class and if so, whether there is a legitimate, nondiscriminatory purpose for the rule or policy. As the *Graoch* case shows, some courts continue to believe that a housing provider may

face potential disparate impact liability for deciding whether to withdraw from or restrict its participation in a federal program. Under such an approach, virtually ***any*** rule or policy adopted by a housing provider that may have a disparate impact on protected classes places the provider at risk for an FHA claim, even though Congress has clearly expressed its view that participation in that program is *purely voluntary. See, e.g., Salute v. Stratford Greens Garden Apts.*, 134 F.3d 293, 300 (2d Cir. 1998) ("[T]he Section 8 program ... remains as voluntary today as it was when originally enacted."). Such concerns discourage housing providers from pursuing legitimate policy goals that may benefit the majority of residents or that improve the operations of the provider and its properties.[2]

- Several *Amici* represent owners who participate in one of more federal housing programs that, pursuant to HUD regulations, involve a so-called "one strike rule," that requires owners to refuse admission to,

2. Several states and localities have adopted so-called "source of income" provisions, making it unlawful to discriminate on the basis of the type of income (including public assistance or Section 8 assistance) used by tenants to pay their rent. *See, e.g.*, Cal. Gov't Code § 12955; N.J. Stat. Ann. § 10:5-4; Robert G. Schwemm, *Housing Discrimination: Law and Litigation*, § 30.3, n. 3 (identifying states and local jurisdictions with source of income rules). No such amendment has been made to the FHA. Given that Congress has reaffirmed the voluntary nature of the Section 8 program and has not included source of income as a protected class, it is particularly inappropriate to use disparate impact analysis to put housing providers at risk of fair housing violations based on their decisions relating to participation in the Section 8 program or the source of tenant income in deciding whether or not to rent to a tenant.

or in some cases evict, tenants who have records of crime or drug use. *See* 25 CFR § 5.850 *et seq.* HUD's rules set certain minimum requirements, but allow owners to adopt rules that impose stricter limitations. *See* HUD Handbook 4350.3, § 4-7C.3-.4 (Rev.-1). Ominously, HUD recently urged owners to reconsider their limitations on providing housing to ex-offenders. HUD's argument suggests that owners who adopt rules that are stricter than HUD's minimal standards may subject themselves to disparate impact claims if those policies inadvertently affect protected classes differently from other persons. Indeed, some disparate impact complaints appear to challenge owners' adoption of strict one-strike responses.

- In addition to screening for undesirable criminal backgrounds, all private firms and public agencies that provide housing adopt other standards for admission of tenants. These standards may include analysis of income sufficiency, credit-worthiness, and past rental history. For example, owners may use income multipliers to confirm that a tenant has monthly income that is two or three times greater than the rent, to ensure that the tenant can pay rent while paying other living expenses. Similarly, an owner may seek to confirm that a prospective tenant can provide evidence of income or employment through consecutive current paystubs. Housing providers also have legitimate reasons to inquire about renters' credit history to determine whether they have a record of defaulting on their obligations. A lease is, after all, a contract to provide housing for a period of time in exchange for promises to make periodic rent payments, and an owner is justified in trying to assure that tenants can meet those rent obligations during the lease term.

Nevertheless, because of the association between income and race in the United States, income or credit-worthiness standards may have a disparate impact on protected classes. *See* U.S. Census Bureau, Statistical Abstract of the United States, *Income, Expenditures, Poverty, & Wealth: Household Income*, Tables 690 & 691 (2012), *available at* http://www.census.gov/compendia/statab/2012/tables/12s0690.pdf. For example, Section 8 renters could argue that income multipliers have an impermissible disparate impact on lower income persons who, coincidentally, are also disproportionately minorities.

Section 8 voucher holders could also argue that they are disparately impacted when required to accept a lease offer in the same amount of time as any other tenant. In some parts of the country, a lease offer must be accepted within 72 hours, which could result in a disparate impact on a voucher holder because public agencies may require more time to approve proposed leases and participants in the Section 8 program are more likely to be part of protected classes under the FHA.

