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A GENERAL OVERVIEW OF DISPARATE IMPACT THEORY

HEARING

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

OF THE

COMMITTEE ON FINANCIAL SERVICES

U.S. HOUSE OF REPRESENTATIVES

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A GENERAL OVERVIEW OF DISPARATE IMPACT THEORY

Tuesday, November 19, 2013

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT
AND INVESTIGATIONS,
COMMITTEE ON FINANCIAL SERVICES,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:06 a.m., in room 2128, Rayburn House Office Building, Hon. Patrick McHenry [chairman of the subcommittee] presiding.

Members present: Representatives McHenry, Duffy, Fincher, Hultgren, Barr, Rothfus; Green, Cleaver, Ellison, Maloney, Delaney, Beatty, and Heck.

Ex officio present: Representatives Hensarling and Waters.

Also present: Representative Garrett.

Chairman MCHENRY. The Subcommittee on Oversight and Investigations will come to order. Without objection, the Chair is authorized to declare a recess of the subcommittee at any time.

Today's hearing is entitled, "A General Overview of Disparate Impact Theory."

I will now recognize myself for 5 minutes for an opening statement.

Fairness, fundamental fairness, ensures that those who must enforce the law, know the law. Fairness, fundamental fairness, also says that those who are under the law will understand the law. Those who benefit from the law should have a level of understanding of what the rules of the game are as well.

Discrimination based on race, sex, or other prohibitive factors is destructive and morally repugnant. More specific to the jurisdiction of this committee, discrimination in housing and in lending is unfair and unjust and has no place in the American marketplace. Unfortunately, discrimination still exists.

For this reason, the protections afforded by the Federal Civil Rights Statutes remain important and necessary. These statutes, like the Fair Housing Act and the Equal Credit Opportunity Act, obligate the government to investigate allegations of discrimination, and to take appropriate action to end discriminatory practices and provide relief to victims.

According to the legal theory of disparate impact, the government or private litigants can bring discrimination claims based solely on statistics that suggest an otherwise neutral policy disparately impacts protected classes. While I believe data can be helpful in better understanding the roots of disparity, it is disconcerting

that unlike other illegal discrimination claims, disparate impact claims do not require the government or a private plaintiff to provide intent to discriminate.

It is important to remember that resources to fight discrimination are not unlimited. I believe our witnesses today make a strong argument that precious resources to fight discrimination are needlessly diluted when agencies with civil rights missions attack disparities that arise for reasons other than discrimination.

This is a timely hearing, as the Department of Housing and Urban Development (HUD) and the Consumer Financial Protection Bureau (CFPB) are considering disparate impact in their regulatory writing and the issuing of guidance. And up until a few days ago, the Supreme Court was planning to address the legitimacy of disparate impact claims under the Fair Housing Act this term.

That, as has been covered in the press, is no longer the case.

In front of us today, we have an expert panel of witnesses who have spent their careers fighting illegal discrimination. In the course of this hearing, I hope to gain a better understanding of the challenges facing those seeking fair treatment under the law and the best way to protect minorities and the most vulnerable in our society from illegal discrimination.

And with that, I yield 5 minutes for an opening statement to the ranking member of the subcommittee, Mr. Green of Texas.

Mr. GREEN. Thank you, Mr. Chairman.

And I would like to thank you for acknowledging that we still have invidious discrimination, that the battle to end invidious discrimination is not yet over.

I am also appreciative that you have embraced this hearing with an open mind so that we can come to conclusions about a long settled standard of disparate impact.

It is my belief that this hearing will be about whether discrimination has to have intention to be harmful. It will be about whether good people can make bad policy. It will be about whether or not a financial institution can charge African Americans $2,937 more than similarly situated White customers for their loans, and charge Hispanics $2,187 more for their loans.

I mention these specific examples because these are examples of how the disparate impact standard, well-settled standard, has had a positive impact on our society and especially on people in certain classes.

I would like to hearken back, if I may, to 1968, because it was the death of Dr. King that allowed or caused, if you will, this Congress, meaning the Congress of the United States of America, to pass the Civil Rights Act of 1968, which has Title VIII within it, the Fair Housing Act.

And it was not an easy time for us in this country. There was invidious discrimination. But there was also covert discrimination. And the Civil Rights Act of 1968 allows us to fight both overt and covert discrimination.

It is great to be able to prove intentionality, that there was intent to do harm. But there are many cases wherein the intent is well-concealed, and the law allows us to use the disparate impact standard to get to that intent that is well-concealed.

We would not be here today, in my opinion, debating an issue of whether or not you have to have intent to do harm to me, if you should hit me with your car. And I am someplace that I lawfully should be. I am not in any way negligent.

You don't have to have intent to harm me. And you don't have to have intent to be liable for the harm that you cause.

Intentionality is obviously an element that, if proven, is beneficial. But there are other ways, there are other circumstances that allow us to prove harm.

And this harm has been shown to be proven with the disparate impact theory.

My hope, Mr. Chairman, is that after today's hearing, we will not find law being promulgated, legislation being promulgated to eliminate or limit what we have had for more than 40 years now as good standing law. My hope is that as we move forward, we may do some things to improve upon what was done in 1968, but not limit it and not circumvent what we have found to be a means by which we can continue to combat invidious discrimination.

Finally, Mr. Chairman, let me say this: This has been a continuing fight to eradicate discrimination. The law in 1968 was not passed unanimously. And since its passage, we have had many efforts to try to limit it, or eliminate it. We have had litigation. And some of the litigation has been settled.

I think that this litigation has been settled had many aspects to it that we may discuss today. But I do believe that the courts, all of the courts that have taken up these issues which have walked away with the notion that it is a legitimate standard which can be used to help eliminate invidious discrimination.

We have come a long way, but we are not there yet. And my hope is that we won't today or at some point in the near future decide that we are going to turn back the clock to a pre-1968 era.

I yield back the balance of my time.

Chairman MCHENRY. And under prior agreement with the ranking member, Mrs. Beatty is recognized for 2 minutes.

Mrs. BEATTY. Thank you, Mr. Chairman, and Mr. Ranking Member, for holding this hearing today. I think it is very timely.

Let me also thank you for being here as witnesses for something which is very difficult and painful for me, as I reflect back to growing up in 1968, and to being discriminated against in the housing market because of the color of my skin.

Mr. Chairman, it was very welcoming to hear your opening remarks and also the remarks of Ranking Member Green.

I will use your words, Mr. Chairman, throughout my conversation and dialogue with the witnesses today, that discrimination has no place in the American marketplace.

And so, as we later question and have dialogue with the witnesses, you will hear those comments from me.

Let me just say that today's hearing comes at a very interesting time, coming 1 week after the notice of the settlement in the Mount Holly case. Certainly, we all are familiar with that case, and this settlement seems to finally conclude the decade-long dispute regarding the use of disparate impact theory in the context of housing policy.

Certainly, you know that this case was scheduled for argument before the Supreme Court, and was expected to be a landmark case, which would have given the highest court in the land the opportunity to evaluate the applicability and future of the legal theory of disparate impact in the housing market.

And certainly, we know it was never argued before the Supreme Court, and the disparate impact clause of the Fair Housing Act has consistently been held up 11 different times in the court of appeals over the last 4 years.

I think I will leave you with this thought: Has discrimination been so institutionalized that we don't know the difference between intentional and unintentional discrimination?

Thank you, Mr. Chairman.

Chairman MCHENRY. Thank you, Mrs. Beatty.

We will now recognize our distinguished panel of witnesses.

First, Peter N. Kirsanow, is a Commissioner on the United States Commission on Civil Rights, where he is currently serving his second 6-year term. From 2006 to 2008, Commissioner Kirsanow also served as a member of the National Labor Relations Board.

He was appointed to both positions by President George W. Bush, and is a partner with the law firm of Benesch, Friedlander, Coplan & Arnoff, as part of its Labor Employment Practices Group, and is also a member of the firm's Diversity and Inclusion Committee.

Commissioner Kirsanow received his B.A. in 1976 from Cornell University, and his J.D. with honors in 1979 from Cleveland State University, where he served as articles editor of the Cleveland State Law Review.

Second, Kenneth L. Marcus is the President and General Counsel of the Louis D. Brandeis Center for Human Rights Under Law. Mr. Marcus founded the Brandeis Center in 2011 to combat the resurgence of anti-Semitism in American higher education.

He is the author of the award-winning book, "Jewish Identity and Civil Rights in America," and previously held the Lillie and Nathan Ackerman Chair in Equality and Justice in America at the Baruch School of Public Affairs at the City University of New York.

Mr. Marcus served in the George W. Bush Administration as the Staff Director of the United States Commission on Civil Rights, and as the General Deputy Assistant Secretary of Housing and Urban Development for Fair Housing and Equal Opportunity.

Mr. Marcus is a magna cum laude graduate of Williams College, and is also a graduate of the Boalt Hall School of Law at Berkeley.

And finally, Dennis Parker is the Director of Civil Justice Programs with the American Civil Liberties Union. In that position, Mr. Parker focuses on combating discrimination and addressing other related issues.

Prior to joining the ACLU, Mr. Parker was the Chief of the Civil Rights Bureau in the Office of the New York State Attorney General under Eliot Spitzer.

Mr. Parker previously served for 14 years at the NAACP Legal Defense and Education Fund, and teaches race, poverty and constitutional law at the Columbia University School of Law Institute.

And Mr. Parker is a graduate of Harvard Law School and Middlebury College.

The witnesses will now be recognized for 5 minutes for an oral presentation of their testimony.

And, without objection, the witnesses' written statements will be made a part of the record, and the witnesses will have until close of business Friday to revise and extend their witness testimony.

On your tables, there are lights—red, yellow, and green—and I don't have to explain the meaning of those. Even Members of Congress mostly understand that. The microphone is also very sensitive, so make sure it is directed towards your mouth. And dealing with the technology as we are, I have to say those things.

So, with that, we will now recognize Commissioner Kirsanow for 5 minutes.

STATEMENT OF PETER N. KIRSANOW, COMMISSIONER, U.S. COMMISSION ON CIVIL RIGHTS, AND PARTNER, BENESCH, FRIEDLANDER, COPLAN & ARNOFF

Mr. KIRSANOW. Thank you, Chairman McHenry, Ranking Member Green, and members of the subcommittee.

I am a member of the U.S. Commission on Civil Rights. And as you know, the Civil Rights Commission was created by the 1957 Civil Rights Act to, among other things, investigate denials of equal protection and discrimination on the basis of race and other protected classifications.

In furtherance of the Commission's objective to investigate denials of equal protection and discrimination on the basis of race and other protected classifications, we have held a number of hearings over the years related to disparate impact, either directly or indirectly. And the last such hearing occurred in December of 2012.

There are four broad concepts or conclusions that can be drawn from those hearings. First, the doctrine of disparate impact is at least of dubious legality and provenance under the Equal Protection Clause.

Second, in many respects, the implementation of disparate impact has been profoundly misguided and elevates equal outcomes over equal opportunity.

Third, although in some respects it has definitely been well-intended, as we have seen in a number of Civil Rights Commission hearings, it has a tendency to harm its purported intended beneficiary.

And finally, it is antithetical to the proposition that individuals are supposed to be judged by the content of their character, versus the color of their skin, because the qualifications standards test devices, policies, dealing with or that purportedly result in disparate impact reveal character—and that may reveal character—often are subordinated to raw color calculations.

Expanding for a moment on the dubious legality of disparate impact, disparate impact emerged from the 1964 Civil Rights Act. If you take a look at the Floor debate among Floor managers of the 1964 Civil Rights Act, disparate impact was not contemplated as a doctrine to prove discrimination or any form of discrimination, as the 1964 Civil Rights Act, but the theoretical framework for disparate impact was already being developed by attorneys for the

EEOC. And when the Fair Housing Act was adopted in 1968, disparate impact had not yet been adopted as a doctrine for demonstrating some type of discrimination under the 1964 Civil Rights Act.

It wasn't until 1971, when the Supreme Court did adopt disparate impact under *Griggs* v. *Duke Power,* that it did become a doctrine with respect to employment law, with respect to Title VII. What is interesting about *Griggs* v. *Duke Power* is, you may recall, there was the requirement that was applied only after job positions were opened up to everybody, that everyone have a high school diploma, among other things, and that had disparate impact among Black employees.

The Supreme Court indicated that it had to have some type of job relatedness or business necessity to be justified. What is often forgotten is that standard device test qualification was adopted with a discriminatory intent.

After the 1971 decision in *Griggs* v. *Duke Power,* disparate impact metasticized into a number of other areas that there hadn't been up to that point any prediction that it would be expanded to other areas. Disparate impact necessarily classifies on the basis of race, and to that extent, unless it meets the strict scrutiny standard which is the highest standard of our Nation's juris prudence, it violates the equal protection clause unless it serves the compelling governmental interest or is nearly tailored to serve that interest.

And that is of dubious probability given the Seattle case, the Louisville case, and even *Grutter* v. *Bollinger.*

In terms of its misguidedness, any classification, any type of standard, any type of test will necessarily have a disparate impact, because we judge people on the basis of individuality and not race.

Famously, one of my colleagues, during a debate, said that she would write a check for $10,000 to anyone who could identify any standard, any device, any policy, any practice that did not yield a disparate impact. I would never make such an offer, maybe $10, but I nonetheless go along with the proposition that it would be extremely difficult to find anything that didn't yield a disparate impact. With respect to housing criteria, and loan criteria for example, almost any qualification would yield a disparate impact on the basis of race, sex, national origin—maybe color—almost any protected class. Employment rates, income, assets, criminal history, family structure—each one of those has different yields depending upon which class someone belongs to.

Finally, with respect to whether or not it has universally broadly—universal good effects, it has a tendency to harm its beneficiaries—I see my time is up. I would be glad to expand on these remarks in the question-and-answer period.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Kirsanow can be found on page 34 of the appendix.]

Chairman MCHENRY. Mr. Marcus?

STATEMENT OF KENNETH L. MARCUS, PRESIDENT AND GENERAL COUNSEL, LOUIS D. BRANDEIS CENTER FOR HUMAN RIGHTS UNDER LAW

Mr. MARCUS. Thank you, Chairman McHenry, Ranking Member Green, and distinguished members of the subcommittee. I am honored to appear again before this committee. At the same time I confess to being somewhat mortified to have to be discussing this particular topic.

I don't think any of us is pleased by the obligation to be fighting discrimination in this day and age. And yet, we are continually reminded that discrimination persists despite the progress that we have made over the decades.

When I was in the civil rights enforcement area within government, and even today in the public interest advocacy realm, I have found numerous instances of intentional discrimination and bigotry including in the housing realm in which, even nowadays, African Americans, Hispanics, and others are often faced with a situation in which renters do not want them, lenders do not want them, and so on and so forth, and I believe this to be one of the greatest evils that we face to this day.

In my written testimony, I give a couple of examples from very recently in which HUD found blatant intentional discrimination, in one case against Burmese immigrants where renters simply did not want them on their premises. And in another instance, in which renters not only did not want African Americans in their mobile home community, but also didn't want anyone who would date an African American.

We have these blatant cases, and it is my feeling that the scarce resources of the Federal civil rights agencies are seldom sufficient to deal with them.

And one of the challenges that we have is that our governmental agencies are often dividing their resources between cases involving blatant intentional discrimination and other things.

Now, it is my view that disparities are important to observe. As a civil rights enforcement official, I was certainly on the lookout for racial and ethnic disparities.

For instance, at the Department of Education, I was continually sifting through data to see whether there were disparate rates of minorities being either subjected to discipline or to misidentification for special education.

The reason I did that is because I have always considered disparities to be a kind of smoke. And where there is smoke, there is sometimes fire. And when there is smoke, a good fire department sends a truck to see what is going on. But, I also believe that it is possible to confuse the smoke and the fire. And I think too much of the time we say that the disparate impact is the problem when in fact it is in fact sometimes a symptom of the problem or a sign of the problem.

Now, when we do that, when we say, we are not going to look for intentional discrimination, we are simply going to look for disparities, there are several different kinds of problems that arise.

One is the diversion of resources that I mentioned. And I think that if you go through the most recent charges by the Office of Fair Housing and Equal Opportunity, you will find that there are some

charges that appear to be based on actual discrimination. And, there are other charges where you would probably agree that they are not of the sort of severity that you would want them clogging up the system.

So I think it is a real problem when our scarce resources are diverted into things other than discrimination. There is also a problem of equal protection. And Commissioner Kirsanow averred to that somewhat.

One of the challenges with disparate impact is that virtually—I would say that when income and wealth are unevenly distributed in society, virtually any standard for underwriting or for determining who to rent to will have a disparate impact.

And so that pushes people into an untenable situation: either be subject to potential liability for violation of Title VIII or other discrimination laws, even if there is no intent to discriminate or no unconscious discrimination; or try to eliminate that disparity in a way that may require race-conscious action that will violate the equal protection clause.

So in many cases, attempts to comply with disparate impact will run the risk of violating the equal protection clause, which is why Justice Scalia indicated in the *Ricci* v. *DeStefano* case that the day will come in which the conflict becomes unavoidable between those provisions.

And finally, in many cases, there is a pressure to impose some sort of quota or other artificial means of eliminating a disparity rather than simply saying, we will use purely race-neutral means.

So what I would say is that while we need to push as hard as we can to eliminate intentional and even unconscious discrimination, disparate impact, as it has been applied, is often counterproductive towards those efforts.

[The prepared statement of Mr. Marcus can be found on page 39 of the appendix.]

Chairman MCHENRY. Mr. Parker?

STATEMENT OF DENNIS D. PARKER, DIRECTOR, RACIAL JUSTICE PROGRAM, AMERICAN CIVIL LIBERTIES UNION

Mr. PARKER. Good morning, Chairman McHenry, Ranking Member Green, and members of the subcommittee.

My name is Dennis Parker, and I am the director of the Racial Justice Program of the American Civil Liberties Union. Our charge is to eliminate barriers to full participation in civic society. And in the name of full disclosure, I am one of the attorneys on the *Atkins* v. *Morgan Stanley* case, a case that relies on disparate impact to prove the devastating impact of unfair lending practices on people of color in Detroit.

The Fair Housing Act was passed nearly 50 years ago to address problems of residential segregation and conditions of poverty which had blocked access to opportunity to communities of color and led to civil unrest.

From the outset, the bipartisan sponsors and supporters of the Fair Housing Act recognized that it was necessary to prohibit all forms of discrimination—both acts resulting from discriminatory intent as well as acts neutral on their face, which had an unjustified discriminatory effect.

In order to achieve the broad antidiscrimination goals of the Act, Congress, the government agencies charged with enforcing the Act, and each of the courts which had interpreted the Act have recognized that the disparate impact standard is a necessary tool in fighting discrimination in all of its forms, and that without the standard practices which have the same discriminatory consequences as intentional discrimination would be shielded from the reach of the law.

Both at the time that the statute was passed, and on subsequent occasions, Congress has resisted attempts to limit the application of the law to instances of intentional discrimination.

Between the enactment of the Fair Housing Act in 1968 and the time when Congress made significant changes to the Act in 1988, all nine courts of appeals which considered the issue concluded that the Fair Housing Act permitted the use of disparate impact claims to fight discrimination in all of its forms.

In 1988, against the backdrop of the unanimous approval of disparate impact claims by all courts of appeals, Congress extended the coverage of the Act to prohibit discrimination based on familial status and disability, added specific exemptions to the Act which would only make sense in light of a continuing disparate impact standard, and enhanced the Department of Housing and Urban Development's authority to interpret the Fair Housing Act.

In the years following the amendments, HUD, the Justice Department, and the agencies charged with enforcing the fair housing and fair lending laws have interpreted the fair housing laws to permit disparate impact claims; have trained their employees to use disparate impact analysis, and have brought enforcement actions relying on disparate impact.

During that same period, the two circuit courts which had not previously addressed the question of the validity of the disparate impact statement, joined the other nine circuits in approving it. On February 15th of this year, HUD reaffirmed the decades-long recognition of the availability of the standard after going through a period of formal notice and comment.

The need for the disparate impact standard as a tool in fighting discrimination is as great or greater now than it has ever been. Problems of residential segregation and the accompanying limitation on access to fine schools, transportation, healthy environments, and employment opportunities continue to plague the Nation.

One striking example of the continuing need for an effective way of addressing the increasingly subtle way in which protected classes are denied fair housing can be seen in the wake of the economic crisis of 2008. Discriminatory lending practices, which included providing high-risk subprime loans to members of communities of color, communities which had previously experienced a long history of intentional discrimination in the form of racial steering, redlining, and lack of access to financial institutions. The combination of the abusive lending practices and the history of discrimination resulted in a foreclosure crisis which had a particularly serious impact on communities of color. And I would point out that the impact of these loans extended to people who had good credit. An African American or a Latino person with a high credit rating was

more likely to get an abusive subprime loan than a White similarly-situated person.

The impact was serious on the communities of color and it reversed many of the gains that were made over the past 50 years.

I notice that my time is up and so I will just say that the disparate impact standard permits the defendant in the case to show that there was a justification for the policy and practice that is being challenged. By permitting the balance between impact goals and the means of achieving those goals, the disparate impact standard permits challenges to barriers which prohibit equal opportunity to fair housing.

It is common sense that any policy which unnecessarily excludes people from housing because of their race, gender, ethnicity or any other protected class should be set aside for one which asserts everyone's needs fairly, effectively, and without discrimination.

Disparate impact is a commonsense way, and we urge that its continued use be permitted.

[The prepared statement of Mr. Parker can be found on page 46 of the appendix.]

Chairman MCHENRY. I will now recognize myself for 5 minutes for questioning.

Commissioner Kirsanow, what is disparate impact?

Mr. KIRSANOW. Disparate impact is the result of any type of standard, test, qualification, policy, or practice which yields a disproportionate outcome for members of a protected class. At least, that is the colloquial definition of it.

Now, disparate impact obviously deals with outcome. It is not necessarily anything to do with opportunity and input. In addition to that, disparate impact has no bearing on whether or not some type of device, policy, or practice is intentionally adopted in order to discriminate on the basis of a protected class.

Chairman MCHENRY. I am not a lawyer, so how does disparate impact differ from disparate treatment discrimination?

Mr. KIRSANOW. Right. Disparate treatment presumes some type of intentional treatment, disparate treatment. That is, you take a Black applicant and a White applicant and you consciously and intentionally—because you can have unconscious discrimination also—or unconsciously and intentionally discriminate against someone on the basis of their protected class, the Black applicant for example.

Disparate impact is where there was no intent necessarily to discriminate, yet because of a qualification standard—let's say, for example, in *Griggs* v. *Duke Power,* that you have a requirement that everybody who obtains a particular employment position have a high school diploma. At least in that area, North Carolina—I'm sorry, South Carolina at the time—the number of Black applicants for a position who had a high school diploma would be far below that of Whites. The outcome therefore would be that more Whites would get that position. That would be disparate impact.

In *Griggs* v. *Duke Power,* that was done intentionally. In many disparate impact cases, there has been no proof of discrimination as the motivating factor for that particular qualification or standard.

Chairman MCHENRY. So, Mr. Marcus, is disparate impact fair? The use of disparate impact as a legal theory, is it fair?

Mr. MARCUS. In my view, some uses are fair. Some may not be. I would say there are two ways of looking at disparate impact. For some, disparate impact is a way of smoking out intentional discrimination that cannot be demonstrated through other ways. So we say, there may not be evidence of intentional discrimination, and yet we think it is there. So we create an analytical device that will help us to find it.

The other approach is to say, no, disparate impact has nothing to do with intent. It is all about the effect. It is a way of eliminating certain effects on minorities that cannot be justified by business necessity.

I believe that there may be ways of using disparate impact to find intentional discrimination, and perhaps the courts will even narrow disparate impact doctrine in order to do that. But where disparate impact becomes detached from discrimination, where it is no longer about intentional discrimination, it has all kinds of unfair ramifications.

One is that it prevents agencies and lawyers from focusing on real intentional or even unconscious discrimination. And another is that it treats employers or lenders or others as if they were bigots, as if they were discriminators when they have no conscious or even unconscious intent to discriminate against anybody.

So by lumping real bigots in with people who develop policies that have no conscious or unconscious animus, I think it can be unfair.

Chairman MCHENRY. So, Commissioner Kirsanow, was disparate impact discrimination prohibited under the Civil Rights Act of 1964?

Mr. KIRSANOW. The intent in 1964, if you look at what the Floor managers were talking about, Congressman McCullough for example and others, there was no intent to use disparate impact, that is to have equality of outcomes. There was considerable debate about that. Clearly, there was an element within Congress that wanted to use that as a tool or device, as Ken indicated, but the outcome of all that was that it would—that is, the 1964 Civil Rights Act, would be calculated to address, as Ranking Member Green talked about, invidious discrimination; an intent to discriminate on the basis of, back in 1964, race and all the other protected classes.

Chairman MCHENRY. My time is short. So was disparate impact addressed in the original Fair Housing Act of 1968?

Mr. KIRSANOW. Not specifically. There was considerable debate about that, and disparate impact first came to fruition in 1971 with *Griggs* v. *Duke Power*.

Chairman MCHENRY. Okay. We will now recognize Mr. Cleaver for 5 minutes.

Mr. CLEAVER. Thank you, Mr. Chairman.

And to the ranking member, thank you for the hearing.

Mr. Marcus, let us assume that in 1984, a certain neighborhood had filed a covenant with the mortgages of the land involved in a subdivision. And the covenant prohibited selling your home to an African American. And then they put a list together of individuals

who wanted to buy in that area, but since African Americans could not buy based on the covenant, the list was non-African American or predominantly Anglo Whites.

And then we then have people filing a lawsuit based on exclusion because they are Black and they can't move in. There is a list of people who can move in. And everybody who lives there is White. How do we deal with that kind of an issue?

Mr. MARCUS. That is an interesting hypothetical, Congressman Cleaver.

Mr. CLEAVER. It may not be that hypothetical. I am just creating something, but it may not be that hypothetical.

Mr. MARCUS. Either way, it is an interesting one. I do think that racially restrictive covenants are repugnant. Now, I have argued in my written testimony and elsewhere that disparate impact can avert a conflict with the equal protection clause if the courts allow a good faith affirmative defense. In my view, that is a way of separating out disparate impact cases that are based on intentional or unconscious discrimination from those that are not.

Now, if a court were to apply the sort of standard that I have suggested, then they would look at this list, which appears facially neutral. If they find that there is this sort of impact, that is to say, all of the names are White names, then one would look at why is that; why are all of the names White names? Is there some entirely good faith reason? Maybe they are all family members. Or maybe there is some legitimate reason.

But if it turns out that there is no good-faith reason, and that it was intended as a way of excluding numbers of a particular racial group, then I think that it is discriminatory and should be considered discriminatory.

Mr. CLEAVER. Okay.

Mr. Parker, I want to stay on this.

Mr. PARKER. Yes.

And I would also—because there are actually concrete examples of exactly what you are talking about. Towns which have restrictions, or that give advantages to current residents of that town, that can have the impact of excluding people of color if the town is a single-race town.

There is no allegation of intentional discrimination or a hatred toward people of color, but the effect is the same. And the Fair Housing Act looks at the consequence. If you are excluded from property, if your house is foreclosed on and it is because of disparate impact, it is little consolation that it is not the result of some intentional discrimination.

But the consequences are still there. And it is important that the law recognize the fact that those consequences have occurred and continue to occur.

Mr. CLEAVER. Now, we still have racial covenants—on the books all over the country, just to my knowledge, they are not being enforced. The Civil Rights Act said you can't do that, so public accommodation in most cities eliminated that.

But there are still administered, nobody bothered to clean it up. So if you go in the courthouses you are going to find this.

I guess my issue is—in 2013, nobody, nobody is going to admit discrimination. I mean, nobody. I am talking about nobody and so,

if nobody admits it then they are either unintentionally committing discriminatory acts or they are denying that what they are doing is in fact discriminatory.

So I am always concerned about this issue because I think at this moment in time, we are having some—it is a weird moment in history. And I am not sure that we need to take too many steps away from the Civil Rights Acts that have been passed in the past.

I have gone over my time, Mr. Chairman. I apologize, and I yield back.

Chairman MCHENRY. I thank my colleague.

We will now recognize Mr. Duffy for 5 minutes.

Mr. DUFFY. Thank you, Mr. Chairman, and I appreciate the witnesses' testimony this morning and the conversation we are having on what I think is a very important topic.

I would agree, I think, with everyone today that discrimination still exists in America. It hasn't been rooted out, and I think it is incumbent upon the Congress and the country to do all we can to make sure we do root it out and make sure it doesn't exist.

But we are not at that point today.

But I do want to have a more in-depth conversation on disparate impact, and Mr. Kirsanow, I think in your opening statement, you had indicated that there were potential unintentional consequences that would negatively affect those whom you think would be beneficiaries of disparate impact.

