No. 13-1371

IN THE

Supreme Court of the United States

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, *et al.*,

Petitioners,

v.

THE INCLUSIVE COMMUNITIES PROJECT, INC.,

Respondent.

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

BRIEF FOR *AMICI CURIAE* NATIONAL LEASED HOUSING ASSOCIATION, NATIONAL MULTIFAMILY HOUSING COUNCIL, NATIONAL APARTMENT ASSOCIATION, NATIONAL ASSOCIATION OF HOUSING AND REDEVELOPMENT OFFICIALS, NATIONAL ASSOCIATION OF RESIDENTIAL PROPERTY MANAGERS, 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., ESQ.
Counsel of Record
NIXON PEABODY LLP
401 Ninth Street, N.W.
Washington, DC 20004
(202) 585-8000
jhayes@nixonpeabody.com

Counsel for Amici Curiae

Of Counsel:
HARRY J. KELLY, ESQ.
BRIAN J. WHITTAKER, ESQ.

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INTEREST OF *AMICI CURIAE*[1]

The *amici curiae*—National Leased Housing Association, National Multifamily Housing Council, National Apartment Association, National Association of Housing and Redevelopment Officials, National Association of Residential Property Managers, 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, local housing officials, 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

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[1] The parties have consented to the filing of this brief. 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.

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 Multifamily 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 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 15 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 more than 170 state and local affiliated associations, representing more than 67,000 members responsible for more than 7.6 million apartment homes throughout the United States and Canada. 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 multifamily residential businesses nationwide.

The National Association of Housing and Redevelopment Officials ("NAHRO") is a professional membership organization comprising more than 22,000 public housing and community development agencies and officials throughout the United States that collectively administer a variety of affordable housing and community development programs at the local level. NAHRO advocates for appropriate laws, adequate funding levels, and responsible public policies that address the needs of local communities.

The National Association of Residential Property Managers ("NARPM") was founded in 1988, and represents over 5,000 residential property managers nationwide, by providing a permanent trade association for the residential property management industry. The organization is dedicated to its members' high standard of business ethics and professionalism, while offering quality education and enhanced fair housing practices throughout the industry.

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 on a variety of regulations governing public housing nationwide.

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. Founded in 1990, 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 2014 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 rural housing industry. CARH represents the interests of over 300 companies that develop, finance, manage, own, and supply goods and services to 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.

BACKGROUND

Congress adopted the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3601 *et seq*. (the "FHAct"), in 1968 to address persistent problems of discrimination in housing. Originally focused on discrimination on the basis of race, color, national origin and religion, the FHAct was expanded to address sex-based discrimination in 1974 and to address discrimination on the basis of familial status and disability in 1988. 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).

This case raises an important question about the scope of the FHAct—whether it creates liability with respect to facially-neutral policies that have a disproportionate effect, or "disparate impact," on members of classes protected by the FHAct. Over the life of the FHAct, many federal district and

appellate courts have concluded that the FHAct creates disparate impact liability where, in the absence of evidence of intent to discriminate, neutral policies and practices disproportionately impact members of the classes protected by the FHAct compared to the population at large. Disparate impact cases are distinguished from "disparate treatment" cases, which require a showing of *intent* to discriminate against members of protected classes.

In 2008, The Inclusive Communities Project, Inc. ("ICP") sued the Texas Department of Housing and Community Affairs ("TDHCA") alleging, *inter alia*, that TDHCA's allocation of Low Income Housing Tax Credits ("LIHTCs") resulted in a disparate impact on African American residents in violation of the FHAct. Joint Appendix ("JA") 75-96. After a bench trial on the merits, the district court concluded that ICP had not proven intentional discrimination, but had established a claim under the FHAct for disparate impact. JA 171-217.

TDHCA appealed, and while its appeal was pending, the United States Department of Housing and Urban Development ("HUD") issued regulations purporting to establish the standard for proving disparate impact claims under the FHAct. *See* JA 365; Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013); 24 C.F.R. § 100.500. According to HUD, the FHAct imposes liability for any housing practice that "actually or predictably

results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin." 24 C.F.R. § 100.500(a).