Other efforts to verify income and employment may also lead to disparate impact claims. Especially in the wake of the financial crisis of 2008, housing providers, lenders, and others have taken well-considered measures to tighten credit standards, including, as noted before, proof of current income and current employment. Unavoidably, tighter credit standards tend to have a harsher impact on lower income persons, presenting those providers or lenders with a Hobson's choice – maintain lower credit standards and risk further losses, or tighten standards and risk disparate

impact claims. Here again, the prospect of disparate impact claims may prevent housing providers, lenders and others from adopting policies that are needed to maintain their balance sheets and the integrity of the Nation's financial system.

- The Violence Against Women Act, 42 U.S.C. § 13701 *et seq.*, provides a variety of protections to victims of domestic violence, dating violence, sexual assault and stalking. Under the one-strike rules discussed above, some owners have adopted policies that require eviction where a person commits an act of violence, including an act of domestic violence. According to guidance released by HUD in February 2011, such policies – while neutral on their face and otherwise consistent with HUD's own one-strike polices – may create disparate impact liability under the FHA if they have a disproportionate impact on protected classes. The guidance identified several cases in which such disparate impact claims were asserted based on sex. *See, e.g., Warren v. Ypsilanti Hous. Auth.*, No. 4:02-cv-40034 (E.D. Mich. 2002) (zero tolerance policy); *Blackwell v. H.A. Hous. L.P.*, No. 05-cv-01225-LTB-CBS (D. Colo. 2005) (anti-transfer policy). This is a classic "damned if you do and damned if you don't situation." Owners are required to conform to HUD's anti-crime policies, but if they adopt stricter policies that are still consistent with HUD's guidelines, they may become subject to disparate impact liability. If HUD is concerned about owners adopting policies that are too severe, HUD should rewrite its rules to clarify what is acceptable. It should not threaten owners, who have legitimate grounds to prevent crime

and maintain security at their properties, with FHA violations based on extreme applications of disparate impact liability.

As noted, these are only a few examples of the distortions that disparate impact claims present to public and private housing providers. They suffice to demonstrate, however, that virtually every rule or policy that a housing provider adopts may have a disparate impact on one or more protected class even if housing providers have neither intent to discriminate nor any understanding of how different races might be impacted by such a policy. Indeed, in many cases, a housing provider cannot predict whether a particular policy or practice will potentially violate the FHA under a theory of disparate impact until after the rule or practice is put into place. The threat of such liability may deter a provider from adopting policies that prevent rental losses and reduce eviction rates, or that promote residents' peaceful enjoyment of their apartments by excluding persons with a history of involvement in violent crime, gang activities, or drug dealing. Simply put, in the absence of evidence that Congress actually intended to impose disparate impact liability under the FHA – which, as explained below, is not the case – housing providers should not be held liable for adopting neutral policies or practices that unintentionally have a disparate impact on protected classes.

B. DISPARATE IMPACT LIABILITY IMPROPERLY EXTENDS THE SCOPE OF THE FHA AND CREATES *DE FACTO* PROTECTED CLASSES THAT CONGRESS DID NOT INTEND

1. The Plain Language Of The FHA Prohibits Only Intentional Acts of Housing Discrimination

The language of the FHA (42 U.S.C. § 3604(a)) is plain: it prohibits disparate treatment "*because of* race, color, religion, sex, familial status or national origin" (emphasis added). By outlawing discrimination "because of" these protected classes, Congress prohibited intentional discrimination in housing. *See, e.g., Community Services, Inc. v. Wind Gap Mun. Auth.*, 421 F.3d. 170, 177 (3rd Cir. 2005) (discussing nature of required "discriminatory purpose"). Disparate impact liability goes far beyond the parameters of the statute by permitting a finding of discrimination as a result of an incidental correlation between an otherwise facially neutral policy and the impact of that policy on a class of persons.

This Court has held that the first step in statutory interpretation is to look at the language of the statute itself. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The language of the statute is clear and concise. It makes it unlawful "to refuse to sell or rent ..., or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status or national origin." 42 U.S.C. § 3604(a). In spite of that clear language, lower courts have held that the FHA supports a claim of disparate impact liability, usually by analogy to other federal laws. *See, e.g., Metro Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th

Cir. 1977) (directing district court to use disparate impact analysis on remand of FHA claims).

