No. 10-1032

In The Supreme Court of the United States

STEVEN MAGNER, et al.,

Petitioners,

v.

THOMAS J. GALLAGHER, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR THE *AMICUS CURIAE* TOWNSHIP OF MOUNT HOLLY, NEW JERSEY, IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*

Amicus Curiae, Township of Mount Holly ("Township"), has an interest in this matter because the outcome of this case will have a direct impact on litigation which is currently pending on a Petition for Rehearing before the Third Circuit Court of Appeals. *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375 (3d Cir. 2011). In that case, residents of a residential neighborhood known as the Gardens challenged the Township's adoption of a redevelopment plan which was intended to address blight conditions within the Gardens, claiming that it violated the Fair Housing Act, 42 U.S.C. §3604(a). *Id*. at 377 and 381. The Third Circuit overturned the District Court's grant of summary judgment and remanded the case back to the District Court, finding that the plaintiffs' claims could proceed based solely on disparate impact. *Id*. at 382 and 387. On September 27, 2011, the Township filed a Motion for Rehearing and Rehearing *En Banc*, which is still pending before the Third Circuit.

SUMMARY OF ARGUMENT

Disparate impact alone should not be a cognizable claim under the FHA. Absent segregative effect, or some other discriminatory indicia, disparate impact alone renders facially neutral policies violative of the FHA for reasons other than race. In the St. Paul context of housing code enforcement, or in Mt. Holly,

New Jersey's efforts to redevelop blighted areas, disparate impact alone can find FHA violations for impacts caused by uncontrolled housing patterns or preferences, blighted housing conditions, or economic conditions.

The disparate impact analysis creates results that conflict with the FHA's goal of promoting racial integration by prohibiting governmental action where there are a disproportionate number of minorities present. This analysis will require governmental entities to consider and address race as a factor in housing code enforcement or redevelopment actions. This contravenes the purpose of the FHA.

Finally, if disparate impact claims are to be allowed, clear standards under a rational burden-shifting test need to be set to permit governments to act to promote public health and safety without running afoul of the FHA.

LEGAL ARGUMENT

I. Disparate Impact Claims Without Segregative Effect Should not be Cognizable Under the FHA.

To date, the Supreme Court has not decided whether disparate impact claims are cognizable under the Fair Housing Act, 42 U.S.C. §§3601 et seq. ("FHA"). In the only case in which this Court has decided a disparate impact claim, the parties conceded the applicability of disparate impact claims.

Town of Huntington, N.Y. v. Huntington Branch, NAACP, 488 U.S. 15, 18 (1988). Since this question is now to be decided in this appeal, this Court should find that given the express language and purpose of the FHA and Congress's failure to amend the FHA as part of the 1991 amendments to Title VII, no disparate impact claims are cognizable under the FHA except where there is proof of segregative effect.

A. The Plain Language of the FHA Indicates the FHA did not Include Disparate Impact Claims.

Unlike Title VII, the Age Discrimination in Employment Act of 1967 ("ADEA"), and the Americans with Disabilities Act of 1990 ("ADA"), the FHA's statutory language does not address discriminatory effect. Thus, the plain language of the FHA does not permit a disparate impact claim.

When undertaking statutory interpretation, the Supreme Court must "begin, as in any case of statutory interpretation, with the language of the statute." *CSX Transp., Inc. v. Alabama Dept. of Revenue*, 131 S. Ct. 1101, 1107 (2011). This is because "the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. *Exxon Mobil Corp. v. Allapattah Services, Inc*., 545 U.S. 546, 568 (2005). Use of extrinsic materials is only appropriate where the terms of the statute are ambiguous. *Id*. Therefore, "'when the statute's language is plain, the sole function of the courts – at least where the

disposition required by the text is not absurd – is to enforce it according to its terms.'" *Lamie v. U.S. Tr.*, 540 U.S. 526 (2004).

The ADA, ADEA, and Title VII by their express language each discuss the "effect" of certain actions by using the term "otherwise adversely affect" when describing unlawful actions under these statutes. 42 U.S.C. §2000e-2(a)(2) (emphasis added) (unlawful to "otherwise adversely ***affect*** his status"); 42 U.S.C. §12112(b)(1) (emphasis added) (unlawful to take action "that adversely ***affects*** the opportunities or status of such applicant or employee"); and 29 U.S.C. §623(a)(1) (emphasis added) (unlawful to "otherwise adversely ***affect*** his status as an employee").

By contrast, the FHA does not contain comparable language regarding "effect" or the "affect" of certain actions. "Discriminatory housing practice" is defined in the FHA to mean "an act that is unlawful under section 3604, 3605, 3606, or 3617 of this title." 42 U.S.C. §3602(f). None of those sections include language addressing discriminatory effect. Sections 3604(a) and (b), which are the particular sections at issue here, do not use the word "effect" or "affect" at all.

> . . . it shall be 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 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.

42 U.S.C. §3604.

This Court has said, "'we ordinarily resist reading words or elements into a statute that do not appear on its face.'" *Dean v. United States*, 556 U.S. 568, 129 S. Ct. 1849, 1853 (2009). Moreover, "considerations of policy divorced from the statute's text and purpose could not override its meaning." *United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723 (2011). Since the FHA on its face does not include any discussion of discriminatory effect, it would be inappropriate for the Court to find that disparate impact claims are cognizable under the FHA.

