No. 13-1371

In the Supreme Court of the United States

TEXAS DEPARTMENT OF HOUSING & 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 OF AMICUS CURIAE TEXAS APARTMENT ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Texas Apartment Association ("TAA"), a non-profit, statewide trade association comprised of landlords, managers, and allied service representatives of the Texas rental housing industry, has been serving that industry for more than 50 years. Its members operate throughout the State of Texas, including six of the largest cities in the nation: Dallas, Houston, Austin, San Antonio, Fort Worth, and El Paso. Accordingly, TAA has daily experience dealing with housing discrimination rules and regulations, and as part of its mission to foster industry stability and better serve the housing needs of Texas residents, TAA educates its members on fair housing laws.

The Fair Housing Act prohibits discrimination in housing. 42 U.S.C. § 3604. TAA strongly supports the Act's goal of eliminating intentional discrimination in housing. The issue raised in this case, however, is whether the Act is also designed to prohibit facially neutral, non-discriminatory conduct that has a disparate impact on members of a protected class.

Disparate-impact claims under the Fair Housing Act have the potential to affect many of TAA's

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1. Pursuant to this Court's Rule 37, Texas Apartment Association states that all parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

members. As do most businesses, TAA's members seek to operate in a manner that minimizes the risk of being confronted with a disparate-impact lawsuit. A disparate-impact claim, alleging discrimination on the basis of race, national origin, or other statutorily defined characteristic, is a serious charge that often results in immediate reputational injury and business disruption. And defending allegations of disparate impact, even if those allegations are proved to be without merit, is costly and stigmatizing. The Court should hold that the Fair Housing Act does not impose liability based on non-discriminatory conduct that inadvertently has a disparate impact on members of a protected class.

SUMMARY OF ARGUMENT

Congress has used easily understood, ordinary terms to differentiate statutory prohibitions of (1) facially non-discriminatory actions that have a "disparate impact" on members of a protected class, and (2) intentional discrimination or "disparate treatment." When prohibiting facially neutral conduct that has a "disparate impact," Congress uses specific language directed to the "effects" of that conduct. On the other hand, when Congress intends to proscribe intentional discrimination, *i.e.*, disparate treatment, it employs text describing discriminatory acts committed "because of" a person's protected status. Congress used only disparate-treatment language in the Fair Housing Act.

The provision of the Fair Housing Act at issue here, 42 U.S.C. § 3604(a), prohibits only intentional

discrimination. Specifically, Section 3604(a) addresses conduct that is undertaken against an individual "because of" that person's membership in a class protected under the statute. Section 3604(a) does not speak to conduct that "adversely affects" or "tends to deprive" members of a protected class, *i.e.*, the language that forms the basis of disparate-impact claims. *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991 (1988) (plurality opinion) (construing Title VII Section 703(a)(2)); *see also Smith v. City of Jackson*, 544 U.S. 228, 236 (2005) (plurality opinion) (construing Age Discrimination in Employment Act Section 4(a)(2)). For this reason alone, Section 3604 does not provide a cause of action for disparate-impact discrimination.

To the extent the Court looks beyond the plain language of Section 3604(a), the Fair Housing Act's legislative history confirms that Congress viewed intentional discrimination as the barrier to equality in the housing market, and designed the Act to combat that evil alone. Further, practical problems with importing disparate-impact analysis to the Fair Housing Act underscore that it should not be judicially construed to create a disparate-impact cause of action. Recognizing disparate-impact liability untethered to the plain text of Section 3604(a) imposes unduly severe consequences on housing providers by overexposing them to lawsuits based on race-neutral, routine decisionmaking. Therefore, TAA respectfully urges the Court to

reverse the Fifth Circuit's decision permitting disparate-impact claims under the Fair Housing Act.

