No. 13-1371

# In the Supreme Court of the United States

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

v.

THE INCLUSIVE COMMUNITIES PROJECT, INC.,
*Respondent*.

*On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit*

**BRIEF OF *AMICI CURIAE* NATIONAL FAIR HOUSING ALLIANCE, CENTER FOR COMMUNITY SELF-HELP, AND HOPE ENTERPRISE CORPORATION IN SUPPORT OF RESPONDENT**

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## STATEMENT OF INTEREST[1]

The National Fair Housing Alliance ("NFHA") is the only national organization dedicated solely to ending discrimination and ensuring equal opportunity in housing for all people. Founded in 1988, NFHA is a consortium of more than 220 private, non-profit fair housing organizations, state and local civil rights agencies, and individuals throughout the United States. NFHA and its members use a variety of means to accomplish the Fair Housing Act's goals of ensuring equal and fair access to housing. Those means include education and outreach, research, public policy initiatives, and, where appropriate, enforcement actions.

NFHA and its members work with those regulated by the Act as well as those protected by it in order to increase housing opportunities for everyone. Since 1991, NFHA has provided consulting and compliance services to real estate and housing industry professionals, including the nation's largest insurance and lending corporations, in order to help those entities comply with the Fair Housing Act and improve customer service. NFHA helps these entities determine if their policies have an unjustified disparate impact on classes protected by the Fair Housing Act, and if so, to modify those policies to ameliorate discriminatory outcomes. NFHA's long and varied

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[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and its counsel made a monetary contribution to its preparation or submission. All parties' letters consenting to the submission of *amicus* briefs have been filed with the Clerk's Office.

experience across the country positions it well to inform this Court as to the actual workings of the Act's disparate impact doctrine on the ground.

The Center for Community Self-Help ("Self-Help") is a family of non-profit organizations that promote ownership and economic opportunity for all. Among its other activities, Self-Help operates a network of state and federally chartered credit unions dedicated to the responsible and inclusive provision of loans and other financial services. Self-Help has intimate familiarity with the methods by which credit can be extended in a responsible manner to populations that traditionally have been denied it.

Since 1980, Self-Help has become one of the nation's largest community economic development financial institutions. It has generated over $6.5 billion in lending to families and communities throughout the nation who are underserved by traditional financial institutions.

Hope Enterprise Corporation ("HOPE") is a community development financial institution, community development intermediary, and policy center. It provides affordable financial services; leverages private, public, and philanthropic resources; and engages in policy analysis in order to fulfill its mission of strengthening communities, building assets, and improving lives in economically distressed parts of the Mid South.

Since 1994, HOPE has generated $2 billion in financing and related services for the unbanked and underbanked, entrepreneurs, homeowners, nonprofit organizations, and health care providers, and for other

community development purposes. Collectively, these projects have benefitted 650,000 individuals in the Mississippi Delta, Hurricane Katrina-affected areas, and other distressed communities throughout Arkansas, Louisiana, Mississippi, and Tennessee. HOPE is intimately familiar with credit and other lending practices that ensure full and equal access to responsible credit for the populations it serves.

## SUMMARY OF ARGUMENT

For four decades, the Fair Housing Act has been construed to include disparate impact liability. During that time, housing, lending, and insurance markets – once bastions of overt segregation and discrimination – have made important strides toward becoming fair and open to all. This is not a coincidence. Disparate impact doctrine has been at the very core of the Act's successes, and it must remain in effect for that progress to continue.

For example, the doctrine has fundamentally changed the culture of the lending industry. An industry that once relied on subjective assessments of potential borrowers – judgments that frequently were infected by unwitting bias or stereotypes – now relies on statistical analysis to produce policies that are both less discriminatory and more predictive of risk. Industry changes that were triggered by fear of disparate impact liability have made industry players better at their jobs. The industry has improved at identifying qualified borrowers in all neighborhoods, and it has done so without sacrificing legitimate business needs or return on investment. In accordance with the requirements of the disparate impact doctrine, the industry has learned to use a finer scalpel to

separate good risk from bad rather than relying on broad, categorical exclusions. It now can identify more qualified borrowers, and that means greater profit for the industry, even as populations and neighborhoods that historically have been starved of credit see greater opportunity.

