No. 10-1032

In The Supreme Court of the United States

STEVE 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 *AMICI CURIAE* OF THE HOUSING ADVOCATES, INC. AND BUCKEYE COMMUNITY HOPE FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

The Fair Housing Act makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a). Respondents are owners of rental properties who argue that Petitioners violated the Fair Housing Act by "aggressively" enforcing the City of Saint Paul's housing code. According to Respondents, because a disproportionate number of renters are African-American, and Respondents rent to many African-Americans, requiring them to meet the housing code will increase their costs and decrease the number of units they make available to rent to African-American tenants. Reversing the district court's grant of summary judgment for Petitioners, the Eighth Circuit held that Respondents should be allowed to proceed to trial because they presented sufficient evidence of a "disparate impact" on African-Americans. The following are the questions presented:

1. Are disparate impact claims cognizable under the Fair Housing Act?

2. If such claims are cognizable, should they be analyzed under the burden-shifting approach used by three circuits, under the balancing test used by four circuits, under a hybrid approach used by two circuits, or by some other test?

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INTEREST OF *AMICI*[1]

The Housing Advocates, Inc. is a private non-profit, tax-exempt corporation based in Cleveland, Ohio, and organized under the laws of Ohio. The mission of the organization is the promotion of equal housing opportunities, tenants' rights, and affordable housing. The Housing Advocates, Inc. provides legal assistance to victims of housing discrimination and to homeowners with complaints involving housing-related services; conducts research and educational programs on related topics to a variety of audiences, including home seekers, renters, homeowners, rental professionals, real estate agents, lenders, brokers, attorneys, insurance agents, underwriters, government officials, and others in the housing industry.

The corporation has existed for over thirty-six years and maintains a staff of lawyers involved in training, education, testing, and enforcement efforts under the fair housing laws. Staff lawyers have participated in significant local and national equal housing litigation, both as counsel and *amicus curiae* regarding fair housing and the rights for victims of housing discrimination: *Barker v. Niles Bolton*

[1] Petitioners and Respondents have filed blanket consents to *amicus* briefs. Pursuant to Rule 37.6 of this court, *amici* state that its counsel authored this brief and *amici* paid for it. This brief was not written in whole or in part by counsel for a party. No person or entity other than *amici curiae* made any monetary contribution to the preparation or submission of this brief. *Amici curiae* and their counsel were not compensated in any way.

Assocs., Slip Copy, 2009 WL 500719 (11th Cir. 2009); *Groner v. Golden Gate Gardens Apts.*, 250 F.3d 1039 (6th Cir. 2001); *Becket v. Our Lady of Angels Apts. Inc.*, 192 F.3d 601 (6th Cir. 1999).

The Buckeye Community Hope Foundation ("Buckeye") was chartered in 1991 as a 501(c)(3) non-profit corporation with the mission of developing and facilitating affordable housing for low-income families. The organization has built housing in the states of Ohio, West Virginia, Indiana, Nebraska, Kentucky, and South Carolina. In meeting this mission, Buckeye has created, owns, or operates more than 1,500 units of affordable housing across the six states previously cited. More than 500 additional units of housing are under development. In 2003, Buckeye appeared before this Court in *City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*, 538 U.S. 188 (2003). Cuyahoga Falls was a referendum case involving a land use issue, where Buckeye challenged the city's delay in approving their low-income tax credit housing development. One of the questions certified by this Court was if the referendum discriminated against racial minorities and families with children in violation of the Fair Housing Act based on a disparate impact claim. Buckeye made a decision to abandon its disparate impact claim in this Court, leading the Court to vacate the Sixth Circuit's approval of this claim and order its dismissal. *City of Cuyahoga Falls*, 538 U.S. at 199-200. One of the reasons for the adverse decision was that the apartment complex had been built, given that the

referendum violated the Ohio Constitution. *Buckeye Community Hope Foundation v. City of Cuyahoga Falls*, 82 Ohio St.3d 539, 697 N.E.2d 181 (1998). Buckeye, in its continued development of affordable housing faces possible discriminatory conduct to delay or prevent its mission. Therefore, the merits of the question whether the Fair Housing Act includes a discriminatory effect theory is still of significant interest to Buckeye. As *amici curiae*, The Housing Advocates, Inc. and Buckeye Community Hope Foundation support the position of Respondents to find that disparate impact can be used to prove a fair housing violation. *Amici* request that this Court find in favor of Respondents and remand this matter for a trial on their claims.

SUMMARY OF ARGUMENT

The current debate over the theory of disparate impact discrimination under Title VIII of the Civil Rights Act of 1968, as amended, 42 U.S.C. §§ 3601 et seq. has seldom been raised in the decisions of the federal courts of appeals. Part of the reason for this acceptance is that Title VIII was enacted only four years after Title VII of the Civil Rights Act of 1964 so the courts have often applied similar legal doctrines to both statutes. There are several justifications for the similarities in the application of the two acts. First, they both seek to eliminate discrimination by public, and private actors. Both Title VII and Title VIII deal, not with subjects that affect only a small

proportion of the population (such as federal regulation of certain specific industries), but with areas of life that affect almost everyone: employment and housing, respectively. The almost universal application of the two acts lends itself to similarities in interpretation; the very broadness of their scopes virtually necessitates doctrinal equivalence in order to ensure some degree of consistency in the law. *Gamble v. City of Escondido*, 104 F.3d 300, 304 (9th Cir. 1997); *Maki v. Laakko*, 88 F.3d 361, 367 (6th Cir. 1996), cert. denied, 519 U.S. 1114 (1997); *Kormoczy v. Sec'y, U.S. Dep't of Hous. and Urban Dev. ex rel. Briggs*, 53 F.3d 821, 824 (7th Cir. 1995); *Selden Apartments v. U.S. Dep't of Hous. and Urban Dev.*, 785 F.2d 152 (6th Cir. 1986)