And I think you were running out of time, so I wanted to ask you a follow-up to give you an opportunity to explain that further, how people could actually be hurt under this theory who were supposed to be benefited.

Mr. KIRSANOW. Yes, thank you, Congressman.

There are a number of examples, but I would like to limit them to the area which I know best, and that is with respect to employment law, where you see the greatest amount of litigation with respect to disparate impact.

We had a hearing just recently at the Civil Rights Commission against—with respect to the EEOC's relatively new criminal background check policy, which makes it a little bit more difficult than it had in the past for employers to conduct criminal background checks on applicants.

I will cut right to the chase on this. It is well-intended, it is designed to increase the reentry of felons into the workplace, something that needs to be done. It is based on the presumption, the realistic presumption that Black and Hispanic applicants are more likely to be screened out as the result of criminal background checks.

But as well-intended as it may be, in many respects it may be misguided.

I will just give you a little bit of information with respect to how it harms the intended beneficiaries. The presumption was that it would increase the probability that Blacks and Hispanics would be hired because the rigorous nature of the background check that is employing what is known as the green standards based on the 11th Circuit, I think it was, case outlying under what circumstances a criminal background check would be permissible.

That is, what type of offense was it? Which job are you applying for? How long ago was the offense? It made the green standards a little bit more stringent. But at the same time what happened is, employers, because it was so difficult to implement the background checks, would abandon their use and resort to impermissible criteria with which to make hiring decisions.

There have been several studies that show that where employers are allowed or have less of a burden, in terms of having criminal background checks, and use background checks robustly, they are more likely to hire Black and Hispanic applicants rather than resort to impermissible stereotypes and thereby exclude them.

In one study, employers were 4 times more likely—4 is not a minor matter—to do so. And in another State, 10.7—I will strike that. Employers who used criminal background checks were 10.7 percent more likely to have recently hired a Black applicant than those who did not.

And the reason, obviously, is because employers are—they make judgments and they have to make judgments with respect to who they are hiring. And they prefer not to have felons, if they don't know what kind of felony it is.

Mr. DUFFY. All right. And I thank you for expanding upon that. Taking intentional discrimination and setting that aside for a moment, I would—they exist, and I want to move it over.

But I want to look at the unintentional discrimination, if you want to call it disparate impact.

If there is no intentional discrimination and we find there is disparate impact, in the end is the consequence that we have now different standards for different people? Different standards if it is based on race or color or sex or national origin that we will have different standards for different people, if we find disparate impact in a certain space? Or am I wrong on that?

Mr. KIRSANOW. It is more likely that you have no or lowered standards. It is—

Mr. DUFFY. What was that?

Mr. KIRSANOW. It is more likely that rather than having different standards, you will have lowered standards or no standards whatsoever.

So that you tend to eliminate the impact as much as possible. That won't happen, however. In some cases you will have some slightly different standards, at least that are unconsciously applied to different protected classes. But what we have seen, and especially in the employment context is, an abandonment of standards so that you don't get hit with the disparate impact liability.

You may see that, kind of the reverse of that in the Richard—

Mr. DUFFY. What is the consequence of far lower standards?

Mr. KIRSANOW. The consequence is, in an employment context for example, you will hire employees who may not make the grade. They come in, can't make the grade, then get fired. Then the employer gets sued for disparate treatment, based on that.

Or you get individuals who are not eligible for a particular loan, they cannot make the payments, or the monthly payments, and are more likely to be foreclosed upon. So there are unintended consequences that harm the intended beneficiaries.

Chairman MCHENRY. The gentleman's time has expired.

Mr. DUFFY. I yield back.

Chairman MCHENRY. Thank you. We will now recognize Mrs. Maloney for 5 minutes.

Mrs. MALONEY. I would like to thank the chairman and the ranking member for holding this hearing and really focusing on this important issue.

The purpose of the Fair Housing Act of 1968 was to reverse what Bobby Kennedy described as the insidious effect of racial segregation in housing. And to accomplish this goal, the Fair Housing Act prohibits housing providers from discriminating on the basis of race, color, religion, sex, disability, family status, and national origin.

Earlier this year, HUD issued a final rule stating that a housing-related practice is discriminatory if it has a so-called disparate impact on one of those protected classes and does not serve a legitimate business purpose.

Opponents of this rule argue that it creates too much uncertainty for lenders. However, it is important to note that HUD's rule did not change the law in any way, shape, or form; it just formalized the disparate impact test that HUD and the Department of Justice had been using for over 40 years.

More importantly, the disparate impact test, contrary to popular belief, does not punish sound business decisions. All a housing lender has to do to avoid liability for a business practice that has a discriminatory effect is show that the practice serves an important business purpose, and there aren't less discriminatory ways to serve that same important business service.

So, I would just call that common sense, and if the end result of the disparate impact rule is that it forces lenders to think twice about whether or not there are less discriminatory ways to accomplish its business objectives, then I say this is all the better for our country.

I would like to ask Mr. Parker, do the same types of problems exist, the entrenched residential segregation that drove Congress to enact the Landmark Fair Housing Act back in 1968, does that still exist today?

Mr. PARKER. Many of the problems that existed then continue to exist. As has been mentioned, there are still instances of intentional discrimination. But there are also a web of practices that working together, tend to deprive protected classes of equal opportunity in housing.

And the example that I gave of the lending market of the mortgages that were given in the run up to 2008, is a perfect example that it had a disparate impact on particular communities and it is an impact that could only be gotten at by using the disparate impacts standard, because there aren't individuals whom you can show acted intentionally to discriminate.

You rely on the statistical evidence to show that there is a difference in treatment that would result in highly qualified people of color being denied mortgages or being given mortgages with terms that are detrimental.

Mrs. MALONEY. So you still believe the disparate impact rule is necessary, and it is necessary as an appropriate remedy, and you

can't get to this determination without the disparate impact, is that correct?

Mr. PARKER. I believe it is at least as necessary as it was at the time when the Fair Housing Act was passed.

Mrs. MALONEY. Given that HUD and the courts have been enforcing the disparate impact rule for over 40 years now, Mr. Parker, do you think that lenders and other housing providers have had sufficient time to adjust and be aware of the rule and the standards?

Mr. PARKER. I think they certainly have.

And, as you pointed out, the disparate impact standard creates a structure that permits them to assert a legitimate business interest.

And unless there is a finding that either that interest is not legitimate or that there is no other way to serve the goals, then it will stand.

Mrs. MALONEY. I am looking at the successful cases that the Justice Department has brought, using the disparate impact theory after the financial crisis, and particularly the Countrywide case that they brought.

Do you think that these cases will have a positive impact by deterring other lenders from engaging in the same kinds of practices that Countrywide engaged in, in their lending practices?

Mr. PARKER. Yes, I think it will. And I think it serves the Nation as a whole because it eliminates the sort of practices that led to the economic disaster that we had in 2008.

Mrs. MALONEY. My time has expired. Thank you very much.

Chairman MCHENRY. The gentlelady's time has expired.

The gentleman from Illinois, Mr. Hultgren, is recognized for 5 minutes.

Mr. HULTGREN. Thank you, Mr. Chairman.

And thank you all so much for being here today to discuss a very important topic. I wonder if I could address this first question to follow up on some of the discussion that my colleague from Wisconsin, Mr. Duffy, had started. I wanted to follow up a little bit more, go a little deeper on that.

Commissioner Kirsanow, and Mr. Marcus, I wonder if you could talk briefly—are neutral practices with the disparate impact on protected groups necessarily indicative of intentional discrimination?

Mr. KIRSANOW. No, they are not necessarily indicative of intentional discrimination.

One of the reasons under *Griggs* v. *Duke Power* that scholars say the Supreme Court had adopted the disparate impact standard was the difficulty in many occasions in proving intentional disparate treatment, as opposed to disparate outcomes.

Disparate outcomes, you can see, it is quite simple.

Is that necessarily evidence of disparate treatment or intentional discrimination? Sometimes, as Ken indicated? Yes, it is. It is smoke, but there is not always fire where there is smoke.

Mr. HULTGREN. Mr. Marcus, any thoughts?

Mr. MARCUS. No, it isn't.

I have spent countless hours identifying disparities, especially in education, to ask the question, is there a reason, in a particular

school district, that certain minorities have been designated for this or not designated for that, is there a reason?

And over and over again, I would find legitimate, nondiscriminatory reasons for it, and then move on.

Once in a while you can't find a legitimate reason, and you have to conclude at the end of the day, that it was based on discrimination.

In my view, we need a better test for separating the wheat from the chaff. The current tests used by HUD, EEOC, and others don't really do that, in part, I think because they are not just looking for intentional discrimination, but they are also looking for other kinds of effects.

And unless we say we are focused on discrimination, on intentional or even unconscious discrimination, we are going to pull them all in together. We are going to pull in both discrimination and also nondiscriminatory effects, and we will end up with the sorts of consequences that Commissioner Kirsanow described.

Mr. HULTGREN. Mr. Marcus, digging a little deeper on that, will the Obama Administration's embrace of disparate impact divert government resources away from combating intentional discrimination?

Mr. MARCUS. It can't help but do that. It is not as if our civil rights enforcement agencies have so much in the way of excessive funds that they can look for exotic or extraneous forms of cases.

When you have to divide the work between as many different kinds of statutes as they do, and then you are looking not just for intentional and conscious discrimination, but also other nondiscriminatory effects, it means at the end of the day you are not able to do an effective job at enforcing any of the civil rights statutes.

Mr. HULTGREN. Mr. Marcus, based on your experience working in civil rights enforcement at the Department of Education, the Department of Housing and Urban Development, and also the Civil Rights Commission, do you believe using government resources to fight and overturn neutral practices that have a disparate impact on minorities, but are not rooted in intentional discrimination, is the best way to fight discrimination?

Mr. MARCUS. No, but I would make one distinction that I think that Commissioner Kirsanow did as well; there is intentional discrimination, and there is unconscious discrimination. And I think both need to be combated.

If someone is intentionally trying to exclude minorities, we need to fight that. Even if they don't know that is what they are doing, but they are doing it, we need to fight that, too.

But if neither exists, then there might be unfortunate policies, there might be policies that we want to speak out against because of inequities that we perceive, but if it is not discrimination, I don't think that we should be focusing our scarce civil rights resources on them.

Mr. HULTGREN. I have less than a minute left. If I can direct this to Commissioner Kirsanow and Mr. Marcus, if we have time, will the Obama Administration's insistence on pursuing disparate impact claims allow cases of intentional discrimination to go

unpunished? And does pursuing disparate impact make society more vulnerable to intentional discrimination?

Mr. KIRSANOW. It could, because as Mr. Marcus indicated, when you have limited resources, you have to decide where you are going to direct those resources.

And when you are talking about disparate impact claims, I don't want to overstate this, but it is in some respects easier to make out a case of disparate impact than it is intentional discrimination. So you go where the money is; you go where you are more likely to achieve a desired result.

Whether or not—we have a multi-billion dollar apparatus designed to address discrimination in this country. Even that may be insufficient. But if you are going to focus on something that arguably could be in violation of the Equal Protection Clause, you are diverting resources away from intentional discrimination, where there is no dispute that we need robust enforcement activities.

Chairman MCHENRY. I will now recognize—

Mr. HULTGREN. Thanks very much, Commissioner.

I yield back.

Chairman MCHENRY. We will now recognize the ranking member of the full Financial Services Committee, Ms. Waters.

Ms. WATERS. Thank you very much.

I am sorry that I was not here for the opening of this hearing. However, it is extremely important that we understand that the Fair Housing Act established a framework for rooting out both intentionally discriminatory acts and seemingly neutral policies that produce a disparate impact on discriminatory effects on certain groups or populations.

Let me just ask our representative here from the ACLU about the Department of Justice, which reached a $335 million settlement with Countrywide, a now defunct mortgage company owned by Bank of America, the largest fair lending settlement on record in the United States.

In that case, the Justice Department alleged that more than 200,000 African-American and Hispanic borrowers who qualified for loans were charged higher fees or placed into subprime loans while prime loans were provided for White borrowers with similar financial situations.

As I look through all of the information, I see that similar actions by lenders such as Wells Fargo and others have taken place.

Now, in African-American and Latino communities, we have had foreclosures which have basically caused great harm and pain in these communities, and we have been struggling trying to get corrections. We have been struggling trying to make sure that we give support to the communities, because when they do these foreclosures, it causes the value of other houses in the community to go down, et cetera, et cetera.

It has been very harmful, and very painful. How was the disparate impact legal theory applied in these cases that I am talking about, in Countrywide in particular? How may the outcome in the Countrywide case have differed if the victims were unable to use the disparate impact doctrine?

Mr. PARKER. The Countrywide case and similar cases are perfect examples of the utility of the disparate impact standard.

It is a perfect example of how the resources that were expended pursuing that case had an impact that, as you suggested, affects tens of thousands of African Americans. It had a profound effect on a large population of people. It permitted the court to address practices that cost these communities enormous sums of money.

And all of it was made possible by a standard that could only—or by a case that could only have been brought using a disparate impact standard. It would have been impossible for individuals to show that they were the victims of intentional discrimination, but they were victims. And the communities of color have been victims of practices to the tune of tens of billions of dollars that have been lost to the—

Ms. WATERS. If I may, I have a few minutes here.

Mr. PARKER. Sorry.

Ms. WATERS. This is true of the case against Wells Fargo, Morgan Stanley, Sun Trust, C&F Mortgage, and even HUD.

And so, the question becomes whether it is intentional or not, the harm that can be caused, such as we see in these cases, is significant. And if we did not have disparate impact to bring these cases, what would happen?

Mr. PARKER. We would lose the opportunity to address some of the biggest problems that are facing our protected classes. We would deny opportunity to fair housing to a significant part of the population.

Ms. WATERS. Thank you, Mr. Chairman. I yield back the balance of my time.

Chairman MCHENRY. I thank the ranking member.

We will now recognize Mr. Barr for 5 minutes.

Mr. BARR. Thank you, Mr. Chairman.

Commissioner Kirsanow, I wanted to explore with you what the meaning of some of these Federal civil rights statutes actually is, specifically the statutory authority that some of these enforcement agencies actually have with respect to applying the disparate impact theory.

So, what is the meaning of these statutes? Are these statutes designed to remedy intentional discrimination, disparate impact, or both?

Mr. KIRSANOW. With the exception of the 1991 Civil Rights Act, which was passed in large measure to address Ward's Cove Packing, all the other civil rights statutes were designed to address intentional discrimination, not disparate impact.

Mr. BARR. Okay. And so the statutory language of, for example, the Fair Housing Act, and the statutory language of the Equal Credit Opportunity Act, is there any statutory language that mentions disparate impact?

Mr. KIRSANOW. There are rules that mention it or at least allude to it. But I would have to think about whether or not there is any statutory language that mentions disparate impact per se.

Mr. BARR. So putting aside administrative regulations or rulemakings, does the statutory language authorize these enforcement agencies to apply disparate impact theory?

Mr. KIRSANOW. No, that has been an administrative prerogative.

Mr. BARR. Okay. So under the Chevron doctrine, which grants to administrative agencies the ability to issue rules or interpretations

based on a reasonable construction of an ambiguous statute, are these statutes sufficiently ambiguous—in your judgment, are these statutes sufficiently ambiguous to confer the authority upon these agencies to apply disparate impact theory under Chevron, and are those rulemakings enforceable under the Chevron deference standard?

Mr. KIRSANOW. Right. I believe both under Chevron I and Chevron II, they would not be. However, having said that, as was stated in the concurring opinion *Ricci* v. *DeStefano,* the Supreme Court has not yet pronounced on that.

Mr. BARR. So that is an unsettled question?

Mr. KIRSANOW. I would say it is still unsettled, but in my judgment, if you take a critical look, a rigorous look at Chevron I or Chevron II, the agencies go beyond the statutory authority in determining their authority under their governing statute.

Mr. BARR. So the bottom line is that the statutes themselves do not authorize these agencies to apply disparate impact, at least not explicitly.

Mr. KIRSANOW. Not explicitly.

Mr. BARR. Okay. With respect to the equal protection arguments and Scalia's concurring opinion in *Ricci* where he talks about the fact that there could be a war between disparate impact and equal protection, would the race-conscious decision-making that would naturally result from the application of disparate impact theory survive strict scrutiny under current Supreme Court precedent?

Mr. KIRSANOW. No.

Mr. BARR. Okay. Would application—and let me ask Mr. Marcus the same question. Would you concur with the Commissioner's assessment of that, based on current Supreme Court precedent?

Mr. MARCUS. I would agree based on current Supreme Court precedent and based on the conception of disparate impact that is in all of the regulatory schemas that you described. I think it is possible to narrowly construe disparate impact in a way that saves it, but as currently written, I believe these disparate impact provisions violate equal protection.

Mr. BARR. And Mr. Marcus, just a follow-up question. My time is expiring. I have about a minute left, so maybe you could take the remainder of the time and answer this question about your earlier testimony. Amplify your earlier testimony, when you discussed how application of disparate impact theory could very well harm the intended beneficiaries.

Obviously, the objective of this hearing is to make sure we don't have discrimination in lending practices in this country. So, aside from diversion of scarce resources away from enforcement of intentional discrimination, could there be—or could you discuss the possibility of denying minorities or protected classes of people from credit because of application of disparate impact. Could this have a negative impact on access to credit for protected classes? And if so, how? How would application of disparate impact theory harm those intended beneficiaries, particularly in the way of access to credit?

Mr. MARCUS. It could, and along the lines that Commissioner Kirsanow also described. I think the problem is that virtually any

facially-neutral standards that are effective for underwriting are going to create disparate impacts.

So, if a lending institution wants to avoid liability, there are various things that it could do. One is to introduce a greater subjective component to eliminate the standards in question. In the event that it uses a more subjective approach, there is a greater likelihood of invidious discrimination. To the extent that it dilutes the criteria, this has the potential also of undermining the safety and soundness of the institution and the resulting potential instability certainly harms everyone.

Chairman MCHENRY. The gentleman's time has expired. And we will have to move on here. Thank you, though.

I will now recognize Mr. Ellison for 5 minutes.

Mr. ELLISON. Thank you, Mr. Chairman.

And I thank the ranking member.

I am really pleased that we are having this hearing because there is not enough discussion around civil rights, inclusion at all. And even if it is cast in this light, we still need to talk about civil and human rights.

I just want to say, though, that I do find it amusing even that somebody would suggest that if we try to protect people from the discrimination that comes in the form of a statistical imbalance or disparate impact, that could undermine the effort to stop discrimination.

Nobody who is a victim of discrimination or potentially is one would ever say such a ridiculous thing. That is the position of a privileged, comfortable person who really wants to discriminate, but wants to look good and feel good as they do it.

This country of ours had legally sanctioned—you could legally discriminate against somebody because they were Black for about 346 years in the United States, from 1619 to 1965. You could say, "You are Black; you are not allowed to be here." And yet not even, I don't know, not even 60 years pass, and all of a sudden we are just beyond that, even though we have disparities in everything.

And of course, we have disparities in everything. If somebody were to restrict your legal right to freely exercise your rights for 11 hours, 15 minutes after they stopped saying they were doing it, admitting they were doing it, you still would be feeling the effects of it, of course.

Now, this whole conversation I think just is evidence that people who believe in civil and human rights of all colors better really get busy because the people who want to recreate American apartheid are busy, active, and absolutely committed to reinstituting racial subordination in America.

But you know what? People of all colors oppose the efforts that some are engaged in. And I think that they need to have as much vigor as the people who want to recreate a pre-civil rights America.

So with that, that is just my candid views.

Let me ask this question. I am curious to ask you a question, Mr. Parker. The disparity in subprime lending and foreclosure rates among minority communities is indisputable. According to a 2009 report by the Center for Responsible Lending, African Americans and Latinos are 47 percent and 45 percent more likely to face fore-

closure than Whites. What role has disparate impact doctrine had in fighting lending discrimination since the financial crisis?

Mr. PARKER. Disparate impact is the main tool for fighting it. And I think it is important, as you pointed out, to recognize that in those cases, in the analyses that were done, they showed that employing correct underwriting standards, that African Americans and Latinos were still more likely to get risky subprime loans, in spite of their own creditworthiness.

So all of this discussion about doing things that undercut credit examinations is completely counter to the reality of what is happening to communities of color.

Mr. ELLISON. Mr. Parker, if—let's just say we didn't have disparate impact and you had to prove case-by-case that the people involved in putting together those loans were intentionally discriminating because of race bias. Would there be any chance to try to counteract the overall effect of racial disparity?

Mr. PARKER. It would be virtually impossible for a number of reasons. One is the complexity of the lending process. One is that you don't know how similarly-situated people are treated unless you have access to that overall data. So that, yes, it would be virtually impossible to prove that.

Mr. ELLISON. Now, we live in 2013. How many mortgage lenders do you know who are going to say, "You are Black; I don't like you; I don't think you ought to own a home, or if you do, you ought to have a higher-price mortgage." How many people are saying that? Is that a commonly done thing?

Mr. PARKER. It is not commonly done, but I think it is also necessary to recognize that the disparate impact standard, as has been suggested, makes it possible to ferret out intentional discrimination. But more importantly, it makes it possible to address unjustified practices that have a discriminatory impact on the basis of a protected category.

Mr. ELLISON. But may be arbitrary?

Mr. PARKER. That are arbitrary, and as I said, unjustified or not justified by either business necessity or any other acceptable goal. And the idea that you would permit that to continue operating when it serves no legitimate purpose at the expense of protected classes is completely counter to the intent of the Fair Housing Act.

Mr. ELLISON. Thank you, Mr. Parker. Keep up the good work.

Chairman MCHENRY. We will now recognize Mr. Rothfus for 5 minutes.

Mr. ROTHFUS. Thank you, Mr. Chairman.

Mr. Marcus, could you provide your insight on the impact of disparate impact and how it affects the availability of mortgages?

Mr. MARCUS. Now, that is a very, very, hard question. I will take a very broad look at it. And what I would say it this. To the extent that lending institutions are dissuaded from using nondiscriminatory facially neutral underwriting standards simply because they have a particular effect that could create legal liability, they will need to use other kinds of standards which may be less effective in determining a credit risk.

And so what that does is ultimately create a weakening of the financial system.

Mr. ROTHFUS. We are having this debate right now about Qualified Mortgages and the ability-to-repay rules that the Consumer Financial Protection Bureau has come out with. If an entity like the CFPB were, say, a private sector association that lending institutions had joined and the CFPB came up with some guidelines on lending such as the debt-to-income ratio at 43 percent for what is going to be a Qualified Mortgage, and it were determined under a disparate impact theory that would be found to disproportionately affect a protected class, might there be liability for such an association?

Mr. MARCUS. There could be. And it seems to me that there are legitimate enforcement methods of finding intentional discrimination that don't require any of that. What we found indication of at HUD is that there are many cases where minorities are treated less well when they walk into a lending institution.

It is not as if someone will say, point blank, "We don't want to lend to African Americans." Of course, that doesn't happen. But, there are certainly plenty of instances where you can find that the White person who walks in will be given information and encouragement, and the minority will be given discouragement and made to wait.

There are lots of cases in which one can find different treatment. It is not easy. It often requires very patient enforcement activity, perhaps with pair testers, but there are ways of getting at different kinds of discrimination faced by minorities that don't create this unintended consequence.

Mr. ROTHFUS. Is it more difficult than to find evidence of intentional discrimination?

Mr. MARCUS. It depends on the particular case, of course. There are cases in which intentional discrimination is fairly easy to find. And there are some cases in which people do explicitly state their prejudice, but they don't—

Mr. ROTHFUS. If you are observing a practice, for example, where they are giving more information to White people and less information to people of color, that is going to be evidence that you are going to be taking to determine whether there is a discriminatory intent there.

Mr. MARCUS. Yes.

Mr. ROTHFUS. And it takes some time to do that?

Mr. MARCUS. Yes, it takes some time. It takes training and pair testers or something of that sort, but—

Mr. ROTHFUS. And resources to do that—

Mr. MARCUS. Yes, yes—

Mr. ROTHFUS. —and to go after individuals like that?

Mr. MARCUS. Yes.

Mr. ROTHFUS. Mr. Kirsanow, how would the defendant assert a legitimate business interest in the context of defending a claim rising under disparate impact?

Mr. KIRSANOW. One of the problems that any defendant has whether it is the employment context, the credit context, the housing context is you don't know going in. It is like the *Laritzen* case where I think it was Judge Easterbrook who said, "You are going into litigation not knowing what standard is going to apply to you."

It is the standard that the EEOC establishes for housing—the HUD establishes or some other entity establishes.

And to go for a moment back to the unintended consequences and the potential harms to the intended beneficiaries, I think Congressman Ellison cited the fact that Blacks have a 47 percent to 45 percent greater foreclosure rate.

One of the things that lenders or employers—whoever the potential charged party does is, they change their standards to avoid disparate impact liability. And in the context of changing that standard, what happens then is loans may be let to people who may not be able to pay those loans back. If it was a level playing field in terms of the administration of loans, that is if there were no intentional discrimination you would think—and on a regression analysis—that Blacks, Hispanics and Whites would all have the same foreclosure rates.

But that is not the case, which suggests that the changing or lowering of standards actually has a deleterious impact on the intended beneficiaries.

Mr. ROTHFUS. I see my time has expired.

Thank you, Mr. Chairman.

Chairman MCHENRY. We will now recognize Mrs. Beatty for 5 minutes.

Mrs. BEATTY. Thank you so much, Mr. Chairman, and Mr. Ranking Member.

I have two questions for the witnesses.

Mr. Parker, the Federal courts and the U.S. Government have applied the disparate impact standards since the 1970s. And the financial services industry has had very clear guidance, I have been told, as to the application of the standard since at least 1994 when the Federal agencies with jurisdiction for lending discrimination issued interagency guidances.

In other words, the industry has known for decades that they had to conform their businesses with the disparate impact standards.

Can you point to any evidence whatsoever that the disparate impact standard has had negative effects on the lending industry?

Mr. PARKER. I can point to no such evidence.

And there are two things I would like to say.

First, the question of the legality of disparate impact is not unsettled. Every circuit court in the country has upheld the practice. And so it is the law in every circuit court in the country.

Second, I would take vigorous exception to the idea that the financial collapse was due to overregulation or enforcement of our fair housing laws.

The abandonment of the usual underwriting standards for a loan-to-value or debt-to-income were not abandoned because people were afraid that the law would be enforced against them. It was abandoned because of greed. It was abandoned because there was a way to make money, and it was money that was made at the expense of the communities that the laws were designed to protect.

And to suggest that it was the law that was responsible for this is outrageous.

Mrs. BEATTY. Thank you so much.

Mr. Commissioner, in reading your testimony—and let me quote—"The Supreme Court originally approved the use of disparate impact theory in the employment context. Unfortunately, the theory has metasticized and is being used in an area of law for which it was never intended. Rather than being used as a way to prove disparate treatment in cases where there is no smoking gun, it is now being used in a way to achieve racial balancing across society..."

I find it amazing, and in light of our history of disparate treatment in policies and the impact and what we just heard from Mr. Parker somewhat inappropriate, when I think of the word "metasticize." Deadly cancer. Something that spreads, which is negative.

And I guess, I am curious as to why you would use a term to say this is equivalent now to a deadly cancer that we are looking in this, especially when our chairman and others have said there is no place in the marketplace for discrimination.

He didn't say intentional, unintentional, or as a result of disparate impact. We have come a long way from red-lining and from the prejudices, and it also made me think—and you can respond to this—that when you said there is no smoking gun.

I think for many of us who grew up during this era or time, I don't care if it is the little lady with gloves and a purse who is standing there and denying me a right because of my skin color, versus a big smoking gun.

Could you express to us why you chose those words?

Mr. KIRSANOW. Absolutely, thank you very much for that question.

I do think that it is invidious to insist upon outcomes. Forty years ago—prior to 40 years ago, 50 years ago, 70 years ago, the outcome was that Whites would be advantaged. That was the desired outcome. It was wrong then. It is wrong now to seek a desired outcome on the basis of race. That is clearly in violation of the equal protection clause.

Today, it may not be as big a problem as it was before, because maybe the right people are in charge. It all depends on where you sit. But to make determinations on the basis of race is antithetical to how this country is supposed to be governed. It is not a function of equal outcome; it is a function of equal opportunity.

Mrs. BEATTY. Well, unfortunately, some of us don't sit on that side. And certainly I hope you are not expecting me to believe that we live in a world that is fair no matter where you sit.

We wouldn't be having this discussion, in my opinion, if there was still not discrimination and if there was not an impact from disparate impact treatment.

Mr. KIRSANOW. And Congresswoman, thank you very much for that, because in fact we have copious mechanisms for dealing with that. No one at this table is suggesting that intentional discrimination, disparate treatment not be addressed in a robust fashion.