The effect of these decisions is to create liability for disparate, unintended impacts resulting from a facially neutral policy. In this case, the challenged policy is a redevelopment plan for an area found to be blighted. The logic of these decisions is contrary to the language of the statute, which makes it unlawful to discriminate "because of" membership in one of the protected classes expressly listed in the statute. These cases eschew the "because of" requirement, instead finding liability where a policy or rule impacts a group of people that coincidentally overlaps with one of the classes the FHA protects. If such an overlap exists, the policy or rule is found to be presumptively discriminatory, eliminating the need to show the discriminatory intent reflected in the "because of" language.

Significantly, Congress has not added language to the FHA expressly barring discriminatory effects, while it has done so in other areas. In *Smith v. City of Jackson*, 544 U. S. 228 (2005), the Court considered whether disparate impact liability arose under § 4(a)(2) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(a)(2). The Court compared the language of § 4(a)(2) of ADEA with the language of § 703(a)(2) of Title VII, 42 U.S.C. § 2000e-2(a)(2). The latter provides that it shall be an unlawful employment practice "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities *or otherwise adversely affect his status* as an employee, because of such individual's race, color, religion, sex or national origin." 42 U.S.C.

§ 2000e-2(a)(2) (emphasis added). The Court held that the "adversely affected" language in § 703(a)(2) supports a disparate impact claim because:

> Neither §703(a)(2) nor the comparable language of the ADEA simply prohibits actions that "limit, segregate, or classify" persons; rather the language prohibits such actions that "deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's" race or color... Thus, the text focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer.

City of Jackson, 544 U.S. at 235-36 (emphasis in original). By analyzing the text of the statute, which focuses on actions that have the *effect of discriminating*, the Court concluded that § 4(a)(2) of ADEA permitted disparate impact claims. *Id.*

To the contrary, the Court explained that § 4(a)(1) of ADEA, which is strikingly similar to § 3604(a) of the FHA, does not support a disparate impact claim. Section 4(a)(1) makes it unlawful to "*discriminate against*" any individual with respect to his compensation "*because of* " such individual's age. 29 U.S.C. § 623(a)(1) (emphasis added). As the Court said, there are "key textual differences" between §§ 4(a)(1) and (2). *City of Jackson*, 544 U.S. at 236, n.6. Section 4(a)(2) contains language that prohibits conduct that "adversely affects' individuals. Section 4(a)(1) bars discrimination "because of" membership in a protected class. The former can support a disparate impact claim. The latter – ***which is the same as the language found in § 3604(a) of the FHA*** – permits disparate treatment claims based on intent, but not disparate impact claims. As the Court said in *City of Jackson* "the focus of the paragraph is on the employer's actions with respect to a targeted individual." *Id.*

Disparate impact claims have been permitted under other federal discrimination laws, but only where Congress inserted language that prohibited an action that had the effect or result of imposing outcomes on protected classes. *See, e.g., Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003) ("Both disparate-treatment and disparate-impact claims are cognizable under the [Americans with Disabilities Act]."); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (recognizing that disparate impact claims are cognizable under § 703(a)(1) of Title VII). However, where a provision like § 3604(a) does not contain results or effects based language, but rather bars discrimination "because of" or "on the basis of," the statute does not permit disparate impact liability claims. *See* Kirk D. Jensen & Jeffery 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, 104-106 (2012).

2. By Ignoring The FHA's Intent Requirement, Disparate Impact Liability Creates *De Facto* Protected Classes That Congress Did Not Allow

When the intent requirement that is present in the statute is read out and is replaced with disparate impact analysis, the FHA's focus on specific protected classes is blurred. Liability without evidence of discriminatory

intent creates an endless, ever increasing number of *de facto* protected classes. To make out a prima facie disparate impact claim, plaintiffs need only show that they belong to one class that closely corresponds to a class protected by the FHA and that the challenged rule or policy has a disparate impact on that class. Thus, disparate impact liability confers protection on persons who have an incidental, perhaps inadvertent, connection to the classes identified in the FHA. Effectively, disparate impact liability creates a series of *de facto* protected classes, going well beyond the classes expressly enumerated in the FHA.