On appeal, the Fifth Circuit explained that it was bound to follow its prior precedents recognizing that disparate impact claims are cognizable under the FHAct. JA 362-63 n.4. Because the Fifth Circuit had never determined the proper legal standard to establish a disparate impact claim, it concluded that the burden-shifting standard in HUD's disparate impact regulations should be applied. JA 366-67. Accordingly, the Fifth Circuit reversed and remanded the case to the district court to apply HUD's burden-shifting standard. JA 368.

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

SUMMARY

Disparate impact liability is based upon a judge-made rule that is not supported by the text of the FHAct. 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.

Disparate impact liability is incompatible with the text of the FHAct, which only prohibits intentional acts of discrimination. It is also at odds with this Court's interpretation of other federal antidiscrimination laws, in which it evaluated the plain text of statutes to determine whether Congress intended to create disparate impact liability. Moreover, disparate impact liability effectively creates a series of *de facto* protected classes, beyond those specified by Congress in the text of the FHAct. Rather than allow disparate impact analysis to water-down the standard of liability under the FHAct, the Court should use this opportunity to reaffirm that statute's focus on intentional acts of discrimination. Finally, the Court should not defer to HUD's recently adopted regulations dealing with disparate impact, which cannot create liability that was not intended by Congress.

ARGUMENT

A. Disparate Impact Theory Presents Unique Problems in the Housing Context That Make it Inappropriate as a Basis for Liability Under the FHAct.

The *Amici* represent developers, owners, and managers of multifamily housing and public housing agencies throughout the United States, who are at the forefront 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, sex, familial status or disability. As a result, the *Amici* are in a unique position to comment on the unintended and harmful consequences that disparate impact rules have had on the housing industry.

As housing providers, the *Amici's* members often are called upon to develop rules or policies that facilitate the operation of their properties. These 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 government rules that affect the location and zoning of their developments, the choice of their tenants, and the terms of tenancy.

Housing providers can find themselves facing claims that their policies, or policies they are required to follow, although neutral on their face, have a harsher impact on protected classes than on others. This is almost inevitable: given the wide economic and demographic variations in the Nation's population, it is difficult to construct a policy, even the most benevolent and useful, that does not have a disproportionate impact on some classes of people when compared to others. Unfortunately, to the extent that housing practices or actions disproportionately affect a protected class of persons under the FHAct, they may become actionable under

the FHAct if a disparate impact standard of liability applies.

Housing providers make decisions on the basis of legitimate concerns including, for example, the physical well-being of their tenants and the financial well-being of their business. Nevertheless, the possibility of disparate impact liability creates inescapable tension with many rules and policies. Although far from exhaustive, the following list provides examples of problems that disparate impact liability presents to housing providers as they attempt to balance competing demands:

- 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. A disproportionate percentage of Section 8 voucher holders are racial minorities and those with disabilities—protected classes under the FHAct. *See* U.S. Dep't of Housing & Urban Development, Resident Characteristics Report (RCR), http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/systems/pic/50058/rcr (last visited Nov. 21, 2014); Barbara Sard & Thyria Alvarez-Sanchez, Ctr. On Budget & Policy Priorities, *Large Majority of Housing Voucher Recipients Work, Are Elderly, or Have Disabilities* (2011),

http://www.cbpp.org/files/12-2-11hous.pdf. Initially, HUD adopted a policy—dubbed "take-one, take-all"—requiring that an owner 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. *E.g.*, *Glover v. Crestwood Lake Section 1 Holding Corps.*, 746 F. Supp. 301 (S.D.N.Y. 1990) (concluding that refusal to accept Section 8 tenants constituted discrimination under 42 U.S.C. § 1437f(t)).