What we are talking about here is whether or not designing a process to yield a specific outcome is what this country should have. And I would suggest to you that the 14th Amendment says, no.

Mrs. BEATTY. We probably just have a little difference of opinion and I notice I only have—I am over.

So maybe off-line, we can have another discussion. Thank you, Mr. Chairman.

Chairman MCHENRY. I thank my colleague.

Without objection, Mr. Garrett, a member of the full Financial Services Committee but not a member of the subcommittee, will have 5 minutes to ask his questions.

Mr. GARRETT. I thank the Chair.

And I thank the panel.

So at the end of the day, we are trying to achieve that goal of fair treatment for everyone. Let me start then with Mr. Marcus.

You write in your testimony that, "Potential defendants would be forced to demonstrate a business necessity for a policy, and that might not have nondiscriminatory rationales, but adverse impacts on some groups."

By doing that, of course, you shift the burden of proof from the prosecutor to the defendant, which effectively erases our system in this government of innocent until proven guilty standard, I would suggest.

Can you tell me how you think this burden shifting will affect the housing industry per se, and business practices as well as our judiciary system as a whole?

Mr. MARCUS. Their effects are already there. In terms of the judicial system as a whole—and I might add the civil rights enforcement system in particular—it shifts our focus away from where, I believe it should be, which is treating people differently based on their race, color, ethnicity so on and so forth.

In terms of the housing market, again, it takes the focus away from nondiscrimination and towards eliminating disparities that may have other reasons whatsoever.

Mr. MARCUS. With due respect, I don't think I would say for me that the goal should be fair treatment for everyone, if we are talking about anti-discrimination laws. There are lots of ways in which practices may be fair or unfair, but not necessarily illegal and not necessarily discriminatory. And given the peculiar evils of discrimination, and given the narrow resources, I believe that those who are combating discrimination should be focused on discrimination, and the goal of eliminating bias, animus, things of that sort.

Mr. GARRETT. So, the answer to my question is that the burden is shifted then in this situation from who is actually trying to prove it to who is actually having to defend it.

So the burden is no longer on the State or the prosecutor, if you will, in order to prove that there was this wrong being done. Now it is on the business entity or the individuals to prove that it was done right.

Isn't that an unfair shifting of that burden? And how do you prove that, if you are in that entity?

Mr. MARCUS. It may be, but then it may be—

Mr. GARRETT. Yes, yes, true, but you have to prove a business's necessity, I think is—

Mr. MARCUS. Yes. To me the concern is not just a shifting of the burden, but also that the way in which the burden is defined may

make it difficult or impossible, even for innocent, nondiscriminatory entities to defend themselves.

Mr. GARRETT. But is—and that is interesting, that is why it is interesting, because does that mean because there is not an identifiable standard as to what the adverse impact effect would be?

Mr. MARCUS. The standards differ slightly. But if the entity has to show that there wasn't a nondiscriminatory alternative that lack the same disparities—

Mr. GARRETT. Yes.

Mr. MARCUS. —then they simply—they are put in a position where they are not even allowed to demonstrate their innocence.

Mr. GARRETT. Right.

Mr. MARCUS. The question isn't innocence or guilt, the question isn't discrimination or nondiscrimination, the question is whether there is simply a different process that could have led to a different outcome.

Mr. GARRETT. Exactly. I think that is important.

Mr. Kirsanow, you were just getting into the end of Mr. Rothfus' questions, here, that the impact—that the goal—that the laudable goal that we may all have here, on both sides of the aisle, may not actually be achieved at the end of the day by the intentions that some Members may have here.

You were just getting that at the end of Mr. Rothfus' questions, when you said, if you do a regression analysis and you could see how it actually does impact upon certain groups of people. Can you just elaborate on that—

Mr. KIRSANOW. It is the law of unintended consequences. And what we found at the Civil Rights Commission—

Mr. GARRETT. Law of unintended consequences, right.

Mr. KIRSANOW. Right, if you take a look at a number of the studies out there, again, these may be well-intended initiatives. But good intentions are not necessarily good results.

Mr. GARRETT. Okay.

Mr. KIRSANOW. And when you look at some of the results, both in terms of mortgage lending, credit, and in terms of employment, what happens when the potential charged party attempts to avoid liability by getting numbers right, and thereby possibly changing or lowering standards is, that it can have a negative outcome at the back end.

That minorities are the ones actually holding the bucket at the end. Where you have greater number of minorities who are fired, because they have been hired under standards for which necessarily under that particular job, they couldn't comply with, or credit histories, where they couldn't necessarily sustain a particular mortgage.

One of the reasons—one of the reasons, not the exclusive, you may have a higher foreclosure rate or a higher default rate, is because standards were changed or modified to avoid disparate impact liability.

Mr. GARRETT. So, we are hurting the people we are trying to help eventually. Thank you.

Chairman MCHENRY. We will now recognize Mr. Heck for 5 minutes.

Mr. HECK. Thank you, Mr. Chairman, and I hope to not use all 5 minutes.

Is any one of you arguing that there is a material difference to the victim between intentional discrimination or unconscious discrimination, or discrimination that is the consequence of "unfortunate policies?"

Does any one of you believe that the material impact to the victim is different?

Mr. KIRSANOW. Yes.

I do believe there is a significant material impact to the—

Mr. HECK. No, no, no. That wasn't my question, sir. My question is, do you believe there is a material difference to the victim—

Mr. KIRSANOW. Yes.

Mr. HECK. —between these forms of discrimination?

Mr. KIRSANOW. Absolutely. Because where a victim is living in a country where outcomes are determined by race, there is a material difference. Where you have a disparate impact standard, or any other kind of standard that yields outcome, based not on content of character, based not on neutral characteristics, but on race, then you have a real impact.

Mr. HECK. I feel like we are speaking different languages. My question is if I am, for example, a person of color, and I am unable to procure the housing because I am a person of color, whether that is the lenders' intent or not, it seems to me the impact on me is the same.

Mr. KIRSANOW. I would disagree. Again, if you are living in a country that doesn't honor the equal protection clause, the impact on you is different.

Mr. PARKER. May I interject?

Mr. HECK. Absolutely, please.

Mr. PARKER. If you are a single woman who is evicted from your apartment because there is a policy of evicting someone who is the victim of a crime, or there is a crime in the apartment, spousal abuse, it doesn't matter that the policy was not implemented out of animus.

The fact is that single mother, who is the victim of abuse, is now homeless. And the idea that the Fair Housing Laws would not be able to assist that woman, would not be able to assist a veteran who is not able to meet a full-time employment status, but could afford to live in an apartment, the idea that they are unprotected by the Fair Housing Act is a serious undercutting of that Act.

Mr. HECK. Mr. Marcus, here is part of what I have heard you say. You have decried discrimination, evidently, especially the blatant and intentional forms, those are quotes. I have heard you discount the use of disparate impacts, either from some legal question, which I don't understand, given the cumulative case law.

And that, if unfortunate policies or unconscious discrimination yield disparate impacts, it is harder to determine and therefore we shouldn't use scarce resources to prosecute or litigate?

Mr. MARCUS. Yes. I think that there is a huge difference between being told you can't live here because I don't like people like you, versus being told you can't live here because the apartment is unavailable.

I think that there is a very distinct and peculiar harm that one faces if one is the subject of discrimination.

To amplify, yes, I have argued that civil rights enforcement should focus on intentional and even unconscious discrimination.

Mr. HECK. But not unfortunate policies that yield disparate impacts, and therefore may be, in fact, discriminatory, because we have scarce resources?

Mr. MARCUS. No, the latter, I would—the latter I would go after if they are discriminatory, meaning that they are motivated by intentional discrimination or unconscious discrimination.

And I think that there are times when it is difficult to ferret it out, the discrimination, using different treatment. And that is why I have indicated that I think that disparate impact theories could be used, but I have argued for an affirmative defense of good faith.

Mr. HECK. In which case, in my 10 seconds remaining, I wish to strongly associate myself with the comments of Mrs. Beatty and to suggest, sir, that if you believe that as deep down as we who are asking questions of this nature do, then I would have thought that you would have led and ended all of your comments with an argument for increased resources to ferret out discrimination, which should not exist in this country.

I yield back the balance of my time, which I don't have.

Chairman MCHENRY. We will now recognize the ranking member of the subcommittee, Mr. Green, for the final questioning of the day.

Mr. GREEN. Thank you, Mr. Chairman, and let me move quickly to this notion that you have to have explicit authorization for a law or a standard to be implemented.

My suspicion is that you would all agree that the Constitution of the United States of America does not call for judicial review. Is there anyone who differs with me in terms of judicial review that is not explicitly mentioned in the Constitution? And we all know, as first-year law students, that it is in the case of what? *Marbury* v. *Madison.* That is where it comes from.

So you don't have to have explicit language for a court to recognize that a standard can be established.

Next point, let's talk about this whole notion, it seems to me, from some of you, that courts are granting summary judgments, based upon numbers that are presented.

There are no summary judgments being presented on some sort of regular basis, with reference to disparate impact.

Mr. Parker, you are a practitioner, how many years you have been practicing law?

Mr. PARKER. Thirty-three.

Mr. GREEN. And have you handled few or many cases of this type?

Mr. PARKER. Many cases.

Mr. GREEN. Do you find that summary judgment is the usual circumstance wherein a defendant has given an affirmative defense by way of answer?

Mr. PARKER. No, I find that, in fact, that the plaintiff is at a disadvantage in many cases, that it is very difficult to bring and to prove these cases.

Mr. GREEN. And do you also find that after disparate impact has been presented, a defendant still has the opportunity to refute the evidence that has been shown, such that the defendant can still prevail?

Mr. PARKER. They do have that opportunity, at least once.

Mr. GREEN. And do you find that—at least once?

Mr. PARKER. Yes.

Mr. GREEN. Do you find that even if the plaintiff then, the moving party presents additional evidence, the defendant still has an additional opportunity to refute the last evidence presented?

Mr. PARKER. That is correct.

Mr. GREEN. So there is a system in place that the courts have recognized now for some 40 years, working efficaciously that there seems to be a desire to overturn. Can you quickly tell me, one more time, because you have said it to others, what would be the implications of eliminating the disparate impact standard, not theory, because it is now a standard?

Mr. PARKER. The impact of eliminating what has been a longstanding practice in the courts, in the agencies that enforce the law, would be to make it difficult, if not impossible, to show that policies which are unnecessary and unjustified have an impact on protected classes to the detriment of those classes.

It would eliminate a whole class of cases, which affect an enormous number of people.

Mr. GREEN. I marvel at how a good many people who are opposed to disparate impact also oppose testing. Testing is the methodology by which we can ascertain whether or not discrimination exists also. It seems that I am seeing a lot of consistency here. Opposed to testing, opposed to disparate impact, but opposed to invidious discrimination.

How do you prove invidious discrimination other than a guy shows up with a white cape and a hood? How do you prove it?

You have to have some tools available to you to deal with people who are intelligent. These people are not idiots. They understand the consequences of their actions. And many of them disguise their actions with clever policies.

But the law wasn't intended just to deal with people who make intentional, overt manifestations. The law is also designed to deal with good people who set bad policies. Can you give an example of a good person who may have had a bad policy? Quickly, because I have a closing statement, Mr. Parker.

Mr. PARKER. Yes. One such policy might be, as I mentioned before, the policy that says you have to be employed in a full-time job to get an apartment. That would have an impact on someone who, because of disability—

Mr. GREEN. A veteran, for example.

Mr. PARKER. Right.

Mr. GREEN. A veteran who has other sources of income. You should consider all sources of income in deciding to rent, not just a person having a full-time job. Because there are people who don't have full-time jobs who can afford the apartment that you are leasing.

Mr. PARKER. And everyone's interest is protected in that case.

Mr. GREEN. Thank you.

My closing comment is this. It has always been the intelligentsia that perpetrates. The ignorant may perpetuate, but it is the intelligentsia that perpetrates. It was the intelligentsia that gave us Dred Scott. It was the intelligentsia that gave us a lot of these laws that we find ourselves having to overturn. And in fact, we have overcome.

So I would hope that this hearing will not allow us to find ourselves having to combat some rule or some law that eventually could overturn 40 years of progress.

I yield back.

Chairman MCHENRY. The gentleman yields back.

I would like to thank our witnesses today. This hearing was very informative. Thank you for your time.

The Chair notes that some Members may have additional questions for this panel, which they may wish to submit in writing. Without objection, the hearing record will remain open for 5 legislative days for Members to submit written questions to these witnesses and to place their responses in the record. Also, without objection, Members will have 5 legislative days to submit extraneous materials to the Chair for inclusion in the record.

This hearing is adjourned.

[Whereupon, at 11:50 a.m., the hearing was adjourned.]

A P P E N D I X

November 19, 2013

Testimony of Peter N. Kirsanow before the House Committee on Financial Services, November 19, 2013

Mr. Chairman, thank you for inviting me to testify today. My name is Peter Kirsanow. I am a partner at the law firm of Benesch, Friedlander, Coplan & Aronoff, a former member of the National Labor Relations Board, and am presently a member of the U.S. Commission on Civil Rights. Although I have been asked to testify here because of the expertise I have gained in the area of disparate impact from my work at the Commission, I am testifying only regarding my own opinion regarding disparate impact, not on behalf of the Commission as a whole.

The Supreme Court originally approved the use of disparate impact theory in the employment context. Unfortunately, the theory has metastasized and is being used in areas of law for which it was never intended. Rather than being used as a way to prove disparate treatment in cases where there is no smoking gun, it is now being used as a way to achieve racial balancing across society. Disparate impact is a legal theory of dubious provenance and legality. Its expansion threatens to harm not only those who are members of what are considered disfavored groups, but also the purported beneficiaries.

To illustrate the metastasization of disparate impact, I would like to begin by discussing a rule HUD recently proposed, which is entitled "Affirmatively Furthering Fair Housing." The rule is based on disparate impact theory. My testimony draws upon a comment I and two of my colleagues submitted to HUD regarding this rule, in addition to an amicus brief we submitted in the Mt. Holly case.

I realize that last February HUD promulgated a rule enshrining disparate impact theory in its regulations.[1] However, that does not change the fact that disparate impact claims are not cognizable under the Fair Housing Act.[2]

Despite others' protestations, it simply is not the case that Congress intended the Fair Housing Act to include disparate impact. To elaborate upon this point, let us look at the seminal civil rights statute, the Civil Rights Act of 1964. The Civil Rights Act of 1964 did not include disparate impact. When the Fair Housing Act was passed, the Supreme Court's *Griggs* decision allowing the use of disparate impact in employment was still three years away.

If disparate impact had not been recognized even in the employment context in 1968, Congress certainly did not intend to include it in the Fair Housing Act. In fact, the legislative history surrounding the adoption of the Civil Rights Act of 1964 suggests that Congress's intent was very dissimilar to that adopted by the Court in *Griggs*.[3] The floor managers of the Senate bill stressed that employers would continue to be free to adopt "bona fide" qualification tests, even if those tests disproportionately affected members of minority groups.[4]

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[1] Docket No. FR-5508-F-02, "Implementation of the Fair Housing Act's Discriminatory Effects Standard," (Feb. 15, 2013).

[2] Brief *Amici Curiae* of Gail Heriot, Peter Kirsanow, and Todd Gaziano in Support of Petitioner at 2, Mount Holly v. Mount Holly Gardens Citizens in Action (No. 11-1507)("No inference can be drawn that when Congress passed the Fair Housing Act of 1968 it was kindly disposed toward disparate impact liability.").

[3] *See id.* at 5-11.

[4] Clark and Case Memorandum, 110 Cong. Rec. 7213.

When Congress amended the Fair Housing Act in 1988, it did not include a disparate impact requirement. To argue that Congress felt no need to include a disparate impact provision in the 1988 amendments because of the *Griggs* decision proves nothing.[5] *Griggs* dealt only with the use of disparate impact in the employment context. Even though appellate courts had recognized the use of disparate impact in the housing context, the lack of Supreme Court precedent on the point indicated to Congress that the issue was not settled, and therefore they would have included a disparate impact provision in the Fair Housing Act if such was their intent.

Furthermore, if the use of disparate impact in the fair housing context is as widely accepted as is claimed, HUD would not have felt the need to issue a rule adopting disparate impact. If there was a statutory basis in the Fair Housing Act, such a rule would have been unnecessary and superfluous. And if HUD and DOJ were confident in the statutory basis and constitutionality of the use of disparate impact in regard to housing, they would not have bent over backwards to engage in a quid pro quo to settle the *Magner v. Gallagher* case, rather than letting the Supreme Court decide the issue.[6]

As a result of HUD's regrettable arrogation of power, the "Affirmatively Furthering Fair Housing" proposed rule is built upon sand. Rather than focusing on incidents of disparate treatment against members of protected classes, the proposed rule transforms people with middle-income levels or below into a protected class based simply on disparate impact.[7] I certainly oppose disparate treatment in housing because of membership in a protected class. However, the proposed rule's focus on disparate impact and the almost complete absence of a discussion of disparate treatment suggests that people are being discriminated against on the basis of their pocketbooks. To argue that housing discrimination is pervasive because members of a protected class are less likely to be able to afford housing that is the size they want or in a more genteel area is bizarre.

The proposed rule's focus on scrutinizing housing patterns based on race and ethnicity is concerning. The rule does not suggest that people tend to live in racial and ethnic clusters because of disparate treatment or because of an entrenched system of segregation enshrined in law. Indeed, if the latter were true forty-five years after passage of the Fair Housing Act, the FHA and HUD would have to be judged abysmal failures. Rather, the proposed rule is premised on a disparate impact theory of discrimination in housing.[8]

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[5] Brief *Amici Curiae* of Current and Former Members of Congress at 3, Mount Holly v. Mount Holly Gardens Citizens in Action (No. 11-1507).

[6] *The Talented Mr. Perez*, THE WALL STREET J., March 21, 2013, *available at* http://online.wsj.com/news/articles/SB10001424127887324281004578356581889324790.

[7] Docket No. FR-5173-P-01, "Affirmatively Furthering Fair Housing," § 5.152.

> Disproportionate housing needs exists [sic] when the percentage of extremely low-income, low-income, moderate-income, and middle-income families in a category of housing need who are members of a protected class is at least 10 percent higher than the percentage of persons in the category as a whole.

[8] Docket No. FR-5173-P-01, "Affirmatively Furthering Fair Housing," § 5.152.

> *Affirmatively furthering fair housing* means taking proactive steps beyond simply combating discrimination to foster more inclusive communities and access to community assets for all persons protected by the Fair Housing Act. More specifically, it means taking steps proactively to address significant disparities in access to community assets . . . .

The underlying flaw in this proposed rule lies in its repeated use of the term "segregation" to describe housing patterns in which members of racial or ethnic groups are concentrated in particular areas. Legal segregation has been dead for over forty years. Geographic clustering of racial and ethnic groups is not in and of itself an invidious phenomenon. Referring to contemporary housing patterns as "segregation" trivializes the horror of legal segregation that existed in the United States for over half a century. "[R]acial imbalance without intentional state action to separate the races does not amount to segregation."[9] I suspect that the rule dubs racial imbalances in housing patterns "segregation" in order to invest a sweeping rule of dubious constitutionality with moral authority. Referring to freely-chosen housing patterns as "segregation" also gives a Manichean cast to what is in reality a complex situation.

The proposed rule contemplates that HUD will provide housing authorities with data on so-called "integration and segregation" of housing patterns and "racially and ethnically concentrated areas of poverty."[10] In order to provide this data, the agency will have to classify Americans on the basis of race. Such a classification is likely unconstitutional. The Supreme Court has repeatedly said that racial classifications are inherently suspect. "This Court has recently reiterated, however, that 'all racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny,'"[11] and "all governmental action based on race—a *group* classification long recognized as 'in most circumstances irrelevant and therefore prohibited,'—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed [citations omitted] [citation marks omitted]."[12]

Not only does HUD intend to track the racial concentration of American neighborhoods, but it expects local housing authorities to engage in racial balancing. The proposed rule states that local housing plans "should be designed to reduce racial and national origin concentrations, including racially or ethnically concentrated areas of poverty, and to reduce segregation and promote integration."[13] This is disparate treatment on the basis of race, which is racial discrimination, plain and simple.

The proposed rule's assumption that it is particularly noxious if minorities live in areas of concentrated poverty displays a mindless preference for racial balancing.[14] Given the demise of legal segregation, this definition ignores the possibility that at least some of these "racially or ethnically concentrated areas of poverty" exist because these members of racial and ethnic minorities prefer to live in communities predominantly peopled by fellow members of their own racial or ethnic group. Surely they should have the right to choose to live where and near whom

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[9] Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701, at 750 (Thomas, J., concurring) (2007).
[10] Docket No. FR-5173-P-01, "Affirmatively Furthering Fair Housing," § 5.154(c).
[11] *Id.* at 741 [citations omitted].
[12] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).
[13] Docket No. FR-5173-P-01, "Affirmatively Furthering Fair Housing," § 903.2(a)(3).
[14] Docket No. FR-5173-P-01, "Affirmatively Furthering Fair Housing," § 5.152.

> Racially or ethnically concentrated area of poverty (RCAP or ECAP) means a geographic area based on the most recent decennial Census and other data to be statistically valid, with significant concentrations of extreme poverty and minority populations.

they prefer. It is hardly surprising that many people have family and friendship networks primarily comprised of one ethnic group or another and would prefer to live near their family and friends. History suggests this is particularly likely in communities primarily comprised of recent immigrants. I suggest that individuals are the ones best suited to determine where they prefer to live, and that adults are generally capable of determining where to live without a government bureaucrat counseling them that Housing Option A is 75% black, 20% Hispanic, and 5% white, but Option B is a better choice because it is 75% white, 20% Hispanic, and 5% black.[15]

No one wants to live in an area of concentrated poverty. But why is it inherently worse to live in a predominantly Hispanic inner-city slum than in a predominantly white poverty-stricken Appalachian county?[16] For that matter, would either the predominantly Hispanic or white area be a less miserable place to live if it were more diverse? These areas are miserable because they are poor, not because most people have the same skin color. This assumption also seems patronizing to racial and ethnic minorities, as if their communities are inferior and their situations will be improved if they are living next to white neighbors.

It is particularly insidious that the proposed rule attempts to give a sinister sheen to voluntary housing choices. The proposed rule is intended to benefit non-whites. Yet the discriminatory provisions of the proposed rule will harm both whites and non-whites.[17] In fact, if the proposed rule is correct that housing prices have a disparate impact on minorities, and therefore non-whites are less likely to be able to afford housing without government assistance, the proposed rule will likely harm non-whites more than whites. The former will more often be subject to a bureaucrat's whims regarding his housing. Why should an African-American person be less preferred under a tenant selection policy than a white person simply because a particular apartment is in a predominantly African-American area?[18]

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[15]Docket No. FR-5173-P-01, "Affirmatively Furthering Fair Housing," § 903.2 ("(3) In accordance with the PHA's obligation to affirmatively further fair housing, . . . the PHA Plan should be designed to reduce racial and ethnic concentrations, including racially or ethnically concentrated areas of poverty, and to reduce segregation and promote integration.").

[16] Kelvin Pollard and Linda A. Jacobsen, The Appalachian Region: A Data Overview from the 2007-2011 American Community Survey, Appalachian Regional Commission, at 14, 41 (Feb. 2013), http://www.arc.gov/assets/research_reports/PRBDataOverviewReport2007-2011.pdf.

> The Appalachian region is significantly less diverse racially and ethnically diverse than the United States as a whole, and most parts of the region have remained far below the national average in their minority populations. In two-thirds of Appalachian counties, minorities (defined as anyone who identifies with a racial or ethnic group other than "white alone, not Hispanic") made up less than 10 percent of the population during the 2007-2011 period. . . .
>
> In 23 Appalachian counties, per capita income was less than $15,000. . . . Indeed, per capita income in the 2007-2011 period was just $18,720 in rural Appalachian counties as a whole, and just $18,197 in central Appalachia.

[17] I do not intend to suggest that discrimination against whites is permissible.

[18] Docket No. FR-5173-P-01, "Affirmatively Furthering Fair Housing," § 903.2(a)(3) ("In accordance with the PHA's obligation to affirmatively further fair housing, the PHA's policies that govern its 'development related activities' including affirmative marketing; tenant selection and assignment policies . . . should be designed to reduce racial and national origin concentrations . . . .").

It is sadly ironic that the proposed rule engages in disparate treatment on the basis of race while attempting to combat disparate impact. Many government entities make this error.[19] It is less expensive and embarrassing to quietly "get your numbers right" than to face public charges of racial discrimination. Nonetheless, disparate treatment on the basis of race is racial discrimination. I believe that the Supreme Court will eventually be forced to rule whether discriminatory actions taken to avoid disparate impact can be reconciled with the Fourteenth Amendment's guarantee of equal protection.[20] I hope this day will come sooner rather than later, but until then HUD should respect the limits of its statute and refrain from engaging in racial discrimination.

One last point I would like to make is that disparate impact often winds up harming the very people intended to benefit. For example, my colleague Gail Heriot has written extensively on the problems caused by affirmative action "mismatch" in academia, which is a sort of less formal application of disparate impact theory. Less-prepared students who are admitted to selective institutions of higher learning in the interests of racial balancing often find themselves struggling to keep up with the material, which can negatively affect their future careers.[21] In the employment context, the EEOC has issued new guidance that attempts to discourage the use of criminal background checks in hiring. Why? Because African-American and Hispanic men are more likely to have criminal records than are white and Asian men, so the use of criminal background checks in hiring has a disparate impact on African-American and Hispanic men. Yet serious social science studies have shown that the use of criminal background checks in hiring actually increases the employment of African-American men overall because employers overestimate the number of African-American men with criminal records.[22] When employers can know that that a particular applicant does not have a criminal record, he can hire him without worrying about all the problems that may arise as a result of hiring an ex-criminal. I cannot predict what the consequences will be for the intended beneficiaries of disparate impact in housing, but the track record of using disparate impact as a social engineering tool suggests the consequences will not be good.

Thank you again for asking me to speak today. I look forward to your questions.

---

[19] Ricci v. DeStefano, 557 U.S. 557, 563 (2009) ("We conclude that race-based action like the City's in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute.").

[20] *See id.* at 594 (Scalia, J., concurring ("resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?").

[21] *See* Gail Heriot, *The Sad Irony of Affirmative Action*, NATIONAL AFFAIRS (Winter 2013), *available at* http://www.nationalaffairs.com/publications/detail/the-sad-irony-of-affirmative-action.

[22] *See* Harry J. Holzer *et al.*, *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices* of Employers, 49 J. L. & ECON. 451 (2006).

Testimony before the U.S. House of Representatives
Committee on Financial Services
Subcommittee on Oversight and Investigations

Hearing on "General Overview of Disparate Impact Theory"

November 19, 2013

Hon. Kenneth L. Marcus[1]

Chairman McHenry, Ranking Member Green, Distinguished Committee Members, I am honored to appear before this committee again today. My name is Kenneth L. Marcus. I am the President and General Counsel of the Louis D. Brandeis Center for Human Rights Under Law. In addition, I am a former Staff Director of the U.S. Commission on Civil Rights and former General Deputy Assistant Secretary of Housing and Urban Development for Fair Housing and Equal Opportunity. The pursuit of fair housing for all Americans is a matter of serious concern, and I commend this subcommittee for its continuing oversight to ensure that the duty to secure fair housing is honored by this administration, by state and local governments, and by the whole housing community. The use of disparate impact theories to enforce fair housing laws is sometimes promoted as a means of accomplishing this goal. In my view, as I will further explain below, the use of disparate impact in fair housing has risks as well as benefits and carries significant legal and policy disadvantages when misapplied.

[1] President and General Counsel, The Louis D. Brandeis Center for Human Rights Under Law (www.brandeiscenter.com); former Staff Director, U.S. Commission on Civil Rights; author, *Jewish Identity and Civil Rights in America* (Cambridge University Press, 2010). Mr. Marcus submits this testimony on his own behalf. It may not represent the views of the Louis D. Brandeis Center.

The Continuing Evil of Housing Discrimination

The issue of housing discrimination remains a serious problem in the United States, although we have made dramatic and significant progress against it over the years. This is also true of discrimination in other areas, such as the workplace and education. At its worst, however, housing discrimination is uniquely harmful, since it literally hits its victims where they live. That is to say, housing discrimination harms people in a place of peculiar vulnerability, where whole families rather than just particular individuals are at risk. When I had the privilege of directing the U.S. Department of Housing and Urban Development's (HUD) Office of Fair Housing and Equal Opportunity, we faced deplorable cases of conscious, intentional discrimination and bigotry. Sad to say, these cases continue to arise, and it is vital that civil rights enforcement officials pursue them vigorously.