Some industry players, however, continue to exclude individuals from housing, or treat some consumers differently, on the basis of unjustified categorical judgments. The disparate impact doctrine remains the best tool available to require reasoned conversations, focused on evidence, as to how to refine those policies to eliminate unnecessary discriminatory effects while still accomplishing legitimate goals.

The disparate impact doctrine imposes neither undue burden nor surprising obligations, nor does it require regulated entities to impose race-conscious policies. Rather, all entities must do is apply real scrutiny to those policies that limit the availability of housing. In short, they must get smarter and more efficient in order to be fairer.

The less discriminatory alternatives required by the doctrine permit individuals to be judged on their merit rather than excluded from housing on the basis of broad, categorical judgments. And these alternatives often prove more profitable, or otherwise beneficial to the entity adopting them, as well.

The disparate impact doctrine has contributed greatly to a productive dialogue between those regulated by the Act and those protected by it. It has permitted conversations (in litigation and otherwise) to focus on best practices rather than accusations of bad

motives. It has given regulated entities across the country clear and objective guidance as to their obligations, rather than having the legality of entities' practices turn on what their subjective motivations may have been. And it has motivated a variety of players to creatively and collaboratively search out less discriminatory alternatives that, not coincidentally, also make the housing, lending, and insurance industries more efficient.

In these industries, no policy decision is made in a vacuum. Any entity's practices are influenced by those of many others, as well as decades or more of past practices. Often the most discriminatory practices are also the most widespread and firmly ingrained.

It sometimes is necessary and appropriate to search for the discriminatory intent that may underlie these practices. But the disparate impact doctrine offers another, less confrontational tool that can be more productive. It focuses the conversation on solutions rather than a search for blame. That has made it a powerful and successful means of changing industry practices in ways that achieve the common goals of business and consumers: improving access to products without sacrificing profit or legitimate business needs.

## ARGUMENT

### I. Disparate Impact Analysis Has Been Integral to the Fair Housing Act's Success

Congress enacted the Fair Housing Act against the background of systemic segregation and discrimination. It was well aware that the problems it was attacking were (and remain) deeply rooted in American society. *See* Br. for Respondent at 8. Congress said as much in

the Act's ambitious statement of purpose, which appears directly in the statutory text and should inform construction of its other provisions: "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. The wording of this affirmative goal (which has no analog in, for example, Title VI of the Civil Rights Act of 1964) suggests that Congress intended the Act to achieve positive results – providing for fair housing – as well as to identify and to punish specific wrongdoers. And that is exactly what the Act has done. Disparate impact has been central to the Act's success up to now and remains a necessary and appropriate tool for continued enforcement of the FHA.

The following examples illustrate how the Fair Housing Act's disparate impact doctrine has led, and can continue to lead, to more refined policies that promote equal opportunity and individualized consideration – often without the need for litigation. That is because, in each case, a disparate impact analysis not only helps to identify the problem but also frames a productive conversation about the solution.

### 1. Fairer Standards in Lending

One of the greatest successes of the disparate impact doctrine – though, as yet, far from a completed project – has been the transformation of the very culture of mortgage underwriting. It once was standard practice in the lending industry to rely heavily on subjective assessments of a prospective borrower's creditworthiness. Then the industry began relying on objective underwriting criteria, but it chose those criteria using little more than assumptions and

crude stereotypes, such as the "redlining" by which lenders deemed entire neighborhoods unfit for credit.

Many had long seen such criteria as discriminatory. But it was difficult to systematically analyze the discriminatory results until Congress amended the Home Mortgage Disclosure Act in 1989. The amendment required banks to collect and report certain details regarding every loan application, including demographic information about prospective borrowers. Studies of that newly available data – including influential reports by the Federal Reserve Bank of Boston – soon revealed disparities in lending outcomes that could not be justified by inputs. *See* Margery Austin Turner & Felicity Skidmore, *Introduction, Summary, and Recommendations*, *in* Mortgage Lending Discrimination: A View Of Existing Evidence 1, 10 (The Urban Institute 1999) (describing "explosive effect" of Boston Fed study on industry and the "extensive soul searching" that followed), *available at* http://www.urban.org/uploadedpdf/mortgage_lending.pdf.