Although Congress subsequently repealed the "take-one, take-all" requirement, some courts have allowed tenants to assert disparate impact claims under the FHAct when owners withdraw from the Section 8 program after initially accepting Section 8 tenants. *See*, *e.g.*, *Graoch Assocs. v. Lousiville/Jefferson County Metro Human Relations Comm'n*, 508 F.3d 366, 376-379 (6th Cir. 2007) (permitting disparate impact claims resulting from withdrawal from Section 8 program but finding no liability because there was no statistical evidence that a disproportionate percentage of racial minorities were adversely impacted); *Green v. Sunpointe Assocs., Ltd.*, No. C96-1542C, 1997 WL 1526484 (W.D. Wash. May 12, 1997) (recognizing disparate impact on African American women and children from owner's withdrawal from Section 8 program).

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; Conn. Gen. Stat. § 46a-64c; D.C. Code Ann. § 2-1402.21; N.J. Stat. Ann. § 10:5-4. But the FHAct has not been amended to prohibit source of income discrimination. Nevertheless, cases like *Graoch* and *Green*, which applied disparate impact analysis, may have the effect of establishing such protection for voucher holders—at least in those jurisdictions—due to the risk of disparate impact liability associated with refusing Section 8 vouchers.

Graoch and *Green* are in tension with other federal court decisions that have categorically refused to apply disparate impact analysis based on refusals to participate in the Section 8 program. *E.g.*, *Salute v. Stratford Greens Garden Apts.*, 136 F.3d 293, 302 (2d Cir. 1998); *Knapp v. Eagle Prop. Mgmt. Corp.*, 54 F.3d 1272, 1280 (7th Cir. 1995). These different interpretations increase confusion and liability risks for housing providers. Because Congress affirmed 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 under the FHAct to threaten housing providers

based on their decisions to not participate in or to withdraw from the Section 8 program.

Of course, to prevail, plaintiffs must show sufficient statistical evidence to support a claim of disparate impact. *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 disparate impact on African Americans and persons with disabilities from non-renewal of Section 8 leases). And owners can rebut these claims with legitimate business justifications. *See Groach Assocs.*, 508 F.3d. at 376 (citing Section 8 program costs as a legitimate justification).

But these requirements simply highlight the problem with disparate impact analysis: a housing provider cannot determine whether a policy it adopts—no matter how neutral in form or benevolent in intent—is consistent with the FHAct until a court or HUD administrative law judge has made a determination based on facts and data. 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 FHAct

claim, even though Congress has clearly expressed its view that participation in that program is *purely voluntary*. *See, e.g.*, *Salute*, 136 F.3d at 302 (quoting *Knapp*, 54 F.3d at 1280). 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.

- State and municipal laws encourage or require criminal background checks of prospective tenants by owners and property managers who are not participants in federal housing programs. Owners of multifamily housing are generally required by lease or state law to assure quiet enjoyment of apartment units rented by their tenants. Owners that provide multifamily rental housing can be held liable if they fail to use reasonable care to protect tenants from foreseeable risk of harm. *See, e.g.*, *Kline v. 1500 Mass. Ave. Corp.*, 439 F.2d 477, 480-81 (D.C. Cir. 1970) (finding landlord liable for tenant injuries resulting from criminal acts by third party); Ely Portillo, *Jury Finds Housing Authority Negligent*, CHARLOTTE OBSERVER, Feb. 10, 2010, *available at* http://charlotte.twcnews.com/content/headlines/621791/jury-finds-housing-authority-negligent-in-woman-s-death/. To avoid such claims, many landlords require criminal background checks of prospective tenants and sometimes refuse to

rent to those with criminal or drug abuse records. *See also, e.g.*, David Thacher, *The Rise of Criminal Background Screening in Rental Housing*, 33 LAW & SOC. INQUIRY 5, 14-15 (2008) (discussing state laws that require or encourage criminal background screening); City of Dubuque, Iowa, Code of Ordinances Title 6, Health, Housing Sanitation, and Environment, Chapter 6 Housing Regulations, Section 6-6-7 Licenses and Inspections (requiring criminal background checks).