Just last year, HUD settled Fair Housing Act claims against the Ecklin Group, a Lancaster, Pennsylvania real estate development group that they found had refused to rent to Burmese refugee families. The agreement came about after company staff allegedly refused to renew the leases of three Burmese families because of their national origin, and told various people that the group would no longer accept rental referrals for refugees referred by Lutheran Refugee Services. Needless to say, the company denied the allegation, which is not unusual in such settlements. In the twenty-first century, it is sobering to think that such blatant national origin discrimination persists. Unfortunately, this Lancaster case was not the only such case of blatant alleged discrimination.

The year before, a HUD Administrative Law Judge found that Phillip and Opal Maze, respectively the rental manager and owner of a Marshall County, Alabama mobile home, had unlawfully discriminated against a white family and an African American man because one of the family members was dating the African American man. Phillip Maze had kicked the African American man off of the premises because of his race. According to HUD, Maze actually told the woman who was dating the African American man that they would have to move out because he did not believe in interracial dating. He then turned off the water to the family's home after observing the African American visitor. When the white female tenant asked what she would have to do to have the water turned back on, Mr. Maze told her to "get rid of the black boyfriend."

Subtle, Covert Discrimination and Disparate Impacts

We know, however, that in the twenty-first century, those who harbor racial bias are seldom so explicit about it. As racism has become socially stigmatized and legally barred, most people who harbor racial prejudice have learned to conceal their bias in ways that are difficult to identify or to prove in a court of law. The disparate impact doctrine can be used to identify intentional discrimination that is hard to demonstrate under the doctrine of differential treatment. Used judiciously, disparate impact can be a useful enforcement tool for identifying intentional or unconscious discrimination in circumstances where the discriminators' motivations are otherwise difficult to ascertain. Used improperly, however, it creates real problems of law and public policy and may

entail violations of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

In the fair housing context, the most obvious problem is that the applicable statute does not explicitly authorize it. The Fair Housing Act, unlike Title VII of the Civil Rights Act of 1964, does not expressly provide a disparate impact cause of action. Nor does it contain language regarding "adverse affects" of the sort that has bolstered a disparate impact claim in other statutory contexts. Instead, its statutory language speaks in terms of discrimination "because of," "based on," or "on account of" various enumerated classifications. The Supreme Court has previously interpreted such terms as providing an intent requirement. In this sense, reliance upon HUD's fair housing regulations unavoidably raises the prospect – absent legislation to incorporate a disparate impact theory – that its prosecutions exceed its statutory mandate. Indeed, President Ronald Reagan's signing statement for the 1988 Amendments insists "that this bill does not represent any congressional or executive branch endorsement of the notion, expressed in some judicial opinions, that Title 8 violations may be established by a showing of disparate impact or discriminatory effects of a practice that is taken without discriminatory intent." In short, President Reagan admonished, "Title 8 speaks only to intentional discrimination." While HUD has long pursued disparate impact claims under Title VIII, the Supreme Court has not yet evaluated the conformity of those regulations with the underlying legislation. Several federal circuit courts have found disparate impact claims to be viable under the Fair Housing Act, but their determinations must be considered provisional until the Supreme Court settles the matter. Recent judicial challenges to the regulations have been settled out of court. If Congress believes that

Title VIII should cover disparate impact, and wants to protect government officials from accusations that their prosecutions are *ultra vires*, it can of course amend the statute to provide an explicit basis for the use of this doctrine. If it chooses to do so, however, it should beware the broader risks posed by misuse of this doctrine.

The Supreme Court's decision in the so-called New Haven firefighters' case, *Ricci v. DeStefano*, raises the deeper problem that current disparate impact doctrine may violate the Equal Protection Clause of the U.S. Constitution. In that case, Justice Scalia observed that the Court's narrow opinion "merely postpones the evil day" the Court will have to decide the central, looming question: "Whether, or to what extent, are the disparate impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?" The same question arises with respect to the Fair Housing Act to the extent that it is interpreted to support disparate impact claims. In a nutshell, the problem is that disparate impact doctrine, as it has evolved over the years, has come to encompass more than just intentional and unconscious discrimination. This broad doctrine has come to include a wide range of actions which have unintended adverse impacts on certain groups which are merely difficult to explain on non-racial grounds. This can lead housing providers or lenders to avoid legitimate criteria such as credit-worthiness or employment status which have legitimate (if difficult-to-prove) non-discriminatory rationales but adverse impacts on some racial groups. These potential defendants would be forced to demonstrate a business "necessity" for the policy, and such demonstrations are hard to mount even when their validity is intuitively obvious. Some have argued that this has had a destabilizing influence on certain markets. Worse, the doctrine is sometimes used to pressure

regulated entities – employers, for example, but perhaps also lenders or housing providers – to engage in quota-like behavior to avoid the prospect of disparate impact liability. In other words, they are forced to use surreptitious means to 'get their numbers right" in order to avoid disparate impact liability.

To the extent that any version of the disparate impact doctrine either constitutes or mandates race-conscious governmental actions for reasons other than the elimination of intentional or unconscious discrimination, I would submit that it is vulnerable to challenge under the Equal Protection Clause. As Justice Scalia's *Ricci* opinion acknowledges, "The question is not an easy one." It is not, however, an avoidable one. As Scalia observed, "the war between disparate impact and equal protection will be waged sooner or later... [and] it behooves us to begin thinking about how – and on what terms – to make peace between them." For this reason, I would urge that any disparate impact provision adopted by this Congress be drafted in a manner that would shield it from constitutional challenge. Mr. Chairman, I ask that my article on this topic, "The War between Disparate Impact and Equal Opportunity," 2008-2009 *Cato Supreme Court Review* 53-83, be included with and incorporated into my testimony. In that article, I have argued that a "good-faith" defense, if adopted by this Congress, could save disparate impact provisions from the constitutional challenges that might otherwise lead to their judicial invalidation.

While I have framed my remarks largely in terms of legal considerations, I should also observe that there are questions of equity and policy that also constrain proper uses of the disparate impact doctrine. As I have noted, the problem of actual, intentional discrimination remains a pressing one even today. It is my belief that the civil rights

enforcement agencies of the United States, including the Office of Fair Housing and Equal Opportunity, have a duty to spend their scarce precious resources pursuing precisely these forms of bigotry. To the extent that they may pursue more marginal cases, based on aggressive interpretations of law, to target disparities that are not based on either intentional or unconscious discrimination, they dilute their strength, divide their focus, and misuse their scarce precious taxpayer funds. People of good will may debate the wisdom or justice of governmental attempts to level disparities that do not arise from intentional or unconscious discrimination. Whatever their value, however, they are a different project from combating discrimination. Given the seriousness of racism, ethnic bias, and other forms of bigotry, it behooves civil rights enforcement agencies to focus their energies on their core mission of eliminating discrimination. This subcommittee can advance that mission by ensuring that legitimate law enforcement tools, including the disparate impact doctrine, are crafted and applied in a manner which focuses them on actual discrimination and shields them from legal challenge.

Written Statement of
Dennis D. Parker, Director
Racial Justice Program
American Civil Liberties Union

Submitted to the Subcommittee on Oversight and Investigations of the U.S. House of Representatives Committee on Financial Services

For a Hearing on

"A General Overview of Disparate Impact Theory"

November 19, 2013

Good morning Chairman McHenry, Ranking Member Green and distinguished members of the Subcommittee. My name is Dennis Parker, and I am the Director of the Racial Justice Program of the American Civil Liberties Union. By way of disclosure, I am also one of the lawyers in the *Adkins v. Morgan Stanley* case, a case brought under the Fair Housing Act charging Morgan Stanley with practices connected with its role in encouraging the creation of toxic, highly risky mortgages which resulted in disparate rates of foreclosure for African Americans in Detroit.

Congress passed the Fair Housing Act nearly fifty years ago to address problems of residential segregation and conditions of poverty which blocked access to opportunity to communities of color and led to bitterness, frustration and civil unrest.

From the outset, the bipartisan sponsors and supporters of the Fair Housing Act recognized that, given the pervasiveness and complexity of housing discrimination, it was necessary to prohibit all forms of discrimination including that resulting from discriminatory intent, as well as acts neutral on their face which had a discriminatory effect[1].

In order to achieve the broad anti-discrimination goals of the act, Congress, the government agencies charged with enforcing the act, and each of the courts which have interpreted the act have recognized that the disparate impact standard is a necessary tool in fighting discrimination in all of its forms and that, without the disparate impact standard, practices that have the same discriminatory consequences as intentional discrimination would be shielded from the reach of the law. That recognition was so strong that both at the time that the statute was passed and on subsequent occasions, Congress has resisted attempts to limit the application of the law only to instances of intentional discrimination.

Further evidence of the legality and the efficacy of the disparate impact standard can be seen in the fact that between the enactment of the Fair Housing Act in 1968 and the time when Congress made significant amendments to the act in 1988, all nine courts of appeals which considered the issue, concluded that the act permitted the use of disparate impact claims to fight discrimination in all of its forms.

In 1988, against the backdrop of the unanimous approval of disparate impact claims by all courts, Congress extended the coverage of the act to prohibit discrimination based on familial status and disability. At the same time, Congress added specific exemptions relating to convictions for certain narcotics offenses, regarding the maximum number of occupants permitted to occupy a dwelling and an exemption specifying that nothing in the act prohibits appraisers from taking factors into consideration other than race, color, religion, national origin, sex, handicap, or familial status. Given the absence of any language in the statute that would

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[1] Senator Edward W. Brook, a co-sponsor of the Fair Housing Act observed that the Act "recognize[d] the manifold and insidious ways in which discrimination works its terrible effects," and aimed to undo the "practical result" of discriminatory policies and break the "dreary cycle of the middle-class exodus to the suburbs and the rapid deterioration of the central city." 114 Cong. Rec. 2085 (1968) at 2279-80. For a detailed discussion of the legislative history of the Act, see Brief of Current and Former Members of Congress as *Amici Curiae* in Support of Respondents, Township of v. Mt. Holly Garden Citizens in Action, Inc., (2013) (No.11-1507), available at: https://www.aclu.org/racial-justice-womens-rights/township-mt-holly-v-mt-holly-gardens-citizens-action-inc-amicus-brief.

prohibit discrimination for any of the actions covered by the exemptions, the inclusion of the language specifying the exemptions would only make sense if those actions would otherwise be barred on a disparate-impact theory. Congress also enhanced the Department of Housing and Urban Development's authority to interpret the Fair Housing Act by giving the agency the power to conduct formal adjudications and to issue regulations interpreting the Act.

Given the history of acceptance of the disparate impact standard, it was no surprise that in the years following the amendments, the Department of Housing and Urban Development (HUD), the Justice Department and the agencies charged with enforcing the fair housing and fair lending laws have interpreted the fair housing laws to permit disparate impact claims, have trained their employees to use disparate impact analysis, and have brought enforcement actions relying on disparate impact. During that same period, the two remaining circuit courts which had not previously addressed the question of the validity of the disparate impact standard joined the other nine circuits in approving of it.

On February 15, 2013, HUD reaffirmed the decades-long recognition of the availability of the disparate impact standard after going through a period of formal notice and comment. The regulation formally recognized the disparate impact standard as one way of proving discrimination. At the same time in the new regulation, HUD emphasized that this rulemaking did not propose new law.

The need for the disparate impact standard as a tool in fighting discrimination is as great or greater now than it has ever been. Problems of residential segregation and the accompanying limitation on access to fine schools, transportation, healthy environments and employment continue to plague the nation.

One striking example of the continuing need for an effective way of addressing the increasingly subtle way in which protected classes are denied access to fair housing can be seen in the wake of the economic crisis of 2008. Discriminatory lending practices, which included providing high risk subprime loans to members of communities of color became increasingly prevalent. Despite repeated attempts to blame the recipients of these mortgages for these loans with the suggestion that a combination of their greed and their lack of creditworthiness was the cause of their problems, the evidence shows that in 2005, 55 percent of subprime borrowers had sufficiently high credit scores to qualify for prime loans. [2] People of color were disproportionately included in that number. A joint report from HUD and the Department of the Treasury found that, as of 2000, "borrowers in black neighborhoods [were] five times as likely to refinance in the subprime market than borrowers in white neighborhoods," even when controlling for income[3]. Even more striking was that "[b]orrowers in *upper-income* black neighborhoods were twice as likely as homeowners in *low-income* white neighborhoods to refinance with a subprime loan." [4]

These communities had previously experienced a long history of intentional

[2] Rick Brooks & Ruth Simon, *Subprime Debacle Traps Even Very Credit-Worthy*, Wall St. J., Dec. 3, 2007.
[3] U.S. Department of Housing and Urban Development. *Curbing Predatory Home Mortgage Lending* (2000) at 47-48, available at: http://www.huduser.org/Publications/pdf/treasrpt.pdf.
[4] Stephen L. Ross & John Yinger. *The Color of Credit: Mortgage Discrimination, Research Methodology, and Fair-Lending Enforcement*, 24-25 (2002).

discrimination in the form of racial steering, redlining and lack of access to financial institutions offering fair borrowing options. The new practice of extending predatory terms of mortgages added new injury to the old. The combination of the new abusive lending practices and the history of discrimination resulted in a foreclosure crisis which had a particularly serious impact on communities of color and reversed many of the economic gains which had been realized by those communities over the past half century. The nature of the policies that had such a serious impact is such that they could only be addressed by disparate impact claims since no individual would be able to demonstrate the discriminatory consequences of the policies which fueled the subprime bubble without relying on evidence of the broad impact of those policies. Cases challenging the lending practices which brought about the economic crisis that threatened the economy as a whole, but had particularly serious consequences on individuals and communities of color illustrate that the disparate impact standard is a careful, measured way of protecting all Americans from discrimination. After plaintiffs have shown that a policy or practice has a disproportionate impact on protected classes, defendants are permitted the opportunity to demonstrate that there is a substantial legitimate reason for the practice and policy. The practice will only violate the fair housing act if its justification is not legitimate or if there is a less discriminatory way to achieve the same purpose.

By permitting the consideration of the multiple factors of impact, goals and the means of achieving those goals, the disparate impact standard permits challenges to barriers which prohibit equal opportunity to fair housing. It is common sense that any policy that unnecessarily excludes people from housing because of their race, gender, ethnicity, disability or any other protected class should be set aside in favor of one that serves everyone's needs fairly, effectively, and without discrimination.

The use of disparate impact is a common sense way of assuring effective and equal fair housing opportunity and should be protected. To do otherwise would undercut decades of progress and betray the efforts of the people nearly half a century ago who sought to assure fairness and equality in housing.

Thank you.

WASHINGTON
LEGISLATIVE OFFICE

November 18, 2013

The Honorable Patrick T. McHenry
Chairman
Subcommittee,
Oversight and Investigations
Committee on Financial Services
U.S. House of Representatives
Washington, DC 20515

The Honorable Al Green
Ranking Member
Subcommittee,
Oversight and Investigations
Committee on Financial Services
U.S. House of Representatives
Washington, D.C. 20515

AMERICAN CIVIL LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

LAURA W. MURPHY
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

ROBERT REMAR
TREASURER

Re: Financial Services Subcommittee on Oversight and Investigations Hearing on the Fair Housing Act

Dear Chairman McHenry and Ranking Member Green:

On behalf of the American Civil Liberties Union ("ACLU"), its over half a million members, 53 affiliates nationwide, and countless additional supporters and activists, we urge you to preserve the federal Fair Housing Act (FHA) in its entirety. The FHA is an indispensable tool that prohibits discrimination in the sale or rental of housing. Since its passage forty-five years ago, every court of appeals that has addressed the question, as well as the Department of Housing and Urban Development, has interpreted the Act to prohibit policies that have a discriminatory impact, regardless of whether they were adopted with a discriminatory intent. While a recent case before the U.S. Supreme Court, *Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, threatened disparate impact claims under the FHA, the case was settled, leaving in place the well-established understanding that the FHA prohibits discrimination in practice, as well as discrimination by design. By maintaining the disparate impact standards of the FHA, Congress would help to ensure basic American values of equal opportunity and to protect against arbitrary and unnecessary barriers to fair housing, particularly for racial minorities and victims of domestic violence.

This important legal tool remains vital for combating and deterring contemporary forms of discrimination in housing. For example, disparate impact analysis provides an essential tool for remedying the widespread racial discrimination that defined the subprime lending boom, during which borrowers of color were disproportionately offered higher-rate loans than white borrowers. Disparate impact doctrine makes it possible to uncover disparities and determine whether racial disparities exist that cannot be justified by credit risk or any other legitimate business considerations.

Similarly, disparate impact analysis confronts structural and institutional barriers to fair housing, such as zoning ordinances that prohibit the building of smaller homes or apartments that working people can afford, which in many places excludes most people of color. In fact, the redevelopment plan in the

Mount Holly case would have demolished the only predominantly minority neighborhood to build new dwellings that few of the current residents would have been able to afford, thus excluding most of the town's minority residents.

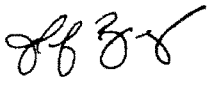
Furthermore, disparate impact analysis under the FHA offers crucial legal protection to women who face eviction or housing denials based on zero-tolerance policies that exclude any member of a household where a crime has taken place. These policies are often used to evict or exclude survivors of domestic and sexual violence, the majority of whom are women and girls. Because zero tolerance policies are facially neutral, disparate impact claims are indispensable in eradicating this devastating form of discrimination.

For these reasons, disparate impact analysis can root out harmful patterns of discrimination that might otherwise remain invisible and go unredressed, and it remains indispensable today in fulfilling Congress' promise to eradicate such discrimination in housing. The FHA's disparate impact standard is consistent with both Congressional intent and necessary to address critical and current issues, such as predatory lending and discrimination against domestic violence victims. It recognizes that actions that have the consequence of perpetuating exclusion and unequal access to housing can be just as harmful to society as intentionally discriminatory acts.

These issues are discussed in more detail in the attached amicus brief, which we recently filed with the Supreme Court in the *Mt. Holly* case. We urge Congress to protect equal opportunity and freedom from discrimination for all by preserving the Fair Housing Act and maintaining its position that disparate impact is important and critical. Please contact Legislative Counsel Jennifer Bellamy with any questions at jbellamy@dcaclu.org.

Sincerely,

Laura W. Murphy
Director, Washington Legislative Office



Jennifer Bellamy
Legislative Counsel

Cc: Members of the Subcommittee on Oversight and Investigations of the House Financial Services Committee.

No. 11-1507

IN THE

Supreme Court of the United States

TOWNSHIP OF MOUNT HOLLY, ET AL.,

Petitioners,

—v.—

MT. HOLLY GARDENS CITIZENS IN ACTION, INC., ET AL.,

Respondents.

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

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF NEW JERSEY, THE NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, THE NATIONAL COMMUNITY REINVESTMENT COALITION, THE NATIONAL CONSUMER LAW CENTER, THE NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY, THE NATIONAL HOUSING LAW PROJECT, PUBLIC JUSTICE, P.C., AND THE NATIONAL WOMEN'S LAW CENTER, IN SUPPORT OF RESPONDENTS

Stuart T. Rossman
National Consumer Law Center
7 Winthrop Square, Suite 400
Boston, MA 02110
(617) 542-8010

Steven R. Shapiro
Counsel of Record
Laurence M. Schwartztol
Sandra S. Park
Lenora M. Lapidus
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500
sshapiro@aclu.org

(*Counsel continued on inside cover*)

Edward Barocas
Jeanne LoCicero
American Civil Liberties
Union of New Jersey
Foundation
P.O. Box 32159
Newark, NJ 07102
(973) 642-2086

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STATEMENT OF INTEREST[1]

Amici curiae are organizations that provide representation, advocacy, and services to victims of housing discrimination, as well as to victims of domestic and sexual violence. In furtherance of their respective missions, each organization has direct experience with the importance of maintaining disparate impact claims under the Fair Housing Act, and thus each organization has a direct interest in the proper resolution of the question presented in this case. A full statement of interest for each of the *amici* is set forth in an appendix to this brief.

SUMMARY OF ARGUMENT

The Fair Housing Act (FHA), interpreted for nearly forty years by federal appellate courts to authorize disparate impact claims, has proven transformative in combating housing discrimination. Nonetheless, discriminatory barriers to equal housing opportunity remain deeply entrenched. This brief focuses on two contemporary forms of housing discrimination that have had particularly devastating consequences: race discrimination in subprime mortgage lending and sex discrimination against victims of domestic and sexual violence. For the same reasons that disparate impact analysis has

[1] The parties have submitted blanket letters of consent to the filing of *amicus curiae* briefs. This brief was not authored in whole or in part by counsel for any party, and no party paid for the preparation or submission of this brief other than *amici*, their members, or their counsel.

been a critical weapon in the statute's anti-discrimination arsenal for over forty years, it remains indispensable today in fulfilling Congress' promise to eradicate discrimination in housing.

1. The foreclosure crisis, which continues to batter communities across the country, was precipitated and exacerbated by widespread abuses on the part of subprime lenders. These abuses were inextricably linked to racial discrimination. A history of lending discrimination created lasting disparities in access to credit opportunities, leaving a vacuum in predominantly African American and Latino communities that was filled by subprime specialists who operated without competition. Subprime lenders set up alternative business channels, through which minority communities had access only to the riskiest and most expensive loan products. Recipients of those products, in turn, faced a severely increased risk of foreclosure. Rigorous economic and statistical analyses have repeatedly shown that racial disparities appear even when holding income and creditworthiness constant – in other words, minority borrowers received riskier loan products than similarly situated whites, leaving minority communities with significantly higher rates of foreclosure.

Disparate impact analysis provides an essential tool for remedying the widespread discrimination that defined the subprime lending boom. Courts considering disparate impact claims examine aggregate data collected by lenders, allowing them to uncover disparities and determine whether or not those disparities can be justified by credit risk or any other legitimate business

considerations. Indeed, discriminatory mortgage lending is particularly susceptible to disparate impact analysis, because lenders collect extensive financial data from borrowers. Legitimate lending decisions reflect algorithmic analysis of objective financial information, so disparities that persist when controlling for legitimate factors expose unlawful discrimination. Disparate impact analysis is thus uniquely powerful as a means of smoking out illegitimate discrimination that would otherwise remain unredressed.

2. Disparate impact analysis has also been critical in addressing housing discrimination against women who have been victims of domestic and sexual violence. The problem arises in a number of contexts, including zero tolerance policies that subject every member of a household to eviction if any member of the household has committed a crime, and municipal nuisance ordinances that subject tenants to eviction if they call the police too frequently. Although neutral on their face, these policies have a disproportionate impact on women, who are substantially more likely than men to suffer from domestic and sexual violence, and thus are substantially more likely to be evicted from their homes because of the violence committed against them.

In addition to being transparently unfair, such policies undermine law enforcement by deterring victims of domestic and sexual violence from reporting crimes, often leaving them trapped in violent situations that they cannot escape. By recognizing disparate impact claims, the FHA has offered legal redress to women in these

circumstances so that they are not faced with the Hobson's choice of risking eviction for themselves and their children, or remaining silent in the face of potentially life-threatening violence.

ARGUMENT

I. DISPARATE IMPACT IS A VITAL TOOL FOR REMEDYING THE DISCRIMINATORY LENDING PRACTICES THAT FUELED THE SUBPRIME LENDING BUBBLE AND CONTRIBUTED TO THE CURRENT FORECLOSURE CRISIS

A. Discriminatory Subprime Lending Was a Major Cause of the Foreclosure Crisis

1. *Roots of Subprime Lending*

Over the last two decades, many subprime lenders engaged in predatory practices, charging excessive fees, imposing overly risky terms, and frequently layering multiple risks in a single transaction. The impact of these practices has fallen disproportionately on minority borrowers. Subprime lenders marketing to minority communities exploited the absence of conventional lending institutions, which was the product of a history of housing discrimination. *See, e.g.*, U.S. DEP'T OF HOUS. & URBAN DEV. & U.S. DEP'T OF THE TREASURY, CURBING PREDATORY HOME MORTGAGE LENDING 18, 47-49 (2000) [hereinafter CURBING PREDATORY HOME MORTGAGE LENDING]; Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American*

Foreclosure Crisis, 75 AM. SOC. REV. 629, 630-31 (2010).

The historical roots of contemporary disparities in access to credit can be traced to the 1930s, when the federal government developed a rating system purporting to assess risks associated with lending in specific neighborhoods. On rating system maps, integrated or predominately black neighborhoods were marked in red. *See* ALYS COHEN, CREDIT DISCRIMINATION (5th ed. 2009); Douglas S. Massey, *Origins of Economic Disparities: The Historical Role of Housing Segregation*, *in* SEGREGATION: THE RISING COST FOR AMERICANS 40, 69-73 (James H. Carr & Nandinee K. Kutty, eds., 2008). Loans were virtually never made in these "redlined" communities. Massey, *Origins of Economic Disparities*, *supra*, at 69. Federal courts have long recognized that the practice of redlining – i.e., basing refusals to extend credit on the racial composition of neighborhoods – violates the Fair Housing Act. *See, e.g.*, *Nationwide Mutual Ins. Co. v. Cisneros*, 52 F.3d 1351, 1359-60 (6th Cir. 1995); *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489, 493 (S.D. Ohio 1976).

Even though redlining was found to be illegal, credit opportunities remained scarce in African American and Latino communities throughout the 1970s and 80s. *See* Kathleen C. Engel & Patricia A. McCoy, *From Credit Denial to Predatory Lending: The Challenge of Sustaining Minority Homeownership*, *in* SEGREGATION: THE RISING COSTS FOR AMERICANS, *supra*, at 81, 85. A series of Pulitzer Prize-winning newspaper articles examining lending practices in Atlanta illustrated the persistence of

neighborhood-based racial discrimination during that period. The investigation found that "[r]ace – not home value or household income – consistently determine[d] the lending patterns of metro Atlanta's largest financial institutions," and that "[a]mong stable neighborhoods of the same income, white neighborhoods always received the most bank loans per 1,000 single family homes," while black neighborhoods "always received the fewest." Bill Dedman, *Atlanta Blacks Losing in Home Loans Scramble*, ATLANTA JOURNAL-CONSTITUTION, May 1, 1988, at A1. Similarly, a study by the Federal Reserve Bank of Boston found that, even after controlling for creditworthiness, blacks and Hispanics were more likely than whites to be turned down for credit. Alicia H. Munnell et al., *Mortgage Lending in Boston: Interpreting HMDA Data*, 86 AMER. ECON. REV. 25, 26 (1996).

Redlining, and the disparities in access to credit it created, set the stage for new forms of discriminatory lending arising in the 1990s and cresting in the years leading up to the 2008 financial crisis. As the 1990s progressed, the advent of subprime lending and mortgage securitization created the tools and incentives that led subprime specialists to focus on communities previously denied access to conventional credit. Subprime products "originally were extended to customers primarily as a temporary credit accommodation in anticipation of early sale of the property or in expectation of future earnings growth." Statement on Subprime Mortgage Lending, 72 FED. REG. 37569-01 (Dep't of the Treas. et al. June 28, 2007). However, lenders also extended these high-cost loans to people who qualified for prime loans and to credit-impaired

borrowers who could not afford the loans. *See, e.g.*, CURBING PREDATORY HOME MORTGAGE LENDING, *supra*, 2; IRA GOLDSTEIN WITH DAN UREVICK-ACKELSBERG, THE REINVESTMENT FUND, SUBPRIME LENDING, MORTGAGE FORECLOSURES AND RACE: HOW FAR HAVE WE COME AND HOW FAR HAVE WE TO GO? 10 (2008). Indeed, an analysis conducted for the *Wall Street Journal* found that, in 2005, 55 percent of subprime borrowers had sufficiently high credit scores to qualify for prime loans. Rick Brooks & Ruth Simon, *Subprime Debacle Traps Even Very Credit-Worthy*, WALL ST. J., Dec. 3, 2007, at A1.