B. Congress did not Amend the FHA When it Amended Title VII to Include Disparate Impact Claims.

It is appropriate to limit disparate impact claims under the FHA to those involving segregative effect because the Civil Rights Act of 1991 did not amend the FHA. If Congress had intended the FHA to apply to disparate impact claims beyond those having a segregative effect, it would have amended the FHA to specifically include claims for discriminatory effect, as it had done to Title VII.

This Court has said that it is inappropriate to "ignore Congress' decision to amend" Title VII where it did not make similar changes to similar laws because "[w]hen Congress amends one statutory provision but not another, it is presumed to have acted intentionally." *Gross v. FBL Fin. Services, Inc*., 557 U.S. 167, 129 S. Ct. 2343 (2009). This was also one of the reasons why this Court chose to limit the scope of disparate impact claims under the ADEA. *Smith v. City of Jackson, Miss*., 544 U.S. 228, 240 (2005). So too must the scope of any disparate impact claims under the FHA be likewise limited.

Thus, disparate impact claims under the FHA should be limited to those cases where a segregative effect can be shown.

C. Disparate Impact Claims are Unnecessary to Further the Purposes of the FHA.

1. Perpetuation of Segregation is the "Effect" the FHA was Designed to Ameliorate.

The purposes of the FHA can be furthered by limiting claims thereunder to those of intentional discrimination, disparate treatment, and where actions create, perpetuate or increase segregation. In finding that Title VII and the ADEA included disparate impact claims, this Court noted that such a finding was appropriate because "Congress had 'directed the thrust of the Act to the consequences of employment

practices, not simply the motivation.'" *Smith v. City of Jackson, Miss*., 544 U.S. 228, 234 (2005).

As explained in *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430 (1971), Title VII's purpose was "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees" because certain practices, policies and procedures "operate to 'freeze' the status quo of prior discriminatory employment practices." See also *Int'l Broth. of Teamsters v. United States*, 431 U.S. 324, 348-349 (1977) (stating "[t]he primary purpose of Title VII was 'to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.'" Discriminatory impact claims were permitted because certain practices operate as the functional equivalent of intentional discrimination in light of the understanding that certain "facially neutral job requirements necessarily operated to perpetuate the effects of intentional discrimination that occurred before Title VII was enacted." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988).

By contrast, this Court has recognized that one of the main purposes of the FHA is to "replace the ghettos 'by truly integrated and balanced living patterns.'" *Trafficante v. Metro. Life Ins. Co*., 409 U.S. 205, 211 (1972), declined to follow on other grounds by *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 869 (2011). The Department of Housing and Urban

Development ("HUD") has also recognized this as the FHA's purpose. 76 Fed. Reg. 70922. HUD also noted that, in addition to intentional discrimination, the FHA was designed to address the "consequences of housing practices," namely the creation, perpetuation or the increasing of segregation." *Id*.

Since the main goal of the FHA is to end discrimination as evidenced by segregation, and to replace segregated housing patterns with truly integrated housing patterns, the evil to be corrected by the FHA can be addressed by limiting disparate impact claims to those situations where there is evidence of segregative effect. This can be shown, for example, where a housing policy has the effect of keeping minorities out of a predominately white neighborhood, or where a housing policy has the effect of keeping minorities in a predominately minority neighborhood.

Although the FHA contains a catch-all phrase, this phrase was not meant to address all circumstances where housing is made unavailable. Rather, by its exact terms, the FHA limits actions where housing is "otherwise . . . unavailable" "because of race." 42 U.S.C. §§3604(a) and (b). Therefore, the focus is not on whether the housing is unavailable, but whether the housing is unavailable on impermissible grounds.

This Court has recently recognized that "[t]he words 'because of' mean 'by reason of: on account of.'" *Gross v. FBL Fin. Services, Inc*., 557 U.S. 167, 129 S. Ct. 2343, 2350 (2009). This language requires that

the impermissible consideration, whether age or race, must have "*had a determinative influence on the outcome*" of the policy or action taken. *Id*. (emphasis added). While it is appropriate to create a presumption that race had a determinative influence on an action or policy having a segregative effect, the same cannot be said for neutral actions or policies that do not have a segregative effect.

Unless segregative effect can be shown, a disparate impact theory is over-inclusive in terms of liability, especially as to governmental entities, because the disparate impacts in housing are often caused by a myriad of innocent causes unrelated to the actual housing policy being challenged. This could lead to liability to a defendant for disparate impacts over which the defendant has no control. It is unfair and beyond the goals of the FHA to hold a defendant liable for disparate impacts that are not "because of race." 42 U.S.C. §3604.

a. Over-Inclusiveness Due to Housing Patterns/Preferences.

One example of over-inclusiveness due to factors outside the control of the policy-maker is where a racial or ethnic imbalance, i.e. a disparate impact, purportedly attributable to a housing policy, is actually caused by residential housing patterns. Sometimes minorities voluntarily choose to live in neighborhoods with other minorities, as opposed to white neighborhoods. When this happens, an area might be

overrepresented by minorities. In such a case, ***any*** policy that applies to such a neighborhood would have a disparate impact.