Disparate impact liability casts doubt on the legality of criminal background screening because it raises the possibility that such screening will unintentionally result in the exclusion of a disproportionate number of individuals from protected classes under the FHAct. Accordingly, property owners and managers are caught between potential liability arising from criminal activity of unscreened tenants and potential liability under the FHAct arising from disparate impacts associated with criminal background screening. *See, e.g.*, Complaint, *The Fortune Society, Inc. v. Sandcastle Towers Hous. Dev. Fund Corp.*, No. 14-6410 (E.D.N.Y. Oct. 30, 2014) (alleging an FHAct claim arising from policy of refusing to rent to persons with criminal convictions based on disparate impacts to African Americans and Latinos).

- Additionally, many owners of multifamily housing participate in one or more federal housing programs that, pursuant to HUD regulations, require owners to refuse admission to, or in some cases evict, tenants who have records of crime or drug use or engage in such criminal activity while tenants. *See* 24 C.F.R. §5.850 *et seq*. HUD's rules set certain minimum requirements, but allow owners to adopt rules that impose stricter limitations. *See id.* at § 5.851 (describing authority to screen applicants and evict tenants); HUD Handbook 4350.3, §4-7C.3-.4.

  Notwithstanding its own recognition of the dangers posed by renting to persons with histories of particular criminal conduct, HUD recently urged public housing agencies ("PHAs") to reconsider limitations on providing housing to ex-offenders. *See* U.S. Department of Housing and Urban Development, Letter from HUD Secretary Shaun Donovan to PHA Executive Directors (2011), *available at* http://www.bazelon.org/LinkClick.aspx?fileticket=o6OLk7b_6c4%3D&tabid=537 (suggesting that PHAs exercise discretion to permit admission of ex-offenders when possible). Moreover, in response to comments about liability risks associated with disparate impact by excluding ex-offenders, HUD refused to recognize a categorical exemption for such actions. Instead, HUD explained that whether the "use of criminal arrest or conviction records

to exclude persons from housing is supported by a legally sufficient justification depends on the facts of the situation." 78 Fed. Reg. 11,460, 11,478. 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 disproportionately affect protected classes.

Similarly, 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. Based on HUD criminal screening and eviction regulations, 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 crime screening rules—may result in disparate impact liability under the FHAct if they have a disproportionate impact on protected classes. *See* U.S. Department of Housing and Urban Development, Assessing Claims of Housing Discrimination Against Victims of Domestic Violence under the Fair Housing Act (FHAct) and the Violence Against Women Act (VAWA) (2011), *available at* http://www.hud.gov/offices/fheo/library/11-domestic-violence-memo-with-attachment.pdf. Accordingly, 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.

- 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, before signing a lease, 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 who also are identifiable as part of a protected class under the FHAct 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 can present problems for a voucher holder because public agencies sometimes require significantly more time to approve proposed leases. Because participants in the Section 8 program are more likely to be part of protected classes under the FHAct, voucher holders who are unable to obtain approval within the permitted time period may claim that they are the victims of disparate impact discrimination.

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. Tighter credit standards tend to have a harsher impact on lower income persons. To the extent that lower income persons are disproportionately minorities, those providers or lenders face 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.

This concern was raised in comments to HUD's proposed disparate impact regulations. A commenter requested "that the final rule codify examples of tenant screening criteria such as rental history, credit checks, income verification, and court records that would be presumed to qualify as legally sufficient justifications." 78 Fed. Reg. 11460, 11471. HUD denied the request, merely stating that "what qualifies as a substantial, legitimate, nondiscriminatory interest … is fact-specific and must be determined on a case-by-case basis." *Id.* HUD's response only increased uncertainty about potential liability under the FHAct for facially neutral tenant screening practices that are tied to legitimate financial concerns.

These are only a few examples of the distortions that disparate impact claims cause for 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 the intent to discriminate nor any understanding of how protected classes might be impacted by such a policy. In many cases, a housing provider cannot predict whether a particular policy or practice will potentially violate the FHAct 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, reduce eviction rates, or 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, the implications of disparate impact liability for housing providers are staggering.

B. Disparate Impact Liability Improperly Extends the Scope of the FHAct and Creates *De Facto* Protected Classes That Congress Did Not Intend.