This Court should remove any doubt that disparate impact is available to prove a fair housing claim. The appropriate test is the one followed in *Arthur v. City of Toledo, Ohio*, 782 F.2d 565, 574-575 (6th Cir. 1986) and the more recent decision of *Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 263 F.3d 627, 640 (6th Cir. 2001), rev'd in part, vacated in part sub nom. 538 U.S. 188 (2003). The Sixth Circuit uses a modified Arlington Heights II analysis. *Metropolitan Hous. Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977) ("*Arlington Heights II*"). It does not require any showing of discriminatory intent and therefore only weighs three *Arlington Heights II* factors. The only factors that should be considered are: (1) how strong is the plaintiff's showing of discriminatory impact; (2) what is

the defendant's interest in taking the action complained of; and (3) does the plaintiff seek to compel the defendant to affirmatively 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. These Sixth Circuit cases are not outliers or exceptions, and they define exactly what the test for disparate impact should be for a matter involving a claim of a facially neutral policy involving a public actor.

Finally, *amici* urge this Court to use a different burden-shifting framework depending on the type of actor involved in the claim. While the burden shifting test adopted in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) is appropriate for a private actor, a governmental actor's greater financial resources and intimate knowledge of the myriad of public policy considerations dictate that it shoulder a heavier burden of proof. The appropriate test for a disparate impact claim against a governmental actor is the hybrid framework, which puts the burden of proof on that actor to show that the challenged policy has a manifest relationship to a legitimate nondiscriminatory interest and that there is no reasonable, less discriminatory alternative.

ARGUMENT

I. IT IS WELL-ESTABLISHED THAT DISPARATE IMPACT CLAIMS ARE COGNIZABLE UNDER THE FAIR HOUSING ACT.

A. The Text and Legislative History of the Fair Housing Act Reveal a Clear Congressional Intent to Permit Disparate Impact Analysis in Housing Discrimination Claims.

The Fair Housing Act of 1968 and its amendments are the principal legislative enactments addressing discrimination in housing, lending and real estate related transactions. This Court in *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 209 (1972), mandated a "generous construction" of the Fair Housing Act in order to carry out a "policy that Congress considered to be of the highest priority." The legislative history suggests that the statute should be read expansively in order to "eliminate the adverse discriminatory effects of past and present prejudice in housing." *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 147 (3d Cir. 1977). Its purpose was to end racially segregated housing and provide for fair housing throughout the nation within limits of the Constitution. *South Suburban Housing Cntr. v. Bd. of Realtors*, 935 F.2d 868, 882 (7th Cir. 1991); 42 U.S.C. § 3601. Senator Mondale, the Fair Housing Act's author, said the law was designed to replace the ghettos "by truly integrated and balanced living patterns." 114 Cong. Rec. 3422 (1968) quoted in *Trafficante*, 409 U.S. at 211.

Statutory construction requires the application of recognized rules. See generally Sutherland Statutory Construction (4th ed. 2006). "The starting point in every case involving construction of a statute is language itself." *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330. The FHA was passed by Congress only a few years after the 1964 Civil Rights Act. Similar to the broad language used in Title VII of the Civil Rights Act, the language of Title VIII expresses an intent that extends beyond overt acts of discrimination to reach actions that "otherwise make unavailable or deny, a dwelling to any person because of race." 42 U.S.C. § 3604(a). This language goes beyond the intent of the actor to reach the effect of the conduct. Section 3604(a)'s language of "otherwise make unavailable" appears "to be as broad as Congress could have made it, and all practices which have the effect of denying dwellings on prohibited grounds are therefore unlawful." *United States v. Youritan Construction Co.*, 370 F. Supp. 643, 648 (N.D. Cal. 1973); see also *Housing Rights Center v. Sterling*, 404 F. Supp. 2d 1179, 1190 (C.D. Cal. 2004) ("§ 3604(a) also prohibits actions that make apartments effectively unavailable"). U.S. Department of Housing and Urban Development regulations interpreting the FHA: 24 C.F.R. § 100.70(c)(1)-(3) (interpreting 42 U.S.C. § 3604(a)). As this Court recognized in *Smith v. City of Jackson*, 544 U.S. 288 (2005), principles of statutory construction dictate that "when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress

intended that text to have the same meaning in both statutes." Id. at 233 (quoting *Northcross v. Bd. of Educ. of Memphis City Schs.*, 412 U.S. 427, 428 (1973) (per curiam)). All federal courts of appeals that address the question have continued to find disparate impact as being applicable under Title VIII.

Petitioners argue that the language of § 3604(a) of the Fair Housing Act mandates that litigants prove intent by virtue of the "because of" language found in the statute. However, "the 'because of race' language is not unique to § 3604(a): that same language appears in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h), yet a prima facie case of Title VII liability is made out when a showing of discriminatory effect (as distinct from intent) is established." *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 147 (3d Cir. 1977), see also *Metro. Hous. Dev. Corp. (Arlington Heights II)*, supra note 2, at 1289 (" . . . we decline to take a narrow view of the phrase "because of race" contained in section 3604(a). Conduct that has the necessary and foreseeable consequence of perpetuating segregation can be as deleterious as purposefully discriminatory conduct in frustrating the national commitment [to fair housing]").