Congress has taken pains to identify who is – and who is not – part of a protected class under the FHA. When the FHA was originally enacted in 1968, it prohibited discrimination based upon race, color, national origin, and religion. Congress later expressly added other forms of discrimination: discrimination based upon sex in 1974 and discrimination based on familial status and disability in 1988. *Supra*, Section II. By adding these classes, Congress did not change the structure of the statute; it maintained the FHA's prohibition against intentional discrimination in housing. Thus, Congress has demonstrated both its concern to remedy intentional acts of discrimination and its willingness to add new classes to the statutory scheme that are in need of protection against that intentional discrimination.

Here again, the Section 8 program provides an example of the overreach resulting from applying disparate impact analysis to FHA claims. As noted above (*supra*, Section IV.A), a policy of not renting to Section 8 voucher holders, based strictly upon an owner's rational business decisions,

could violate §3604(a) if Section 8 voucher holders are disproportionately members of a racial minority, even though a statistical correlation between poverty and a particular race does not necessarily demonstrate discriminatory intent. *Ybarra v. Town of Los Altos Hills*, 503 F. 2d 250, 253 (9th Cir. 1974). Because Section 8 voucher holders are statistically more likely to belong to protected classes under the FHA, disparate impact liability effectively creates a new protected class – Section 8 voucher holders.

This process occurs with respect to every class of persons covered by a disparate impact claim, thereby expanding the reach of the statute beyond the classes Congress has specifically enumerated. Certainly, as noted, Congress has demonstrated the ability to extend the FHA's protections several times since 1968. If it wished to make Section 8 voucher holders a protected class, it could do so. Where Congress has not extended the list of protected classes, the lower courts and agencies are not at liberty to use disparate impact analysis to do so.

3. The Court Should Follow Its Precedents To Assure That The FHA Is Applied As Congress Directed

In accordance with *City of Jackson* and the other cases permitting disparate impact claims when the statutory language only permits disparate treatment claims, the Court should use this case to make it plain that § 3604(a) does not support disparate impact claims. Rather, § 3604(a) should be interpreted as the "because" language of other anti-discrimination statutes has been interpreted, to bar intent based discrimination, but not

to support disparate impact claims. Likewise, it should make clear that lower courts and agencies must respect those protected classes listed in the express language of the FHA and not use disparate impact analysis to create additional protected classes outside the zone of protection intended by Congress.

C. DISPARATE IMPACT LIABILITY IS NOT NEEDED TO PREVENT INTENTIONAL FORMS OF DISCRIMINATION SUCH AS EXCLUSIONARY ZONING

Disparate impact liability is attractive to plaintiffs because it eliminates the single most significant obstacle to liability – the need to prove actual intent to discriminate. From the point of view of a plaintiff, by eliminating the need to show intent, disparate impact analysis makes the FHA a more effective anti-discrimination tool.

From the point of view of a defendant, however, disparate impact "dumbs-down" fair housing law to the point that even well-intended and useful rules and policies can result in expensive, embarrassing, and time-consuming litigation. By reducing the plaintiff's burden to showing statistical evidence of a disproportionate impact, many innocent – indeed, well-intended – persons and organizations that have adopted rules or policies directed to legitimate goals (such as confirming that new tenants are credit-worthy and pose no criminal threat to other tenants) find themselves facing discrimination charges. Especially where, as here, Congress has refused to expressly incorporate language to invalidate purely effects-based outcomes, neither courts nor HUD should attempt to rewrite the statute. Instead, they should not

proscribe conduct in the absence of evidence that a person truly intended to discriminate against one of the classes actually protected by the FHA.

Concluding that the FHA does not recognize disparate impact claims should not threaten the FHA's effectiveness, however. Rather than water down the standard of liability written into the FHA by eliminating an intent requirement, courts should be willing to scrutinize challenged conduct to assure that actual examples of intentional discrimination are penalized.