However, as the Supreme Court has recognized in the school segregation context, when housing discrimination is attributable to residential patterns, a governmental actor cannot be held liable for the effect because it has no control over residential patterns. *Austin Indep. Sch. Dist. v. United States*, 429 U.S. 990, 994 (1976). Rather, "[e]conomic pressures and voluntary preferences are the primary determinants of residential patterns." *Id*. Thus, disparate impact claims can be over-inclusive in this regard.

b. Over-Inclusive Where Housing is Blighted, Unsanitary or Unsafe.

Similarly, disparate impact claims can be over-inclusive where the housing is unavailable because it is blighted, unsafe or unsanitary. Governmental entities, as an exercise of their police powers, must make determinations regarding whether housing is fit for occupancy. This is often done through building/construction regulations or enforcement of such regulations. Occasionally, it is done through condemnation of unsafe buildings or through redevelopment of blighted areas.

In making these determinations, a house occasionally must be acquired and demolished because it is blighted, unsafe or unsanitary. When this happens, the housing is being made unavailable because of the

condition of the building or neighborhood, not because of the race of the occupant or owner of the house. Occasionally, where blight affects a neighborhood, there can be a disparate impact on minorities simply because the blighted neighborhood is predominantly occupied by minorities. However, this does not change the fact that the housing is unavailable due to the blighted condition of the house or the neighborhood, rather than being unavailable because of race.

Disparate impact claims are therefore over-inclusive because a plaintiff will always be able to establish a prima facie case where redevelopment and demolition activities occur within areas or buildings overrepresented by minorities. This is because ***any*** housing policy or action with regard to that neighborhood or building have a disparate impact simply because there are more minorities than non-minorities.

In fact, this is exactly the case in Mount Holly, New Jersey. The Township is undertaking redevelopment of a residential neighborhood that is blighted. *Mt. Holly Gardens*, *supra*, 658 F.3d at 378-379. The blight designation was upheld by all levels of the New Jersey State Courts. *Id*. at 380.

However, minorities happen to be overrepresented in the blighted area (80% minorities vs. 20% non-minorities). *Id*. at 378. The area also happened to be the largest concentration of minorities in Mount Holly. *Id*. at 377-378. As a result, the plaintiffs in that case were able to secure an expert who could opine that the redevelopment of the blighted area was

having a disproportionate effect because the redevelopment affected more minority residents of the Township than non-minorities within the Township. *Id*. at 382. However, the disparate impact was due to the fact that there was an overrepresentation of minorities living in a blighted area, as opposed to the rest of the Township which was not blighted.

There was no segregative effect as a result of the Township's redevelopment efforts even though only 70 of the 329 homes remain occupied. *Id*. at 378 and 380. Instead, the minority population in Mount Holly has increased since 2000. Compare http://factfinder.census.gov/servlet/QTTable?_bm=y&-geo_id=06000US3400548900&-qr_name=DEC_2000_SF1_U_QTP6&-ds_name=D&-_lang=en&-redoLog=false (showing a White (alone) population of 68.7% in 2000) with http://factfinder.census.gov/servlet/ADPTable?_bm=y&-geo_id=06000US3400548900&-qr_name=ACS_2009_5YR_G00_DP5YR5&-ds_name=D&-_lang=en (showing a 63.3% White population according to ACS Demographic and Housing Estimates: 2005-2009). Moreover, both the State courts and the Third Circuit found no evidence of discriminatory intent. *Mt. Holly Gardens*, 658 F.3d at 387.

Despite lack of discriminatory intent and an absence of segregative effect, the Third Circuit found a prima facie case under the FHA due to disparate impact. *Id*. at 383-384. As a result, the Township is forced to litigate an FHA claim due to the unavoidable consequences of taking action with respect to a segregated, predominately minority occupied blighted

area. Housing was not made unavailable to the Gardens residents because of race. Rather, housing is being made unavailable because the Gardens residents lived in a blighted area and redevelopment was necessary in order to correct the blight conditions.

Even though the Third Circuit recognized that allowing disparate impact cases might have an over-inclusive effect. It noted that such an outcome was acceptable because establishment of a prima facie case did not necessarily equate to liability under the FHA. *Id*. at 384-385. However, even if a violation of the FHA is ultimately not found, a defendant should not be forced to undergo the expense and time associated with a lawsuit for disparate impacts beyond its control. Such a result is inequitable to defendants and serves only to encourage potential defendants to consider race when making housing policy decisions for fear of having to litigate FHA claims. Such a result is also contrary to both the purposes of the FHA and the Equal Protection Clause of the United States Constitution.

c. Over-Inclusiveness due to Economic Conditions.

Similarly, another example of over-inclusiveness due to factors outside the control of the policy-maker is where a racial or ethnic imbalance, i.e. a disparate impact, purportedly attributable to a housing policy is actually caused by the economic status of the household. Simply because minorities might be

overrepresented among low-income households does not mean that a policy affecting low-income households is an action taken "because of race." Rather, the effect could be caused simply by the fact that the household is poor. Unless the policy affecting low-income households has a segregative effect, such a policy does not make housing unavailable because of race. It makes housing unavailable because of income.

One example of this is in the instant case. Respondents challenge the housing code policy as having a disparate impact because it increases housing costs. If housing costs are increased and the housing is no longer affordable to a household, it is not unavailable "because of race." Rather, it is unavailable because the household is poor and cannot afford the new cost of housing. There is no evidence that more affluent minorities could not or would not occupy the same housing. If they can, the housing is not unavailable "because of race." So long as there is no segregative effect, a housing policy affecting the poor does not make housing unavailable "because of race."