Similar to the way the 1964 Civil Rights Act was amended in 1991, codifying disparate impact into law, the FHA was amended in 1988. "By 1988 . . . a strong consensus had developed among the circuits that the proper meaning of the Fair Housing Act included a discriminatory effect standard." See R. Schwemm, Housing Discrimination Law and Litigation, § 10:4

p.3 (2007). Congress rejected the opportunity to overrule the uniform circuit court opinions by proscribing the theory's application in fair housing cases. Id. "This congressional decision to maintain the existing Fair Housing Act standards was made with a full understanding of the numerous court decisions that had endorsed the discriminatory effect theory." Id. In fact, Senator Kennedy, who sponsored the 1988 amendments, stated "Congress accepted this consistent judicial interpretation." Id. This fact proves fatal to Petitioners' argument that the text of the statute evinces a Congressional intent to disallow disparate impact claims, as the sponsor of the 1988 amendments explicitly acknowledges that the amendments are meant to accept the disparate impact standard. If it was Congress's intent to prohibit liability based on disparate impact alone, its chance was in 1988: Congress declined, thereby effectively codifying disparate impact as a separate basis of liability in fair housing cases.

This clear evidence of legislative intent prevails over other principles of statutory construction. *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974). There are additional sections of the legislative record of the Federal Fair Housing Amendments Act of 1988 which support that Congress intended to make disparate impact available to prove a fair housing violation. For example, the U.S. House of Representatives, Committee on the Judiciary, Report 100-711: the Fair Housing Amendments Act of 1988 89-93, 100th Cong., 2nd Sess.

(1988), reprinted in 1988 U.S. Code Congressional and Administrative News 2173 to 2230 (1988) (hereinafter House Report) at 2186 states, "[t]he Committee understands that housing discrimination against handicapped persons is not limited to blatant, intentional acts of discrimination. Acts that have the effect of causing discrimination can be just as devastating as intentional discrimination." In another part of this report Congressmen Swindall, Sensenbrenner, Shaw, Dannemeyer, Coble, and Slaughter explained their decision to vote against the bill because an amendment they had introduced requiring that any zoning decisions would not be "a violation of the Fair Housing Act unless the decision was made with the intent to discriminate on the basis of race or other prohibited criteria under the Act" had been rejected by the Committee. 134 Cong. Rec. 23711 (1988). These two sections of the most recent reenactment of the Fair Housing Act show a very clear legislative intent. Congress knew and wanted plaintiffs to have available the theory of disparate impact to prove a Fair Housing claim. *Aaron v. SEC*, 446 U.S. 680, 697 (1980).

Lastly, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978); *Nat'l Lead Co. v. United States*, 252 U.S. 140, 146-47 (1920); *Farrell Lines, Inc. v. United States*, 499 F.2d 587, 605 (1974); *cf. Pierce v. Underwood*, 487 U.S. 552 (1988). The legislative history

shows that Congress was aware of this precedent. House Report at 2182 n.52 (1988) (citing disparate impact cases from several circuits). Even where the legislative history does not explicitly reference a prior interpretation, the Supreme Court has often found that Congress has ratified lower court and agency interpretations through statutory reenactment. See, e.g., *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 384-86 (1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 379 (1982). The preceding references to the Fair Housing Amendments Act of 1988 establish that desparate impact is available to prove a violation.

B. This Court Should Give Due Deference to Agency Interpretations Supporting Disparate Impact Claims.

A number of HUD administrative decisions have held that the discriminatory effect standard should be applied in HUD proceedings brought under the Fair Housing Act. *Mountain Side Mobile Estates P'ship v. Sec'y of Hous. and Urban Dev.*, 56 F.3d 1243, 1250-57 (10th Cir. 1995); *HUD v. Pfaff*, Fair Housing – Fair Lending Rptr. ¶25,085, at pp. 25,781-83 (HUD ALJ 1994), rev'd on other grounds, 88 F.3d 739 (9th Cir. 1996); *HUD v. Ross*, Fair Housing – Fair Lending Rptr. ¶25,075, at pp. 25,699-700 (HUD ALJ 1994); *HUD v. Carter*, Fair Housing – Fair Lending Rptr. ¶25,029, at pp. 25,317-18 (HUD ALJ 1992). This Court in *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837

(1984) expressed that deference should apply to such administrative interpretations. HUD's interpretation of the FHA is entitled to substantial deference. See *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (stating an agency's interpretation of its own regulation is entitled to substantial deference unless it is "plainly erroneous or inconsistent with the regulation").

Adjudication has distinct advantages over rulemaking when the agency lacks sufficient experience with a particular problem to warrant ossifying a tentative judgment into a black letter rule; still other solutions may be so specialized and variable as to defy accommodation in a rule. *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947). "There is thus a very definite place for the case-by-case evolution of statutory standards." Id. at 203; see also, *FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775, 811 (1978). It is therefore significant that other federal agencies have endorsed this theory in undertaking their enforcement responsibilities. See, e.g., Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18266-01 (April 15, 1994) (where HUD, Department of Justice, and a number of other federal agencies that regulate financial institutions joined together in a project called the Interagency Task Force on Fair Lending to produce a "Policy Statement on Discrimination in Lending" that, inter alia, recognized that proof of disparate impact would be sufficient to establish a violation of the Fair Housing Act).

In addition, the U.S. Department of Justice, for almost four decades, has been litigating fair housing

cases based on disparate impact claims. *United States v. City of Black Jack, Missouri*, 508 F.2d 1179, 1184-85 (8th Cir. 1974); *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1236-37 (2d Cir. 1987); *United States v. City of Parma,* 661 F.2d 562, 576-78 (6th Cir. 1981); *United States v. City of Birmingham, Mich.*, 727 F.2d 560, 565-66 (6th Cir. 1984); *United States v. Starrett City Associates*, 840 F.2d 1096, 1100 (2d Cir. 1988).