ARGUMENT

I. THE TEXT AND HISTORY OF THE FAIR HOUSING ACT CONFIRM THAT IT DOES NOT AUTHORIZE DISPARATE-IMPACT CLAIMS.

The court of appeals below allowed a "disparate impact" claim to proceed under the Fair Housing Act against the Texas Department of Housing and Community Affairs (TDHCA).[2] *Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs,* 747 F.3d 275 (5th Cir. 2014). Such a claim requires neither an allegation nor proof that individuals were treated differently because of their race. Instead, plaintiffs may merely show that a neutral practice has a disproportionate effect, *i.e.*, a disparate impact, on some protected group. But both the text and history of the Fair Housing Act establish that it was intended to apply solely to intentional discrimination, not to acts having a disparate impact on protected classes. The Court should now make

2. The Court has previously decided two cases implicating disparate-impact analysis, but in each case the question whether disparate-impact claims are cognizable was not addressed. *See Town of Huntington v. Huntington Branch, N.A.A.C.P.*, 488 U.S. 15, 18 (1988) (the parties conceded the applicability of the disparate-impact theory); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 199-200 (2003) (vacating the FHA claim because it was abandoned on appeal).

clear that disparate-impact claims are not cognizable under the Act.

A. The Text of 42 U.S.C. § 3604 Prohibits Only Purposeful Discrimination.

Statutory interpretation always "begins with the statutory text" and "if the text is unambiguous," it "ends there as well." *BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004) (plurality opinion) (citing *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004)). This is because "the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

And in recent years the Court has reconfirmed the primacy of statutory text in the interpretation and application of anti-discrimination statutes. In *Smith v. City of Jackson*, 544 U.S. 228 (2005), the Court looked to the text of an anti-discrimination statute, rather than a broad interpretation of the statute's purpose, to determine whether the statute permits disparate-impact claims.[3] *See also Am. Ins.*

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3. In *American Insurance Association v. United States Department of Housing and Urban Development*, No. 13–00966 (RJL), 2014 WL 5802283, at *12-13 (D.D.C. Nov. 7, 2014), the court noted that "it is remarkable that none of the Circuit Courts that have recognized claims of disparate impact subsequent to the Supreme Court's decision in *Smith* have either discussed *Smith* in any detail, or reconsidered their Circuit precedent in light of its holding." (citing, *inter alia*, *Inclusive Cmtys. Project, Inc.,* 747 F.3d 275 at 280). The court further observed that "*Smith* represents a sea change in

Ass'n v. HUD, No. 13–00966 (RJL), 2014 WL 5802283, at *7 (D.D.C. Nov. 7, 2014) (noting that the Court "has made clear that statutes will only prohibit practices resulting in a disparate impact . . . when they contain *clear* language to that effect") (citing *City of Jackson*, 544 U.S. at 235–36; *Bd. of Educ. of City Sch. Dist. of City of New York v. Harris*, 444 U.S. 130, 138–39 (1979)).

The issue before the Court in *City of Jackson* was whether the Age Discrimination in Employment Act ("ADEA") permits disparate-impact claims. The plurality explained that determining whether the ADEA supports a disparate-impact claim turned on textual analysis, specifically whether the statutory language "focuses on the *effects* of the action on the [protected individual] rather than the motivation for the action of the [defendant]." *Id*. at 236.

Thus, statutory language that pertains to discriminatory "actions" and their "motivation" supports intentional-discrimination claims only, not disparate-impact claims. *See id.* at 236 n.6 (concluding that Section 4(a)(1) of the ADEA, which makes it unlawful for an employer "to fail or refuse to hire . . . any individual . . . because of such individual's age" did not "encompass disparate-impact liability") (emphases omitted); *see also Alexander v. Sandoval*, 532 U.S. 275, 280 (2001)

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approach to the analysis of statutory provisions with respect to disparate impact liability" and therefore found a party's reliance on pre-*Smith* case law to be "unavailing." *Id.* at *13.

(observing that it is "beyond dispute" that Section 601 of Title VI, 42 U.S.C. § 2000d, which makes it unlawful for any person to "be denied" federal financial assistance because of race, "prohibits *only* intentional discrimination") (emphasis added); *City of Mobile v. Bolden*, 446 U.S. 55, 60-64 (1980) (plurality opinion) (interpreting Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, which, until a later amendment, made it unlawful to "deny or abridge" voting rights on account of race, to prohibit only intentional discrimination).

On the other hand, statutory language that focuses on adverse *effects*, rather than the nature or motivation of the action, encompasses disparate-impact liability. *See City of Jackson*, 544 U.S. at 236 n.6 (concluding that Section 4(a)(2) of the ADEA, which makes it unlawful for an employer "to limit . . . his employees 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 age" implicates disparate-impact liability) (emphasis added and omitted); *see also Watson*, 487 U.S. at 991 (concluding that Title VII "may be analyzed under the disparate impact approach" because the statute prohibits employer practices that adversely affect an employee's status).