Even the drafters of the FHA recognized that the law of economics impacts the availability of housing. See 114 Cong. Rec. 2279 ("Fair housing does not promise to end the ghetto . . . but it will make it possible for those who have the resources to escape. . . ."); and 114 Cong. Rec. 3422 (statement of Sen. Mondale) ("[F]air housing by itself will not move a single Negro into the suburbs – the laws of economics will

determine that."). Households of all races are forced to make decisions regarding what homes they can and cannot afford. Not everyone can afford to live in the specific home or neighborhood they want to live. Therefore, unless decisions regarding low-income housing is having a segregative effect by driving minorities out of the municipality or preventing minorities from moving in, the housing is not being made unavailable due to race.

D. Disparate Impact Claims Without Segregative Effect Create a Conflict Between the FHA's Dual Goals.

Allowing disparate impact claims against governmental entities based on general land use, redevelopment or housing code policies is inappropriate because it often results in a conflict between the dual goals of the FHA. There are two concurrent goals of the FHA. The first goal is "that government protect the freedom of individuals to choose where they want to live." 114 Cong. Rec. 2525 (statement of Sen. Brooke). The second goal is the replacement of minority predominated ghettos with "truly integrated and balanced living patterns." See 114 Cong. Rec. 3422 (statement of Sen. Mondale).

Several Circuits have recognized these dual goals of the FHA: "the Act was intended to promote 'open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to

combat.'" *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1289 (7th Cir. 1977).

The Fifth Circuit has stated, "[t]he provisions of 42 U.S.C. §3604 are to be given broad and liberal construction, in keeping with Congress' intent in passing the Fair Housing Act of replacing racially segregated housing with 'truly integrated and balanced living patterns.'" *Woods-Drake v. Lundy*, 667 F.2d 1198, 1201 (5th Cir. 1982). In fact, the Second Circuit has gone so far as to say that the purpose of promoting integration is even more important than the policy of protecting a person's choice of where to live. As explained by the Second Circuit,

> Congress' desire in providing fair housing throughout the United States was to stem the spread of urban ghettos and to promote open, integrated housing, even though the effect in some instances might be to prevent some members of a racial minority from residing in publicly assisted housing in a particular location. The affirmative duty to consider the impact of publicly assisted housing programs on racial concentration and to act affirmatively to promote the policy of fair, integrated housing is not to be put aside whenever racial minorities are willing to accept segregated housing. The purpose of racial integration is to benefit the community as a whole, not just certain of its members.

Otero v. New York City Hous. Auth., 484 F.2d 1122, 1134 (2d Cir. 1973). This is probably why several

Circuit courts have recognized that not "every action which produced discriminatory effects is illegal." *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977). See also *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 192 (4th Cir. 1999).

Depending on the circumstance, disparate impact cases can create a conflict between the dual goals of the FHA. The most prominent example is when housing must be condemned, demolished and/or redeveloped. For example, in the Mount Holly litigation the plaintiffs' FHA claim is causing a conflict between the dual goals of the FHA. The Township is seeking to redevelop a blighted residential area which is predominately occupied by low and moderate income minority households and redevelop it into a mixed income, more integrated residential neighborhood. The area is unquestionably blighted and 80% of the area's occupants are poor minorities. *Mt. Holly Gardens*, *supra*, 658 F.3d at 377-380. In its place, the Township's plan seeks to construct up to 464 market rate houses (in the form of townhouses and apartment), and 56 deed restricted affordable housing units. *Id*. at 379. In short, the Township's plan would replace this segregated urban ghetto with a truly integrated housing pattern.

The plaintiffs in that case are essentially demanding that the area be redeveloped through rehabilitation only, and be undertaken in stages so that all of the existing residents who have successfully been relocated would move back to the neighborhood.

Id. at 386. In short, they are seeking to force the Township to perpetuate the segregated living conditions in the Gardens.

This Court has recognized that "Congress has made a strong national commitment to promote integrated housing." *Linmark Associates, Inc. v. Willingboro Twp*., 431 U.S. 85, 95 (1977). As a result, it is inconceivable that the drafters of the FHA would have intended that the FHA could be used to force governmental entities to continue or perpetuate segregation. Yet, the Third Circuit's decision allows just that. Allowing such claims could be the end of redevelopment of minority predominated slums because a governmental entity may not have the funds or the wherewithal to litigate an FHA claim should the resident disagree with the proposed plan for redevelopment. Allowing a disparate impact claim under the FHA to be used to perpetuate segregation directly contradicts the intent and purpose of the FHA to further integration. Thus, disparate impact claims other than claims involving segregative effect should not be allowed.

II. If Disparate Impact Claims are Permitted, This Court Should Adopt Standards Similar to Those Used in Title VII Cases.