1. The Plain Language of the FHAct Prohibits Only Intentional Discrimination in Housing Practices.

The language of the FHAct (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.*, *Cmty. Servs., Inc. v. Wind Gap Mun. Auth.*, 421 F.3d 170, 177 (3rd Cir. 2005) (discussing nature of required "discriminatory purpose"). Disparate impact theory goes far beyond the parameters of the statute by permitting a finding of discrimination without any finding of discriminatory intent.

The Court need not look further than the clear and concise language of the FHAct to determine its meaning. 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 FHAct 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). "[B]ecause of" means "by reason of [or] on account of," indicating *unequivocal* cause or intent. *American Heritage Dictionary* 117 (1st ed. 1969) (noting that "because" "always indicates an unequivocal causal relationship").

In spite of that clear language, many lower courts have held that the FHAct supports a claim of disparate impact liability. Such claims are permitted without any evidence of discriminatory intent, usually by analogizing the FHAct 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 FHAct claims).

Disparate impact liability goes far beyond the parameters of the statute by permitting a finding of unlawful discrimination as a result of a correlation between a facially neutral policy and unanticipated, indeed accidental, impacts on a protected class of persons. 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 includes a disproportionate number of individuals

that belong to one of the protected classes under the FHAct. If such an overlap exists, the policy or rule is presumptively discriminatory, eliminating the need to show the discriminatory intent reflected in the "because of" language of the statute.

Significantly, Congress has not added language to the FHAct expressly prohibiting effects-based discrimination, while it has done so in other antidiscrimination statutes. For example, 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). Title VII 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 explained that the "adversely affect" language in § 703(a)(2) of Title VII supports a disparate impact claim:

> 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 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991 (1988)) (plurality opinion) (emphasis in original); *see also id.* at 243 (Scalia, J., concurring in part and concurring in the judgment) ("agreeing with all of the Court's reasoning" but resolving the case based on deference to the administering federal agency). 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. *See id.* at 235-36 (plurality opinion).

On the other hand, the Court explained that § 4(a)(1) of ADEA does not support a disparate impact claim. Like § 3604(a) of the FHAct, § 4(a)(1) of ADEA 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). There are "key textual differences" between §§ 4(a)(1) and (2) of ADEA. *City of Jackson*, 544 U.S. at 236, n.6 (plurality

opinion). Section 4(a)(2) contains language that prohibits conduct that "adversely affects" individuals, while § 4(a)(1) bars discrimination "because of" membership in a protected class. Section 4(a)(2) can support a disparate impact claim. However, Section 4(a)(1)—***which contains the same language found in § 3604(a) of the FHAct***—permits disparate treatment claims based on intent, but not disparate impact claims. "The focus of [§ 4(a)(1)] is on the employer's actions with respect to a targeted individual." *Id.*

Disparate impact claims are permissible under other federal discrimination laws as well, but only where Congress included language focused on the effects or resulting outcomes on protected classes from the actions of others. Examples include § 703(a)(2) of Title VII, § 4(a)(2) of ADEA, the Americans with Disabilities Act, 42 U.S.C. § 12112(b) ("ADA"), the Rehabilitation Act of 1973, 29 U.S.C. § 791(g) (the "Rehabilitation Act") and the Voting Rights Act, 42 U.S.C. § 1973(a). *See, e.g.*, *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003) ("Both disparate-treatment and disparate-impact claims are cognizable under the ADA."); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (recognizing that disparate impact claims are cognizable under Title VII). However, because § 3604(a) does not contain results or effects-based language, the FHAct does not permit disparate impact claims. *See also* 42 U.S.C. § 3606 (prohibiting discrimination "on account of…"). The District Court for the District of Columbia recently agreed, concluding that the

FHAct clearly does not permit disparate impact claims. *See Am. Ins. Ass'n v. U.S. Dep't of Housing & Urban Dev.*, No. 13-0966-RJL, slip op. at 17-22 (D.D.C. Nov. 3, 2014).