In response, practices changed. In the mid-1990s, the Government Sponsored Entities ("GSEs") Fannie Mae and Freddie Mac introduced their automated underwriting systems, Desktop Underwriter and Loan Prospector. These automated systems permitted any lender to evaluate prospective loans using objective criteria such as loan-to-value and debt-to-income ratios that were, at least in theory, based on sound statistical principles. These systems are evaluated for compliance with fair lending principles by the GSEs themselves, as well as by the Department of Housing and Urban Development ("HUD"). Their use quickly proved to

make lending decisions both more accurate and fairer. *See, e.g.*, Susan Wharton Gates, et al., *Automated Underwriting in Mortgage Lending: Good News For The Underserved?*, 13 Hous. Policy Debate 369, 383-85 (2002), http://content.knowledgeplex.org/kp2/img/cache/sem/39460.pdf (last visited Dec. 22, 2014). Meanwhile, HUD and other federal agencies that regulate mortgage lending, including the Department of Justice, issued regulatory and enforcement documents embracing the disparate impact standard in this context.[2]

Accepting and internalizing the principles underlying disparate impact analysis, leading players in the industry have refined the GSEs' automated underwriting systems. They have developed lending standards of their own – customized to reflect their unique customer bases – that more accurately and objectively separate qualified from unqualified borrowers. The result has been that credit markets, though still far from completely fair, are now more open than ever before to those traditionally shut out of credit. Meanwhile, banks have discovered that these less discriminatory criteria also work better at identifying real risk.

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[2] *See, e.g.*, Policy Statement on Discrimination in Lending, *available at* http://www.occ.treas.gov/news-issuances/federal-register/94fr9214.pdf; Interagency Fair Lending Examination Procedures, *available at* http://www.ffiec.gov/pdf/fairlend.pdf; Interagency Statement on Fair Lending Compliance and the Ability-to-Repay and Qualified Mortgage Standards Rule, *available at* http://www.federalreserve.gov/news events/press/bcreg/bcreg20131022a1.pdf.

Many leading banks have adopted a process by which they systematically search out the least discriminatory underwriting criteria that also are reliable indicators of risk. As more information about prospective borrowers becomes available, a bank may choose from a large number of potential variables to include in underwriting. Many of those variables prove to be redundant, because they are highly correlated with each other. After evaluating various combinations, a bank usually settles on a handful of factors that, collectively, are sufficiently predictive of risk.

The bank then tests that collection of variables for discriminatory impact based on race, sex, age, and other protected classifications. Should a discriminatory impact be apparent, the bank substitutes for one criterion another that is highly correlated with it, and tests again, repeating the process as necessary. Sometimes the substitution fails to ameliorate the disparity; sometimes it degrades the predictive quality of the algorithm too much. But through a highly honed and efficient statistical analysis, eventually a bank can isolate and eliminate those variables that cause unnecessary discriminatory impact, without compromising its ability to identify risk.

This process – developed as a direct result of the challenge the disparate impact doctrine posed to the lending industry – is now standard practice among major lenders. It has resulted in a fairer loan process for all borrowers and a more profitable one for banks. Those who historically have been denied loans at a disproportionate rate now have greater access. And not only have lenders fully retained their ability to identify and respond to risk, they have also expanded their

customer base. This offers enormous potential to increase profit. In short, the industry is better off for the rationalization of its processes required by disparate impact doctrine.

### 2. The Transformation of the Property Insurance Industry

The property insurance industry has experienced a similar transformation in its culture. Even after the Fair Housing Act banned overt refusal to insure homes in predominantly African-American communities, the industry for many years adopted exclusionary policies – not backed by evidence – that produced the same discriminatory effect.