The operative provision of the Fair Housing Act at issue in this case is 42 U.S.C. § 3604(a). The Act 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). Thus, Congress used language in Section 3604(a) that focuses exclusively on discriminatory "actions" and their "motivation," not the "effects" of facially neutral policies. *See City of Jackson*, 544 U.S. at 234, 236 & n.6; *see also Am. Ins. Ass'n*, 2014 WL 5802283, at *8 ("When Congress intends to expand liability to claims of discrimination based on disparate impact, it uses language focused on the result or effect of particular conduct, rather than the conduct itself."). Because the language of Section 3604(a) focuses only on prohibited acts, and not on the effects of those acts, Congress plainly limited its scope to intentional-discrimination claims. *Am. Ins. Ass'n*, 2014 WL 5802283, at *8 ("In the FHA, Congress has included *no* such effects-based language.").

Notably, Section 3604(a)'s language tracks the text of other statutory provisions that prohibit actions taken "because of" a protected characteristic. For example, Section 703(a)(1) of Title VII and Section 4(a)(1) of the ADEA prohibit specific discriminatory conduct, but like Section 3604(a) do not focus on the "effects" of the prohibited conduct.[4]

4. Section 703(a)(1) makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

See Ricci v. DeStefano, 557 U.S. 557, 583 (2009) (construing § 703(a)(1) as an intentional-discrimination provision); *City of Jackson*, 544 U.S. at 236 n.6, 249 (finding no disparate-impact liability under ADEA § 4(a)(1)). Indeed, "[t]he statutory language in § 3604(a) is materially *identical* to the statutory language used in the disparate-treatment prohibitions in Title VII and the ADEA." *Am. Ins. Ass'n*, 2014 WL 5802283, at *9. The Court generally treats such language similarities in statutes as "a strong indication that [they] should be interpreted *pari passu*." *Northcross v. Bd. of Educ.*, 412 U.S. 427, 428 (1973) (per curiam).

Conversely, Section 3604(a)'s text differs materially from statutory provisions that permit claims for disparate impact, such as Section 703(a)(2) of Title VII,[5] Section 4(a)(2) of the ADEA,[6] and Section 102 of the Americans with Disabilities Act of 1990 ("ADA").[7] Each of those other provisions prohibits conduct that "adversely affects" a protected class, using language the Court has recognized as

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Section 4(a)(1) of the ADEA similarly states that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1).

5. 42 U.S.C. § 2000e-2(a)(2).

6. 29 U.S.C. § 623(a)(2).

7. 42 U.S.C. § 12112(b).

authorizing claims of disparate impact.[8] *See Griggs v. Duke Power Co.*, 401 U.S. 424, 426 n.1, 429-31 (1971) (Section 703(a)(2) of Title VII permits disparate-impact claims); *City of Jackson*, 544 U.S. at 236 & n.6 (Section 4(a)(2) of the ADEA permits disparate-impact claims); *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003) (Section 102(b) of the ADA permits disparate-impact claims).

Respondent ICP asserts that Section 3604(a) resembles the statutory language in the disparate-impact provisions of Title VII and the ADEA, rather than the language found in disparate-treatment provisions. Specifically, ICP claims that "The phrase

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8. Section 703(a)(2) of Title VII provides that it shall be an unlawful employment practice for an employer "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).

Section 4(a)(2) of the ADEA provides that it shall be unlawful for an employer "to limit, segregate, or classify his employees 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 age." 29 U.S.C. § 623(a)(2).

Section 102 of the ADA defines "discrimination" to include "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee." 42 U.S.C. § 12112(b)(1).

'or otherwise make unavailable or deny' in the FHA parallels the phrase 'or otherwise adversely affect' in Title VII," which was cited by *City of Jackson* as providing disparate-impact claims. Resp. ICP's Br. in Opp'n 14.