A good example is in the area of exclusionary zoning, the practice of local governments to deny or restrict permits, variances and other authorizations required to develop multifamily housing properties. Historically, many cases have been filed alleging that local communities have taken steps over multiple years to prevent the development of multifamily housing in order to keep lower income persons and racial minorities out of their communities. Various grounds have been advanced in these cases to attack exclusionary zoning practices. In one of the earliest fair housing cases to reach this Court, *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977), claims were asserted under the FHA and the equal protection clause of the Fourteenth Amendment. Other cases invoke the Civil Rights Act of 1866 (42 U.S.C. §§ 1981 and 1982). *See, e.g., Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 140 (3d Cir. 1977). In many of these cases, exclusionary zoning practices have been attacked by applying a disparate impact theory. *See, e.g., Village of Arlington Heights*, 558 F.2d at 1294-95 (remanding case to district court with instructions to pursue disparate impact analysis).

The fact that these cases were pursued using disparate impact analysis does not mean, however, that disparate impact analysis is necessary to stop discriminatory zoning practices. As noted above, disparate impact analysis is used because it eliminates the need for proof of discriminatory intent. But that does not mean that such intent did not exist in these cases. Indeed, the very existence of patterns of exclusionary zoning itself is strong evidence of intent to discriminate – discriminatory zoning does not just happen. It arises from years of practices that consistently and routinely deny otherwise valid applications for permits, variances and other government authorizations. The persistence of highly segregated communities, on the one hand, and the absence of approvals of permits, variances or other authorizations that would allow multifamily housing development, on the other, should provide strong grounds to infer a discriminatory intent.

Thus, in addition to providing an opportunity for the Court to confirm that the FHA does not recognize disparate impact claims, this case also provides an opportunity for the Court to make clear that the FHA punishes intentional housing discrimination and to remind lower courts and agencies that, where intentional discrimination exists, it should be strongly condemned as Congress intended. In particular, lower courts and agencies should be very alert and sensitive to evidence of intentional discrimination. Specifically, the courts should be able to discern that long-standing practices designed to keep racial minorities from moving into highly segregated communities demonstrate the requisite amount of intent to support an FHA claim. Intent does not require express and overt discriminatory statements; it can equally be inferred from long-standing conduct that causes direct

injury to persons in the protected classes. *See Village of Arlington Heights*, 429 U.S. at 267 ("The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes."); *Washington v. Davis*, 426 U.S. 229, 242 (1976) ("Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts....").

Refocusing FHA liability on evidence of intent is preferential to disparate impact analysis in several respects. First, and most importantly, focusing on intentional acts of discrimination reaffirms the integrity of the protected classes actually identified by Congress in the FHA. Second, it does not penalize neutral conduct that has only incidental impacts on protected classes. Persons and agencies will not be held liable because policies adopted to pursue other legitimate goals somehow have an unintentional adverse impact on others. Congress expressly identified certain classes of persons for protection under the FHA. By focusing on actual acts of intentional discrimination against those classes – as opposed to the *de facto* classes of persons now protected under disparate impact analysis – the Court will help to assure that the goals and scope of the FHA, as enacted by Congress, are achieved. If Congress wants to further amend the FHA, to extend protections to other persons, it is free, within constitutional limits, to do so. The Court will have satisfied its responsibilities by assuring that the FHA's prohibitions on intentional discrimination, as established by Congress, are vigorously enforced.

Reaffirming the FHA's focus on intentional discrimination may make it more difficult to bring some

discrimination claims, but the goal should not simply be to make it easy to prosecute such claims. Rather, in the absence of actual evidence or express language showing that Congress intended to address discriminatory impacts, the courts should, especially in the area of exclusionary zoning, closely scrutinize whether prolonged patterns of conduct demonstrate an actual intent to discriminate against a particular protected class. If patterns of invidious discrimination exist, they should find a violation of the FHA has occurred, but absent such evidence of intent, no violation should be found.