Although disparate impact claims absent evidence of segregative effect are inappropriate, if this Court were to permit such claims, then it is appropriate to

adopt standards equivalent to those used in Title VII cases.[1]

Almost all of the Circuits have concluded, at one time or another, that Title VII cases are analogous to Title VIII cases and/or that it is appropriate to give those two statutes like construction. *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 50 (1st Cir. 2000); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 935 (2d Cir. 1988) *aff'd in part sub nom., Town of Huntington, N.Y. v. Huntington Branch, NAACP*, 488 U.S. 15 (1988); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 146 (3d Cir. 1977); *Betsey v. Turtle Creek Associates*, 736 F.2d 983, 987 (4th Cir. 1984); *Graoch Associates # 33, L.P. v. Louisville/Jefferson County Metro Human Relations Comm'n*, 508 F.3d 366, 371-372 (6th Cir. 2007); *Kyles v. J.K. Guardian Sec. Services, Inc.*, 222 F.3d 289, 295 (7th Cir. 2000); *United States v. Badgett*, 976 F.2d 1176, 1178 (8th Cir. 1992); *Gamble v. City of Escondido*, 104 F.3d 300, 304 (9th Cir. 1997); *Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev.*, 56 F.3d 1243, 1251, n.7 (10th Cir. 1995).

Therefore, there is a common recognition among the Circuits that consideration of Title VII precedent is highly relevant to determining the appropriate

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[1] The proposed standards set forth herein are suggested only for application in disparate impact claims. The standards otherwise applicable to intentional discrimination claims, disparate treatment claims would still apply.

prima facie case standard to apply to FHA cases. This is because "[t]he two statutes are part of a coordinated scheme of federal civil rights laws enacted to end discrimination . . . " *Huntington Branch*, *supra*, 844 F.2d at 935. Thus, if this Court allows disparate impact claims of similar scope as that of Title VII, its evaluation of disparate impact claims under the FHA should be equivalent.

In formulating the exact standard to be applied, caution must be taken to avoid creating a potential for a plaintiff to unnecessarily burden a defendant or to increase the likelihood of imposing liability on an undeserving defendant. In this regard, this Court must avoid adopting a test that fails to appropriately consider a defendant's legitimate, non-discriminatory interest. A defendant must be given an opportunity to defend its actions without having to undergo the expense and time of a full trial where such actions were truly non-discriminatory. Sometimes legitimate governmental action has a disparate impact, but not a discriminatory impact. The Court must be careful not to throw the baby out with the bathwater or hinder governmental entities' ability to exercise their unique regulatory role in the housing context.

A. A Burden Shifting Test is Appropriate.

Causes of action under a Title VII disparate impact claim follows a burden-shifting test similar to that utilized by the Eighth Circuit in FHA cases.

In the Title VII context, the Supreme Court has carefully set forth the required analysis.

> To establish a prima facie case of discrimination, a plaintiff must show that the facially neutral employment practice had a significantly discriminatory impact. If that showing is made, the employer must then demonstrate that "any given requirement [has] a manifest relationship to the employment in question," in order to avoid a finding of discrimination. Even in such a case, however, the plaintiff may prevail, if he shows that the employer was using the practice as a mere pretext for discrimination.

Connecticut v. Teal, 457 U.S. 440, 446-447 (1982) (internal citations omitted). Accord, *Ricci v. DeStefano*, 129 S. Ct. 2658, 2673 (2009).

In other words, the burden shifting test first requires a plaintiff to prove disparate impact, then the burden shifts to a defendant to identify a legitimate business necessity, then the burden shifts back to a plaintiff. Ultimately, the burden remains on the plaintiff to prove the action taken is "because of race." See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 523-524 (1993) (stating "Title VII does not award damages against employers who cannot prove a nondiscriminatory reason for adverse employment action . . . That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of race is correct").

The burden-shifting test used in Title VII cases is appropriate in all disparate impact cases because it accomplishes two goals. First, it protects the plaintiff by giving the plaintiff a "rebuttable 'presumption'" that he or she has been discriminated against, lessening the burden of showing discrimination. See *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714-715 (1983) (stating "[b]y establishing a *prima facie* case, the plaintiff in a Title VII action creates a rebuttable 'presumption that the employer unlawfully discriminated against' him"). Second, it protects the defendant by ensuring the burden of persuasion appropriately remains with the plaintiff. See *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000) (stating "[a]lthough intermediate evidentiary burdens shift back and forth under this framework, '[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff'").

Even HUD has determined that this burden-shifting test is appropriate for evaluating disparate impact claims. In their recently proposed rules,[2] HUD proposed that disparate impact claims be governed by

[2] About a week after this Court accepted certiorari in this Case, HUD published a proposed set of rules for the purpose of "establish[ing] a uniform standard of liability for facially neutral housing practices that have a discriminatory effect." 76 Fed. Reg. 70923. Prior hereto, HUD has had no rules governing disparate impact claims, despite the authority to make rules implementing the FHA. 76 Fed. Reg. 70921.

a similar burden-shifting standard as proposed herein. 76 Fed. Reg. 70923-70924. HUD felt it was important to place the initial burden of a prima facie case on the plaintiff, then shifts it to the defendant to provide a nondiscriminatory interest and then shifts it back to the plaintiff to establish a less discriminatory alternative. *Id*. This burden-shifting standard was appropriate, HUD said, because "'neither party is saddled with having to prove a negative.'" *Id*. at 70924.

Given the similarities between Title VII and Title VIII, and HUD's endorsement of a similar test, it is appropriate to utilize this burden-shifting test for disparate impact claims that are allowed under the FHA.