For example, many insurers refused coverage based on highly subjective assessments of a homeowner's "pride of ownership" or "good housekeeping." *See* Consent Decree in *United States v. Nationwide Mut. Ins. Co.*, C2-97-291 (S.D. Ohio Mar. 10, 1997), *available at* http://www.justice.gov/crt/about/hce/documents/nationsettle.php. They would refuse to insure homes worth less than a certain amount, or homes of a certain age. *See, e.g.*, *Toledo Fair Hous. Ctr. v. Nationwide Mut. Ins. Co.*, 704 N.E.2d 667, 674 (Ct. C.P. Ohio 1997) (describing evidence showing that minimum-value requirement excluded 83 percent of homeowners in majority African-American neighborhoods, compared with 31 percent in white neighborhoods). Or they would refuse to insure homes that were valued at less than the estimated cost to rebuild them, on the assumption (not supported by evidence) that the owners of such homes would burn them down. *See* Gregory D. Squires, *Racial Profiling, Insurance Style: Insurance Redlining And The Uneven Development Of*

*Metropolitan Areas*, 25 J. of Urban Aff. 391, 400 (2003); *see, e.g.*, *Nat'l Fair Hous. Alliance v. Prudential Ins.*, 208 F. Supp. 2d 46 (D.D.C. 2002).

Such distinctions could be legitimate, despite their obvious discriminatory effect, if they were, in fact, better correlated with risk than with race. But when sued under a disparate impact theory, insurers could not demonstrate any actuarial basis for these policies. Nor could they justify their decision to exclude these properties from insurance coverage altogether rather than charging rates that reflected their supposedly higher risk. Rather, the insurers simply created categorical exclusions (as well as highly subjective grounds for exclusion) that tracked their prior overt discrimination. Only when faced with disparate impact liability did the insurance industry eliminate these and other[3] discriminatory practices – and they did not face the dire consequences (such as a rash of burned-down homes) that they had feared.

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[3] Many more examples can be given of such unreasonable restrictions. One property insurer allegedly refused to insure homes with flat roofs in one area. *See* Statement In Support of Complaint of the National Fair Housing Alliance Against Allstate Corporation (attachment to HUD complaint), *available at* http://www.nationalfairhousing.org/Portals/33/NFHA%20HUD%20Complaint%20v%20%20Allstate%20Attachment%20B.pdf. For more examples, *see* Stephen M. Dane, *Race Discrimination Is Not Risk Discrimination: Why Disparate Impact Analysis Of Homeowners Insurance Practices Is Here To Stay*, 33 No. 6 Banking & Fin. Servs. Pol'y Rep. 1 (June 2014) (collecting examples of insurance practices based not on "careful, statistical studies," but rather on "subjective stereotypes about classes of consumers and types and geographic location of property").

We recognize the important step forward that occurred when many insurers ceased their intentional and overt discrimination. That was a milestone on the path to a fairer society. But those whom the Fair Housing Act is meant to protect often remained excluded, regardless of the insurers' benign intentions. For the Act's intended beneficiaries, its protections would have been a dead letter without the disparate impact doctrine.

Once faced with disparate impact liability, the insurance industry, like the lending industry, significantly changed its culture. It began looking for ways to profitably offer insurance to more people, rather than looking for reasons to exclude people from coverage. That required it to develop more refined underwriting criteria that could distinguish between good and bad risk in traditionally underserved communities, sometimes in cooperation with fair housing advocates such as amici. For example, instead of categorically excluding older homes, property insurers began requiring more rigorous inspection of older heating, plumbing, and electrical systems. Any problems that turn up in such inspections often can be redressed, resulting in the improvement of older housing stock even as property insurers' legitimate concerns are met.

The bottom line is that disparate impact liability has forced the property insurance industry to become fairer, and at the same time more dynamic, creative, and profitable. There remains much work to be done to make the property insurance industry truly non-discriminatory, but considerable progress has been made in a short period of time.

### 3. Refusal to Make Home Loans for Row Houses

Despite the progress detailed above, unjustified and discriminatory practices continue and, in some cases, are newly instituted. A representative example is the refusal by some lenders to make home loans secured by row houses in certain urban locations. This policy, like far too many others, was enacted in response to real problems but took an overly blunt approach and, in the process, disproportionately affected people and communities of color.