More recently, the Department of Housing and Urban Development, which has the power to make rules to carry out the Fair Housing Act, has issued a Notice of Proposed Rule-Making (NPRM) dated November 16, 2011, that proposes to formally adopt the pre-Wards Cove burden-shifting framework in regard to the second stage of inquiry. See Implementation of the Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. 70921, 70925 (proposed Nov. 16, 2011) (to be codified 24 C.F.R. § 100.500(c)(3)). This Court should give due deference to the administrative agencies charged with implementing the Fair Housing Act that have embraced the use of disparate impact analysis. Alternatively, Skidmore deference would apply in the instant situation based on HUD's "specialized experience" and "the value of uniformity." (citing *United States v. Mead Corp.*, 533 U.S. 218, 234-35 (2001)); *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944) (stating rulings of Administrator not conclusive but entitled to respect as they determine policy and guide enforcement and such deference serves the interest of uniformity).

C. Disparate Impact Analysis Is Indispensable to Eliminating Housing Discrimination.

In making this determination of the applicability of disparate impact theory to prove a fair housing violation, this Court may draw upon many sources such as the Court of Appeals decisions, rules of statutory construction, the Restatement of the Law, treatises and law review commentaries. See C. Wright, Handbook of the Law of Federal Courts § 58 (3d ed. 1976). Petitioners fail to identify any new arguments supporting the view that the Fair Housing Act was intended to limit violations to only those caused by intentional discrimination. The great many treatises and law review articles on this subject found that Congress intended to provide for similar burdens of proof for Title VIII of the Civil Rights Act of 1968, as amended, as in its sister statute Title VII of the Civil Rights Act of 1964.

To truly understand the policy justifications for the Act one must first understand the social, economic, and political climate in which it was passed. The late 1960s was a time of tremendous social strife in America. Riots broke out with alarming frequency in African-American neighborhoods across the country.[2]

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[2] In 1963, race riots in Maryland prompted the imposition of modified martial law. Hedrick Smith, *Martial Law is Imposed in Cambridge, Md.*, N.Y. TIMES, July 13, 1963, at 1. In 1965, riots broke out in the Watts neighborhood of Los Angeles, eventually resulting in numerous deaths. Peter Bart, 2,000

(Continued on following page)

The Fair Housing Act's debate had as its background Martin Luther King's Poor People's March and, in fact, Dr. King's assassination as the catalyst for its passage. Aric Short, Post-Acquisition Harassment and the Scope of the Fair Housing Act, 58 Ala. L. Rev. 203, 224 (2006); citing Paul Hoffman, National Political, Labor and Religious Leaders Mourn Dr. King, N.Y. TIMES, Apr. 6, 1968, at 27; see also R. Schwemm Housing Discrimination Law and Litigation, § 5:2 (2007).

The Fair Housing Act was passed by Congress in 1968, only a few years after the 1964 Civil Rights Act. Similar to the broad language used in Title VII of the Civil Rights Act, the language of Title VIII includes language that "extends beyond overt acts of discrimination to reach actions that 'otherwise make unavailable or deny, a dwelling to any person because of race.'" Lindsey E. Sacher, Through the Looking Glass and Beyond: The Future of Disparate Impact Doctrine under Title VIII, 61 Case W. Res. 603, 609 (2010) (citing 42 U.S.C. § 3604(a) (2006)). This language does not focus on the actor's motivation, but rather on the consequences of his actions. The FHA and Title VII of the Civil Rights Act of 1964 "use the

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Troops Enter Los Angeles on Third Day of Negro Rioting, N.Y. TIMES, Aug. 14, 1965, at 1. In 1967, twenty-three people were killed in race riots in Newark and forty-three were killed in riots in Detroit. Other cities, including Washington, Kansas City, Chicago, and Baltimore, also suffered through violent race riots. Sydney H. Schanberg, Sociologists Say Latest Riots Differ From Those of the Past, N.Y. TIMES, Aug. 17, 1965, at 17.

same language in prohibiting discrimination[.]" *Villas West II of Willowridge Homewoners Ass'n, Inc. v. McGlothin*, 885 N.E.2d 1274, 1282 (Ind. 2008).

The Second Circuit has held, in reliance on this Court's direction in *Trafficante*, that both Title VII and Title VIII are "part of a coordinated scheme of federal civil rights laws enacted to end discrimination[.]" *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 935 (2d. Cir. 1988), aff'd in part, 488 U.S. 15 (1988). "[An] intent requirement would strip the statute of all impact on de facto segregation," and, furthermore, the achievement of the Act's purpose "requires a discriminatory effect standard." Id. at 934 (citing John Stick, Comment, Justifying a Discriminatory Effect Under the Fair Housing Act: A Search for the Proper Standard, 27 UCLA L. Rev. 398, 406 (1979)).

In the aftermath of Hurricane Katrina, a council district in Orleans Parish sought to restrict the development of affordable rental housing in the district. Stacy E. Seicshnaydre, Is the Road to Disparate Impact Paved with Good Intentions?: Stuck on State of Mind in Antidiscrimination Law, 42 Wake Forest L. Rev. 1141, 1190 (citing Leslie Williams & Coleman Warner, N.O. May Idle Housing in East, NOLA.COM, Mar. 8, 2007, http://www.nola.com/newslogs/topnews/index.ssf?/mtlogs/nola_topnews/archives/2007_03.html#243071). Such an action would undoubtedly have a disproportionate impact on minorities, especially African-Americans. Interestingly, the council was majority African-American. Proving intentional

discrimination on behalf of a majority African-American council would be difficult, to say the least, yet the discriminatory effect would be no less damaging to would-be residents denied housing opportunities.

From a practical standpoint, whether discrimination is intentional matters not to the victim. Indeed, as one court noted when applying the disparate impact analysis in an exclusionary zoning case, "we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme." Seicshnaydre, supra at 1188. Indeed, as Susan Neiman notes in her book Evil in Modern Thought: An Alternative History of Philosophy, "[w]e are threatened more often by those with indifferent or misguided intentions than by those with malevolent ones." Seicshnaydre, supra at 1187, quoting Susan Neiman, Evil in Modern Thought: An Alternative History of Philosophy, 280 (2002). "Thus, we don't need to characterize decision makers as 'monsters' in order to require them to be accountable for the harm that they cause." Id. "'What counts is not what your road is paved with, but whether it leads to hell.'" Id., quoting Neiman at 275.