B. Requirements for Establishing a Prima Facie Case Under the FHA Should be Similar to that Under Title VII.

It is important for this Court to establish what is required in order for a plaintiff to establish a prima facie case in order for innocent defendants to avoid unnecessary cost and time litigating FHA claims. If the standard for establishing a prima facie case is too easy to meet, a plaintiff will be able to use the FHA to delay or increase the cost of implementing legitimate housing policies that do not violate the FHA.[3]

[3] By way of example, the Township of Mount Holly has been litigating plaintiffs' FHA claims since 2003 and has incurred hundreds of thousands of dollars in attorneys' fees as a result thereof and the project has suffered economically because of the delay and stay of Township activities.

It would be inequitable and unjust to force a blameless defendant to undergo the time and expense of litigation for an action which would not violate the FHA. It would also encourage defendants to make race-based housing policy decisions in order to avoid getting sued.

1. A Plaintiff's Prima Facie Case Must Set forth More than Just a Statistical Disparity.

This Court has established guidelines for evaluating prima facie cases in Title VII disparate impact cases. While a prima facie case of disparate impact can be shown by statistical disparities, a plaintiff's burden under Title VII goes beyond a mere showing of statistical disparity. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-995 (1988). See also *Ricci v. DeStefano*, 129 S. Ct. 2658, 2692 (2009) (recognizing that "statistical imbalances alone . . . do not give rise to liability"). "As the very name 'prima facie case' suggests, there must be at least a logical connection between each element of the prima facie case and the illegal discrimination for which it establishes a 'legally mandatory, rebuttable presumption.'" *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 311-312 (1996).

To establish a prima facie case under Title VII, a plaintiff must "begin by identifying the specific employment practice that is challenged." *Watson*, 487 U.S. at 994-995. Accord *Meacham v. Knolls Atomic Power Laboratory*, 554 U.S. 84, 100-101 (2008). In addition,

a plaintiff must establish causation, "that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has ***caused*** the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Id*. (emphasis added). See also *Smith v. City of Jackson, Miss*., 544 U.S. 228, 241 (2005) (emphasis original) (stating "the employee is 'responsible for isolating and identifying the *specific* employment practices that are allegedly responsible for any observed statistical disparities'").

The reason these requirements are imposed on a plaintiff is "to avoid the 'result [of] employers being potentially liable for "the myriad of innocent causes that may lead to statistical imbalances."'" *Meacham v. Knolls Atomic Power Lab*., 554 U.S. 84, 100 (2008). As a result, "evidence in these 'disparate impact' cases usually focuses on statistical disparities, rather than specific incidents, and on competing explanations for those disparities." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988).

So too in a housing discrimination case, care should be taken to avoid holding governmental entities liable for a "'myriad of innocent causes that may lead to statistical imbalances.'" As discussed in Section I.C.1.a., b. and c. above, a racial or ethnic imbalance that is purportedly attributable to a housing policy could actually be caused by residential housing patterns. Similarly, disparate impact in an FHA case could be caused simply by the fact that minorities are overrepresented in a group to which a

policy applies, as in the redevelopment context. As a result, a plaintiff alleging disparate impact should be required to identify a particular housing practice/policy at issue and present some evidence showing that the challenged housing practice/policy caused the statistical imbalance.

For prima facie cases based solely on statistical imbalances caused by a mere correlation between race and poverty, care must be taken to establish that an FHA violation is based on racial considerations and not on poverty. As the Ninth Circuit has said, merely because a statistical correlation exists between poverty and a particular race or ethnicity, it does not transform discrimination against poor people into racial discrimination. *Ybarra v. Town of Los Altos Hills*, 503 F.2d 250, 253 (9th Cir. 1974). Poverty is not a suspect classification. *Harris v. McRae,* 448 U.S. 297, 323 (1980). The FHA does not forbid housing policies that make housing unavailable because of poverty. 42 U.S.C. §3604.

To establish that a housing policy affecting low-income households has a discriminatory impact because of race, a plaintiff should be required to show more than merely the fact that minorities are over-represented among the poor. The appropriate standard was set forth in *Reinhart v. Lincoln County*, 482 F.3d 1225 (10th Cir. 2007):

> It is not enough for the [Plaintiffs] to show that (1) a regulation would increase housing costs and (2) members of a protected group

> tend to be less wealthy than others. It is essential to be able to compare who could afford the housing before the new regulations with who could afford it afterwards. For example, it may be that no members of protected groups could afford homes in the [Plaintiffs] development even if the former development regulations stayed in place. Or it may be that anyone who could afford a home built under the former regulations could still afford a home built under the new ones. In either of these situations there is no disparate impact on a protected group.

In other words, where segregative effect is absent, a prima facie case under the FHA should not be established based solely on statistics showing that minorities are overrepresented among the poor.

This Court has recognized that the usefulness of statistics in proving disparate impact "depends on all of the surrounding facts and circumstances." *Intern. Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 340 (1977). Statistics are generally considered useful in discrimination cases when the statistical imbalance is a telltale sign of purposeful discrimination. *Id*. at 324, n.20. Therefore, to ensure that a housing policy is truly made "because of race," statistics in an FHA disparate impact case should exclude all non-racial variables before it can be presumed that the statistical evidence shows disparate impact based on race. This is why causation should be a critical component of any prima facie case for disparate impact.