But the phrase "otherwise make unavailable or deny" in Section 3604(a), on its face, employs active tense verbs that denote intentional conduct: *i.e.*, the act of "making" a dwelling unavailable or "denying" a dwelling to a person. This language, like the other operative terms of Section 3604(a), focuses exclusively on discriminatory "actions" and their "motivation," not the "effects" of facially neutral policies. ICP's contrary conclusion simply cannot be reconciled with the language used by Congress. *See Am. Ins. Ass'n*, 2014 WL 5802283, at *9 ("It takes hutzpah (bordering on desperation) for defendants to argue that § 3604(a) more closely resembles the statutory language in the disparate-impact provisions of Title VII and the ADEA, both of which contain explicit effects-focused language that is conspicuously lacking in § 3604(a).").

ICP additionally argues that three exemptions in the Fair Housing Act presuppose disparate-impact liability. Resp. ICP's Br. in Opp'n 15–16 (citing 42 U.S.C. §§ 3605(c), 3607(b)(1), 3607(b)(4)). ICP argues that exemptions pertaining to drug offenders, occupancy limits, and the ability of real estate appraisers to account for factors other than protected classes would be unnecessary if the Fair Housing Act prohibited only intentional discrimination against

protected classes. *Id.* These provisions, however, "merely provide safe-harbors, clarifying that nothing in the FHA prohibits the specific conduct discussed." *Am. Ins. Ass'n*, 2014 WL 5802283, at *10 (emphases omitted). And "under the burden-shifting framework applied to claims of disparate-treatment by many jurisdictions, these safe-harbor provisions provide *per se* legitimate bases as defenses to claims of disparate treatment." *Id.* (citing *2922 Sherman Ave. Tenants' Ass'n v. Dist. of Columbia*, 444 F.3d 673, 682 (D.C. Cir. 2006)). As the *American Insurance Association* court concluded with regard to identical arguments, "Considering the unambiguous meaning of the FHA's plain text . . . defendants' contention that the cited provisions *presuppose* the presence of disparate-impact liability appears to be nothing more than wishful thinking on steroids[.]" *Id.*

The Court's analysis should begin and end with Section 3604(a)'s language, which is unambiguous and includes no text supporting disparate-impact liability. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) ("[W]here, as here, the statute's language is plain, the sole function of the court is to enforce it according to its terms") (internal quotation marks and citation omitted). The Court should now confirm that, under its plain terms, Section 3604(a) prohibits only intentional discrimination.

B. The History of 42 U.S.C. § 3604 Confirms That It Does Not Authorize Disparate-Impact Claims.

Although the Court need look no further than the text of Section 3604(a) to determine that it does not authorize disparate-impact claims, the statute's history confirms this conclusion. When the Fair Housing Act was adopted in 1968, it was designed to ensure that no one would be denied the right to live where they choose for discriminatory reasons. As described by Congress, it was not meant to impose liability for actions that were taken for non-discriminatory purposes merely because they impact the availability of housing.

To begin with, the Act's legislative history confirms that members of Congress individually viewed intentional discrimination as the barrier to equality in the housing market, and designed the Act to combat that evil alone.[9] No member of Congress suggested that the Act could be used to require homeowners, landlords, or local governments to evaluate and balance the racial impacts of their otherwise neutral housing decisions. To the contrary, as Senator Mondale, the Act's principal sponsor, explained: "The bill permits an owner to do . . . everything he could ever do with property,

9. The FHA was introduced as a floor amendment to the Civil Rights Act of 1968, *see* 114 Cong. Rec. 2270, 2270-72 (1968), and was the subject of extensive debate on the floor of the House and Senate Chambers.

except refuse to sell it to a person solely on the basis of his color or his religion. That is all it does. It does not confer any right." 114 Cong. Rec. 5640, 5643 (1968). Other legislators had the same understanding: "A person can sell his property to anyone he chooses, as long as it is by personal choice and not because of motivations of discrimination." 114 Cong. Rec. 2270, 2283 (1968) (Sen. Brooke); *see also* 114 Cong. Rec. 2524, 2530 (1968) (Sen. Tydings) (stating that "the deliberate exclusion from residential neighborhoods on grounds of race" was the evil the Act sought to correct).