D. THE COURT SHOULD NOT DEFER TO HUD'S REGULATION ESTABLISHING A DISCRIMINATORY EFFECTS STANDARD UNDER THE FHA

Earlier this year, HUD issued a final rule that "formally establishes the three-part burden-shifting test for determining when a practice with a discriminatory effect violates the [FHA]." *Implementation of the Fair Housing Act's Discriminatory Effects Standard*, 78 Fed. Reg. 11460 (Feb. 15, 2013). The final rule states that it is intended to provide "greater clarity and predictability for all parties engaged in housing transactions as to how the discriminatory effects standard applies." *Id.*

The timing of HUD's rulemaking suggests that it was issued with the hope that the Court would defer to HUD's regulation and not independently determine whether disparate impact claims are cognizable under the FHA. HUD issued the notice of proposed rulemaking in November 2011 – decades after the FHA was enacted and amended in relevant part, but a mere nine days after the Court granted certiorari in *Magner v. Gallagher*, No.

10-1032. The Court granted certiorari in *Magner* to decide whether a lawsuit could be brought for a violation of the FHA based on a practice that has a disparate impact, and if so, how courts should determine whether an action has a prohibited disparate impact. The Court did not render a decision on the merits in *Magner* because the parties agreed to dismiss the case.

Nevertheless, the Court should not defer to HUD's regulation for several reasons. First, HUD's regulation is contrary to the unambiguous text of the FHA, which prohibits only intentional discrimination. Second, HUD may not create a right of action under the FHA for disparate impact claims that is not clearly expressed in the text of the statute. Third, HUD's regulation has no retroactive effect and would only apply to future claims if it is valid and a reasonable interpretation of the FHA.

1. The FHA is Unambiguous and Prohibits Only Intentional Discrimination

The plain language of the FHA leaves no doubt that Congress intended to prohibit only intentional discrimination in housing practices, not disparate impacts resulting from housing practices. *See* Pet. Br. at Section I; *supra* Section IV.B.1. Because "the intent of Congress is clear" under the terms of the FHA, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 841 (1984).

In *Alexander v. Sandoval*, the Court refused to defer to "rights-creating language" in regulations issued by the United States Department of Justice pursuant to § 602

of Title VI of the Civil Rights Act of 1964 because the regulations did not "simply apply § 601"; instead, they "forbid conduct that § 601 permits" by establishing a right of action for disparate impact discrimination. 532 U.S. 275, 285, 291 (2001). The Court concluded that Title VI did not permit suits for actions that had a discriminatory effect, beginning and ending with the statutory text. *See id.* at 288, 293. The Court should apply the same analysis when considering HUD's regulation under the FHA. *See also, e.g., Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2040 (2012) (refusing to defer to HUD's policy statement because the statute was unambiguous); *Smith*, 544 U.S. at 233-36 (analyzing the text of § 4(a)(1) of the Age Discrimination in Employment Act and concluding that it does not recognize disparate impact claims).

2. HUD Cannot Create a Right of Action that is Not Explicit in the Text of the FHA

To create a right of action under the FHA for disparate impacts that result from housing practices, Congress had to do so in "clear and unambiguous terms." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002). "Where a statute does not include ... explicit 'right- or duty-creating language' [the Court] rarely impute[s] to Congress an intent to create a private right of action." *Id.* at 284 n.3. The text of the FHA shows that Congress did not clearly and unambiguously create a right of action for disparate impact claims.

Because Congress did not explicitly create a right of action for disparate impact claims, HUD cannot create that right of action through rulemaking. "Language in a regulation may invoke a private right of action that

Congress through statutory text created, but it may not create a right that Congress has not." *Sandoval*, 532 U.S. at 291. To conclude otherwise would violate fundamental separation of power principles. *See id.* ("[I]t is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress."); *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001) ("Article I, § 1, of the Constitution vests '[a]ll legislative Powers herein granted ... in a Congress of the United States.' This text permits no delegation of those powers.").