2. Challenges Should be Allowed to a Plaintiff's Prima Facie Case.

In addition to rebutting a plaintiff's prima facie case through presentation of a legitimate business reason for its actions, a defendant in a Title VII case is also able to challenge a plaintiff's statistical proofs. Neither courts nor defendants are "obliged to assume that plaintiffs' statistical evidence is reliable. 'If the employer discerns fallacies or deficiencies in the data offered by the plaintiff, he is free to adduce countervailing evidence of his own.'" *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 996 (1988). A defendant may "'impeach the reliability of the statistical evidence, they may offer rebutting evidence, or they may disparage in arguments or in briefs the probative weight which the plaintiffs' evidence should be accorded.'" *Id*.

While "'(s)tatistical analyses have served and will continue to serve an important role" in cases in which the existence of discrimination is a disputed issue,'" their usefulness is limited. *Int'l Broth. of Teamsters v. United States*, 431 U.S. 324, 339-340 (1977). This is why the Supreme Court has cautioned, "statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances." *Id*.

The usefulness of statistical data in an FHA case should likewise be limited as statistics in a housing discrimination case are no more infallible

than statistics in an employment discrimination case. Thus, appropriate guidelines should be developed for evaluating the usefulness of statistics in an FHA case.

a. Challenges Regarding the Use of Appropriate Comparables.

In the Title VII context, the usefulness of statistics depends on whether the statistics compare appropriate groups. For example, in *Hazelwood*, the Supreme Court stated, "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 309 (1977). Accord, *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 997 (1988).

Likewise, in a housing discrimination case, a housing policy might be limited in applicability due to special circumstances. For example, in a redevelopment context, when a New Jersey municipality seeks to undertake redevelopment, its actions are limited by statutory requirements, necessitating the presence of certain blighting conditions. See *N.J.S.A*. 40A:12A-5 to 40:12A-7 and *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447, 462 and 465 (N.J. Sup. Ct. 2007). Therefore, residents who are within a designated redevelopment area are unique.

In a sense, a redevelopment designation is analogous to special qualifications in an employment context. As a result, when an area has been validly designated as a redevelopment area, comparisons to the general population, rather than the smaller group who live in the blighted area, have little probative value. In such a situation, the action taken with respect to those residents is because they live in a blighted area, not because of race. It may happen that those living in the blighted area are mostly minority. However, this is a factor over which the municipality has no control.

Several Circuit Courts have also held that when evaluating statistical disparities in FHA cases, statistical disparities should be evaluated considering the impact on the total group to which the policy applied. See *Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dept. of Hous. & Urban Dev.*, 639 F.3d 1078, 1086 (D.C. Cir. 2011); *Graoch Assoc. # 33, L.P. v. Louisville/Jefferson Cnty. Metro Human Relations Comm'n*, 508 F.3d 366, 378 (6th Cir. 2007); *Betsey v. Turtle Creek Assoc.*, 736 F.2d 983, 987 (4th Cir. 1984). Limiting the evaluation of the disparate impact of a policy to a comparison of the minorities verses non-minorities within the group to which the policy applied is important because it helps prevent disparate impact claims based on unavoidable consequences.

For example, in *Edwards v. Johnston Cnty. Health Dept.*, the Fourth Circuit held that the plaintiffs who challenged the issuance of housing permits for immigrant workers failed to establish a prima

facie case under the FHA. 885 F.2d 1215, 1223 (4th Cir. 1989). Notwithstanding the fact that the migrant workers affected were predominately minority, the "white and nonwhite migrant workers suffered the same degree of harm because they shared the same substandard housing." *Id*. The Court went on to explain,

> It is true, of course, that any policy or action taken with respect to these workers will necessarily affect more non-white than white migrant farmworkers. But merely demonstrating a statistical imbalance, without more, does not establish a greater discriminatory adverse effect on one race compared to another.

Id.

Similarly, in *Graoch Assoc.*, *supra*, the Sixth Circuit rejected the plaintiffs' claims that a landlord's decision to withdraw from participation in the Section 8 voucher program established a prima facie case under the FHA. 508 F.3d at 378-379. The Court stated that notwithstanding the fact that the apartment was 90% minority and 10% white, there was no disproportionate impact because when the percentage of minorities who were Section 8 tenants were compared to the total pool of tenants at the apartment, the minority makeup was the same: both were "overwhelmingly non-white." *Id*.

Finally, in *Betsey*, *supra*, the Fourth Circuit evaluated an FHA claim involving the closure of a

building within a larger apartment complex. 736 F.2d at 985. The building in question was occupied predominately by African-Americans. *Id*. However, the Court did not find a violation of the FHA on that basis. Rather, the Fourth Circuit compared the impact of the conversion policy using the percentage of minorities affected by the policy versus the percentage of non-minorities affected. *Id*. at 988.

Thus, a plaintiff's evidence of statistical disparity must evaluate the impact of the policy by comparing between groups to which the policy applied.

b. Challenges Regarding Whether the Disparate Impact is Substantial.

Often, a policy or practice can have a disparate impact on a protected class. However, a prima facie case in a Title VII matter is only established where the disparate impact is substantial. Generally, in the Title VII context, the Courts use the Equal Employment Opportunity Commission's (EEOC) 80% standard as a "'rule of thumb for the courts'" when deciding what constitutes significant adverse impact. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2678 (2009).

Similarly, the Circuit Courts that have found disparate impact in FHA cases have usually done so on impacts exceeding 80%. *Rizzo*, 564 F.2d at 142 (impacting 95% minorities vs. 5% non-minorities); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.3d 926, 929 (2d. Cir. 1988) (minorities *three* times more affected); and *Keith v. Volpe*, 858 F.2d 467, 484

(9th Cir. 1988) (minorities had *twice* the adverse impact).