In addition to emphasizing its focus on intentional discrimination, members of Congress also affirmed that the Fair Housing Act did not have any broader socioeconomic purpose of guaranteeing the availability of housing to any particular individuals or demographic groups. As Senator Mondale stated:

> [T]he basic purpose of this legislation is to permit people who have the ability to do so to buy any house offered to the public if they can afford to buy it. It would not overcome the economic problem of those who could not afford to purchase the house of their choice.

114 Cong. Rec. 3421, 3421 (1968); *see also* 114 Cong. Rec. 3119, 3129 (1968) (Sen. Hatfield) (recognizing that the FHA attempts to eliminate the injustice that occurs when a person "is denied the right to buy a home within a community according to his economic

ability . . . merely because his skin is a different color"); 114 Cong. Rec. 3235, 3252 (1968) (Senator Scott) (stating that the FHA would ensure that individuals "can rent or buy the dwelling of their choice if they have the money or credit to qualify").

Although legislators made clear that they hoped prohibiting intentional discrimination would encourage more "integrated and balanced living patterns" across the country, 114 Cong. Rec. at 3422 (1968) (Sen. Mondale), none of them suggested that the Act would require homeowners, landlords, or local governments to consider race in every housing decision.

Respondent ICP does not dispute that the 1968 congressional record demonstrates that the Fair Housing Act was intended to reach only intentional discrimination. Rather, ICP asserts that the 1988 amendments, which left the operative language of Section 3604(a) undisturbed, Pub. L. No. 100-430, § 6, 102 Stat. 1619, 1620 (1988), implicitly adopted judicial opinions interpreting the Fair Housing Act to permit disparate-impact claims. *See* Resp. ICP's Br. in Opp'n 16. Simply put, ICP's assertions cannot be reconciled with the history of the 1988 amendments.

While ICP is correct that courts presume congressional awareness of judicial precedent, *e.g.*, *Lorillard v. Pons*, 434 U.S. 575, 580 (1978), ICP fails to explain why that principle would demonstrate congressional intent to *sub silentio* adopt a judicial interpretation via amendment when the contemporary record of that amendment expressly

indicates otherwise. Here, the only testimony ICP cites for the proposition that the 1988 amendments demonstrate congressional approval of disparate-impact claims is Representative Swindall's testimony with regard to his unadopted amendment that would have required proof of intentional discrimination in challenges to zoning decisions. Resp. ICP's Br. in Opp'n 16. But ICP fails to disclose that Representative Swindall disclaimed any stance on the general availability of disparate-impact claims under the Fair Housing Act, instead expressly leaving it for resolution by this Court. Representative Swindall's testimony is facially irreconcilable with ICP's claim that his failed zoning amendment demonstrated that the 1988 amendments adopted a disparate impact theory outside the zoning context:

> Further, my amendment did not seek, implicitly or explicitly, to establish a standard of liability in any other context but zoning. My amendment left to caselaw and eventual Supreme Court resolution whether a discriminatory intent or discriminatory effects standard is appropriate for realtors, landlords, public housing authorities—all situations but zoning. Indeed, the amendment not only did not address these other situations, it stated that H.R. 1158 does not express approval or

> disapproval of current court decisions in these other contexts.

H.R. REP. 100-711, at 89 (1988).[10] Thus, contrary to ICP's claims, the 1988 amendments do not demonstrate that Congress intended to expand the reach of the Fair Housing Act beyond the intentional discrimination targeted by the 1968 Congress.

And tellingly, in later years, Congress enacted two other statutes that authorize disparate-impact claims. In 1990, Congress enacted Section 102 of the Americans with Disabilities Act, which uses the phrase "adversely affects" to permit disparate-impact claims asserted by disabled persons. 42 U.S.C. § 12112(b); *see Raytheon*, 540 U.S. at 53. In 1991, Congress amended Title VII to explicitly authorize claims based on "disparate impact." 42 U.S.C. § 2000e-2(k).

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10. The historical record contains additional, conflicting evidence as to the availability of disparate-impact claims under the 1988 amendments. In signing the amendments into law, President Reagan stated that the amendments did "not represent any congressional or executive branch endorsement of the notion, expressed in some judicial opinions, that [T]itle 8 violations may be established by a showing of disparate impact . . . without discriminatory intent . . . Title 8 speaks only to intentional discrimination." Remarks on Signing the Fair Housing Amendments Act of 1988, 24 Weekly Comp. Pres. Doc. 1140, 1141 (Sept. 13, 1988). But Senate Sponsor Kennedy subsequently asserted that President Reagan's statement was "flatly inconsistent with Congress's understanding of the law." 134 Cong. Reg. 23,711 (1988).