The impetus for this policy was a highly publicized series of inflated appraisals. Dilapidated row houses in areas with lower home values (and with predominantly African-American residents) were fraudulently assigned values comparable to better-maintained row houses in wealthier areas. These improper comparisons generated artificially high appraised values, facilitating the "flipping" of these row houses at inflated prices. Inexperienced homebuyers were targeted by predatory sellers and found themselves stuck with purportedly renovated dwellings that proved uninhabitable. *See, e.g.*, *Predatory Lending: Joint Hearing Before a Subcommittee of the Committee on Appropriations*, 107th Cong. (May 14, 2001), *available at* https://bulk.resource.org/gpo.gov/hearings/107s/85218.txt.

In response, many industry players joined forces and took effective steps to crack down on this practice, including prosecuting wrongdoers, educating prospective homebuyers, and reforming lending

guidelines.[4] As a result, appraisal fraud in the communities in question plummeted. *See* Julie Scharper, *Flipping Cases Of City Homes Drop 77% Since '99, Report Says*, Balt. Sun (Mar. 23, 2006), http://articles.baltimoresun.com/2006-03-23/news/0603230009_1_flipping-predatory-lending-homebuyers (last visited Dec. 22, 2014).

Nonetheless, certain lenders took a blunter and more exclusionary approach: they simply stopped making loans secured by row houses. Thus, the same predominantly African-American communities victimized by the fraudulent appraisals now faced difficulty in buying or selling their homes. This refusal persisted years after the less discriminatory alternatives described above were implemented and the reports of widespread appraisal fraud diminished. *See* Kenneth R. Harney, *Discriminating Lenders, Or Just Discrimination?*, Wash. Post (May 19, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/05/18/AR2007051800742.html (last visited Dec. 22, 2014). Only when faced with litigation under a disparate impact theory did the lenders in question agree to drop their no-row-houses policy. *See, e.g.*, News Release, U.S. Dep't of Hous. & Urban Dev., *HUD Announces $100,000 Settlement Of Fair Lending*

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[4] For example, the Federal Housing Administration promulgated a rule imposing stringent requirements on those properties resold within 180 days after purchase at more than twice the original price. Such sales now require documentation explaining how improvements to the property justify the increased price. *See* Prohibition of Property Flipping in HUD's Single Family Mortgage Insurance Programs, 68 Fed. Reg. 23,370 (May 1, 2003) (codified at 24 C.F.R. § 203).

*Complaint Against First Indiana Bank, N.A.* (June 4, 2007), http://archives.hud.gov/news/2007/pr07-080.cfm (last visited Dec. 22, 2014).

The no-row-house policy demonstrates how many industry players, if not required to do otherwise, will continue to employ shortcuts instead of precise solutions, and, in the process, cause discriminatory results. The lenders in question confronted a real problem that did correlate to rowhouses in certain underserved areas. But the problem was not the rowhouses.

The lenders could instead have focused on the actual problem, which was that the combination of poor underwriting practices and unreliable appraisals left them too often with loans in default and collateral that turned out to be worthless. Once the appraisal concern was resolved, they could have improved their loan products and underwriting policies to reduce the risk of default. They could have employed some of same measures that the Federal Housing Administration used to ensure the value of the collateral. These alternative solutions would more directly address the problem without unnecessarily excluding vulnerable and underserved populations from housing and lending opportunities. The disparate impact doctrine simply requires a good-faith effort at more precise solutions, rather than a blanket ban on service to those who live in a broad class of properties.

**4. Lessons Learned**

These experiences have important implications for this Court's analysis. Petitioners and their amici rely heavily on the notion that applying disparate impact

analysis to housing, lending, and insurance decisions is a novel concept that will degrade decision-making. Implicit in their briefs is the assumption that industry requirements and processes are carefully calibrated to distinguish between qualified and unqualified candidates. *See, e.g.*, AIA Br. at 15 (assuring this Court that insurers never "discriminate among insureds based on factors that not are legitimately related to risk"). As the discussion above makes clear, the views of petitioners and their amici are mistaken in two ways.