2. By Ignoring the FHAct's Intent Requirement, Disparate Impact Analysis Creates *De Facto* Protected Classes That Congress Did Not Intend.

When the intent requirement is read out of the FHAct and potential liability is expanded by the use of disparate impact analysis, the statute's focus on specific protected classes is blurred and congressional intent is undermined. Liability without evidence of discriminatory intent creates an endless, increasing number of *de facto* protected classes. Thus, disparate impact analysis effectively extends protection to classes of persons—Section 8 voucher holders, ex-offenders, and persons with poor credit, among others—that Congress did not identify in the FHAct. To make out a prima facie disparate impact claim, plaintiffs need only to show that they belong to a class protected by the FHAct and that a facially neutral housing policy targeted at an unprotected class of individuals also disproportionately impacts the protected class to which they belong. Disparate impact analysis creates a series of *de facto* protected classes because housing providers are effectively prohibited from taking certain actions against entire unprotected classes of people simply because the unprotected class coincidentally contains a disproportionate

number of individuals that belong to protected classes under the FHAct.

Congress has taken pains to identify who is—and who is not—protected by the FHAct. When the FHAct was originally enacted in 1968, it prohibited discrimination based upon race, color, national origin and religion. Congress later specifically added other forms of discrimination: discrimination based upon sex in 1974 and discrimination based on familial status and disability in 1988. 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). When Congress added these classes, it did not change the structure of the statute; it maintained the FHAct's prohibition against intentional discrimination in housing. Thus, Congress has demonstrated both its desire to remedy intentional acts of discrimination and its willingness to add new protected classes to the statutory scheme.

Here again, the Section 8 program provides an example of the overreach resulting from applying disparate impact analysis to FHAct claims. As previously noted, a policy of not renting to Section 8 voucher holders, based strictly upon an owner's rational business decisions, could be held to violate § 3604(a) if Section 8 voucher holders are disproportionately members of a racial minority, even though the existence of a statistical correlation between poverty and a particular race does not necessarily demonstrate discriminatory intent. *See*

Ybarra v. Town of Los Altos Hills, 503 F. 2d 250, 253 (9th Cir. 1974). Courts essentially create a new protected class—Section 8 voucher holders—when they make it unlawful to refuse to rent to Section 8 voucher holders because such a refusal has an unintended, disparate impact on a protected class under the FHAct.

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 FHAct's protections several times since 1968. If Congress 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.

Circuit Judge Jones recognized this problem and raised questions about the scope of disparate impact liability in her concurrence below. She made the point that TDHCA had a "forceful argument that the appellees did not prove a facially neutral practice that caused the observed disparity" because appellees' argument hinged on merely a "statistical 'imbalance' in the location of LIHTC units approved by TDHCA." JA 368-69. "Put more bluntly, if the appellees' framing of disparate impact analysis is correct, then the NBA is prima facie liable for disparate impact in the hiring of basketball players."

JA 370. Similar disagreements have occurred in other circuits. *See, e.g.*, *Mount Holly Gardens Citizens in Action, Inc. v. Twp of Mount Holly*, 658 F.3d 375 (3d Cir. 2011); *Cmty. Servs. v. Wind Gap Mun. Auth.*, 421 F.3d 170 (3d Cir. 2005); *Charleston Hous. Auth. v. USDA*, 419 F.3d 729 (8th Cir. 2005). Given the courts' disagreements about the scope of disparate impact liability, confusion among housing providers is inevitable under a disparate impact standard like that adopted by HUD in its disparate impact regulations under the FHAct.

3. The Court Should Follow Its Precedents to Assure That the FHAct is Applied as Congress Intended.

The circuit courts have not fully analyzed the viability of disparate impact claims under the FHAct since *City of Jackson*. In *Magner v. Gallagher*, Circuit Judge Colloton, who was joined by four other circuit judges, explained in a dissent from denial of rehearing en banc:

> [T]here has been little consideration in this circuit of the textual basis for [disparate impact] liability, and virtually no discussion of the matter by any court of appeals since the Court in *Smith* explained how the text of Title VII justified the decision in *Griggs*. The district court and the parties understandably have taken disparate-impact analysis as a given

> under circuit precedent, but recent developments in the law suggest that the issue is appropriate for careful review….