Further, HUD has no authority to create a right of action for disparate impact claims under the FHA. Section 808(a) of the FHA grants HUD "authority and responsibility for administering" the FHA, and § 815 permits HUD to "make rules to carry out this title." 42 U.S.C. §§ 3608(a), 3614a. However, these provisions are devoid of any "rights-creating" language and do not display any "congressional intent to create new rights." *Sandoval*, 532 U.S. at 288-89. Instead, they limit HUD to "administering" and "carry[ing] out" other provisions of the FHA. *Cf. id.* at 289 ("§ 602 limits agencies to 'effectuating' rights already created by § 601."). HUD's regulation cannot "administer" or "carry out" the other provisions of the FHA by creating a new or different right. Thus, HUD's regulation is entitled to no deference. Indeed, it exceeds HUD's statutory authority and is therefore invalid. *See Batterton v. Francis*, 432 U.S. 416, 426, 428 (1977); *cf. Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 613 (1983) (O'Connor, J., concurring) ("If ... the purpose of Title VI is to proscribe *only* purposeful discrimination in a program receiving federal financial assistance, it is difficult to fathom how the Court could

uphold administrative regulations that would proscribe conduct by the recipient having only a discriminatory *effect*.") (emphasis in original).

In sum, because Congress did not explicitly create a right of action for disparate impact claims under the FHA, HUD cannot "interpret" the FHA to include that right using its rulemaking authority. HUD's regulation establishing a discriminatory effects standard goes beyond mere gap-filling that is subject to *Chevron* deference and impermissibly creates new law by adding another element to the FHA.

3. HUD's Disparate Impact Regulations Cannot Be Applied Retroactively

HUD's regulation need not be considered in this case because it has no retroactive effect. The presumption against retroactive application of new law is "deeply rooted" in American jurisprudence and is fundamental to fair notice that is necessary to give "people confidence about the legal consequences of their actions." *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 265 (1994). Even though HUD has rulemaking authority under the FHA (see 42 U.S.C. § 3614a), no "express terms" of the FHA give it power to promulgate retroactive rules. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). As a result, even if HUD's regulation is a valid and reasonable interpretation of the FHA, it affects only future cases. *Cf. id.* at 215 (concluding that the Medicare Act provides "no authority to promulgate retroactive cost-limit rules"). In this case, the text of the FHA is dispositive.

HUD's final rule suggests that it "is not proposing new law in this area," citing handbooks, policy statements, and regulations implementing other statutes that recognize a disparate impact standard. 78 Fed. Reg. at 11462. However, HUD's final rule is the *only* formal regulation applicable to the FHA that implements a disparate impact standard. And although HUD identifies formal adjudications in which a disparate impact standard has been applied, see *id.* at 11461 n.12, adjudicatory proceedings cannot be used to promulgate rules that apply prospectively. *NLRB v. Wyman*, 394 U.S. 759, 764 (1969) (plurality opinion); *accord id.* at 777 (Douglas, J. dissenting); *id.* at 780-81 (Harlan, J., dissenting). Although adjudicated cases "may serve as precedents[,] this is far from saying ... that commands, decisions or policies in adjudication are 'rules' in the sense that they must, without more, be obeyed by the affected public." *Id.* at 764; *accord Bowen*, 488 U.S. at 221 (Scalia, J., concurring). Contrary to HUD's statement otherwise, HUD's regulation *does* establish new law that purports to apply generally to entities subject to the FHA. Thus, if HUD's regulation may be applied at all, it may only be applied prospectively, not retroactively.

V. CONCLUSION

For the foregoing reasons, the Court should conclude that the FHA does not recognize disparate impact liability.

Respectfully submitted,

JOHN C. HAYES, JR.
Counsel of Record
NIXON PEABODY LLP
401 Ninth Street, N.W.
Washington, D.C. 20004
(202) 585-8000
jhayes@nixonpeabody.com

Of Counsel:
HARRY J. KELLY
BRIAN J. WHITTAKER

Attorneys for Amici Curiae National Leased Housing Association, National Multi Housing Council, National Apartment Association, New Jersey Apartment Association, Public Housing Authorities Directors Association, National Affordable Housing Management Association, and Council for Affordable and Rural Housing