Lenders intensified these unscrupulous practices in response to explosive demand from financial firms that bundled subprime mortgages into securities products. *See, e.g.*, *Adkins v. Morgan Stanley*, -- F.3d --, 2013 WL 3835198, at *2 (S.D.N.Y. July 25, 2013); *see also* KATHLEEN C. ENGEL & PATRICIA A. MCCOY, THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE, AND NEXT STEPS 56-58 (2011). In contrast to traditional lending – where banks held onto mortgages, bearing the risk and reward of payment obligations for the life of the loan – securitization allowed lenders to quickly dispose of loans, selling them to investment banks (which, in turn, sold investment interests in large pools of loans). *Id.* at 40-41; *see also* William Apgar & Allegra Calder, *The Dual Mortgage Market: The Persistence of Discrimination in Mortgage Lending*, *in* THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 101, 104 (Xavier De Souza Briggs, ed., 2005). This process allowed lenders to rapidly replenish their funds, enabling a cycle of origination, sale, and securitization. Because these loans could be quickly

sold, and because the secondary market incentivized origination of loans with the riskiest terms over prime loans, lenders changed their focus from quality to quantity, emphasizing volume in risky loans that generated the largest profits. ENGEL & MCCOY, THE SUBPRIME VIRUS, *supra*, at 28-29, 32-33. "Rather than simply search for the best loan product for the customer," the secondary market created incentives to "'push market' particular products to the extent that the market [would] bear." REN S. ESSENE & WILLIAM APGAR, JOINT CTR. FOR HOUS. STUDIES, HARVARD UNIV., UNDERSTANDING MORTGAGE MARKET BEHAVIOR: CREATING GOOD MORTGAGE OPTIONS FOR ALL AMERICANS 8 (2007) (citation omitted). For these reasons, the "invention of securitized mortgages . . . changed the calculus of mortgage lending and made minority households very desirable as clients." Rugh & Massey, *supra*, at 631.

2. *Subprime Lending Practices Resulted in Widespread Racial Disparities*

The subprime lending boom and race were inextricably linked from the outset. A joint report from the U.S. Department of Housing and Urban Development (HUD) and the U.S. Department of the Treasury found that as of 2000, "borrowers in black neighborhoods [were] five times as likely to refinance in the subprime market than borrowers in white neighborhoods," even when controlling for income. CURBING PREDATORY HOME MORTGAGE LENDING, *supra*, 47-48. Moreover, "[b]orrowers in *upper-income* black neighborhoods were twice as likely as homeowners in *low-income* white neighborhoods to refinance with a subprime loan." *Id.* at 48; *see also* STEPHEN L. ROSS & JOHN YINGER, THE COLOR OF

CREDIT: MORTGAGE DISCRIMINATION, RESEARCH METHODOLOGY, AND FAIR-LENDING ENFORCEMENT 24-25 (2002) (summarizing research on minority access to credit). In effect, a "dual mortgage market" took root, in which different communities were offered "a different mix of products and by different types of lenders" and subprime lenders "disproportionately target[ed] minority, especially African American, borrowers and communities, resulting in a noticeable lack of prime loans among even the highest-income minority borrowers." Apgar & Calder, *supra*, at 102; *see also* Binyam Appelbaum et al., *New Industry Fills Void in Minority Lending: Critics Say Borrowers Turn to High-Rate Lenders Because Bank Loans Too Often Not Available*, THE CHARLOTTE OBSERVER, Apr. 29, 2005, at 1A (describing institutions with high-cost units focused on predominately minority borrowers).

Other studies uncovered stark disparities as subprime lending expanded. One study found that, within the subprime market, "borrowers of color . . . were more than 30 percent more likely to receive a higher-rate loan than white borrowers, even after accounting for differences in risk." DEBBIE GRUENSTEIN BOCIAN ET AL., CTR. FOR RESPONSIBLE LENDING, UNFAIR LENDING: THE EFFECT OF RACE AND ETHNICITY ON THE PRICE OF SUBPRIME MORTGAGES 3 (2006). Another study found that African Americans and Latinos were much more likely to receive subprime loans, and that "the disparities were especially pronounced for borrowers with higher credit scores." DEBBIE GRUENSTEIN BOCIAN ET AL., CTR. FOR RESPONSIBLE LENDING, LOST GROUND, 2011: DISPARITIES IN MORTGAGE LENDING AND FORECLOSURES 5 (2011). That study also found

"evidence that higher-rate loans were often inappropriately targeted: as many as 61 percent of borrowers who received subprime loans had credit scores that would have enabled them to qualify for a prime loan." *Id.* at 17 (citation omitted). These practices also meant that "borrowers in minority groups were much more likely to receive loans with product features associated with higher rates of foreclosure," i.e., loans with higher interests rates or with risky terms, like ballooning interest rates. *Id.* at 21. These high disparities persisted even after controlling for credit score. *Id.*

Disparities in subprime lending have led to high levels of foreclosure among borrowers of color, devastating black and Latino communities. "African Americans and Latinos are, respectively, 47% and 45% more likely to be facing foreclosure than whites." DEBBIE GRUENSTEIN BOCIAN ET AL., CTR. FOR RESPONSIBLE LENDING, FORECLOSURE BY RACE AND ETHNICITY 10 (2010). These disparities persist even within income categories. *Id.* at 9-10. The Center for Responsible Lending estimates that "the spillover wealth lost to African-American and Latino communities between 2009 and 2012 as a result of depreciated property values alone will be $194 billion and $177 billion, respectively." *Id.* at 11; *see also* JAMES H. CARR ET AL., NAT'L COMMUNITY REINVESTMENT COAL., THE FORECLOSURE CRISIS AND ITS IMPACT ON COMMUNITIES OF COLOR: RESEARCH AND SOLUTIONS 31 (Sept. 2011) (discussing the racial wealth gap).

Examined in the aggregate, the connection between race, subprime lending, and foreclosures is starkly apparent. Researchers at Princeton

University, for example, studied the relationship between neighborhood racial composition, subprime lending, and foreclosure rates, and found strong statistical links. *See* Rugh & Massey, *supra*, at 644. "Simply put, the greater the degree of Hispanic and especially black segregation a metropolitan area exhibits, the higher the number and rate of foreclosures it experiences." *Id.*

B. Disparate Impact Analysis Plays a Vital Role in Combating Lending Discrimination

Disparate impact analysis provides an indispensable framework for remedying discriminatory lending practices.[2] When focusing on

[2] *Amici* note that lending cases typically arise under 42 U.S.C. § 3605 (prohibiting discrimination in mortgage lending and other "residential real estate-related transactions"), while the specific question before the Court in this case relates to 42 U.S.C. § 3604(a). *But see, e.g.*, *Barkley v. Olympia Mortg. Co.*, 2010 WL 3709278, at *18 (E.D.N.Y. Sept. 13, 2010) (noting that "predatory lending connected to the purchase of a home can form the basis of a claim under either § 3604(b) or § 3605(a)."); *Nat'l Comm. Reinvestment Coal. v. Novastar Fin., Inc.*, 2008 WL 977351 at *3 (D.D.C. Mar. 31, 2008) (holding "that 42 U.S.C. § 3604 applies to discrimination in the availability of mortgage financing."). Accordingly, even a ruling for petitioners would not automatically apply to lending cases brought under § 3605, contrary to the suggestion of Petitioners' *amici*. *See* Br. for Am. Fin. Servs. Ass'n et al. as *Amici Curiae* in Supp. Of Pet'r at 26-29. Nonetheless, discriminatory subprime lending illustrates the critical role of disparate impact analysis in combating current and pervasive forms of discrimination in housing, and should therefore inform the Court's disposition of this case.

individual lending transactions, disparities in the availability and terms of credit are easily masked by the complexity of the loan process.[3] Yet lenders collect highly detailed data relevant to the creditworthiness of individual loan applicants. Disparate impact doctrine sets out a method for examining that data on a large scale and determining whether racial disparities exist that cannot be accounted for by credit risk or any other legitimate business considerations. For that reason, disparate impact analysis can root out harmful patterns of discrimination that might otherwise remain invisible and go unredressed.

Since it was first articulated by this Court in the employment context, disparate impact analysis has provided a means to combat "practices that are fair in form, but discriminatory in operation." *Griggs*

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[3] This was particularly true in the years before the housing market collapse. For borrowers offered prime loans, published rates and terms were readily available, lenders gave free quotes, and lock-in commitments were common, enabling borrowers to shop for the best deal. Patricia A. McCoy, *Rethinking Disclosure in a World of Risk-Based Pricing*, 44 HARV. J. ON LEGIS. 123, 124 (2007). In contrast, although subprime lenders had the technology and information needed to provide firm price quotes to customers at minimal cost, these lenders typically "entice[d] customers with rosy prices that [were] not available to weaker borrowers, hike[d] the price after customers [paid] a hefty application fee, then raise[d] the price again at closing, often with no advance notice." *Id.* at 124. "[P]rices in the subprime market [were] only partly based on differences in borrowers' risk. Other factors, including mortgage broker compensation, discrimination, and rent-seeking, [could] and [did] push up subprime prices." *Id.* at 127.

v. Duke Power Co., 401 U.S. 424, 431 (1971). In effectuating that standard, this Court has explained that the evidence in disparate impact cases "usually focuses on statistical disparities, rather than specific incidents, and on competing explanations for those disparities" because this mode of analysis exposes practices that, while "adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988). Aggregate analysis is at times necessary to achieve the purpose of the civil rights laws, which are directed foremost at "the consequences of [ ] practices, not simply the motivation." *Griggs*, 401 U.S. at 432. As Congress found and this Court has recognized, discrimination is a "complex and pervasive phenomenon" most accurately described "in terms of 'systems' and 'effects' rather than simply intentional wrongs." *Connecticut v. Teal*, 457 U.S. 440, 447 n.8 (1982) (quoting S. REP. NO. 92-415, at 5 (1971)).

In the mortgage lending context, the key question is whether the availability or terms of credit vary according to race in a manner that cannot be justified by credit risk or any other legitimate business consideration. Typically, this inquiry proceeds by applying statistical regression analysis to a large sample of a defendant's loans, comparing the availability or terms of credit to borrowers of different races while controlling for factors that would legitimately affect lending outcomes. The critical ingredient in making this analysis probative of discrimination is selecting the right control variables. "[L]egitimate controls are those associated with a person's qualifications to rent or buy a house."

John Yinger, *Evidence of Discrimination in Consumer Markets*, 12 J. OF ECON. PERSP. 23, 27 (1998). Regression analysis of aggregate data allows a court to discern pricing disparities between white and minority borrowers that cannot be justified by legitimate factors, a situation that one district court referred to as "a classic case of disparate impact," *Miller v. Countrywide Bank, N.A.*, 571 F.Supp. 2d 251, 254 (D. Mass. 2008) ("If the facts alleged in the complaint are to be believed – which they must at this point in the litigation – the net effect of Countrywide's pricing policy is a classic case of disparate impact: White homeowners with identical or similar credit scores pay different rates and charges than African American homeowners . . . .").[4]

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[4] *Amici* are not aware of any court that has yet adjudicated the merits in a case alleging unjustified statistical disparities in subprime lending. Several cases pressing such allegations are currently pending or have closed prior to adjudication on the merits. *See, e.g.*, *Adkins*, -- F.3d --, 2013 WL 3835198, *2 (denying motion to dismiss; pending); *City of Memphis v. Wells Fargo Bank, N.A.*, No. 09-2857, 2011 WL 1706756 (W.D. Tenn. May 4, 2011) (denying motion to dismiss; subsequently settled); *In re Wells Fargo Mortg. Lending Practices Litig.*, No. 3:08-md-01930 (N.D. Cal. Apr. 10, 2008) (dismissed pursuant to settlement); *Mayor of Baltimore v. Wells Fargo Bank, N.A.*, No. 1:08-CV-00062, 2011 WL 1557759 (D. Md. Apr. 22, 2011) (denying defendants' motion to dismiss; subsequently settled); Final Approval Order, *Ramirez v. Greenpoint Mortg. Funding, Inc.*, No. 3:08-cv-00369 (N.D. Cal. Apr. 12, 2011) (approving class settlement); *Guerra v. GMAC, LLC*, No. 2:08-cv-01297, 2009 WL 449153 (E.D. Pa. Feb. 20, 2009) (denying motion to dismiss; pending); *Barrett v. H&R Block, Inc.*, 652 F.Supp. 2d 104 (D. Mass. 2009) (granting defendant parent company's motion to dismiss for lack of personal jurisdiction and denying subsidiaries' motion to dismiss; subsequently dismissed by

Indeed, disparate impact analysis is particularly well suited for the mortgage lending context, because allegations of mortgage discrimination can be tested in a highly sophisticated manner. Raw disparities in loan terms can be rigorously examined to determine whether they reflect objective factors related to creditworthiness – e.g., credit score, the ratio of a loan to a home's value, an applicant's total debt obligations, etc. *See generally* Class Certification Report of Howell E. Jackson at ¶ 36, *In re Wells Fargo Mort. Lending Practices Litig.*, No. 08-CV-01930 (N.D. Cal. Sept. 1, 2010) ("Loan pricing decisions are made en masse by automated systems of regularly updated rate sheets" and are "based on the formulaic application of objective, statistically-validated criteria."). If a lending policy leads to disparities even after controlling for legitimate factors, and if the policy cannot otherwise be justified as a business necessity, those disparities reveal illicit discrimination.

This mode of analysis is uniquely effective in uncovering unjustified disparities. One recent HUD study focused specifically on whether racial disparities in rates of subprime lending could be explained by factors related to creditworthiness, concluding that "the inclusion of credit score measures did not explain away the troubling finding

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stipulation); Order Granting Voluntary Dismissal, *Garcia v. Countrywide Fin. Corp.*, No. 5:07-cv-1161, 2008 WL 7842104 (C.D. Cal. Jan. 17, 2008) (denying motion to dismiss as to plaintiffs' disparate impact claims; subsequently consolidated into multi-district litigation and settled); Memorandum and Order, *Hargraves v. Capital City Mortg. Corp.*, No. 1:98-cv-01021 (D.D.C. Mar. 27, 2002) (dismissing in light of settlement).

that even after years of public policy efforts, race and ethnicity remain important determinants of the allocation of mortgage credit in both home purchase and home refinance markets." WILLIAM APGAR ET AL., U.S. DEP'T OF HOUS. & URBAN DEV., RISK OR RACE: AN ASSESSMENT OF SUBPRIME LENDING PATTERNS IN NINE METROPOLITAN AREAS 45 (2009); *see also* Complaint at ¶ 3, *United States v. Countrywide Fin. Corp.,* No. CV11 10540 (C.D. Cal. Dec. 21, 2011) ("As a result of Countrywide's policies and practices, more than 200,000 Hispanic and African-American borrowers paid Countrywide higher loan fees and costs for their home mortgages than non-Hispanic White borrowers, not based on their creditworthiness or other objective criteria related to borrower risk, but because of their race or national origin."); Apgar & Calder, *supra*, at 111-15 (summarizing research of subprime lending designed to "control[] for neighborhood and borrower characteristics, including several measures of risk" and concluding that those studies "confirm[] that race remains a factor").

Expert witness analysis in several recent lawsuits demonstrates that, when subject to regression analyses designed to account for legitimate markers of creditworthiness, the practices of many leading subprime lenders reveal significant unjustified racial disparities. *E.g.*, Class Certification Report of Howell E. Jackson at ¶ 53, *In re Wells Fargo Mort. Lending Practices Litig.*, No. 08-CV-01930 (N.D. Cal. Sept. 1, 2010) ("even when a comprehensive list of risk-based characteristics are controlled for, African Americans' APRs are 10.1 basis points greater than whites' APRs, and Hispanics' APRs are 6.4 basis points greater than

whites' APRs"); Class Certification Report of Ian Ayres at ¶ 69, *Barrett v. Option One Mortg., Corp.*, No. 08-10157 (D. Mass. Sept. 24, 2010) ("even when a comprehensive list of risk-based characteristics are controlled for, African Americans' APRs are 8.6 basis points greater than whites' APRs"); Class Certification Report of Howell E. Jackson at ¶ 52, *Ramirez v. Greenpoint Mortg. Funding, Inc.*, No. 3:08-cv-00369 (N.D. Cal. Apr. 1, 2010) ("even when a comprehensive list of risk-based characteristics are controlled for, African Americans' APRs are 9.4 basis points greater than whites' APRs, and Hispanics' APRs are 7.6 basis points greater than whites' APRs").

Given the effectiveness of disparate impact analysis in identifying unjustified disparities, it is unsurprising that the federal agencies charged with enforcing the Fair Housing Act have embraced disparate impact analysis in combating discriminatory lending. Most recently, HUD promulgated a rule codifying the disparate impact standard. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013). In instituting that rule, the agency explicitly contemplated its application to facially neutral lending practices that resulted in an unjustified disparate impact. *Id.* at 11,475-76. This understanding, moreover, long predated the recent HUD rule. A 1994 interagency Policy Statement on Discrimination in Lending explains that the "existence of disparate impact" is frequently established "through a quantitative or statistical analysis" that may focus on a challenged practice's "effect on an applicant pool." Policy Statement on Discrimination in Lending, 59 FED. REG. 18266-01,

18,269 (Dep't of Hous. & Urban Dev. et al. Apr. 15, 1994).[5]

Amicus briefs filed by the lending industry assert that the disparate impact standard impedes legitimate business practices, but those arguments ignore the fact that disparate impact liability will not attach to policies that are shown to be legitimate and necessary to originate safe loans. For example, in arguing against the disparate impact standard, those *amici* point to government data showing that, in 2011, "African-American applicants for conventional home-purchase loans were rejected at a rate more than twice the rate at which white applicants were rejected . . . . [and] Hispanic applicants were rejected at a rate more than 1.6 times the rate at which white applicants were rejected." Br. for Am. Fin. Servs. Ass'n et al. as *Amici Curiae* in Supp. Of Pet'r at11 n.18. But if such disparities arise from facially neutral policies that are legitimate and necessary to

[5] Congress has endorsed the application of disparate impact analysis to the lending context through its regulation of the secondary mortgage market. In delegating authority to HUD to regulate entities like Fannie Mae and Freddie Mac – the so-called Government Sponsored Enterprises that purchase pools of mortgage loans – Congress directed the agency to issue regulations that "prohibit each enterprise from discriminating in any manner in the purchase of any mortgage because of race, color, religion, sex, handicap, familial status, age, or national origin, including any consideration of the age or location of the dwelling or the age of the neighborhood or census tract where the dwelling is located in a manner that has a *discriminatory effect*." 12 U.S.C. § 4545(1). Significantly, this mandate appears in the same statute that requires HUD to ensure that the enterprises "comply with the Fair Housing Act." *Id.* at 4545(2).

originate safe loans, there is no threat of disparate impact liability. Conversely, in the absence of such justification, it is hard to see how the disparities cited by *amici* operate as an argument *against* the disparate impact standard – to the contrary, they provide evidence of the problem disparate impact is designed to address. Those *amici* also argue that "[u]nder a disparate-impact theory, lenders would face the double bind of incurring increased litigation risk simply by complying with government directives and sensible lending standards."[6] *Id.* at 4. The "double bind" threat, however, is an illusion: any lender that adopted a practice that was in fact mandated by a government directive would prevail in litigation challenging the practice because compliance with relevant legal requirements is a "substantial and legitimate" interest, and would therefore constitute a defense to a disparate impact claim. *See* 24 C.F.R. § 100.500(b).[7]

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[6] *Amici* do not adduce any evidence of such a "double bind" actually occurring, even though disparate impact has been the law of the land under prevailing circuit court precedent for decades, and all lenders are on notice of the Justice Department's 1994 fair lending guidance. *See* Policy Statement on Discrimination in Lending, 59 Fed. Reg. at 18,269.

[7] *Amici* representing the banking industry concede that, under HUD's regulations, lenders have an opportunity to avoid disparate impact liability by demonstrating a legitimate business interest. Br. for Am. Fin. Servs. Ass'n et al. as *Amici Curiae* in Supp. Of Pet'r at 12. But they dismiss the significance of that clear legal principle with the unsupported assertion that "virtually every lender in the United States could be sued for using non-discriminatory credit standards simply because variations in economic and credit characteristics produce different credit outcomes among racial and ethnic

The same *amici* also misleadingly assert that it is somehow inconsistent with responsible underwriting practices to avoid disparate impact. *See* Br. for Am. Fin. Servs. Ass'n et al. as *Amici Curiae* in Supp. Of Pet'r at 18-19. To the contrary, it was the subprime lending industry's *abandonment* of sound underwriting that resulted in a disparate impact on minority borrowers. With the proliferation of loan products that required no information on borrower income or assets, subprime lenders eviscerated sound underwriting. *See, e.g.*, Engel & McCoy, The Subprime Virus, *supra*, at 33, 35-39 (describing lenders using slogans like "a thin file is a good file," and "Did You Know NovaStar Offers to Completely Ignore Consumer Credit!"); *Testimony Before the S. Comm. on Banking, Hous., and Urban Affairs*, 110th Cong. 10-11 (Mar. 4, 2008) (statement of John C. Dugan, Comptroller of the Currency) (recounting how the pressures from securities market led to loosened underwriting standards); Christopher L. Peterson, *Predatory Structured Finance*, 28 Cardozo L. Rev. 2185, 2214-15 (2007) (observing that in "the rush to originate new loans" to be securitized "some lenders have even disregarded their *own* underwriting guidelines"). Minority borrowers absorbed the consequences of lenders' shoddy underwriting because they were targeted for a disproportionate share of the high-cost, risk-layered loans. Thus, the deterioration of underwriting standards in the lead-up to the foreclosure crisis was a tactic of discriminatory lending, not a product of anti-discrimination law.

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groups." *Id.* at 12-13. That conclusory assertion should not obscure the actual operation of the disparate impact standard.

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The cascading effects of the foreclosure crisis touch every community in America. But African American and Latino communities disproportionately suffered the consequences of abusive lending practices. In light of those disparities, there remains an urgent need for effective means to address past abuses and deter future ones. For the reasons explained above, disparities in lending outcomes can be rigorously analyzed to control for legitimate factors related to a lender's business necessity. It is hard to fathom any argument in favor of insulating lenders from liability when they systematically provide credit on less favorable terms because of race and in the absence of any legitimate justification. Disparate impact analysis is the principal tool for policing these abuses.

II. DISPARATE IMPACT ANALYSIS IS A CRUCIAL TOOL FOR ADDRESSING HOUSING DISCRIMINATION AGAINST DOMESTIC AND SEXUAL VIOLENCE VICTIMS

Disparate impact analysis under the FHA offers crucial legal protection to women who face eviction or housing denials based on domestic and sexual violence perpetrated against them. Domestic and sexual violence is a primary cause, and consequence, of homelessness and housing instability for women and girls. *See, e.g.*, 42 U.S.C. § 14043e (congressional finding that domestic violence causes homelessness and that an estimate of 92 percent of homeless mothers have experienced severe physical and/or sexual assault at some time, 60 percent of all

homeless women and children have been abused by age 12, and 63 percent have been victims of intimate partner violence as adults); U.S. CONF. OF MAYORS, HUNGER AND HOMELESSNESS SURVEY 26 (Dec. 2012) (reporting that over a quarter of cities surveyed in 2011-12 cited domestic violence as one of the three main causes of family homelessness).

Discriminatory housing policies contribute to and exacerbate the housing crises faced by victims. 42 U.S.C. § 14043e(3) (congressional finding that "[w]omen and families across the country are being discriminated against, denied access to, and even evicted from public and subsidized housing because of their status as victims of domestic violence"). However, many of the housing policies that can punish victims – such as zero tolerance-for-crime policies (sometimes referred to as one-strike policies), or policies that explicitly target victims of domestic and sexual violence – are facially neutral. Disparate impact analysis reveals how these policies adversely impact women and girls, who make up the vast majority of victims of domestic and sexual violence. It also allows survivors to challenge housing policies that, when enforced against them, eliminate housing options and endanger their safety.

The legal protection offered to survivors by disparate impact analysis under the FHA was first established in 2001, after Tiffani Ann Alvera sought redress when she faced eviction from her Seaside, Oregon apartment pursuant to a zero tolerance policy. *See* Determination of Reasonable Cause, *Alvera v. Creekside Village Apartments*, No. 10-99-

0538-8 (Dep't of Hous. & Urban Dev. Apr. 13, 2001).[8] After she was assaulted by her husband and he was imprisoned, Ms. Alvera provided a copy of the restraining order she obtained to her property manager. *Id.* at 1-2. She was then served with a 24-hour eviction notice based on the incident of domestic violence she had experienced. It stated: "You, someone in your control, or your pet, has seriously threatened to immediately inflict personal injury, or has inflicted personal injury upon the landlord or other tenants." *Id.*

Ms. Alvera filed a complaint with HUD, which found that taking action against all members of a household after an incident of domestic violence "has an adverse impact based on sex, because of the disproportionate number of women victims of domestic violence." *Id.* at 4. HUD noted that there were no similarly situated male tenants. *Id.* at 3. Accordingly, the case could best be understood through the lens of disparate impact. After reviewing the available statistics on intimate partner violence and gender and the arguments presented by the management company, HUD concluded that discrimination had occurred: "The evidence taken as a whole establishes that a policy of evicting innocent victims of domestic violence because of that violence has a disproportionate adverse impact on women and is not supported by a valid business or health or safety reason." *Id.* at 6. The Department of Justice subsequently filed suit, leading to a consent decree

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[8] HUD's Determination of Reasonable Cause is available at http://www.nhlp.org/files/6a.%20Alvera%20reasonable%20cause%20finding_0.pdf.

that mandated the adoption of a housing policy prohibiting discrimination against victims of violence. Consent Decree, *United States ex rel. Alvera v. The C.B.M. Group, Inc.*, No. 01-857-PA (D. Or. Nov. 5, 2001).

Since *Alvera*, other women facing eviction following a domestic violence incident and the abuser's arrest or removal from the home have invoked disparate impact analysis under the FHA. For example, in 2003, Quinn Bouley and her two children faced eviction from their St. Albans, Vermont home. After her husband physically attacked her, Ms. Bouley called the police and fled. *Bouley v. Young-Sabourin*, 394 F. Supp. 2d 675, 677 (D. Vt. 2005). St. Albans police arrested her husband, who pled guilty to several criminal charges related to the incident, and Ms. Bouley obtained a restraining order. *Id.* Three days later, her landlord gave Ms. Bouley a 30-day notice to vacate, quoting a provision in the lease that stated: "Tenant will not use or allow said premises or any part thereof to be used for unlawful purposes, in any noisy, boisterous or any other manner offensive to any other occupant of the building." *Id.* In other words, violence directed *against* Ms. Bouley was cited as a predicate for evicting her pursuant to a facially neutral policy. Ms. Bouley filed a federal lawsuit, including allegations that the landlord's policy of evicting the victims of domestic violence had an adverse, disparate impact on women. Complaint at ¶¶ 26-28, *Bouley v. Young-Sabourin*, 394 F. Supp. 2d 675 (D. Vt. Nov. 24, 2003) (No. 1:03-cv-320). The case settled after the court denied the defendants' motion for summary judgment. *Bouley*, 394 F. Supp. 2d at 678.

In 2006, Tanica Lewis and her two daughters were evicted from their Detroit home after her abusive ex-partner, who had never lived at the residence, broke through the windows, kicked in her door, and was arrested for home invasion. Complaint, *Lewis v. North End Village*, No. 2:07-cv-10757 (E.D. Mich. Feb. 21, 2007). Although Ms. Lewis previously had provided a copy of a current protection order to her management company, she received a 30-day notice of eviction, stating that she had violated the portion of her lease that held her liable for any damage resulting from lack of proper supervision of her guests. *Id.* at ¶¶ 22, 32. As a result, Ms. Lewis was forced to remain in a shelter with her daughters, although it was safe to return to their home given her ex-partner's incarceration. Santiago Esparza, *Landlord, Victim Settle*, DETROIT NEWS, Feb. 27, 2008. She subsequently filed a federal lawsuit that included disparate impact claims. Ultimately, she obtained a settlement that required the management company to adopt a policy prohibiting discrimination based on domestic and sexual violence and compensated her for the financial losses she had suffered. Stipulated Order of Dismissal as to Tanica Lewis, *Lewis v. North End Village*, No. 2:07-cv-10757 (E.D. Mich. Feb. 26, 2008).

In 2007, Kathy Cleaves-Milan was evicted from her Elmhurst, Illinois apartment complex after calling the police to remove her fiancé, who was threatening to shoot her and himself with a gun. Complaint, *Cleaves-Milan v. AIMCO Elm Creek LP*, No. 1:09-cv-06143 (N.D. Ill. Oct. 1, 2009). She explained the circumstances and provided her protective order to the management company, yet was told that "anytime there is a crime in an

apartment the household must be evicted." *Id.* at ¶ 31. She was compelled to move, forcing her daughter to transfer to a substandard school, and was charged a $3180 lease termination fee by the management company. *Id.* at ¶¶ 34-35, 37; *see also* Sara Olkon, *Tenant Reported Abuse – Then Suffered Eviction*, CHI. TRIB., Oct. 13, 2009 (quoting Cleaves-Milan as stating, "I was punished for protecting myself and my daughter").

This recurring fact-pattern places the importance of the disparate impact standard in stark relief. As in *Alvera*, the seminal challenge to a zero tolerance policy disproportionately affecting women, the lawsuits discussed above have challenged facially neutral policies that are applied overwhelmingly against women.