636 F.3d 380, 383 (8th Cir. 2010). Indeed, in a November 2014 opinion, the District Court for the District of Columbia concluded that HUD exceeded its authority under the FHAct when it promulgated its disparate impact regulations, relying in large part on this Court's opinion in *City of Jackson*. *See Am. Ins. Ass'n*, No. 13-0966-RJL, slip op. at 17-22, 29-31.

Pursuant to *City of Jackson* and similar cases, the Court should use this case to clarify that the FHAct does not support disparate impact claims. The FHAct should be interpreted the same as other antidiscrimination statutes, with virtually identical "because of" language, to bar intentional discrimination only. *See id.* at 22 ("In addition to the clear meaning of the FHA's plain text, the striking similarities between the statutory language of § 3604(a) and the disparate-treatment provisions of Title VII and the ADEA leave this Court with no doubt that Congress intended the FHA to prohibit intentional discrimination only."). Likewise, the Court should make clear that lower courts and agencies must respect those protected classes listed in the express language of the FHAct and not use disparate impact analysis to create additional protected classes beyond those intended by Congress.

C. Disparate Impact Theory is Not Needed to Advance Congressional Intent.

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

From defendants' point of view, however, disparate impact dilutes fair housing law to the point that, as explained above, even well-intended and useful rules and policies can result in expensive, embarrassing, and time-consuming litigation. By reducing plaintiffs' prima facie burden to nothing more than statistical evidence of a disproportionate impact, many innocent—indeed, well-intended—persons and organizations that have adopted rules or policies to advance legitimate goals find themselves facing discrimination charges. This result is especially troubling because Congress has not expressly incorporated language in the FHAct to invalidate purely effects-based outcomes. Courts should be loath to find disparate impact liability and proscribe conduct in the absence of evidence that a person truly intended to discriminate against a class expressly protected by the FHAct.

Concluding that the FHAct does not recognize disparate impact claims would not undermine the

purpose of the FHAct. Rather than water down the standard of liability written into the FHAct by eliminating an intent requirement, courts should scrutinize challenged conduct to assure that intentional discrimination is penalized.

A good example is in the area of exclusionary zoning—a practice of some 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 FHAct 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 1283 (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 essential in order to attack 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 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 FHAct does not recognize disparate impact claims, this case also provides an opportunity for the Court to make clear that the FHAct punishes intentional housing discrimination and to remind lower courts and agencies that intentional discrimination should be strongly condemned. 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 intent to support an FHAct 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.").

From the perspective of the housing industry, refocusing FHAct liability on evidence of intent is preferential to disparate impact analysis in several respects. First, and most important, focusing on intentional acts of discrimination reaffirms the integrity of the protected classes actually identified by Congress in the FHAct. Second, it does not penalize neutral conduct that has only collateral impacts on protected classes. So long as all similarly-situated individuals in the class of persons targeted by a facially neutral housing policy are treated the same, and there is no evidence of an intent to discriminate, there should be no liability under the FHAct. That should be true even if a subgroup of the class affected by the facially neutral housing policy also happens to be a protected class under the FHAct. As noted above, Congress has expressly identified certain classes of persons for protection under the FHAct. 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 FHAct, as enacted by Congress, are achieved. If Congress wants to amend the FHAct to extend protections to other persons, it may do so within constitutional limits. The Court will have satisfied its responsibilities by assuring that the FHAct's prohibitions on intentional discrimination, as established by Congress, are vigorously enforced.

D. The Court Should Not Defer to HUD's Regulations.

In 2013, 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 [FHAct]." 78 Fed. Reg. 11460. 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 regulations and not independently determine whether disparate impact claims are cognizable under the FHAct. HUD issued the notice of proposed rulemaking in November 2011—decades after the FHAct 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 FHAct 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 regulations for several reasons. First, HUD's regulations are contrary to the unambiguous text of the FHAct, which prohibits only intentional discrimination. Second, HUD may not create a right of action under the FHAct for disparate impact claims that is not clearly expressed in the text of the statute. Third, HUD's regulations have no retroactive effect and would only apply to future claims that are valid and a reasonable interpretation of the FHAct.