Furthermore, Congress sought not only to punish bad actors but to encourage society to act with foresight regarding the impact on those classes of individuals protected by the Fair Housing Act. "One of the basic principles in the Fair Housing Act and the Housing and Community Development Act of 1974 is

that the federal government, and all of its programs and activities, must take proactive steps to advance fair housing, not just to avoid discriminating." The Leadership Conference on Human and Civil Rights, Report of the National Commission on Fair Housing and Equal Opportunity, p. 9 (2008), available at: http://www.civilrights.org/publications/reports/fairhousing/future_of_fair_housing_report.pdf. Even if the textual and historical arguments on both sides of the issue were evenly balanced, respect for the well-settled views of this Court's expansive liberal treatment of the Act as well as the uniform finding that disparate impact theory is available to prove a claim by the Court of Appeals, and for the rule of law itself, see *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting), should prevent endorsing such a dramatic upheaval in the law as it has evolved over the last four decades.

D. The Courts of Appeals Have Uniformly Used Disparate Impact Analysis to Prove a Fair Housing Act Violation.

This Court first recognized the concept of disparate impact as a basis for liability under Title VII of the Civil Rights Act of 1964 in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Though "disparate impact" never appeared in the Act's original version, this Court found that the language of § 703(a)(2), made it unlawful for an employer to "limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment

opportunities or otherwise adversely affect his status as an employee, because of such individual's race." Relying on this language, Griggs found a congressional intent to prohibit practices producing a disparate effect on members of certain groups, thereby determining that the Act was designed to attack not only overt discrimination but also practices that are "fair in form, but discriminatory in operation." *Griggs*, 401 U.S. at 432. This Court's theory regarding Title VII cases was then routinely applied to Title VIII litigation. Though the lower courts often used different tests for disparate impact, each circuit found that disparate impact claims were viable under Title VIII.

The principle of stare decisis provided continuing support for the reliance on the disparate impact theory in litigation of fair housing claims. Until the dissenters in *Magner v. Gallagher*, 619 F.3d 823 (8th Cir. 2010), reh'g denied, 2010 U.S. App. LEXIS 27066 (8th Cir. Nov. 15, 2010) (Colloton, J. dissenting from denial of reh'g en banc), rev'g 595 F. Supp. 2d 987 (D. Minn. 2008), every federal court of appeals to consider the use of disparate impact claims after the 1988 Fair Housing Amendments Act have continued to recognize that the Fair Housing Act may be violated without a showing of discriminatory intent. *Casa Marie, Inc. v. Superior Court of Puerto Rico for Dist. of Arecibo*, 988 F.2d 252, 269 n.20 (1st Cir. 1993); and *Mountain Side Mobile Estates P'ship v. Sec'y of Hous. and Urban Dev.*, 56 F.3d 1243, 1250-51 (10th Cir. 1995); *Larkin v. Mich. Dept. of Soc. Servs.*, 89 F.3d

285, 289 (6th Cir. 1996); *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 250-51 (9th Cir. 1997); *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49 (1st Cir. 2000); *Tsombanidis v. West Haven Fire Dept.*, 352 F.3d 565, 574-78 (2d Cir. 2003). While this fact is not determinative of how this Court would rule, it nonetheless provides significant support for the proposition.

In *Smith v. City of Jackson*, 544 U.S. 228 (2005), this Court faced this same question concerning the Age Discrimination in Employment Act of 1967 (ADEA). Looking at both the statutory text and agency rulemaking Smith answered in the affirmative that a disparate impact claim can be raised against an employer in an age discrimination claim. Thus an employee can sue for a facially neutral policy that may disproportionally impact workers based on their age. *Smith* at 247. Since 2005, no court has applied Smith to find that disparate impact claims are not cognizable under the FHA. To the contrary, numerous courts post-Smith, as discussed above, have permitted disparate impact claims under the FHA.

In *Nat'l Cmty. Reinvestment Coalition v. Accredited Home Lenders Holding Company*, 579 F. Supp. 2d 70 (D.D.C. 2008), the United States District Court for the District of Columbia rejected a lender's challenge to the availability of disparate impact claims under the FHA, holding that "Smith does not preclude disparate impact claims pursuant to the FHA." Id. at 79. The Court suggested several reasons as to why

Smith permitted disparate impact claims under the FHA. Among those reasons given by the Court was the "overwhelming precedent" for this theory in all eleven other Federal Circuits. Additionally, the court recognized the Plaintiff's argument that, post-Smith, other Federal District courts had affirmatively decided that Smith did not bar disparate impact cases under the FHA.

As Justice Cardozo observed long ago, the "labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." The Nature of the Judicial Process 149 (1921). See *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986) ("[Stare decisis] permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact. While stare decisis is not an inexorable command, the careful observer will discern that any detours from the straight path of stare decisis in our past have occurred for articulable reasons, and only when the Court has felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained.' *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting).")

II. GOVERNMENTAL HOUSING POLICIES REQUIRE A DIFFERENT DISPARATE IMPACT TEST TO BE APPLIED THAN THOSE OF A PRIVATE ACTOR.

A. Finding Disparate Impact Depends on Factual Circumstances.

Proving disparate impact is highly dependent on the factual circumstances of each individual case. The central inquiry to be addressed is: given the circumstances of a particular case, did the policy in question, through its implementation and execution, have a disparate impact on the aggrieved party? Moreover, the statistics must be of a kind and degree sufficient to reveal a causal relationship between the challenged practice and the disparity. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988). The factual aspects of a disparate impact claim are critical to the success of such an action and it is imperative that the data be precise. The need for a rigorous inquiry into the details of each specific case was laid out by the Seventh Circuit, which stated that "the courts must use their discretion in deciding whether, given the particular circumstances of each case, relief should be granted under the statute." *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977).