These subsequent enactments confirm that Congress understood precisely how to impose disparate-impact liability. Congress's failure to change the Fair Housing Act demonstrates its intent to leave Section 3604(a) limited to claims for intentional discrimination. *See Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009) (stating that it is inappropriate to "ignore Congress' decision to amend" Title VII where it did not make similar changes to similar laws because "[w]hen Congress amends one statutory provision but not another, it is presumed to have acted intentionally").

Thus, the 1988 amendments provide no basis to depart from the plain meaning of the text of Section 3604(a) that Congress enacted in 1968, and indeed reinforce that Congress was content with limiting that provision to intentional discrimination.

II. CONSTRUING 42 U.S.C. § 3604 TO PERMIT EXTRATEXTUAL DISPARATE-IMPACT CLAIMS IMPOSES UNDULY SEVERE CONSEQUENCES ON HOUSING PROVIDERS.

Construing Section 3604(a) to permit disparate-impact claims requires the Court to ignore the text and history of the statute, which confirm that Congress contemplated only intentional-discrimination claims under the Fair Housing Act. *See supra* Part I. But doing so in order to recognize extratextual disparate-impact claims would not only require a departure from settled principles of statutory construction, it would also impose troubling real-world consequences.

Specifically, disparate-impact claims overexpose housing providers to lawsuits based on race-neutral, routine decisionmaking. Every day, housing providers work to eliminate housing discrimination and make their residences available to all, without regard to race, color, national origin, religion, sex, familial status, or disability. Likewise, housing providers frequently must make a variety of routine, race-neutral decisions bearing on the safety of their residents and the economic viability of their properties. Given the economic and demographic disparities throughout the United States, these routine decisions frequently affect some demographics differently than others.

As such, the day-to-day functioning of housing providers exposes them to Fair Housing Act lawsuits brought under a disparate-impact theory. And these Fair Housing Act disparate-impact suits inflict significant expense, time, and stigma upon defendants. Unfortunately, the ultimate meritlessness of any particular suit does not alleviate these problems. There is significant pressure to settle—regardless of a suit's lack of merit—and even an ultimately prevailing defendant typically cannot recover attorney's fees. The disparate-impact theory should not be judicially written into the Fair Housing Act to impose this wide-ranging exposure on housing providers.

A. Routine Housing Decisions Inherently Expose Housing Providers to Disparate-Impact Allegations.

As a practical matter, housing providers must develop rules and policies that ensure the safety of their residents and the economic viability of their properties. Some basic policies inherent in a functioning rental property include screening tenants for certain criminal histories, ensuring that prospective tenants will be able to afford rent, and limiting the number of tenants to an appropriate amount of individuals for the size of a living space. However, under a disparate-impact theory, these policies expose housing providers to litigation under the Fair Housing Act.

For example, in *Pfaff v. HUD*, 88 F.3d 739 (9th Cir. 1996), an administrative law judge had found private landlords, a retired couple in their 70s, liable for familial status discrimination based upon facially neutral numerical occupancy requirements. The administrative law judge imposed compensatory damages, emotional distress damages, a civil penalty, and a three-year reporting requirement on the retired couple. However, this finding was eventually reversed on appeal by the Ninth Circuit, which "admonish[ed] HUD for its heavy-handed conduct in this case," *id.* at 742. Specifically, the court found that HUD had made "inconsistent and misleading representations to those regulated by the FHA" with regard to occupancy restrictions, *id.* at 748, and that the occupancy restriction was

reasonable to advance a legitimate business purpose, *id*. at 749.

Significantly, the court noted that it was "troubled that in this especially complex area of the law, in which private individuals may be subject to heavy-handed enforcement proceedings, the Secretary has done so little to enlighten the public as to what he expects of them." *Id*. The court recognized the inherent difficulty of line-drawing in the Fair Housing Act disparate-impact context, and further noted that "If HUD finds the line-drawing question difficult, imagine the position of [the private landlord couple]." *Id*. *See also Graoch Assocs. #33, L.P. v. Louisville/Jefferson Cnty. Metro Human Relations Comm'n*, 508 F.3d 366, 376–77 (6th Cir. 2007) (permitting disparate-impact claim based on withdrawal from section 8 program, but finding no liability).