First, many entities continue to exclude people based on overbroad generalizations. Entities pursuing legitimate objectives still employ imprecise classifications, based on stereotypes or hunches rather than sound data, and in doing so unnecessarily disqualify people who disproportionately are of color. It is, unfortunately, not rare to find that decisions that exclude people from housing or provide it on inferior terms still are based on received wisdom or sloppy thinking that cannot withstand close scrutiny. Inevitably these unexamined hunches about what "just makes sense" are influenced by this country's long history of intentional, institutionalized discrimination and housing segregation. *See, e.g.*, The Nat'l Comm'n on Fair Hous. & Equal Opportunity, *The Future of Fair Housing: Report of the National Commission on Fair Housing and Equal Opportunity* 6-9 (Dec. 2008) (summarizing some of this history), *available at* http://www.nationalfairhousing.org/Portals/33/reports/future_of_fair_Housing.pdf.

Present-day actors, often without awareness that they are doing so, thus perpetuate past discrimination through requirements and processes that achieve their stated goals only imprecisely (at best). They may honestly believe their methods are sound until confronted with evidence of unjustified discriminatory impact. *See, e.g.*, Kenneth Temkin, *et al.*, *Inside A Lender: A Case Study Of The Mortgage Application Process*, *in* Mortgage Lending Discrimination, *supra*, at 145-49. Sometimes the requirements causing discriminatory effects are of recent vintage. Other times they are vestiges of past discrimination that linger on, unexamined, long after those who instituted them have passed from the scene. For just that reason, this Court has long recognized that disparate impact doctrine is essential with respect to practices that "operate to 'freeze' the status quo of prior discriminat[ion]." *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971). If not scrutinized, the housing practices of today have a tendency to reproduce the effects of those of yesterday.

Second, it is now well established that, far from degrading the quality of decision-making, disparate impact analysis improves it. To the extent that the housing, lending, and insurance industries have become fairer and more efficient in recent years – and they have – the disparate impact doctrine, and the principles underlying it, have driven much of that progress.

While entities should re-examine their exclusionary policies on a regular basis as a matter of sound practice, experience teaches us that they often require prodding to do so. The disparate impact doctrine has

performed that function. It has given entities an incentive to internalize fair housing principles and critically evaluate their own policies. It also has given them a vocabulary to assess the propriety of their policies – both internally and with outsiders – without charging anyone with discriminatory intent and with an eye toward constructive solutions. In short, disparate impact analysis has not simply been a vehicle for litigation; it has been a mechanism for obviating the need for litigation and improving the performance of the free market. *Cf.* Melissa Hart, *Disparate Impact Discrimination: The Limits Of Litigation, The Possibilities For Internal Compliance*, 33 J. C. & U. L. 547 (2007) (describing how the greatest success of Title VII's disparate impact doctrine has not been in litigation, but rather through motivating employers to voluntarily make workplaces more equitable), *available at* http://www.stetson.edu/law/academics/highered/home/media/2007/DisparateImpact.pdf.

## II. Compliance With the Fair Housing Act Requires Only Sharpened Thinking About Policies, not Racially Engineered Outcomes

It is not nearly so burdensome to comply with the Fair Housing Act's disparate impact doctrine as petitioners and their amici suggest. In particular, such compliance does not "effectively compel entities to engage in race-conscious decision-making in order to avoid legal liability." Texas Br. at 43. This assertion confuses a potential defendant's obligations outside of litigation with a plaintiff's initial burden once disparate impact litigation commences.

In reality, to avoid disparate impact liability, an entity need only ensure that policies that exclude individuals from housing do so fairly and precisely. It need only avoid relying on the overbroad and unexamined grounds for exclusion that too often are little more than a proxy for race or other protected classifications.

By requiring greater precision in decision-making, the doctrine safeguards the right to be treated as an individual rather than as a member of an unjustly disfavored class. And it serves not only fairness, but also the economy as a whole, by unleashing creative and entrepreneurial thinking and encouraging collaboration among multiple stakeholders.

### 1. A Potential Defendant Can Avoid Liability Without Adopting Race-Conscious Policies

A prospective defendant's compliance obligations outside of litigation necessarily are informed by, but are not co-extensive with, the standards for prevailing at various stages of disparate impact litigation. The decision below, following the guidance of the Department of Housing and Urban Development's regulation, properly articulated a three-part burden-shifting process for adjudicating disparate impact claims before remanding for the district court to assess in the first instance whether plaintiff had made out a claim.