As opposed to disparate treatment, proving disparate impact focuses on the effect of a particular policy. The court in *Arlington Heights II* noted that there are two types of racially discriminatory effects that can be produced by a facially neutral policy. Id.

The first type of effect is when the policy has a greater adverse impact on one racial group than another. Where the effect of the policy unfairly impacts a racial minority, it constitutes unlawful discrimination in violation of the Fair Housing Act. The second type of effect is its impact on the community that is involved, for example fostering segregation and preventing interracial association. This type of effect renders the policy a violation regardless of its impact on a specific racial group. Id.

The first type of discriminatory effect discussed by the *Arlington Heights II* court was analyzed in *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3d Cir. 1977). In that case, the city of Philadelphia had taken action to cancel a planned townhouse project that would provide public housing in a primarily white section of town. This cancellation of a public housing project had an adverse impact on African-Americans, as they made up eighty-five percent of all people on a waiting list for public housing. Id. at 142-43. Racial minorities made up ninety-five percent of all people on the waiting list for public housing in Philadelphia. Id. Thus, the discriminatory effect on minorities, African-Americans in particular, was much greater than any adverse impact on other racial groups, such as white persons living in Philadelphia at this time.

The court in *Arlington Heights II* focused on the second type of racially discriminatory effect, that which fosters segregation and prevents integrated communities. *Arlington Heights II* at 1291. However, the second type of effect had a much greater

likelihood of being applicable. The court remanded with instructions that the district court needed to determine if there was another parcel of land in the area that was suitable for low cost housing. If not, then the refusal to rezone would have had the effect of perpetuating segregated housing in contravention of the Fair Housing Act. Id. at 1291, 1295.

The discriminatory effects discussed in *Rizzo* and *Arlington Heights II* were cited in *Huntington Branch NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988) as that court attempted to resolve a claim of disparate impact. In reversing a district court ruling that there was no finding of disparate impact, the Second Circuit noted that the district court had focused only on the first type of discriminatory effect and determined that it was not significant enough of an effect to support a claim of disparate impact. Id. at 937. The Huntington court went on to reiterate that there is also the second *Arlington Heights II* effect, which the district court had not addressed. Ultimately, the Huntington court found that both discriminatory effects had been perpetuated in the case. Id. The court then ordered the community to enact rezoning, overturning the district court's limited and incomplete analysis.

A key aspect of the court's decision in *Huntington* was the proper use of statistics for proving disparate impact. Typically, "a disparate impact is demonstrated by statistics." *Hallmark Developers, Inc. v. Fulton County*, 466 F.3d 1276, 1287 (11th Cir. 2006). Thus, a statistical analysis of the facts and circumstances of

the case at hand is a proper way to show a disparate impact. However, improperly used statistics can be more misleading than informative. The statistical analysis must be applied to the proper population and the proper population is "always the subset of the population that is affected by the disputed decision." Id.

Although no "single test controls in measuring disparate impact," *Langlois v. Abington Hous. Auth.,* 207 F.3d 43, 50 (1st Cir. 2000) (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 995-96 n. 3 (1988)), certain guidelines have developed. First, it may be inappropriate to rely on "absolute numbers rather than on proportional statistics." *Huntington*, 844 F.2d at 938. Second, "statistics based on the general population [should] bear a proven relationship to the actual applicant flow." Id. at 938 n. 11. Third, the appropriate inquiry is into the impact on the total group to which a policy or decision applies. *Betsey v. Turtle Creek Assocs.,* 736 F.2d 983, 987 (4th Cir. 1984).

The courts of appeals have identified multiple tests for finding disparate impact. However, when the challenged action is undertaken by a government actor, *amici* urge that the test identified in *Arlington Heights II*, as modified by the Sixth Circuit, is the proper one to use. The Sixth Circuit uses an *Arlington Heights II* analysis, but does not require any showing of discriminatory intent and therefore only weighs three of the four *Arlington Heights II* factors. *Arthur v. City of Toledo, Ohio*, 782 F.2d 565, 574-75

(6th Cir. 1986). The court held that only the following factors should be considered: (1) how strong is the plaintiffs showing of discriminatory impact; (2) what is the defendant's interest in taking the action complained of; and (3) does the plaintiff seek to compel the defendant to affirmatively 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. *Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 263 F.3d 627, 640 (6th Cir. 2001), rev'd in part, vacated in part sub nom. 538 U.S. 188 (2003).

"We adopt three of the four factors pronounced in Arlington [Heights] II. Under the second factor, the Seventh Circuit inquired whether plaintiffs introduced some evidence of discriminatory intent. The court, however, concluded that this factor was 'the least important of the four factors.' We agree and additionally decide not to consider this factor in our analysis." *Arthur*, 782 F.2d at 575 (citing *Arlington Heights II*, 558 F.2d at 1292).

The Tenth Circuit, like the Sixth Circuit, applies a modified Arlington Heights II test which includes only the first, third, and fourth factors of Arlington Heights II. *Reinhart v. Lincoln Cnty.*, 482 F.3d 1225, 1229 (10th Cir. 2007); *Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev.*, 56 F.3d 1243, 1252 (10th Cir. 1995). In eliminating the 'intent' requirement, the court explained that intent is required only in claims for disparate treatment. *Reinhart*, 482 F.3d at 1229; *Bangerter v. Orem City Corp.*,

46 F.3d 1491, 1501 (10th Cir. 1995). In contrast, in disparate impact claims, the plaintiff need not show that the policy was formulated with discriminatory intent because the plaintiff is challenging a facially neutral policy that "actually or predictably results in . . . discrimination." *Reinhart*, 482 F.3d at 1229 (citing *Huntington Branch, NAACP*, 844 F.2d at 934 (internal quotation marks omitted), aff'd sub nom., 488 U.S. 15 (1988)).