1. Where Congressional Intent is Clear—as It is From the Text of the FHAct—Deference is Unwarranted.

The plain language of the FHAct leaves no doubt that Congress intended to prohibit only intentional discrimination in housing practices, not disparate impacts resulting from housing practices. *See* Br. for the Pet'rs at 13-17; Section B.1, *supra*. Because "the intent of Congress is clear" under the terms of the FHAct, "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 regulations under the FHAct. *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); *City of Jackson*, 544 U.S. at 233-36 (plurality opinion).

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

To create a right of action under the FHAct 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." *Gonzaga Univ.*, 536 U.S. at 284 n.3. As previously explained, Congress did not clearly and unambiguously create a right of action under the FHAct 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 liability under the FHAct. Section 808(a) of the FHAct grants HUD "authority and responsibility for administering" the FHAct, 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 FHAct. *Cf. id.* at 289 ("§ 602 limits agencies to 'effectuating' rights already created by § 601."). HUD's regulations cannot "administer" or "carry out" the other provisions of the FHAct by creating a new or different right. Thus, HUD's regulations are entitled to no deference. Indeed, HUD's regulations exceed its statutory authority and are therefore invalid. *See Am. Ins. Ass'n*, No. 13-0966-RJL, slip op. at 17 ("[T]he FHA unambiguously prohibits only intentional discrimination. Accordingly, the Disparate Impact Rule exceeds HUD's 'statutory jurisdiction, authority, or limitations, 5 U.S.C. § 706(2)(C), and thereby violates the [Administrative Procedure Act]."); *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 FHAct, HUD cannot "interpret" the FHAct to include that right using its rulemaking authority. HUD's disparate impact regulations go far beyond mere gap-filling that is subject to *Chevron* deference

and impermissibly create new law by expanding the scope of the FHAct beyond what Congress intended.

As the primary federal agency regulating the housing industry, with oversight over multifamily and single-family housing, HUD's actions dramatically affect the housing industry and the daily operations of the *Amici* and the constituencies that they represent. History demonstrates the importance of "high walls and clear distinctions" that are inherent in the doctrine of separation of powers to limit the usurpation and abuse of power. *Plaut v. Spendthrift Farm*, 514 U.S. 211, 239 (1995). The doctrine is *not* "a remedy to be applied only when specific harm, or risk of specific harm, can be identified." *Id.* However, HUD's disparate impact regulations are particularly troubling, due to HUD's "calculat[ed]" proposal of the regulations just nine days after the Court granted certiorari in *Magner* (*Am. Ins. Ass'n*, No. 13-0966-RJL, slip op. at 5), especially since the regulations will only amplify the aforementioned harmful effects from applying disparate impact analysis in the housing industry by adding greater uncertainty about the scope of liability under the FHAct.

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

HUD's regulations need not be considered in this case because they have 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 FHAct (see 42 U.S.C. § 3614a), no "express terms" of the FHAct 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 regulations are a valid and reasonable interpretation of the FHAct, they affect 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 FHAct 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 rule applicable to the FHAct 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 regulations *do* establish new law that purports to apply generally to entities subject to the FHAct.

CONCLUSION

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

Respectfully submitted,

John C. Hayes, Jr., Esq.
Nixon Peabody LLP
401 Ninth Street, N.W.
Washington, D.C. 20004
(202) 585-8000
jhayes@nixonpeabody.com

Of Counsel:
Harry J. Kelly, Esq.
Brian J. Whittaker, Esq.

Attorneys for Amici Curiae National Leased Housing Association, National Multifamily Housing Council, National Apartment Association, National Association of Housing and Redevelopment Officials, National Association of Residential Property Managers, Public Housing Authorities Directors Association, National Affordable Housing Management Association, and Council for Affordable and Rural Housing