It is critical that any standard determining disparate impact require an impact be of such a nature and magnitude that it is repugnant to the purposes of the FHA. If insignificant disparate impacts are sufficient to create a prima facie case, it is no longer a reasonable presumption that a policy or practice was actually undertaken "because of race."

C. A Defendant's Burden of Proof Should Mirror a Title VII Defendant's.

It is equally important to know what is required in order to satisfy a defendant's burden. This is important because there are certain occasions, especially for governmental entities, when an action must be taken despite its potential for discriminatory impact. In such situations, a defendant must have some standards against which to evaluate its liability for an FHA violation. Without adequate guidance on what constitutes a valid defense to an FHA claim, it may hinder the undertaking of valid governmental action that is necessary for the protection of the public health and general welfare.

It is generally accepted that an employer's burden in a Title VII case is met where the employer can show that the challenged practice or policy "has 'a manifest relationship to the employment in question.'" *Ricci v. DeStefano*, 129 S. Ct. 2658, 2673 (2009). This manifest relationship test can be satisfied where

an employer's "legitimate [employment] goals were 'significantly served by' the exclusionary rule at issue in that case even though the rule was not required by those goals." *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 998 (1988). In essence, a Title VII defendant has met its burden when it has shown that its practice or policy was taken for a non-discriminatory purpose, and that the practice or policy will actually accomplish that purpose.

A defendant in an FHA case should have a similar standard. An FHA defendant should be able to satisfy its burden by showing that there is a legitimate non-discriminatory purpose for the challenged housing policy or practice and the policy or practice chosen will actually accomplish the asserted purpose.

HUD's proposed rules add an additional requirement for an FHA defendant: a defendant must also show the challenged policy or practice is "necessary." 76 Fed. Reg. 70925. However, whether something is "necessary" or not is very subjective. Including such a requirement essentially leaves a potential FHA defendant without an adequate means of determining whether a purported action would subject them to an FHA violation.

If such a standard must be included, it must be able to be met where a defendant has provided a compelling reason for the action taken. As to governmental defendants, actions taken for purposes related to public health, safety and the general welfare should be a sufficient compelling reason for a purported action, especially where there is no segregative

effect. This is because "[l]and use policy customarily has been considered a feature of local government and an area in which the tenets of federalism are particularly strong." *Izzo v. Borough of River Edge*, 843 F.2d 765, 769 (3d Cir. 1988). This Court has recognized that,

> We refused to limit the concept of public welfare that may be enhanced by zoning regulations. We said:
>
> "Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.
>
> We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."

Vill. of Belle Terre v. Boraas, 416 U.S. 1, 5-6 (1974). Thus, any standard adopted must not be overly

restrictive on governmental entities' valid exercise of police powers for the public health, safety and general welfare of the entire community.

D. Plaintiff's Proof of a Less Restrictive Means Must Serve the Government's Legitimate Need in a Comparable Way.

Finally, it is important for this Court to develop appropriate standards for determining the availability of less restrictive alternatives. This is important, especially in a housing context, because housing policies often involve considerations of public health, safety, and welfare, especially when it involves governmental entities.

Moreover, fiscal considerations are important in housing policy because it can often make the difference whether a particular housing project can be undertaken or whether a governmental entity can actually enact or enforce a particular housing policy. With regard to governmental entities in particular, the cost of a housing practice or policy is especially important because taxpayers are ultimately responsible for bearing the burden of paying for increased costs of government. This is probably why some Circuit Courts have recognized that a relevant factor in determining FHA violations is "whether the plaintiff seeks to compel the defendant affirmatively to provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing." *Graoch Associates # 33, L.P. v. Louisville/*

Jefferson County Metro Human Relations Comm'n, 508 F.3d 366, 372-374 (6th Cir. 2007).

In the Title VII context, Congress has said that a plaintiff's demonstration of less restrictive means "shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of 'alternative employment practice.'" 42 U.S.C. §2000e-2(k)(1)(C). In 1989, this Court said,

> [A]ny alternative practices which respondents offer up in this respect must be equally effective as petitioners' chosen hiring procedures in achieving petitioners' legitimate employment goals. Moreover, "[f]actors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals." "Courts are generally less competent than employers to restructure business practices," consequently, the judiciary should proceed with care before mandating that an employer must adopt a plaintiff's alternative selection or hiring practice in response to a Title VII suit.

Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 661 (1989) (internal citations omitted).

So too, in the housing context, considerations of effectiveness and cost are equally important when evaluating less restrictive means. Especially with governmental defendants, it is important to ensure that any suggested alternative serve the defendant's

legitimate purposes in a comparable manner and at a comparable cost to the method the defendant had selected. If a plaintiff's proposed less restrictive alternative does not accomplish the defendant's goal or need as efficiently as the defendant's proposed method, or if it substantially increases the cost to achieve the goal or need, then it should not be considered as a valid less restrictive alternative.

CONCLUSION

For the foregoing reasons, *Amicus Curiae*, Township of Mount Holly, respectfully requests that this Court rule that disparate impact claims under the Fair Housing Act, 42 U.S.C. §3604 be limited to claims asserting a segregative effect, or if not so limited, that such claims be governed by the standards set forth herein.

Respectfully submitted,

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