B. A Government Actor May Prevail, in a Fair Housing Claim, Only if It Proves, a Necessary and Manifest Relationship to A Legitimate, Nondiscriminatory Reason, and that a No Less Discriminatory Method is Available for the Disputed Policy.

This Court should adopt the burden-shifting approach endorsed by HUD and applied by a majority of the courts of appeals in regard to the second stage of the disparate-impact inquiry. That is the stage that arises once the plaintiff presents a prima facie showing of disparate impact. Under the burden-shifting approach, after the plaintiff makes a showing (stage one) that a facially neutral policy or practice has a disparate impact on a protected class or results in the perpetuation of segregation, the burden shifts to the defendant (stage two) to prove that the challenged practice has a necessary and manifest relationship to one or more of the defendant's legitimate, nondiscriminatory reasons. This shift is analogous to the means by which a defendant in a Title VII case may avoid

liability by proving the existence of a business necessity for a challenged policy or practice.

Typically in a Title VII case, the burden of persuasion then shifts back to the plaintiff (stage three) to prove the existence of an alternative, less discriminatory method by which the defendant may reach its legitimate objectives. In the context of a claim of disparate impact brought under the Fair Housing Act against a private defendant, the assignment of the burden of proof to the plaintiff at stage three of the inquiry is appropriate. However, in the case of a government actor, the defendant is best equipped to present alternative, less discriminatory practices. Thus the burden of proof at stage three of the inquiry should remain with the government actor rather than shift back to the plaintiff.

Petitioners unpersuasively argue (Pet Br. 38-44) that this Court should adopt the Wards Cove framework in the analysis of disparate impact claims under the Fair Housing Act. The Wards Cove framework for disparate-impact claims in employment differs from the burden-shifting approach used by the Eighth Circuit Court of Appeals in that the burden of proof remains with the plaintiff at all times. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989). Under *Wards Cove*, the plaintiff must first make a showing that a particular practice or policy results in a disparate impact on a protected group. Id. at 657. The burden of production, but not persuasion, then shifts to the defendant to produce evidence that the challenged practice has a "business justification", i.e.,

that the practice serves the legitimate employment goals of the employer. Id. at 659. The plaintiff retains the burden to prove that the proffered justification is not legitimate, or, that it is pretextual because there exist alternative, equally effective methods by which the defendant could meet those employment goals, and in doing so, avoid the discriminatory effects that accompany the challenged practice. Id.

Wards Cove's assignment of the burden of proof to plaintiffs in the second stage of the inquiry, regarding the legitimacy of the defendant's business justification, was modified by Congress via the enactment of the Civil Rights Act of 1991. See 42 U.S.C. § 2000e-2(k)(1)(A)(i). In doing so, Congress recognized that the defendant in an employment discrimination case is best equipped to explain and justify the unique business needs and employment goals that make a particular policy or practice necessary and desirable. Petitioners argue that because the provision of the Civil Rights Act of 1991 that overrules that holding only expressly applies to Title VII, and fails to mention other statutes, disparate-impact claims under the FHA should be governed by the *Wards Cove* framework. Petitioners anchor their argument in *Smith v. City of Jackson*, 544 U.S. 228 (2005), which they contend stands for the proposition that the Civil Rights Act of 1991's amendment of the burden of proof is relevant only in the Title VII context, not in the ADEA context, nor, by analogy, in the Title VIII context. Both the argument and the analogy fail.

First, in *Meacham v. Knolls Atomic Power Laboratory*, 554 U.S. 84 (2008), this Court clarified and refined its holding in *Smith*. In *Meacham*, this Court makes clear that although Smith does state that the Wards Cove analysis remains applicable to the ADEA, it does so in only two identifiable ways: 1) the "existence of disparate impact liability" and 2) "a plaintiff-employee's burden of identifying which particular practices allegedly cause an observed disparate impact." 544 U.S. at 98.

The Fair Housing Act has a broad purpose: 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." *Otero v. New York City Housing Authority*, 484 F.2d 1122, 1134 (2d Cir. 1973). Because it is analogous to Title VII, prohibits discrimination based on the same protected characteristics, and is intended to undo and prevent the types of discrimination that are as present in housing as they are in employment, the statutory language of the Fair Housing Act ought to be interpreted in a similarly broad fashion as Title VII.

Because of the similarity between Title VII and the Fair Housing Act, many courts of appeals have applied the Title VII burden-shifting approach to the second stage of inquiry in Fair Housing Act disparate-impact claims.

This approach makes sense. An employer, and analogously, a private or government actor engaging

in a challenged housing practice, is in a unique position to prove the existence of legitimate reasons for its own conduct. In addition, because both Title VII and the Fair Housing Act were enacted to combat discrimination based on an identical list of protected classes, the extension of Title VII disparate impact case law to Fair Housing Act claims is both logically and practically sound. Many of the courts of appeals have embraced this logic by adopting Title VII's burden-shifting approach at the second stage of inquiry. See, e.g., *Oti Kaga, Inc. v. S. Dakota Hous. Dev. Auth.*, 342 F.3d 871, 883 (8th Cir. 2003); *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment of Twp. of Scotch Plains*, 284 F.3d 442, 466-67 (3d Cir. 2002).