In addition, local governments across the country are increasingly passing ordinances that are neutral on their face but have a devastating impact on domestic violence victims. Often known as chronic nuisance ordinances, these laws impose penalties on landlords based on a tenant's repeated calls to the police. Cari Fais, Note, *Denying Access to Justice: The Cost of Applying Chronic Nuisance Laws to Domestic Violence*, 108 COLUM. L. REV. 1181, 1187 (2008). Many landlords seek to avoid these sanctions and eliminate the "nuisance" by evicting the unit's tenants, including victims of domestic violence who may need to reach out to police repeatedly due to the conduct of their abusers. *See* EMILY WERTH, SARGENT SHRIVER NAT'L CTR. ON POVERTY LAW, THE COST OF BEING "CRIME FREE": LEGAL AND POLITICAL CONSEQUENCES OF CRIME FREE RENTAL HOUSING AND NUISANCE PROPERTY ORDINANCES 8-9 (2013). Indeed,

a study by a Harvard scholar established that survivors of domestic violence are regularly evicted under this type of ordinance, forcing victims to choose between calling the police and maintaining their home. Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOC. REV. 117, 125-127, 130 (2012) (reporting that domestic violence was the third most cited nuisance activity under a Milwaukee ordinance, that properties in black neighborhoods were more than twice as likely to be cited, and surveying 59 other ordinances).

Without disparate impact analysis, even the most extreme disparities in the effect of policies that punish survivors for the violence perpetrated against them would likely lie beyond the reach of anti-discrimination law, and survivors of domestic and sexual violence deprived of housing would lack legal redress.

This reasoning was embraced by HUD in recently-issued guidance to all fair housing staff addressing the applicability of disparate impact analysis in situations involving domestic violence. *See* SARA K. PRATT, U.S. DEP'T OF HOUS. & URBAN DEV., OFFICE OF FAIR HOUS. & EQUAL OPPORTUNITY, ASSESSING CLAIMS OF HOUSING DISCRIMINATION AGAINST VICTIMS OF DOMESTIC VIOLENCE UNDER THE FAIR HOUSING ACT AND THE VIOLENCE AGAINST WOMEN ACT (2011) [hereinafter HUD MEMO]. The guidance notes that an estimated 1.3 million women are the victims of assault by an intimate partner each year, that about one in four women will experience intimate partner violence in her lifetime,

and that 85 percent of victims of domestic violence are women. *Id.* at 2 (citing U.S. DEP'T OF HEALTH & HUMAN SERVICES, COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES (2003); CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, CRIME DATA BRIEF: INTIMATE PARTNER VIOLENCE, 1993-2001 (2003)).[9] Because "statistics

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[9] More recent statistics confirm that although the prevalence of domestic violence against men has increased, women still experience extremely high, and disproportionate, rates of domestic and sexual violence. M.C. BLACK ET AL., CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 18, 38-39, 54-55 (2011) (reporting that more than one in three women has experienced rape, physical violence, and/or stalking by an intimate partner in her lifetime, that nearly five times more women, compared to men, need medical care from domestic violence, and that thirteen times more women than men have been raped). Intimate partner violence, rape, and stalking are even more prevalent among African American women, American Indian women, and multiracial women. *Id.* at 20, 31.

While the HUD Memo focused on domestic violence, studies document the devastating impact of both domestic and sexual violence on women. The most recent Department of Justice study examining intimate partner violence found that, from 1994 to 2010, about 4 in 5 victims of intimate partner violence were female. SHANNAN CATALANO, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: INTIMATE PARTNER VIOLENCE, 1993-2010, at 3 (2012). Women also made up 70 percent of all domestic violence homicide victims in 2007, a percentage that has not changed significantly over time. SHANNAN CATALANO, U.S. DEP'T OF JUSTICE, FEMALE VICTIMS OF VIOLENCE 1, 3 (revised Oct. 2009). Likewise, women are far more likely to be victimized by rape, sexual assault, and stalking, whether or not they know the perpetrator. JENNIFER L. TRUMAN, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION, 2010 9 (2011) (finding that women experienced over 169,000 rapes and sexual assaults,

show that discrimination against victims of domestic violence is almost always discrimination against women," the HUD Memo stated that a disparate impact analysis is appropriate when a facially neutral housing policy disproportionately affects victims. *Id.* at 2, 5. According to the guidance: "Disparate impact cases often arise in the context of 'zero tolerance' policies, under which the entire household is evicted for the criminal activity of one household member. . . . [A]s the overwhelming majority of domestic violence victims, women are often evicted as a result of the violence of their abusers." [10] *Id.* at 5.

Other laws do not provide comprehensive protection against housing discrimination. The federal Violence Against Women Act ("VAWA"), which contains targeted housing protections for victims of domestic violence, sexual assault, dating violence, and stalking, applies only to specific federally-funded housing programs and does not provide victims with an explicit administrative or judicial remedy.[11] 42 U.S.C. § 14043e-11; HUD MEMO, *supra*, at 4.

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compared to approximately 15,000 experienced by men); SHANNAN CATALANO, U.S. DEP'T OF JUSTICE, STALKING VICTIMS IN THE UNITED STATES - REVISED 4 (2012) (finding that women are stalked at nearly three times the rate of men).

[10] In the memo, HUD stated that the application of zero tolerance policies to domestic violence victims, while not per se unlawful, may be illegal and is subject to a disparate impact analysis. HUD MEMO, *supra*, at 2, 5.

[11] Contrary to the suggestion of *amici* National Leased Housing Association et al., fair housing obligations are consistent with

Only a handful of states have enacted laws specifically prohibiting discrimination against victims of domestic or sexual violence when they both apply for and live in rental housing. *See* NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, THERE'S NO PLACE LIKE HOME: STATE LAWS THAT PROTECT HOUSING RIGHTS FOR SURVIVORS OF DOMESTIC AND SEXUAL VIOLENCE 18-20 (2013) (including Arkansas, District of Columbia, Indiana, North Carolina, Oregon, Rhode Island, Washington, Wisconsin). *See also* NAT'L HOUSING LAW PROJECT, HOUSING RIGHTS OF DOMESTIC VIOLENCE SURVIVORS: A STATE AND LOCAL LAW COMPENDIUM (2013); Br. of Amici Curiae Legal Momentum et al. Moreover, the few states that have interpreted how their state fair housing laws apply when victims face housing discrimination have relied, in part, on their understanding that the federal FHA allows for disparate impact claims. 1985 N.Y. Op. Att'y Gen. 45 (1985), 1985 WL 194069 at *3-4 (citing the FHA in finding that the practice of denying housing to domestic violence victims has a disparate impact on women in violation of state human rights law); *Winsor v. Regency Prop. Mgmt., Inc.*, No. 94 CV 2349 (Wis. Cir. Ct. Oct. 2, 1995) (holding that the state fair housing law, which is modeled on the federal FHA, prohibits housing

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VAWA and HUD policy. While HUD authorizes evictions from public housing based on criminal activity, VAWA prohibits application of such policies based on domestic violence, dating violence, sexual assault, and stalking. 42 U.S.C. § 14043e-11. Interpreting the FHA to prohibit evictions of victims based on the violence perpetrated against them is consistent with HUD's requirements for public housing authorities, which must comply with VAWA's protections for victims of violence.

discrimination against victims, using a disparate impact theory). A ruling that disparate impact claims are foreclosed under the FHA would mean that most survivors of domestic and sexual violence would have severely limited recourse when subjected to eviction or housing denials simply because they were victimized by violence.

The persistence of housing discrimination against victims of domestic and sexual violence only reinforces the importance of disparate impact analysis as a legal tool. The practice of evicting victims based on their abusers' criminal activity,[12] or the noise disturbance and property damage they cause, is widespread. *See* NAT'L LAW CTR. ON HOMELESSNESS & POVERTY & NAT'L NETWORK TO END DOMESTIC VIOLENCE, LOST HOUSING, LOST SAFETY: SURVIVORS OF DOMESTIC VIOLENCE EXPERIENCE HOUSING DENIALS AND EVICTIONS ACROSS THE COUNTRY 7-9 (2007) [hereinafter LOST HOUSING, LOST SAFETY]; NAT'L SEXUAL VIOLENCE RESOURCE CTR., NATIONAL SURVEY OF ADVOCATES ON SEXUAL VIOLENCE, HOUSING & VIOLENCE AGAINST WOMEN ACT 17-18 (2011). A national survey of service providers showed that approximately 30 percent had represented domestic violence victims who were either threatened with eviction or evicted due to the violence or noise, calls to the police, or physical

[12] Landlords are especially likely to become aware of these crimes because such a significant percentage occurs at home. *See, e.g.*, SHANNAN CATALANO, U.S. DEP'T OF JUSTICE, CRIME DATA BRIEF: INTIMATE PARTNER VIOLENCE IN THE UNITED STATES 24 (revised Dec. 19, 2007) [hereinafter INTIMATE PARTNER VIOLENCE IN THE U.S.].

damage directly resulting from the violence. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, DOMESTIC VIOLENCE PROGRAM, INSULT TO INJURY: VIOLATIONS OF THE VIOLENCE AGAINST WOMEN ACT, at v, 12 (2009) [hereinafter INSULT TO INJURY]; LOST HOUSING, LOST SAFETY, *supra*, at 2-4, 7-9.

Domestic and sexual violence survivors are also frequently subjected to discrimination when they apply for housing, simply because they have experienced violence. This can occur when, for example, their past history of victimization may become known to landlords because they are applying for housing from domestic violence or emergency shelters. *See* EQUAL RIGHTS CTR., NO VACANCY: HOUSING DISCRIMINATION AGAINST SURVIVORS OF DOMESTIC VIOLENCE IN THE DISTRICT OF COLUMBIA (2008) (finding significant discrimination against victims applying for housing, despite the District's anti-discrimination law); LOST HOUSING, LOST SAFETY, *supra*, at 3, 5, 9-10; ANTI-DISCRIMINATION CTR. OF METRO NY, ADDING INSULT TO INJURY: HOUSING DISCRIMINATION AGAINST SURVIVORS OF DOMESTIC VIOLENCE (2005); *see also* INSULT TO INJURY, *supra*, at iv, 10 (reporting that more than a third of surveyed advocates had worked with victims who were denied housing for reasons directly related to domestic violence, dating violence, or stalking).

Discriminatory evictions and denials thus give rise to a double victimization, imperiling the housing options and safety of a victim when she is most in

need of secure housing.[13] Housing discrimination based on violence compounds the safety risks because it can further trap victims, who often have few resources due to their abuse and isolation, in dangerous situations. *See also* Br. of Amici Curiae Legal Momentum et al. Congress has recognized that "[v]ictims of domestic violence often return to abusive partners because they cannot find long-term housing." 42 U.S.C. § 14043e(7); *see also* WILDER RESEARCH CTR., HOMELESSNESS IN MINNESOTA 2012 STUDY: INITIAL FINDINGS-CHARACTERISTICS AND TRENDS, PEOPLE EXPERIENCING HOMELESSNESS IN MINNESOTA 2 (2013) (48 percent of homeless women reported staying in an abusive situation due to lack of housing alternatives); TK Logan et al., *Barriers to Services for Rural and Urban Survivors of Rape*, 20 J. INTERPERSONAL VIOLENCE 591, 600, 611 (2005) (rural women who had been sexually assaulted stated that, without housing, other services were not likely to be helpful); AM. BAR ASSOC., COMMISSION ON

[13] Many victims already lose their homes due to violence. *See, e.g.*, KATRINA BAUM ET AL., U.S. DEP'T OF JUSTICE, STALKING VICTIMIZATION IN THE UNITED STATES 6 (2009) (stating that one in seven stalking victims reported they moved as a result of stalking); JANA L. JASINSKI ET AL., THE EXPERIENCE OF VIOLENCE IN THE LIVES OF HOMELESS WOMEN: A RESEARCH REPORT 2, 65 (2005) (finding that one out of every four homeless women is homeless because of violence committed against her); WILDER RESEARCH CTR., HOMELESS ADULTS AND THEIR CHILDREN IN FARGO, NORTH DAKOTA, AND MOORHEAD, MINNESOTA: REGIONAL SURVEY OF PERSONS WITHOUT PERMANENT SHELTER 39 (2010) (similar); CTR. FOR IMPACT RESEARCH, PATHWAYS TO AND FROM HOMELESSNESS: WOMEN AND CHILDREN IN CHICAGO SHELTERS 3 (2004) (similar).

DOMESTIC VIOLENCE, REPORT TO THE HOUSE OF DELEGATES 2 (2003); AMY CORREIA & JEN RUBIN, VAWNET APPLIED RESEARCH FORUM, HOUSING AND BATTERED WOMEN 1-3 (2001); Joan Zorza, *Woman Battering: A Major Cause of Homelessness*, 25 CLEARINGHOUSE REV. 420 (1991). Tragically, the shortage of housing alternatives has been found to be a major contributing factor to fatalities. *See, e.g.*, JAKE FAWCETT, WASHINGTON STATE COALITION AGAINST DOMESTIC VIOLENCE, UP TO US: LESSONS LEARNED AND GOALS FOR CHANGE AFTER THIRTEEN YEARS OF THE WASHINGTON STATE DOMESTIC VIOLENCE FATALITY REVIEW 44-45 (2010).

Disparate impact analysis is therefore a crucial tool for preserving the housing and enhancing the safety of survivors of domestic and sexual violence that would otherwise be jeopardized by facially neutral policies that discriminate against victims. The eradication of that legal remedy would escalate both the risk of homelessness for victims and their children and the likelihood that they are forced to remain in dangerous living situations.

CONCLUSION

Amici respectfully urge this Court to affirm the judgment below, and hold that disparate impact claims can be brought under the Fair Housing Act.

Respectfully Submitted,

Steven R. Shapiro
Counsel of Record
Laurence M. Schwartztol
Sandra S. Park
Lenora M. Lapidus
American Civil Liberties
Union Foundation
125 Broad Street
New York, N.Y. 10004
(212) 549-2500
sshapiro@aclu.org

Stuart T. Rossman
National Consumer Law
Center
7 Winthrop Square
Boston, MA 02110

Edward Barocas
Jeanne LoCicero
American Civil Liberties
Union of New Jersey
P.O. Box 32159
Newark, N.J. 07102

Dated: October 28, 2013

APPENDIX

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. **The American Civil Liberties Union of New Jersey** is one of its statewide affiliates. Since its founding in 1920, the ACLU has appeared before this Court in numerous cases, both as direct counsel and *amicus curiae*. Of particular relevance to this case, the ACLU's Racial Justice Program engages in a nationwide program of litigation and advocacy on behalf of people who have been historically denied their constitutional and civil rights on the basis of race in housing and other areas. The ACLU's Women's Rights Project has, among other things, worked to improve access to housing for survivors of domestic and sexual violence and their children, including litigating cases on behalf of battered women who faced eviction based on the abuse they experienced.

MFY Legal Services, Inc. (MFY), a nonprofit organization, envisions a society in which no one is

denied justice because he or she cannot afford an attorney. To make this vision a reality, for 50 years MFY has provided free legal assistance to residents of New York City on a wide range of civil legal issues, prioritizing services to vulnerable and underserved populations, while simultaneously working to end the root causes of inequities through impact litigation, law reform and policy advocacy. MFY provides advice and representation to more than 8,500 New Yorkers each year. In September 2008, with the implosion of the housing market, MFY created its Foreclosure Prevention Project. Over the past five years, MFY has been on the frontlines of the foreclosure crisis, providing services to more than 2,700 individuals, saving hundreds of homes from unnecessary foreclosures. MFY attorneys have witnessed first-hand the devastating and discriminatory impact of predatory mortgage lending, and, through both defensive and affirmative litigation, MFY has sought to combat its effects and preserve homeownership in New York City. MFY's Mental Health Law Project and Disability and Aging Rights Project also regularly litigates

Fair Housing Act claims on behalf of people with disabilities who live in private apartments, public housing, and facilities such as adult homes.

The National Coalition Against Domestic Violence (NCADV), based in Colorado since 1992, was formed in 1978 to create a national network of programs serving victims of domestic violence. There are over 2,000 domestic violence programs currently in the United States. NCADV provides technical assistance, general information and referrals, and community awareness campaigns, and does public policy work at the national level. NCADV has participated in many amicus briefs over the years on issues relating to domestic violence victims, for whom obtaining and keeping safe housing is a major and pressing concern. It is critical that survivors have access to legal remedies through the Fair Housing Act when they experience housing discrimination based on the violence perpetrated against them.

The National Community Reinvestment Coalition (NCRC) is a

nonprofit public interest organization founded in 1990. NCRC, both directly and through its network of six hundred community-based member organizations, works to increase access to basic banking services including credit and savings, and to create and sustain affordable housing, job development and vibrant communities for America's working families. NCRC, through its National Neighbors civil rights program, seeks to advance fair lending and open housing practices nationwide and actively assists in efforts to affirmatively further fair housing and eliminate discrimination that is detrimental to the economic growth of low to moderate income and traditionally underserved communities.

The National Consumer Law Center (NCLC) is a national research and advocacy organization focusing on justice in consumer financial transactions, especially for low income and elderly consumers. Since its founding as a nonprofit corporation in 1969, NCLC has been a resource center addressing numerous consumer finance issues affecting equal access to

fair credit in the marketplace. NCLC publishes a 20-volume Consumer Credit and Sales Legal Practice Series, including Credit Discrimination, Sixth Ed., and has served on the Federal Reserve System Consumer-Industry Advisory Committee and committees of the National Conference of Commissioners on Uniform State Laws. NCLC has also acted as the Federal Trade Commission's designated consumer representative in promulgating important consumer-protection regulations.

The National Housing Law Project (NHLP) is a private, nonprofit, national housing and legal advocacy center established in 1968. Its mission is to advance housing justice for poor people by increasing and preserving the supply of decent, affordable housing; improving existing housing conditions, including physical conditions and management practices; expanding and enforcing low-income tenants' and homeowners' rights; and increasing housing opportunities for racial and ethnic minorities. Through policy advocacy and litigation, NHLP has been responsible for many

critically important changes to federal housing policy and programs that have resulted in increased housing opportunities and improved housing conditions for poor people. NHLP has worked with hundreds of advocates, attorneys and agencies throughout the country on cases involving tenants and homeowners in foreclosure as well as cases involving housing and domestic violence. In addition, NHLP has advocated for policies that help victims of domestic violence to access and maintain safe and decent housing. The present case involves a critical remedy for the widespread discrimination experienced by victims of subprime lending and victims of domestic and sexual violence. Disparate impact analysis provides an essential tool for identifying and ending these patterns, practices and policies that illegitimately and disproportionately discriminate against protected groups of people. Without this important enforcement tool, it will be extremely difficult, if not impossible, to address pervasive and covert housing discrimination.

The National Law Center on Homelessness & Poverty (the "Law Center") was founded in 1989. The mission of the Law Center is to prevent and end homelessness by serving as the legal arm of the nationwide movement to end homelessness. To achieve its mission, the organization pursues three main strategies: impact litigation, policy advocacy, and public education. Over more than a decade, the Law Center has devoted significant attention to protecting the housing rights of victims of domestic violence, thereby preventing them and their family members from becoming homeless. The Law Center has done this work through legislation such as the Violence Against Women Act, administrative advocacy with agencies such as HUD and the U.S. Department of Justice, and litigation. The Law Center joins this brief in order to emphasize the importance of disparate impact analysis in the ability of survivors to vindicate these important rights.

The National Women's Law Center is a nonprofit legal advocacy organization dedicated to the

advancement and protection of women's legal rights and opportunities since its founding in 1972. The Center focuses on issues of key importance to women and their families, including economic security, employment, education, health, and reproductive rights, with special attention to the needs of low-income women, and has participated as counsel or *amicus curiae* in a range of cases before this Court to secure the equal treatment of women under the law, including cases challenging practices that have a discriminatory impact on women, even in the absence of proof of discriminatory animus. The Center has long sought to ensure that rights and opportunities are not restricted for women based on arbitrary practices or policies not justified by compelling interests.

Public Justice, P.C., is a national public interest law firm dedicated to pursuing justice for the victims of corporate and government abuses. Throughout its history, Public Justice has participated in cases that highlight the importance of the role that disparate impact claims play in

ensuring the effectiveness of our nation's federal civil rights statutes. For example, Public Justice joined in an *amici* brief in *Smith v. City of Jackson*, urging this Court to hold, as it ultimately did, 544 U.S. 228 (2005), that the Age Discrimination in Employment Act prohibits not only disparate treatment discrimination, but also disparate impact discrimination. Public Justice is gravely concerned that the arguments advanced by petitioner in this case, if adopted, would eviscerate the effectiveness of the Fair Housing Act.

Statement

of

National Association of Mutual Insurance Companies

to the

United States House of Representatives

Committee on Financial Services

Subcommittee on Oversight and Investigations

Hearing on

A General Overview of Disparate Impact Theory

November 19, 2013

Introduction

The National Association of Mutual Insurance Companies (NAMIC) is pleased to provide testimony on the legal doctrine of disparate impact and its relationship to the business of property/casualty insurance.

We are 1,400 property/casualty insurance companies serving more than 135 million auto, home and business policyholders, with more than $196 billion in premiums accounting for 50 percent of the automobile/homeowners market and 31 percent of the business insurance market. We are the largest property/casualty insurance trade association in the country, with regional and local mutual insurance companies on main streets across America joining many of the country's largest national insurers who also call NAMIC their home. More than 200,000 people are employed by NAMIC members.

For more than two decades, fair housing activists have sought to limit insurance companies' use of risk-based methods for underwriting and pricing homeowners insurance. This effort intensified in March 2013, when the U.S. Department of Housing and Urban Development (HUD) promulgated a new administrative rule that codifies the use of the "disparate impact" theory of discrimination to prove allegations of unlawful discrimination under the Fair Housing Act (FHA). The disparate-impact theory holds that a policy or practice that has a disproportionate effect on a group defined by race, ethnicity, or certain other characteristics may constitute illegal discrimination, even if the policy or practice is neutral with respect to such prohibited characteristics, and even if the architects of the policy or practice did not intend to discriminate on the basis of these characteristics and apply it evenhandedly.

Under the HUD disparate-impact rule, government regulators and private plaintiffs can bring claims of illegal discrimination in the provision of housing, mortgage lending, homeowners insurance, and other housing-related products without having to prove that any individuals were treated differently because of their group membership. All that is necessary is a statistical analysis showing that the percentage in one group that was adversely affected by a neutral practice is greater than the percentage that was adversely affected by the practice in other groups.

The following hypothetical example illustrates how disparate-impact theory might work in practice: Suppose that a property insurer decides not to provide coverage for homes with wood-burning stoves because claims data suggest that such homes have a higher than average probability of catching fire. If it turns out that the insurer's decision adversely affects a greater percentage of white homeowners than nonwhite homeowners, a white homeowner with a wood-burning stove could sue the insurer.[1] It

[1] A popular misconception is that federal antidiscrimination laws such as the Fair Housing Act protect only nonwhite minority groups and women from discriminatory practices based on race and gender. In fact, the laws' provisions apply to *any* group defined by "race, color, national origin, religion, sex, familial status [or] disability." It is therefore quite possible that the disparate-impact approach could be used to prove claims that defendants

would not matter that the insurer's decision to avoid the risk associated with wood-burning stoves was neutral with respect to race and not motivated by hostility toward whites. Nor would it matter that the insurer's decision was applied uniformly to all applicants for coverage, without regard to race, or that the insurer did not even know the racial identity of those applying for coverage.

According to the disparate-impact theory as described in the HUD rule, the insurer would be in violation of the FHA unless it could prove to the satisfaction of a judge or jury that its reason for charging more for homes with wood-burning stoves is not only actuarially sound; it would also have to prove that doing so was "*necessary* to achieve one or more of its *substantial*, legitimate, nondiscriminatory interests."[2] And even if the insurer could meet that burden, the HUD rule would still allow the plaintiff to prevail if he could show that the insurer's "substantial, legitimate, nondiscriminatory interest could be served by a practice that *has a less discriminatory effect*."[3] The alternative practice need not serve the insurer's interest as well as the challenged practice, and it could still have a disparate impact, albeit of lesser magnitude than that produced by the challenged practice. If a judge or jury could be convinced that such an alternative practice could be found, the insurer would be judged guilty of illegal discrimination on the basis of race.

This is obviously a bad state of affairs, and the purpose of this testimony is to explain how it came about, the legal and policy objections to it, and what can be done in response.

Section II of this testimony clarifies the meaning and explains the use of "discrimination" in the enterprise of insurance, contrasting "risk discrimination" with the kinds of discrimination prohibited under the FHA and other federal and state antidiscrimination laws. Section III provides a brief history of the evolution of the disparate-impact theory of discrimination and its relationship to contemporary antidiscrimination laws, including

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illegally discriminated against whites, immigrants from any country, members of any religion or religious sect, or males.

[2] 78 *Federal Register* 11,481 (to be codified at 24 C.F.R. 100.500 et seq.) As prescribed in the rule, the disparate-impact burden-shifting process is as follows:

- The party challenging a practice by an insurer must first prove a prima facie case that the practice results in, or would predictably result in, a discriminatory effect on the basis of a protected characteristic, which under the FHA includes race, color, national origin, religion, sex, familial status and disability.
- If the challenging party meets that burden, the burden shifts to the respondent/defendant to prove that the challenged practice is necessary to achieve one or more of its substantial, legitimate, nondiscriminatory interests. A legally sufficient justification must be supported by evidence and not be hypothetical or speculative. A substantial interest is a core interest of the organization that has a direct relationship to the function of that organization. A substantial, legitimate, nondiscriminatory interest is equivalent to the concept of "business necessity" applied in connection with other types of discrimination claims.
- If the respondent/defendant meets its burden, the challenging party may still establish liability by proving that the substantial, legitimate, nondiscriminatory interest could be served by a practice that has less discriminatory effect.

[3] *Ibid.*

the FHA. This section also analyzes and critiques the general consequences of the disparate-impact approach. Section IV examines the role historically played by HUD in promoting the application of disparate-impact analysis to insurance underwriting practices and pricing, as well as the consequences of that application, again most particularly in the context of underwriting and pricing of homeowners insurance. Section V focuses on a particular insurance underwriting factor—consumer credit history—as a case study of the application of the disparate-impact theory to insurance. Finally, Section VI provides a conclusion along with the authors' recommendations.

II. Homeowners Insurance, Risk, and the Fair Housing Act

In common parlance, the word "discrimination" has acquired connotations so profoundly negative that many people reflexively assume that the act of discriminating can never be fair. "Unfair discrimination" may therefore seem a redundancy. Yet in their daily lives, people frequently make decisions that require them to recognize material distinctions among things, places, and other people—in other words, they discriminate. What should concern us is whether acts of discrimination are informed by accurate information and by the application of neutral standards that are free of bias.

Discriminating among Kinds of Discrimination

In the business of insurance, discrimination takes the form of assessing and classifying varying degrees of risk. From the perspective of insurers, classifying people and their property according to the risk they present, and treating similar risks similarly, is a form of discrimination that is both reasonable and fair. A leading textbook for students of insurance regulation notes that "in insurance, discrimination is not necessarily a negative term so much as a descriptive one. For insurance, fair discrimination is not only permitted, but necessary."[4] Unfair discrimination, on the other hand, occurs when similar risks are treated differently.[5]

The importance of distinguishing between fair and unfair discrimination in insurance has long been recognized by the National Association of Insurance Commissioners,[6] whose Model Unfair Trade Practices Act prohibits "discrimination between individuals or risks of the same class and of essentially the same hazards." In addition, the Model Act prohibits "refusing to insure, refusing to continue to insure, or limiting the amount of coverage available to an individual because of the sex, marital status, race, religion or national origin of the individual"[7]—regardless of whether these characteristics are related to risk. In sum, the Model Act posits that discrimination based on risk is "fair"

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[4] Kathleen Heald Ettlinger, *State Insurance Regulation* (Insurance Institute of America, 1995), pp. 29-30.
[5] For a detailed discussion of risk assessment and classification, see Kenneth S. Abraham, "Efficiency and Fairness in Insurance Risk Classification," *Virginia Law Review*, Vol. 71 (1985), pp. 403-451.
[6] The National Association of Insurance Commissioners (NAIC) is composed of the insurance commissioners of all fifty states. (The insurance industry is regulated at the state level.) The organization addresses problems that concern the industry nationwide, and drafts model laws and regulations to aid state decision-makers in setting insurance regulatory standards.
[7] NAIC Unfair Trade Practice Act, section 4G(3)(4)(5), NAIC Model Regulation Service at p. 880-4 (Jan. 2004).

except when an insurer explicitly considers an individual's sex, marital status, race, religion, or national origin as a risk factor. As of 2004, a majority of the states had adopted the NAIC Model Act, or a substantially similar version of it.[8]

Assessing, Classifying, and Pricing Risk

Insurance evolved over time as a partial solution to our inability to predict the future. No one knows for certain what hazards lie ahead, but the prudent person understands that she is exposed to any number of risks. A homeowner runs the risk that her home could be damaged by fire or a weather-related calamity. The owner of an automobile knows that her car could crash or be stolen. Insurance allows an individual to manage these risks by making what she regards as a reasonable payment now in order to protect herself from the possibility of financial disaster in the future. But insurance is attractive to individuals only if the price of coverage corresponds to their perceived risk. A rational consumer will not voluntarily purchase insurance if she believes that the price she is charged for coverage is excessive relative to the probability and magnitude of her potential loss.