Unfortunately, the concerns identified by the *Pfaff* court are fully applicable today, as highlighted by criminal background measures taken to ensure resident safety. Property owners and managers understandably implement policies limiting the potential residency of individuals with certain criminal histories. Indeed, HUD regulations for federal housing programs establish mandatory and discretionary prohibitions on individuals convicted of particular crimes. *See* 24 C.F.R. § 5.854–56.

But some commentators have called for aggressive use of the Fair Housing Act to challenge these policies, noting the advantages to plaintiffs.

See, e.g., Jesse Kropf, Note, *Keeping "Them" Out: Criminal Record Screening, Public Housing, and the Fight Against Racial Caste*, 4 Geo. J. L. & Mod. Critical Race Persp. 75, 80 n.32 (Spring 2012) (collecting commentary). And HUD has encouraged housing providers to reconsider their limitations with regard to individuals with criminal backgrounds. *See* Letter from Shaun Donovan, Secretary of HUD, to PHA Executive Director (June 17, 2011) ("remind[ing]" public housing agencies of their discretion, and "encourag[ing]" allowing ex-offenders to rejoin their families in public housing "when appropriate").[11] As advocates of Title VIII challenges in this area have acknowledged, "it is difficult to predict how this new area of law will develop." Kropf, *Keeping "Them" Out*, at 97. Thus, housing providers continue to be subject to the uncertainty and unfair exposure identified by the *Pfaff* court.

B. Even Ultimately Meritless Disparate-Impact Claims Impose Significant Litigation Expenses and Settlement Pressure on Defendants.

Given the relative ease of asserting a disparate-impact claim resulting from a housing policy, housing providers are exposed to many situations where a disparate-impact claim can be alleged even

11. Available at http://www.bazelon.org/LinkClick.aspx?fileticket=o6OLk7b_6c4%3D&tabid=537 (last visited November 21, 2014).

though the claim is ultimately meritless. Thus, the majority of Fair Housing Act defendants that can risk an appeal succeed. Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under The Fair Housing Act*, 63 AM. U. L. REV. 357 (2013). However, the ability to ultimately prevail in litigation in no way alleviates the practical problems of applying disparate-impact theory to the housing context. Defendants in disparate-impact suits are exposed to time-consuming and stigmatizing lawsuits, which often impose severe expenses and settlement pressure—even when entirely meritless.

For example, in *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269 (W.D. Tex. 2007), the district court approved a settlement in a five-year plus class action suit including Fair Housing Act disparate-impact claims based on a credit-scoring procedure. Significantly, in approving the settlement, the court held that there were "obstacles to plaintiffs' ability to prevail on their disparate impact theory brought under the Fair Housing Act," *id.* at 288–89, and that "plaintiffs face substantial challenges in establishing a prima facie case," *id.* at 289.

Despite the numerous court-recognized problems with the plaintiffs' case, the defendant settled, implementing injunctive relief and incidental damages, *id.* at 294–95, and paying over $11 million in attorney's fees, *id.* at 322–39. The court order explains why a defendant would settle despite the recognized defects in the plaintiffs' case:

> Here, the litigation has proceeded over a period of five years and has included appeals to the United States Court of Appeals for the Fifth Circuit and the United States Supreme Court. As noted, Allstate filed a motion to dismiss at the outset of this case which was denied . . . . This initial motion was litigated for three years and is indicative of the complexity, expense, and likely duration of continued litigation. Specifically, as counsel for the parties have concluded, the probability of further protracted litigation, including appeals, would be a certainty in the absence of a settlement.

Id. at 291. Similarly, in *Hispanics United of DuPage County v. Addison*, 988 F.Supp. 1130, 1165 (N.D. Ill. 1997), the court approved a consent decree providing "the plaintiffs with substantially all of the relief that they could have obtained had they prevailed at trial, and much more." This extensive relief was approved despite the court's holding that two factors of its four-factor test favored the plaintiffs, and two favored the defendants. *See id.* at 1163–64. Notably, the court found some evidence of intentional discrimination relevant to its disparate-impact test, but concluded that "At best, this issue could have been decided only after a full trial on the merits, which would have been financially and emotionally devastating to both sides in this case." *Id.* at 1159.