If the defendant in a disparate impact case under the Fair Housing Act proves the existence of a legitimate, nondiscriminatory reason, a court must still determine whether there is a less discriminatory alternative to the challenged practice. See, e.g., *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 936 (2d Cir. 1988). On the question of which party bears the burden of proof regarding less discriminatory alternatives, there is no unanimity among the courts. Especially when a governmental entity is the defendant, many federal courts have held that the defendant has the burden of proof to demonstrate that there is no less discriminatory alternative. See, e.g., id. at 939 (a defendant must show that there are no less discriminatory alternatives available); *Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly*, 658 F.3d 375, 385

(3d Cir. 2011) (holding that defendants have the burden of showing that there is no less discriminatory alternative and that "[o]nly when the defendants make this showing does the burden shift back to the plaintiffs – where it ultimately remains – to provide evidence of such an alternative"); *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 50 (1st Cir. 2000) (affirming the district court's decision holding that the defendant failed to show a less discriminatory alternative); *Inclusive Communities Project, Inc. v. Texas Dep't of Hous. & Cmty. Affairs*, 749 F. Supp. 2d 486, 503 (N.D. Tex. 2010); *Dews v. Town of Sunnyvale*, 109 F. Supp. 2d 526, 565 (N.D. Tex. 2000); *North Shore-Chicago Rehabilitation, Inc. v. Skokie*, 827 F. Supp. 497 (N.D. Ill. 1993).

On the other hand, in a couple of cases involving private party defendants, a few courts have placed the burden on plaintiff to show there is no less restrictive alternative to the challenged practice. See *Mountain Side Mobile Estates P'ship v. Sec'y of Hous. and Urban Dev.*, 56 F.3d 1243, 1254 (10th Cir. 1995) ("the plaintiff must 'show that other [policies], without a similarly undesirable . . . effect, would also serve the [defendant's] legitimate interest'", quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988). Accord, *Snyder v. Barry Realty, Inc.*, 953 F. Supp. 217 (N.D. Ill. 1996).

Although the Mountain Side court did apply a Title VII analysis, not all courts – again, especially those dealing with claims against governmental entities – have imported Title VII principles into the

determination of which party bears the burden of establishing a less discriminatory alternative in cases brought under the Fair Housing Act. As the Third Circuit explained in *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 148 (3d Cir. 1977), "[l]ooking to Title VII for the correct standard for rebuttal of a prima facie case, we note that the 'business necessity' test employed in Title VII job discrimination cases, *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 28 L. Ed. 2d 158, 91 S. Ct. 849, is of somewhat uncertain application in Title VIII cases." Id. The Third Circuit explained that less discriminatory alternatives are far easier to identify and quantify in a Title VII case, noting that "the job-related qualities which might legitimately bar a Title VII-protected employee from employment will be much more susceptible to definition and quantification than any attempted justification of discriminatory housing practices under Title VIII." Id.; see also, *Huntington*, 844 F.2d at 937-38 (stating that "in Title VIII cases there is no single objective like job performance to which the legitimacy of the facially neutral rule may be related" and that a defendant's justifications are "normally based on a variety of circumstances" in zoning cases under the Fair Housing Act); *Langlois*, 207 F.3d at 51 (noting that "a single criterion-like the relationship of the test to job performance used under Title VII is hardly possible" under the Fair Housing Act). Thus, at least in cases involving public defendants, both the qualitative and quantitative nature of less discriminatory alternatives in Fair Housing Act cases supports assigning the burden of proof to the defendant.

Finally, there is a practical reason for assigning the burden of proof to establish a less discriminatory alternative in a Fair Housing Act case to the defendant: that party almost always has superior knowledge of the alternative practices that would be less discriminatory and whether the alternatives would meet the defendant's objectives. The test to determine a less discriminatory alternative asks whether an alternative imposes "an undue hardship under the circumstances of the specific case" on the defendant or respondent. *Mt. Holly*, 658 F.3d at 386. The test is similar to the rebuttal burden imposed on a defendant or respondent in a reasonable accommodation case. Id.

In assessing who should have the burden in Fair Housing Act cases, courts have often placed the burden on the party for whom the proof was the easiest. *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1291, 1295 n. 16 (7th Cir. 1977) (holding that the burden to identify parcels of land that were appropriate for the development of multi-family housing was on the defendant municipality because "[i]t is far easier for defendant to show that a single parcel of land which is suitable does exist than for plaintiffs to show that no suitable land exists" and that allocating the burdens any other way "would compel plaintiffs to attempt the impossible task of proving a negative"). The defendant generally has far superior knowledge of the alternative practices available to meet its legitimate objectives and is in a far better position to assess whether an alternative

would impose an undue hardship upon it in the particular circumstances of the case.

For example, in cases challenging zoning policies or practices as having a disparate impact on people of color, the municipal defendant will unquestionably have superior knowledge about the existence and feasibility of alternative approaches that might achieve its permissible objectives with less discriminatory impact on protected classes. Plaintiffs will rarely be in a position to conduct such an assessment, both because they will not have access to the required information and are outside of the political decision-making process. In such a case, logic would dictate imposing the burden on local government to identify such alternatives and to articulate why they would not achieve its objectives.

Even in some cases involving private defendants, such as cases involving insurance or lending, where private companies scrupulously protect proprietary information such as credit scores, actuarial data and risk assessment, there is a strong rationale for imposing the burden on the defendant. In such cases, the defendant's knowledge will be vastly superior to that of a plaintiff with respect to less discriminatory alternatives.

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CONCLUSION

As *amici curiae*, The Housing Advocates, Inc. and Buckeye Community Hope Foundation, Inc. support the position of Respondents that disparate impact is available to prove a fair housing claim. However, we urge this Court find the proper disparate impact test should be a modified Arlington Heights II test requiring in the case of a claim against a governmental actor that the burden of proof be imposed on the defendant to prove that the challenged policy has a manifest relationship to a legitimate nondiscriminatory interest and that there is no reasonable, less discriminatory alternative.

Respectfully submitted,

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