Establishing the optimal price of insurance is therefore critical to the business of insurance. But insurance is unlike other industries in that the price of insurance is determined by future costs that are inherently difficult to predict. If even a small number of individuals comprised within a particular insurance pool incurs inordinately large losses, the premiums paid by every member of the pool will have to be increased. When an insurer acquires information that allows it to improve the accuracy of its ability to assess risk, it can more closely align the price it charges for coverage with the cost of providing that coverage. "The pressure for increased accuracy," observes economist Scott Harrington, "is relentless. Insurers that predict claim costs better than their competitors prosper. Insurers that respond slowly end up insuring a disproportionate volume of business at inadequate rates; they lose money and either take corrective action or disappear."[9]

The process of risk assessment often reveals significant disparities in the level of risk that various individuals present. Certain personal characteristics or behavioral traits may suggest either a relatively high or a relatively low probability of future loss. Similarly, variations in the condition and use of the item to be insured will translate to disparities in risk. To keep premiums low and prevent adverse selection,[10] insurers classify insureds into groups posing similar risks. Distributing risk among a pool of relatively low-risk insureds will keep costs down and result in lower premiums. By the same token, distributing risk among a pool of relatively high-risk insureds will lead to

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[8] *Id.* at p. 880-4 (Jan. 2004).
[9] Scott Harrington, "Repairing Insurance Markets," *Regulation* (Summer 2002).
[10] Adverse selection is the phenomenon whereby low-risk insureds leave the insurance pool, leaving behind higher risk insureds. The effect of this is necessarily to increase the costs borne by insurers, and hence to drive up premiums.

higher costs that necessitate higher premiums.[11] In each case, the price of insurance and the type of coverage offered are a function of the insurer's assessment of the risk presented by the insured.

One factor that insurers often consider in assessing risk among applicants for homeowners insurance is the home's geographic location. Consider those regions of the U.S. that are unusually prone to devastation by natural forces such as tornadoes, floods, earthquakes, and wildfires. Insurers know from experience that homes located in these areas suffer more frequent and/or more severe losses than homes located elsewhere, so insurers charge rates that reflect the relatively greater degree of risk that the insurer must bear in providing coverage for such properties. By the same token, people whose homes are located in areas that are relatively free of extreme weather-related hazards will typically pay a lower rate for coverage because insurers' experience shows that such properties incur losses that are fewer and/or less severe than homes located in areas prone to natural catastrophes.

In the modern American city, risk may be a function of social and economic factors. Deteriorated urban core areas often suffer from relatively high rates of property crime such as vandalism and arson. Accidental fires are also more prevalent; the large number of old, substandard structures characteristic of economically depressed areas increases the probability of fire damage even to buildings in good repair.[12] The quality of municipal services in urban areas can likewise affect the likelihood and magnitude of losses. For example, the equipment, training, and manpower of local firefighting units—and the degree of rigor in local housing inspections—can affect the frequency and severity of fires. All of these are risk factors that an insurer would have reason to consider in deciding what type of coverage to offer and in determining its price.

Homeowners Insurance and the Fair Housing Act

The Fair Housing Act as amended makes it unlawful

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.[13]

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[11] Conceivably, the risk posed by some individuals will be so great that they cannot fit into any existing risk pool without driving up costs and encouraging adverse selection. Such people will be deemed uninsurable.
[12] "Meeting the Insurance Crisis of Our Cities," *President's National Advisory Panel on Insurance in Riot-Affected Areas* (Washington, DC: U.S. Government Printing Office, 1968), p. 6.
[13] 42 U.S.C. Sec. 3604.

Although the text of the Act contains no explicit reference to insurance, federal courts have generally concluded that the law applies to insurance inasmuch as homeowners insurance is a "service" related to "the sale or rental of a dwelling." But there is a world of difference between applying it to ban intentional discrimination on the basis of race and other proscribed categories, versus applying it to ban insurance practices that do not unfairly discriminate by their terms, in their intent, or in their application, but simply have a disproportionate effect on this or that group. Unfortunately, HUD has now made clear through new regulations that it will strongly embrace this disparate-impact approach to FHA enforcement. In the next section we explain more precisely what this approach entails.

III. Insurance Practices and the Disparate Impact Theory of Discrimination

It is by no means clear that the disparate-impact theory is cognizable under the FHA, much less that disparate-impact analysis is an appropriate means of proving allegations of illegal housing discrimination on the part of insurers.

As noted above, the FHA makes it unlawful to "discriminate against any person ... because of race, color, religion, sex, familial status, or national origin." Similarly, the 1989 HUD regulations define unlawful insurance discrimination under the Act as "refusing to provide ... property or hazard insurance for dwellings or providing ... insurance differently because of race, color, religion, sex, handicap, familial status, or national origin." Defining unlawful discrimination as a form of behavior undertaken *because of* some (impermissible) factor is a way of making clear that, to be unlawful, an act of discrimination must be intentional rather than inadvertent. It indicates that the behavior involves disparate treatment of individual persons, rather than behavior that affords equal treatment of individuals but results in a disparate impact, or disproportionate effect, upon a group of persons as revealed through statistics.

Before considering the implications of the disparate-impact theory for homeowners insurance underwriting and pricing, it is important to understand what, exactly, is meant by the term "disparate impact" and how it operates in contexts other than insurance. To answer these questions, a brief digression is necessary.

The Disparate Impact Theory of Discrimination: A Short History

The disparate-impact theory of discrimination has been a source of controversy among legal scholars and civil rights policy analysts for more than 40 years.[14] The theory's origins can be found in the 1971 Supreme Court case of *Griggs v. Duke Power Co.*[15] In *Griggs*, the Court was asked to consider whether the application of "facially neutral" employment criteria that disproportionately excluded blacks violated Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race. The

[14] See, e.g., Detlefsen, *Civil Rights under Reagan* (San Francisco: ICS Press, 1991), *passim*.
[15] *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

Court held that, in a case where members of a racial minority group had been intentionally excluded from employment prior to the enactment of Title VII, the use of such neutral criteria—in this case, performance on a general intelligence test and possession of a high school diploma—was *prima facie* unlawful if it produced, as between blacks and nonblacks, a "disparate impact" that was adverse to blacks as a group.

The Court ruled that for an employer to rebut the presumption of illegal racial discrimination in such circumstances, it would have to prove to a court's satisfaction that the neutral criteria that produced them were "job-related." Writing for a unanimous Court, Chief Justice Warren Burger declared that "Congress directed the thrust of the [Civil Rights] Act to the *consequences* of employment practices, not simply the motivation. More than that, Congress placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." Furthermore, "good intent or absence of discriminatory intent does not redeem" employment procedures or testing mechanisms that operate as "built-in headwinds for minority groups and are unrelated to measuring job capability."[16]

Putting aside the question whether Burger's opinion can be reconciled with the relevant statutory language or its legislative history, the *Griggs* ruling assumes that it is possible to distinguish empirically those criteria that are truly "job-related" from those that are not.[17] That assumption is highly problematic, as the economist Thomas Sowell has explained:

Nor can the "job-relatedness" of the standards be assessed in any mechanical way by the nature of the task. Standards that are *person*-related play the same economic role as standards that are *job*-related. If people who finish high school seem to the employer to work out better than dropouts, third parties who were not there can neither deny this assessment nor demand that it be proved to their uninformed satisfaction. It makes no difference economically whether this was because the specific task relates to what was learned in high school or because those who finish high school differ in outlook from those who drop out. Neither does it matter economically whether those who score higher on certain tests make better workers because the kind of people who read enough to do well on tests tend to differ from those who spend their time in activities that require no reading.[18]

In short, hiring standards that are not demonstrably "job-related" may still provide a reliable basis for predicting successful performance on the job. Nevertheless, lower federal courts significantly expanded the disparate-impact doctrine throughout the 1970s, as the "job relatedness" element of the *Griggs* decision rapidly evolved into what

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[16] *Ibid.* (Emphasis in original)

[17] In fact, it is likely that, in creating the disparate-impact cause of action, the Supreme Court misconstrued Title VII in *Griggs*. See Gold, Michael Evan (1985). Griggs' *folly: An essay on the theory, problems, and origin of the adverse impact definition of employment discrimination and a recommendation for reform.* Industrial Relations L.J. 7(4), 429-598. http://digitalcommons.ilr.cornell.edu/cbpubs/9/

[18] Thomas Sowell, *Civil Rights: Rhetoric or Reality?* (New York: William Morrow, 1984) pp. 115-116 (emphasis in original).

has become known as the "business necessity" test. A leading case described the test as follows:

The test is whether there exists an overriding legitimate business purpose such that the practice is necessary for the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.[19]

Note the stringency with which "business necessity" is defined: Employment criteria that produce a disparate racial impact may be sustained only if they are "compelling," which is to say, "necessary for the safe and efficient operation of the business." The courts applying this test seemed not to recognize that to survive in a highly competitive market economy, it is usually not enough for a firm to operate "safely" and "efficiently"; it must also provide a product or service that consumers regard as superior to that offered by competing firms.

The lower courts also extended the *range* of employment practices that were governed by the disparate-impact and business-necessity doctrines. *Griggs* spoke only of standardized tests and educational credentials, but by 1972 federal case law had established that an employer could not refuse to hire applicants with multiple arrest records (unless it could prove the job-relatedness of this criterion), because national statistics revealed that blacks are arrested more frequently than whites.[20] Because it can be exceedingly difficult to prove to the satisfaction of a judge or a jury that neutral criteria such as these are "necessary" in the sense used by the courts, many employers responded by avoiding the use of any objective criterion that might lead to a disparate outcome among racial and ethnic groups. Employers that made hiring and promotion decisions based on workers' performance on standardized tests either abandoned their use of such tests or resorted to practices such as "race-norming" (i.e., adding points to the scores of candidates belonging to groups that would otherwise be adversely affected by testing) and "supplemental selection" techniques (i.e., choosing from separate lists of minority and nonminority candidates) in order to avoid disparate racial outcomes.

The approach has further metastasized by spreading far and wide from the employment arena: It is now used for everything from education to voting, from environmental law to pizza delivery – and, of course, in housing and insurance.[21]

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[19] *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir. 1971).
[20] *Gregory v. Litton Systems, Inc.*, 316 F.Supp 401, 403 (C.D. Cal. 1970), *aff'd*, 472 F.2d 613 (9th Cir. 1972).
[21] See Roger Clegg, "Disparate Impact in the Private Sector: A Theory Going Haywire" (NLCPI/AEI monograph, December 2001, available at http://www.aei.org/files/2001/12/01/Briefly-Disparate-Impact.pdf); and Roger Clegg, "How Not to Fight Discrimination," Wall Street Journal (Feb. 26, 2013), available at http://online.wsj.com/article/SB10001424127887324162304578301804194205718.html.

The Disparate Impact Theory of Discrimination: A Short Critique

Most people would not consider it "discrimination" if, for example, an insurer lacking discriminatory intent adopted a race-neutral criterion and applied it to all individuals regardless of race. Indeed, they would find it objectionable – would consider it to be discrimination and certainly to invite discrimination – if a law forced them to choose criteria or to apply them with an eye on the skin color of the person seeking insurance coverage.

Those defending the disparate-impact approach make several closely related arguments. The first is that, because there is so much racism in our society and it is so cleverly hidden, it does not make sense to require plaintiffs to produce a smoking gun of discriminatory intent. The second is that no one should object to a defendant having to defend a selection device with a disparate impact and, if he cannot justify it in court, being forced to get rid of it. The third justification is that equality of racial results is *ipso facto* a very important social end, and so it makes sense to require any selection device – no matter how innocent, innocently contrived, and innocently applied – that thwarts this end to jump through some narrow hoops.

Part of the answer to the first argument is empirical: that it exaggerates the extent to which racism abounds, and that where racism does exist it is not particularly well-hidden. But of course it is hard to persuade some people on this point. It is also true, however, that proving discriminatory intent does not require the production of a "smoking gun" memorandum or the like. The Supreme Court has made clear that there can be circumstantial proof of discrimination, just as there can for other offenses. It's just that the ultimate question ought to be whether there actually is discrimination, not whether there is nothing more than the failure to achieve a particular racial balance or quota. The fact that an offense is difficult to detect would not in any other context justify redefining the offense. For example, the fact that drug smugglers are hard to catch would not justify a conclusive presumption that all entrants into the United States are carrying illegal drugs. And it bears repeating that, in a disparate-impact lawsuit, even if the defendant can prove to a certainty that he acted with no discriminatory intent, it is irrelevant to his liability.

Nor is it true that there is no appreciable cost to requiring defendants to defend a selection device and to get rid of any selection device that they cannot justify. In the first place, the defendant is not just told to get rid of a selection device: He also must pay his lawyers, the other side's lawyers, and any damages, besides getting rid of a device that he believes serves a legitimate end. In the latter regard, there are the inevitable economic costs attendant to letting inexpert bureaucrats, judges, and plaintiffs' lawyers determine – through litigation or threat of litigation – the selection devices that ought to be used, rather than leaving that determination to someone who knows his business. Finally, it is simply not the case that only bad selection devices will be shied away from. Being confident in a policy does not necessarily mean that you are willing to "bet the company" in an uncertain lawsuit that will be decided by a judge or jury who knows much less about the business than you do.

It is the third argument that one suspects is behind much of the defense of the disparate-impact approach. Yes, there will be economic costs to getting rid of perfectly good selection devices, but the social-justice benefits justify them: We want to have equal racial outcomes and aren't comfortable with anything that stands in the way of them. There is, in this, a manifest impatience with anyone's fear of losing money (even though, as discussed elsewhere, it is not only insurance companies but policyholders of all colors who will ultimately lose money). But let us focus instead on the noneconomic costs and benefits. The trouble is that the third argument is no longer an argument against discrimination but in its favor. The justification is not that the disparate-impact approach will end discrimination against some groups, but rather an acknowledgment that it will increase discrimination against others: That is, that some groups are being made to pay more money than the logic dictates they should in order to subsidize other groups. The institutionalization of such discrimination is a serious social cost indeed. Indeed, this brand of social "justice" is quite unjust, and it will result in resentment and stigmatization.

* * *

The disparate-impact approach has always been a bad idea. The focus of a civil-rights lawsuit ought to be on whether people of different races are treated differently *because* of their race. That is the commonsense and dictionary definition of "discrimination," and it is what the Fair Housing Act clearly says and means, as is discussed below. The question of intent, rather than incidental effect, ought to be at the heart of every lawsuit. Defendants in disparate-impact lawsuits do have the opportunity to rebut the plaintiffs' case by proving that their policies are justified by some "necessity." But, as we have discussed, it is risky to go to court, trying to prove to a judge or jury – who will know nothing about the business of insurance, and may be indifferent, to put it mildly, to the interests of insurance companies – that the challenged practice is a "necessity." What's more, the technical "validation" frequently insisted on by civil rights plaintiffs, enforcement bureaucrats, or federal judges is often expensive and difficult, if not impossible.

Conversely, it is almost always possible that a plaintiff in one group can come up with a tweaked approach that will diminish the impact on that group while still serving the company's end, if not quite so well. For example, in our hypothetical example of a disparate-impact lawsuit involving a home with a wood-burning stove that was discussed earlier, the plaintiff might have demonstrated that, had the insurer agreed to offer coverage if the woodstove was professionally installed, contained certain safety features, or was used sparingly (perhaps as indicated by the amount of wood that it burned each year), as opposed to categorically refusing to provide coverage for such homes, this practice would have had less of a "discriminatory effect" on white homeowners while still allowing the insurer to protect itself against the inordinate fire risk presented by wood-burning stoves. Such a showing would be enough to establish liability on the part of the insurer, never mind that the plaintiff's alternative approach would probably be less effective in preventing insured fire-related losses and certainly

more costly to administer (requiring individual home inspections by specially-trained inspectors).

All this, moreover, is designed to create an incentive for insurers to ensure that disparate impact does not occur in the first place by taking steps to ensure that their numbers come out right. If they do this by simply abandoning a legitimate criterion, the end result will be less of a disparate impact but higher insurance rates for everyone – not to mention the fact that the reason for the higher rates is to ensure a particular racial result (exactly the kind of race-based decision-making that the civil-rights laws was designed to prohibit). Thus, what is really rotten at the core of the disparate-impact approach is this: Under the guise of combating the problem of "unintended" or "hidden" discrimination, the theory encourages deliberate, overt discrimination. Applied to property insurance, it requires underwriting and rating factors to be chosen with an eye on the racial bottom line. Such a practice would be condemned under any other circumstances, and rightly so.

In sum, by pushing companies to substitute race-outcome-based decisions for decisions that are color-blind and merit-based (or risk-based, in the case of insurance), disparate-impact lawsuits have two bad results: less efficient and productive business practices, and the institutionalization of race-conscious decision-making. That is not just the effect of disparate impact; it is its intent.

IV. Disparate Impact, Homeowners Insurance, and HUD

While the objections to the disparate-impact approach are therefore serious, HUD has nonetheless adopted it. This section will describe briefly how this came about, and then outline the legal problems it raises, both as a general matter and in the specific approach taken in HUD's new regulations.

How HUD Came To Embrace the Disparate-Impact Approach

Early in the Clinton administration and soon after the Sixth and Seventh Circuits decided that the Fair Housing Act applies to property insurance, HUD made clear its intention to apply disparate-impact analysis to allegations of housing discrimination. An internal memorandum dated December 17, 1993, written by Assistant Secretary Roberta Achtenberg and addressed to "all regional directors" of the agency's Office of Fair Housing and Equal Opportunity, begins with the following instruction:

Cases which have been brought under the Fair Housing Act should now be analyzed using a disparate impact analysis, to the extent that this theory is applicable to a particular case.

Under a disparate impact analysis, a policy, standard, practice or procedure which, in operation, disproportionately adversely affects persons protected by the Fair Housing Act coverages may violate the Act.[22]

The memorandum went on to note that "a respondent may rebut a *prima facie* case by evidence that the policy is justified by a business necessity which is sufficiently compelling to overcome the discriminatory effect. The business necessity justification may not be hypothetical or speculative." The memo admonished HUD investigators to wield the disparate impact weapon aggressively, and to regard claims of "business necessity" with a high degree of skepticism:

Each [respondent] should be investigated to determine if there are genuine business reasons for the policy. The respondent should also be queried as to whether or not the respondent considered any alternatives to the particular policy, and what the reasons for rejecting the alternatives, if any, were. ... [T]he investigation should consider whether there are any less discriminatory ways in which the respondent's business justifications may be addressed. These steps are important because if there is a less discriminatory way by which genuine business necessities may be addressed, it may be argued that the respondent should have adopted a less discriminatory alternative.[23]

Now, however, HUD has gone even further, and adopted formal regulations that strongly embrace the disparate-impact approach.

The timing, it must be said, is suspicious: (1) First, on November 7, 2011, the Supreme Court granted review in *Magner v. Gallagher*, which raised the issue whether the Fair Housing Act allowed disparate-impact causes of action at all; (2) just nine days later, HUD published proposed regulations that embraced the disparate-impact approach; (3) then, in February 2012, the Obama administration persuaded the petitioner in the *Magner* case to withdraw the successfully submitted cert petition just prior to oral argument before the Court, an unheard of action, but one which was taken here because the administration promised not to participate against the petitioner in another, unrelated case (potentially costing the government, and saving the petitioner, over $160 million); and (4) last, the administration published the final version of the HUD regulations, just in time to cite them in its amicus brief to the Court in *Township of Mt. Holly v. Mt. Holly Gardens Citizens in Action, Inc.* – another case before the Court, also raising the FHA disparate-impact issue – and to urge the Court to give deference to them. We say the timing is "suspicious" because, as discussed in more detail in the next section, it appears that the regulations were quickly written and adopted so that the Supreme Court could be urged to defer to them, and that the *Magner* case was torpedoed because in February 2012 there were not yet any final regulations to which the Court could be urged to defer.

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[22] HUD Memorandum to All Regional Directors, Office of Fair Housing and Equal Opportunity, on "Applicability of Disparate Impact Analysis to Fair Housing Cases," December 17, 1993, p. 1. Also see Robert Detlefsen, "HUDlining: Disparate Impact and Insurance," Center for Equal Opportunity, October 1997.
[23] *Ibid.* p. 2.

The final version of the HUD regulations is also "aggressive" in the way the disparate-impact approach is used, according to a February 12, 2013, analysis by the law firm Morrison and Foerster.[24] The new rule "goes well beyond" HUD's prior position: "It articulates a burden-shifting framework that places significant new burdens onto defendants, and it 'clarifies' the standard for 'business justification' that HUD had originally proposed into a test the courts have affirmatively rejected." It will also apply retroactively, and to "a broad range of housing activity." Requiring a defendant to "prove" that a challenged practice is "necessary" is "inconsistent with legal authority" (e.g., the Supreme Court's 1989 decision in *Wards Cove Packing Co. v. Atonio*[25]). Worse, the way that the rule will allow a plaintiff to prevail by showing a "less discriminatory" alternative "may well begin to swallow the original rule."

The rule makes clear that HUD's new disparate-impact regulations will apply to insurers, but offers few clues about how problems like those raised in this testimony will be avoided.[26] In predicting how the HUD regulations will be applied, it is worth taking a look at *Disparate Impact under the Fair Housing Act: A Proposed Approach,* a 2009 report that was commissioned by the National Fair Housing Alliance and co-authored by Sara Pratt, now an official at HUD.[27] Particularly interesting is Appendix 2, which provides "examples of impact-producing policies that might violate the FHA." The last four examples involve homeowners insurance, and suggest that just about any insurance underwriting practice will run afoul of the law because there will almost always be a "less discriminatory" – if more burdensome – alternative practice that the insurer could have used.

Immediate Legal Issues Raised by the HUD Regulations

The text of the Fair Housing Act is inconsistent with the disparate-impact approach in any number of ways, and the legislative history supports the view that only disparate treatment was targeted by the statute. Allowing a disparate-impact approach would also create a number of bizarre policy outcomes. For example, it would make an ordinance in one city illegal while allowing exactly the same ordinance in another city, just because of the different racial makeup of the two cities – an odd outcome for a national civil-rights law. It would encourage enforcement (or non-enforcement) of such ordinances with an eye on racial outcomes – again, an odd result for a nondiscrimination law. It is especially strange to encourage mortgage lenders to make decisions based on race, as the HUD rule would do, when such decision making is believed by many to have played a key role in triggering the mortgage crisis of 2007-08.[28]

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[24] Michael J. Agoglia, et al., "HUD Issues Aggressive New Fair Housing Rule," February 12, 2013. Available at http://www.mofo.com/files/Uploads/Images/130212-HUD-Issues-Aggressive-New-Fair-Housing-Rule.pdf.
[25] 490 U.S. 642 (1989).
[26] 78 FR 11474-75.
[27] Electronic copy available at http://ssrn.com/abstract=1577291.
[28] http://www.jdsupra.com/legalnews/brief-amicus-curiae-of-pacific-legal-fou-74521/

There are several reasons why the HUD disparate-impact rule is entitled to little deference from the courts. First and foremost and as also noted above, the meaning of the statute is clear that only actual discrimination — "disparate treatment" — is banned. Further, the Fair Housing Act has been on the books for 45 years, and during that time the Executive Branch has sometimes used the disparate-impact approach and sometimes not. For example, President Reagan explicitly rejected the approach in signing major amendments to the Act, and his Justice Department argued against it in a brief to the Supreme Court; the Bushes didn't think much of it, either. The Obama administration, on the other hand, orchestrated a controversial deal with the City of St. Paul to get it to withdraw last term's cert petition in *Magner*, and meanwhile has worked on promulgating those new regulations – a process that was not begun until *after* the Court had granted review in *Magner*. "We were afraid we might lose disparate impact in the Supreme Court because there wasn't a regulation," said HUD official Sara Pratt.[29]

Finally, the Supreme Court will, where possible, avoid construing a statute in a way that would create a constitutional problem. And construing the Fair Housing Act to allow disparate-impact causes of action would be constitutionally problematic in at least two ways: It encourages race-based decision making, and it would alter the federal-state balance by calling into question race-neutral rules in areas of the law typically left to the states.

Not only is the approach taken by HUD problematic as a general matter, but the regulations that HUD has adopted inevitably raise additional and technical questions that can be resolved only through expensive and wasteful litigation. For example:

(a) How great does the "impact" have to be?
(b) How does one quantify the strength of the defendant's interest, especially if it is not an immediate pecuniary interest?
(c) How precisely does the "alternative" practice have to be presented, and how comparable in cost must it be?[30]

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[29] Pratt quote can be found here: http://www.propublica.org/article/how-the-supreme-court-could-scuttle-critical-fair-housing-rule.

[30] James Scanlon, an expert on the use of statistics in civil-rights cases, has noted that one dealing with housing/lending disparate impact issues should be aware of an anomaly in the federal government's regulation of lenders arising from the failure to recognize that reducing the frequency of adverse outcomes (like mortgage rejection), while tending to reduce relative differences in the corresponding favorable outcomes (like mortgage approval), tends to increase relative differences in the adverse outcome. The pattern is well illustrated in test score data which show how lowering a test cutoff reduces relative differences in pass rates but increases relative differences in failure rates. Everyone who deals with data should know this, Mr. Scanlon notes, but few do. In any case, out of concern about seemingly large relative differences in adverse lending outcomes (which were attributed in part to the disparate impact of standard lending criteria), the federal government has for 19 years been pressuring lenders to relax lending criteria and otherwise to reduce the frequency of adverse lending outcomes. But unaware that doing so tends to increase relative differences in experiencing those outcomes, regulators continue to judge compliance on the basis of relative differences in adverse outcomes. Thus, Mr. Scanlon concludes, by acceding to pressures to reduce adverse lending outcomes, lenders increase the likelihood that they will be sued for discrimination. See "Misunderstanding of Statistics Leads to Misguided Law Enforcement Policies" (*Amstat News*, Dec. 2012); "'Disparate Impact': Regulators Need a Lesson in Statistics" (*American Banker*, June 5, 2012); "The Lending Industry's Conundrum" (*National Law Journal*, Apr. 2, 2012). Related articles going back to 1992 may be

Note that, in a disparate-treatment lawsuit, on the other hand, the inquiry is always straightforward: Are people being treated differently because of their skin color? Statistical evidence is still permissible, and the implausibility of a policy's rationale is fair game, but the focus is clear and so the problems listed above vanish.

Additional Legal and Policy Issues Raises by the HUD Regulations

It is very odd to tell an insurer: Before you can adopt a policy, you must first look to see whether it has a disproportionate effect on any racial group, on any ethnic group, on any gender, and on any religious group (not to mention "familial status," handicap, and any other group protected by other federal, state, or local laws from discrimination). For example, most insurers do not even ask a prospective policyholder what his religion is; if we are serious about the disparate-impact approach, then insurers will have to start asking policyholders about religion when they weren't before – an odd outcome for a civil-rights statute.

This calculus will be further complicated by the fact that racial, ethnic, and religious groups can always be subdivided. Recently, for example, the *Chronicle of Higher Education* ran a column that complained about the grouping "Asian and Pacific Islanders," because while the group as a whole might be "overrepresented" among successful students, certain subgroups were "underrepresented."[31] Likewise, a policy might not have a disparate impact on whites, or Latinos, or Asians as a whole, but it might have a disparate impact on Arab Americans, or Mexican Americans, or Hmong Americans. Or it might not have a disparate impact on Muslims generally, but it does on Shiite Muslims.

The winners and losers when the disparate-impact approach is used are not always predictable. Consider:

- The threat of a disparate-impact *firing* lawsuit will, according to research by two Yale Law School professors, discourage some employers from *hiring* minorities in the first place.[32]
- De-emphasizing the results of the written test for policemen and firefighters will result in less disparate impact on the hiring of African Americans, but will hurt women; de-emphasizing the results of the physical strength test will result in less disparate impact on women, but will hurt African American men.

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found on the Lending Disparities section of jpscanlan.com. That page and its subpages discuss a number of related issues (for example, the Less Discriminatory Alternative - Substantive subpage of the Disparate Impact page explains that, in most situations where a disparity is measured in terms of relative differences in adverse outcomes, what would commonly be regarded as the obvious less discriminatory alternative will tend to increase the relative difference). See also Mr. Scanlon's March 4, 2013 letter to the Federal Reserve Board.