However, with regard to the expense of litigating a Fair Housing Act claim, it is significant that the availability of discretionary attorney's fees depends upon a party's status as a plaintiff or defendant. A defendant may obtain attorney's fees only when a plaintiff's claim is found to be frivolous. *See, e.g., Bryant Woods Inn, Inc. v. Howard Cnty.*, 124 F.3d 597, 606 (4th Cir. 1997) (noting, in a Fair Housing Act case, that "under a civil rights statute that contains a fee shifting provision . . . . a prevailing defendant may receive fees only upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.") (internal formatting omitted) (quoting *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 417 (1978)); *see also E.E.O.C. v. Wynell, Inc.*, Nos. 95-20419 & 95-20523, 95 F.3d 49, 49 (5th Cir. June 6, 1996) (per curiam) (holding that attorney's fees "are awarded to a prevailing defendant in a Title VII action only in extreme cases" and reversing award of attorney's fees because "we cannot say that it was clear that the E.E.O.C.'s claims were frivolous, groundless, or without foundation.").

Under this principle, in *E.E.O.C. v. Consolidated Service Systems*, 839 F.Supp. 1285 (N.D. Ill. 1993), the court found for the defendant in a Title VII action after a bench trial, but denied attorney's fees because it found the E.E.O.C.'s action was not frivolous. On appeal, the Seventh Circuit affirmed, even though the defendant had "been dragged

through seven years of federal litigation at outrageous expense for a firm of its size." *E.E.O.C. v. Consol. Serv. Sys.*, 989 F.2d 233, 238 (7th Cir. 1993); *see also Vitug v. Multistate Tax Comm'n*, 883 F.Supp. 215, 223 (N.D. Ill. 1995) (order adopting magistrate recommendation) (rejecting Title VII disparate-impact claim, because the plaintiff "utterly failed to support his claim with any meaningful statistical evidence and as a result, [plaintiff] cannot establish a prima facie case, thus his disparate impact claim must fail," but denying attorney's fees "In light of the wide latitude afforded plaintiffs in the establishment of circumstantial evidence of discriminatory employment practices.").

Likewise, in *Adams v. Austal, U.S.A., L.L.C.*, No. 08–0155–KD–N, 2012 WL 871378 (S.D. Ala. Mar. 14, 2012), the defendants prevailed on all of the plaintiffs' claims, including a potential class action disparate-impact claim based on an employer's treatment of its employees. The disparate-impact claim was eventually not pursued on summary judgment. *Id.* at *2. The court held that the defendant was not entitled to attorney's fees because it did not have "an airtight defense with settled law and facts securely on its side." *Id.* at *3. The Eleventh Circuit affirmed on appeal, concluding that "Where plaintiffs introduced evidence sufficient to support their claims, findings of frivolity generally do not stand." *Adams v. Austal, U.S.A., L.L.C.*, 503 Fed. Appx. 699, 702 (11th Cir. 2013).

Finally, it should be noted that the need to defend against meritless disparate-impact suits is particularly damaging to defendants' reputations. "[T]he stigma of facing suit for negligence (for example) probably is, and ought to be, less than that associated with having allegedly violated someone's civil rights." *Green v. Brantley*, 941 F.2d 1146, 1150 (11th Cir. 1991); *Schrob v. Catterson*, 967 F.2d 929, 941 (3d Cir. 1992) (quoting *Green*).

In sum, the misapplication of disparate-impact theory to Fair Housing Act cases permits parties to assert claims for a broad spectrum of race-neutral decisions inherent in the provision of housing. Compounding this broad extra-textual exposure is the fact that even ultimately meritless claims still impose litigation expenses, time, and stigma on defendants in disparate-impact lawsuits, and attorney's fees typically cannot be recovered by defendants. The practical problems with importing disparate-impact analysis to the Fair Housing Act underscore that the text of the act does not provide for disparate-impact liability, and it should not be judicially construed to do so.

CONCLUSION

The Fifth Circuit's Judgment should be reversed.

Respectfully submitted.

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