[31] Kawika Riley, "Pacific Islanders: A Misclassified People," *Chronicle of Higher Education*, June 7, 2013, at A31.

[32] Ian Ayres & Peter Siegelman, "The Q-Word as Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas," 74 *Tex. L.Rev.* 1487 (1996).

- Reliance on standardized tests for university admissions and K-12 "ability grouping" will be to the advantage of some minority racial groups but will also be to the disadvantage of others.

To put it another way: Just about any selection criterion is likely to have a disparate impact on some group. But why should every disparity be viewed as a social problem, let alone a social problem that can be solved by a government regulation or a civil-rights lawsuit?

There are temporal problems as well. A policy that might be unobjectionable at one point in time might become illegal if the demographic mix of the relevant jurisdiction changes. Or, even if the demographic mix does not change, it might still become illegal if the characteristics of some groups, in the aggregate, do change. For example, a refusal to insure homes of less than a particular value might have been lawful in 2007 but might become illegal if a particular racial minority was especially hard-hit by the recession.

And there are geographic problems, too. An insurance policy that is sold in Arizona might be legal there but illegal if sold in New Jersey because the two states are different demographically. It seems nonsensical to tell that company that it must ensure no disparate impact in every state (or every county, for that matter) in which it does business; but it seems equally nonsensical to say that a small company that does business in only one geographic region will be barred from selling policies that it would be free to sell if it did business nationally.

Finally, even if a company wanted to do all this number-crunching, it's not at all clear that the numbers are there to crunch. The credit history of every racial, ethnic, and religious group in every county in Kentucky may not be available.

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As noted above, the disparate-impact approach inevitably *encourages* race-consciousness by a company and its agents. If a company senses that it is selling "too many" policies to, say, Asian Americans and "too few" policies, to, say, Latinos, then it will begin to pull back from selling to the former and give preferential consideration to the latter. This is a perverse result for a nondiscrimination law to have.

What's more, pressuring companies to charge customers the same amount for what are essentially different products is itself discrimination against those who ought to be charged less. If a lawn mowing company is told that it must charge all customers the same price, no matter how big or small the lawn, this means that people with large lawns are getting a discount at the expense of those with small lawns; likewise, if policyholders who present less risk must be charged the same as those who present greater risk, then the former are being discriminated against in favor of the latter. Insurers made this point to HUD in commenting on the proposed rule, but it was ignored.

The trend in recent decades has been to push companies to focus on behavior rather than immutable characteristics. Yet the disparate-impact approach does just the opposite, by insisting that companies look to immutable characteristics and making it risky for them to scrutinize behavior.

And it is hard to see how it does anyone (and any group) any good to remove a disincentive for bad, impulsive behavior – or, to put it more positively, why wouldn't we want to encourage people not to have bad credit ratings and criminal records, rather than following the rules and making good choices in life? The use of the disparate-impact approach encourages problems to be swept under the rug rather than being addressed directly. For example, if some groups are less likely to earn high-school diplomas, then it is better to address that problem directly rather than telling employers they cannot require high-school diplomas; indeed, the latter prohibition actually removes an incentive for correcting the underlying problem. A number of educational reforms in California were precipitated when, but only when, a ballot initiative there prohibited the state's use of preferences based on race, ethnicity, and sex.

Finally, if the price of insurance goes up, the people who will be most easily priced out of the market are the less affluent – who are, ironically, likely to be members of those racial and ethnic groups that the supporters of the disparate-impact approach profess to be helping. Conversely, the market itself provides a strong incentive for insurers not to indulge any "taste for racial discrimination," as Nobel-laureate Gary Becker termed it.[33]

V. Credit-Based Insurance Scores and Disparate Impact

Sometimes a factor considered by property insurers bears an obvious relationship to risk (the property is located in an area with a history of frequent catastrophic windstorms); sometimes consideration of a factor can be rejected out of hand as unfair (race); and sometimes a factor indisputably does have a strong correlation with risk but no one – including insurers – is exactly sure why.

One insurance underwriting factor that fits the latter description, is likely to come under fire with the new HUD rule, and has indeed already been proven especially vulnerable to allegations of unfair discrimination based on disparate-impact analysis is consumer credit information, which insurers use to help them decide whether to issue or renew a policy, and to establish its price.[34] Insurers are interested in consumer credit information because they have discovered that an individual's experience managing credit is an accurate predictor of whether he will file a claim for automobile or homeowners insurance, and the potential size of losses.[35] Today, most large

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[33] Source (from Wikipedia entry on Becker: ^ The Open University: Learning Space."Economics Explains Discrimination in the Labour Market." Accessed June 29, 2012.

[34] The HUD regulations discuss the use of credit scores, but not specifically in the insurance context. 78 FR 11475-76.

[35] Numerous studies have confirmed the relationship between consumer credit ratings and property insurance losses. See Michael J. Miller and Richard A. Smith, "The Relationship of Credit-Based Insurance Scores to Private Passenger Automobile Insurance Loss Propensity," EPIC Actuaries, LLC (June 2003); Bruce Kellison, Patrick

automobile and homeowners insurers use "credit-based insurance scores" for underwriting and rating purposes. Though the precise methodology for calculating insurance scores varies among insurers, the scores are typically based on such factors as payment history, forced collections, bankruptcies, ratio of account balances to credit limits, types of credit utilized, and any pending credit applications.

Empirical Studies

While numerous empirical studies have confirmed the relationship between credit history and insurance risk, arguably the most thorough and rigorous report on the subject was produced by the Texas Department of Insurance (TDI) in December 2004 (a supplemental report was issued in January 2005). The TDI obtained data from six leading insurer groups for approximately 2 million policies. Of these, approximately 1.2 million were for personal auto insurance and 800,000 were for homeowners insurance. The personal auto policies covered roughly 2.5 million vehicles. To account for the fact that individual insurers use different credit scoring models, the TDI gathered data from six different personal auto and three different homeowner's insurance credit scoring models.

The TDI study was unusual both because of the size of its database, and because it included individual information on race and ethnicity. That information was missing from other studies—including those conducted or sponsored by the insurance industry—for a simple reason: insurers do not collect information concerning the race or ethnicity of their policyholders or applicants for insurance. As a state agency, however, the TDI was able to draw on the resources of the Texas Department of Public Safety and the Texas Office of the Secretary of State. Based on data it acquired from those agencies, the TDI was able to classify individuals as white, black, Asian, and Hispanic.

The TDI also obtained credit scores and input variables (e.g., number of credit cards, number of collections, etc.) from credit vendors. Data regarding race/ethnicity, credit score, credit-related variables, policy details, and claim history for each of the 2 million policies was entered into a database for each insurer group and line of business (personal auto or homeowners). The TDI used the data "to analyze whether the use of credit scoring: (1) impacts certain classes of individuals more than others; and (2) predicts claims experience."[36] The first question was answered in the first installment of

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Brockett, Seon-Hi Shin, and Shihong Li, "A Statistical Analysis of the Relationship Between Credit History and Insurance Losses," Bureau of Business Research, McCombs School of Business, University of Texas at Austin (March 2003);American Academy of Actuaries, "The Use of Credit History for Personal Lines of Insurance; Report to the National Association of Insurance Commissioners" (November 15, 2002); James E. Monaghan, "The Impact of Personal Credit History on Loss Performance in Personal Lines," Actuarial Society Forum (Winter 2000); Commonwealth of Virginia, State Corporation Commission, Bureau of Insurance, "Use of Credit Reports in Underwriting" (1999); Fair, Isaac & Co., "Predictiveness of Credit History for Insurance Loss Ratio Relativities" (1999). See also the two studies discussed in the next section: Texas Department of Insurance, *Report to the 79th Legislature: Use of Credit Information by Insurers in Texas* (December 30, 2004), with Supplemental Report on "The Multivariate Analysis" (January 31, 2005); and A Report to Congress by the Federal Trade Commission, *Credit-Based Insurance Scores: Impact on Consumers of Automobile Insurance* (July 2007).

[36] *Report to the 79th Legislature: Use of Credit Information by Insurers in Texas* (December 30, 2004), p.3

the report issued in late December 2004: "Whites and Asians, as a group, tend to have better credit scores than Blacks and Hispanics. In general, Blacks have an average credit score that is roughly 10 percent to 35 percent worse than the credit scores for Whites. Hispanics have an average credit score that is roughly 5 percent to 25 percent worse than those for Whites. Asians have average credit scores that are about the same or slightly worse than those for Whites."[37] The report's executive summary stated that "Blacks and Hispanics tend to be over-represented in the worse credit score categories and under-represented in the better credit score categories."

As for whether credit scores predict claims experience, the December report concluded that "there appears to be a strong relationship between credit scores and claims experience on an aggregate basis."[38] The report cautioned, however, that "credit scores, to some extent, may be reflective of other risk characteristics associated with claims." The report explained that, because the positive correlation between credit score and claims experience was based on a univariate statistical analysis, the department needed to perform a multivariate analysis to determine if, and to what extent, credit scoring enables an insurer to predict losses more accurately than it could without resorting to credit scores. A month later, the department released its multivariate analysis in the form of a supplemental report, which concluded that "for both personal auto liability and homeowners, credit score was related to claim experience even after considering other commonly used rating variables. This means that credit score provides insurers with additional predictive information distinct from other rating variables. By using credit score, insurers can better classify and rate risks based on differences in claim experience."[39]

This finding so surprised Texas insurance commissioner Jose Montemayor that he felt obliged to acknowledge, in a letter to Governor Rick Perry accompanying the supplemental report, that prior to the study "my initial suspicions were that while there may be a correlation to risk, credit scoring's value in pricing and underwriting risk was superficial, supported by the strength of other risk variables." The study, however, "did not support those initial suspicions." Credit scoring, Montemayor added, "is not unfairly discriminatory as defined in current law because credit scoring is not based on race, nor is it a precise indicator of one's race."[40]

In 2007, the Federal Trade Commission issued a report to Congress, titled "Credit-Based Insurance Scores: Impacts on Consumers of Automobile Insurance," that covered much of the same ground as the TDI study and reached essentially the same conclusions. Like the TDI study, the FTC report concluded that credit-based insurance scoring improves insurers' ability to assess and price risk; better matches the price of insurance with the risk of loss posed by the consumer; benefits low-risk consumers by allowing them to pay less for coverage; and benefits high-risk consumers by allowing

[37] Ibid., p. 13.
[38] Ibid., executive summary.
[39] Supplemental Report on "The Multivariate Analysis" (January 31, 2005).
[40] Cite to Montemayor letter.

them to purchase coverage that would not otherwise be available.[41] And also like the TDI study, the FTC report found that blacks and Hispanics are "substantially overrepresented" among consumers with the lowest scores, and "substantially underrepresented" among consumers with the highest scores.

The 'Proxy' Canard

Notably, the FTC report dismissed an assertion often made by those who oppose credit-based insurance scoring on disparate-impact grounds: *viz.*, the notion that scores serve as a "proxy" for race, ethnicity, and income. That claim, which Congress specifically directed the FTC to investigate, implies that credit scores—and presumably any other underwriting factor that produces a disparate impact—can be used to predict an individual's race or ethnicity and thus to facilitate covert discrimination against members of particular groups. The FTC found that "credit-based insurance scores appear to have little effect as a 'proxy' for membership in racial and ethnic groups in decisions related to insurance," noting that there was a range of credit-based insurance scores *within* every group studied and that scores accurately predict risk insurance claims *within* each racial and ethnic group. [42]

Intuition alone suggests that the proxy claim is rather silly. An insurer that, for whatever reason, wished to use credit scores as a means of overcharging or avoiding black or Hispanic customers would not succeed in screening out the many blacks and Hispanics with high credit scores. But it would definitely succeed in screening out a large number of whites with low credit scores. That is because while blacks, Hispanics, and whites are apparently not equally represented among those with high and low credit scores on a *group percentage* basis, the aggregate *number* of white *individuals* with low credit scores will almost certainly exceed the aggregate *number* of black or Hispanic *individuals* with low credit scores, for the obvious reason that there are many more whites than blacks or Hispanics in the general population.

Implications of the Credit-Scoring Studies

The TDI and FTC studies' conclusions—with respect to both credit-based insurance scoring's impact on the groups studied and its validity as a risk-based underwriting tool—would in all likelihood apply to many, and perhaps most, property insurance underwriting factors. In other words, it is likely that a statistical analysis of any underwriting factor would show that the proportion of individuals that is adversely affected by the factor is not the same for every racial, ethnic, and religious group. Conversely, the premise underlying disparate-impact theory is that a "fair" process is one that results in statistical parity among groups. Applied to insurance underwriting and pricing, disparate impact theory assumes that a neutral, risk-based underwriting factor will have the same statistical impact on whites, blacks, Hispanics, and Asians. Further, inasmuch as religion is also a protected class under the Fair Housing Act, the

[41] Cite to FTC report.
[42] FTC report.

theory posits that underwriting factors should have the same statistical impact on Muslims, Jews, Christians, Hindus, and perhaps atheists.

As we have seen, this notion is strikingly different from the prevailing view held by insurers and embedded in state insurance regulation, which is that unfair discrimination involves disparate treatment of people who present similar risks. In sum, discrimination in insurance is assumed to be fair as long as it takes the form of neutral, objective risk assessment and classification.

At this point, however, a caveat is in order. To say that discrimination is "fair" is not to say that it is in all circumstances socially or politically acceptable. Taken literally, the axiom that "risk discrimination is fair discrimination" could justify intentional discrimination against entire racial, ethnic, or religious groups if insurers had data showing that these groups have higher-than-average loss probabilities—much as auto insurers justify discrimination against teenage drivers for that reason. Yet as legal scholar Kenneth Abraham observes, even if it could be demonstrated that in certain situations race correlates with risk, most Americans would strongly oppose an insurance regulatory regime that allowed the use of race as an underwriting or rating variable.[43] Still, there is no denying that restricting the use of risk-based underwriting variables that are morally or politically unacceptable undermines the assessment of risk, with the result that low-risk individuals will subsidize the insurance costs of high-risk individuals. As Abraham explains:

Whenever an efficiency-promoting but emotionally or morally suspect variable is rendered inadmissible, a form of redistribution of risk occurs. The risk-assessment goal of insurance is sacrificed to the risk-distribution goal. Subsidies then run from the low-risk members of other groups to the high-risk members of the group identified by an inadmissible variable. Variables that would otherwise be used in classification because of their economic superiority are not used because of their social inferiority. That is simply the cost of avoiding discrimination in insurance on the basis of the suspect variable in question. Indeed, our willingness to ignore variables that would otherwise be useful for classification is largely what defines them as discriminatory in this context.[44]

But, we hasten to add, the issue confronting policymakers today is *not* whether to reject "efficiency promoting" variables that are explicitly based on race, ethnicity, religion, or other suspect classifications: There is a strong societal consensus against disparate treatment on these grounds, which insurers share. Rather, the question is whether neutral variables that unintentionally produce a disparate impact among groups are thereby rendered so "emotionally or morally suspect" that they should be officially discouraged or prohibited, notwithstanding the cross-subsidies that would result. We think the answer to that question is clearly no, because few people would consider this to be discrimination at all.

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[43] Kenneth S. Abraham, *Distributing Risk: Insurance, Legal Theory, and Public Policy* (Yale Univ. Press, 1986), p. 93.
[44] Ibid. (Emphasis added.)

VI. Conclusion and Recommendations

One can easily imagine a future in which insurers will be required to document a precise cause-and-effect relationship between each underwriting and pricing variable they use and its associated risk. In addition, they will be required to show that no "less discriminatory" risk-assessment technique is available. Where it is not possible or too costly to meet this burden, insurers will have no choice but to abandon the use of those risk selection practices and cost-based pricing mechanisms that yield a disparate racial impact.

In such an event, an insurer would have, in theory, two options: It could distribute the expected, more frequent, and higher claim costs of one group of homeowners among another group of homeowners who present lower risk, in effect creating a cross-subsidy. That, however, would lead to "the underwriter's nemesis: adverse selection."[45] Alternatively, the insurer could ignore economic reality and treat high-risk insureds as if they presented low risk, a strategy that eventually would either drive the insurer from the market or cause it to fail, because to continue doing business in a regulated market that demands underpricing of risk would threaten not only the insurer's profits, but its solvency as well. The threat to solvency is an important consideration to which disparate-impact enthusiasts are apparently oblivious. It is worth noting that solvency regulation has historically been a central mission of state insurance regulators.

The evidence, examples, and critiques presented in this testimony demonstrate the economic irrationality and injustice of the disparate-impact approach. Policymakers at all levels of government should work with insurers and other stakeholders to curtail its further encroachment into U.S. law and regulation, and eventually to prohibit its use altogether. Aside from challenging the validity of the disparate-impact doctrine in the courts (as was attempted in the *Magner* case and is currently being done in *Mt. Holly*), there are two basic ways in which this can be done.

1. Lawmakers should oppose attempts to codify the disparate-impact approach through legislation. For example, if there is ultimately a court ruling that the disparate-impact approach may not be used under the Fair Housing Act, federal legislation will inevitably and immediately be proposed to overturn that decision. Moreover, regardless of what happens with regard to federal fair-housing law, there will be proposals at the state level to adopt the disparate-impact approach, and they, too, should be aggressively resisted by state legislators and governors. Ideally, in fact, it would be desirable to spell out in legislation that the disparate-impact approach should *not* be used.

2. Legislators should use persuasion – and, if necessary, agency oversight hearings and the budget appropriations process – to prevent executive-branch adoption of the disparate-impact in its regulations and lawsuits. We have seen at

[45] Rosemary Baptiste, James Carson, et al., "Redlining, Property Insurance and Urban Markets: Concepts, Issues, Initiatives, and Solutions," *Chartered Property & Casualty Underwriters Journal*, Summer 1996, p. 82.

the federal level that often the applicable statutes are ambiguous about whether the disparate-impact approach is contemplated; in these situations, it is important to persuade executive-branch officials not to go down this road in the regulations they adopt or in the positions they take in litigation. Ideally, in fact, it would be desirable to persuade these officials to clarify in their regulations that disparate-treatment must be shown for there to be a violation, and to take this position in litigation as well.

Answers to Questions for the Record of
The House Committee on Financial Services
Subcommittee on Oversight and Investigations

Dennis D. Parker
Director, Racial Justice Program
American Civil Liberties Union

Laura W. Murphy
Director, Washington Legislative Office
American Civil Liberties Union

"A General Overview of Disparate Impact Theory"

November 19, 2013

QUESTIONS FROM REP. KEITH ELLISON

Question 1: Domestic Violence

I am very concerned about the scourge of domestic violence. I worry that if the disparate impact standard is limited or eliminated, it might be possible to evict the entire family [member]. The disparate impact standard protects women and children from eviction after domestic violence.

- Should a woman lose her housing because she is being abused by someone in her household?
- Is it is fair to evict her with her abuser because she was "party" to a domestic dispute?
- Do you think a child should have to leave his home because his father is abusing him?

Reply: It is ridiculous and unjust for a woman to lose her housing just because she is a victim of intimate partner violence; yet, this happens regularly across the U.S. Domestic and sexual violence is a primary cause, and consequence, of homelessness and housing instability for women and girls. Congress' own findings reveal that domestic violence causes homelessness and that an estimated 92 percent of homeless mothers have experienced severe physical and/or sexual assault at some time, 60 percent of all homeless women and children have been abused by age 12, and 63 percent have been victims of intimate partner violence as adults. 42 U.S.C. § 14043e. The U.S. Conference of Mayors' Hunger and Homelessness Survey reported that over a quarter of cities surveyed in 2011-12 cited domestic violence as one of the three main causes of family homelessness.

The ACLU has represented a number of survivors who faced eviction because of the abuse perpetrated by their batterers and thus deeply understands the importance of legal remedies in ensuring access to safe housing. Victims of violence should be able to remain in their homes if they wish, and not be punished by landlords for the violence perpetrated against them.

Disparate impact analysis under the Fair Housing Act (FHA) offers crucial legal protection to women and their children who face eviction or housing denials based on domestic and sexual violence perpetrated against them. Discriminatory housing policies contribute to and exacerbate the housing crises faced by victims. However, many of the housing policies that can punish victims – such as zero tolerance-for crime policies (sometimes referred to as one-strike policies), or policies that explicitly target victims of domestic and sexual violence – are facially neutral. Disparate impact analysis reveals how these policies adversely impact women and girl, who make up the vast majority of victims of domestic and sexual violence. It also allows survivors to challenge housing policies that, when enforced against them, eliminate housing options and endanger their safety.

The legal protection offered to survivors by disparate impact analysis under the FHA was first established in *Alvera v. Creekside Village Apartments*, No. 10-99-0538-8 (Dep't of Hous. & Urban Dev. Apr. 13, 2001). HUD found that taking action against all members of a household after an incident of domestic violence "has an adverse impact based on sex, because of the disproportionate number of women victims of domestic violence." HUD noted that there were no similarly situated male tenants. Accordingly, the case could best be understood through the lens of disparate impact. After reviewing the available statistics on intimate partner violence and gender and the arguments presented by the management company, HUD concluded that discrimination had occurred: "The evidence taken as a whole establishes that a policy of evicting innocent victims of domestic violence because of that violence has a disproportionate adverse impact on women and is not supported by a valid business or health or safety reason." *Id.* The Department of Justice subsequently filed suit, leading to a consent decree that mandated the adoption of a housing policy prohibiting discrimination against victims of violence. Consent Decree, *United States ex rel. Alvera v. The C.B.M. Group, Inc.*, No. 01-857-PA (D. Or. Nov. 5, 2001).

In addition, local governments across the country are increasingly passing ordinances that are neutral on their face but have a devastating impact on domestic violence victims. Often known as "chronic nuisance ordinances," these laws impose penalties on landlords based on a tenant's repeated calls to the police. Many landlords seek to avoid these sanctions and eliminate the "nuisance" by evicting the unit's tenants, including victims of domestic violence who may need to reach out to police repeatedly due to the conduct of their abusers. Indeed, a study by a Harvard scholar established that survivors of domestic violence are regularly evicted under this type of ordinance, forcing victims to choose between calling the police and maintaining their home. Matthew Desmond & Nicol Valdez, Unpolicing the Urban Poor: Consequences of Third- Party Policing for Inner-City Women, 78 AM. SOC. REV. 117, 125-127, 130 (2012).

Without disparate impact analysis, even the most extreme disparities in the effect of policies that punish survivors for the violence perpetrated against them would likely lie beyond the reach of antidiscrimination law, and survivors of domestic and sexual violence deprived of housing would lack legal redress. This reasoning was embraced by HUD in recently-issued guidance to all fair housing staff addressing the applicability of disparate impact analysis in situations involving domestic violence. See SARA K. PRATT, U.S. DEP'T OF HOUS. & URBAN DEV., OFFICE OF FAIR HOUS. & EQUAL OPPORTUNITY, ASSESSING CLAIMS OF HOUSING DISCRIMINATION AGAINST VICTIMS OF DOMESTIC VIOLENCE UNDER THE FAIR HOUSING ACT AND THE VIOLENCE AGAINST WOMEN ACT (2011). The guidance notes that an estimated 1.3 million women are the victims of assault by an intimate partner each year and that about one in four women will experience intimate partner violence in her lifetime, and that 85 percent of victims of domestic violence are women. Because "statistics show that discrimination against victims of domestic violence is almost always discrimination against women," the HUD Memo stated that a disparate impact analysis is appropriate when a facially neutral housing policy disproportionately affects victims.

Other laws do not provide comprehensive protection against housing discrimination. The federal Violence Against Women Act ("VAWA"), which contains targeted housing protections for victims of domestic violence, sexual assault, dating violence, and stalking, applies only to specific federally-funded housing programs and does not provide victims with an explicit administrative or judicial remedy. Disparate impact analysis is therefore a crucial tool for preserving the housing and enhancing the safety of survivors of domestic and sexual violence that would otherwise be jeopardized by facially neutral policies that discriminate against victims. The eradication of that legal remedy would escalate both the risk of homelessness for victims and their children and the likelihood that they are forced to remain in dangerous living situations.

Question 2: Disabled Veterans and People with Disabilities

The disparate impact standard requires that landlords cannot require that tenants have a job. All income must be considered. This allows disabled vets who receive veterans' benefits to be able to find apartments.

- If the disparate impact standard was eliminated, could an apartment complex only allow people with full-time jobs to reside in the development?

- What would the impact of eliminating the disabled impact standard on disabled veterans who cannot work – even if they CAN afford the rent?

Reply: Elimination of the disparate impact would make it considerably more difficult to bring federal cases challenging policies which imposed arbitrary policies unrelated to any legitimate interest. Although some states and municipalities have laws forbidding discrimination based upon source of income, those protections are far from being universal. As a result, groups who rely on sources of income other than full time employment, which could include disabled veterans, single mothers receiving child support or public assistance, people with disabilities on Social Security, or any other persons who is fully able to meet financial obligations relating to housing could be unfairly excluded from housing opportunities.

Most jurisdictions allow landlords great leeway, so renting only to people with full-time jobs would not be illegal. However, the policy would discriminate against people who are unable to hold full-time jobs, such as disabled veterans and other people with disabilities. Without a disparate impact standard, it is unlikely that people with disabilities – a protected class – would have any recourse to enforce their rights.

Question 3: Families with Children

Families with children already struggle to find and afford safe and appropriate housing. I am concerned that if the disparate impact standard was weakened, condominiums could implement random policies that discriminate against families with children.

- For example, if a couple residing in a one-bedroom unit in a building with a two-person per bedroom limit had their first child, would it be fair to fine or evict them?

Reply: Although HUD has not followed a policy of prosecuting cases involving the use of a two-person per bedroom standard, such policies would necessarily have the impact of substantially limiting the availability of housing to families with children without requiring a showing that the limitation is justified by any legitimate concerns such as safety or health. Moreover, these policies have the potential of violating the Fair Housing Act because of the fact that families of color tend to be larger than white families and would therefore be disproportionately excluded from available housing (the average Hispanic household size is 3.54 people, the average Asian household size is 2.95 people as compared to the average white household size of only 2.56. Family Status and Household Relationship of People 15 Years and Over, by Marital Status, Age, and Sex: 2010, America's Families and Living Arrangements: 2010, U.S. CENSUS BUREAU, http://www.census.gov/population/www/socdemo/hhfam/cps2010.html). Eliminating the disparate impact standard would complicate efforts to challenge occupancy restrictions which serve no legitimate function but which deprive families with children and larger families of color housing opportunities.

Question 4: Credit Reports and Credit Scores

I am especially concerned about the disparities that exist in credit scores. It is well documented that credit scores do not always accurately reflect someone's ability and willingness to repay. In order to have a credit score, a person needs at least three lines of credit. That generally means someone needs a relationship with a bank (a checking or savings account are normally pre-requisites for any type of loan), and at least two credit cards. Those who lack a credit card, a mortgage, car payment or other credit history are Credit Invisible. We know that at least 54 million people are Credit Invisible.

I have heard from prospective tenants that they cannot rent apartments because they lack a credit score or a credit report. I have heard the same concerns from potential job applicants. According to a Federal Reserve report, from August 2007, the average credit score for an African-American consumer is less than half the average score of a white consumer. These disparities are not wholly due to differences in credit usage but the prevalence of thin/no file in minority communities.

- Do you think there is a "substantial, legitimate, non-discriminatory justification for using credit reports for housing rental or employment?

- Bank of America and Kaplan, the educational services company, were sued in part because of their use of credit scores in employment screening. What empirical research exists that links credit reports to employee quality?

- Last year, 35 bills in 17 states and DC were introduced to restrict the use of credit information in employment decisions. Do you think we need to restrict the use of credit information in employment decisions at the national level?

- Do you think we should work to make the credit reporting system more inclusive and accurate?

Reply: We are unaware of any research that shows any statistical correlation between what is in somebody's credit report and their job performance or their likelihood to commit fraud in employment. In their Report, "Discredited: How Employment Credit Checks Keep Qualified Workers Out of a Job: DEMOS concluded that credit history illegitimately obstructs access to employment because the lower credit ratings which individuals of color result at least in part from discrimination and the absence of equal opportunity. http://www.demos.org/discredited-how-employment-credit-checks-keep-qualified-workers-out-job. Given that fact, to the extent that credit history may also not reflect the ability of people seeking housing to pay housing costs, policies which require high credit scores may disproportionately exclude persons of color for no legitimate purpose. Eliminating the disparate impact standard would make it difficult to challenge a practice which eliminated opportunities for classes protected by the Fair Housing Act even those practices may have no legitimate justification.

Creating a more inclusive and accurate credit reporting system would necessarily reduce the number of qualified people unfairly excluded from available housing. There is no acceptable reason for permitting the continuation of practices which unfairly exclude qualified people from employment or housing.

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