No court has applied that process in this case (which began, and was litigated for a long while, solely as a discriminatory treatment claim, see Br. for Respondent at 25-27 (describing summary judgment

briefing focused on allegations of intentional discrimination)). But if properly applied, the process works quite differently from Texas's description of it. Texas errs in describing disparate impact litigation as requiring an initial finding of liability based solely on impact followed by the adjudication of an affirmative defense based on justification. *See* Tex. Br. at 12. In reality, there is no finding of liability at all unless and until a plaintiff shows not only that a policy has a disparate impact, but also that the policy is unnecessary.

A plaintiff bears the initial burden of demonstrating that a specific policy of the defendant results in a substantial discriminatory impact. It is not sufficient for a plaintiff to complain about an unfortunate outcome and call on the defendant to do something about it; rather, the plaintiff must challenge a specific practice that causes that outcome, in order to start a productive conversation about whether that practice is justified and necessary.[5] *See Ricci v. DeStefano*, 557 U.S. 557, 581 (2009) (discarding test results because of racial disparities in outcomes without finding the test itself deficient would "amount to a *de facto* quota system"). Nor is it sufficient for a plaintiff to point to a trivial disparity, or one that can be explained without reference to any policy of the defendant.

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[5] For example, it is insufficient for a plaintiff to allege that housing projects are approved more often in some neighborhoods than in others. That is an outcome, not a policy. If there exists an explicit policy to achieve that outcome, of course, that may amount to intentional discrimination.

If a plaintiff can identify a specific practice that does cause a substantial discriminatory impact, the defendant then must articulate a legitimate interest that the challenged policy furthers. Finally, in order to prevail, the plaintiff bears the ultimate burden of demonstrating that the defendant can achieve that legitimate interest through an alternative approach that reduces or eliminates the discriminatory effect. *See* 24 C.F.R. § 100.50.

This burden-shifting approach is based upon, and resembles, the *McDonnell Douglas* burden-shifting that this Court has adopted for intentional discrimination claims. Under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny, as under disparate impact doctrine, a plaintiff challenging a policy must first demonstrate that the policy has a discriminatory effect.[6] *See, e.g.*, *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977). The defendant must then articulate a legitimate reason for that policy, and the plaintiff then bears the ultimate burden of showing that the proffered reason is pretextual and that the real reason is discriminatory.

As this comparison with the *McDonnell Douglas* framework demonstrates, the burdens the parties bear at various stages in litigation should not be confused with the ultimate question or a prospective defendant's obligations to avoid liability. With respect to intent claims, the plaintiff bears almost precisely the same

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[6] The first step in the *McDonnell Douglas* analysis is somewhat different when the plaintiff challenges an individual employment action as opposed to a larger policy of the type that would be at issue in a disparate impact claim.

burden at step one (of showing discriminatory impact), yet no one contends that an entity accordingly must use race-conscious decision-making to avoid liability. Rather, an entity's compliance obligations are shaped by steps two and three of the analysis. To avoid discriminatory intent liability, it must ensure that each policy is actually motivated by a legitimate, non-discriminatory rationale.

To avoid disparate impact liability, an entity likewise should focus on the second and third steps of the disparate impact burden-shifting process. An entity first should ensure that each policy that excludes people from housing opportunities (*e.g.*, requirements for obtaining a loan or a rental apartment) is justified by a legitimate business purpose and demonstrates validity in operation (*e.g.*, it is accurate and predictive in identifying risk). It then should ensure that it is not foregoing an alternative policy that could achieve that purpose with less discriminatory impact.

So long as the entity follows these steps, it has nothing to fear in litigation, no matter what impact its policies have. The disparate impact doctrine will never bar it from accomplishing legitimate ends. And its compliance burden is a slight one that largely overlaps with what would be, in any event, sound business practice.

Nor does the disparate impact doctrine leave regulated entities particularly uncertain as to what their obligations are. Disparate impact doctrine focuses on objective practices rather than subjective intent. Court rulings and agency statements therefore can provide clear guidance as to whether a practice is permissible. Industry groups, housing advocates, and

others can work together to formulate practices that will survive scrutiny everywhere.

For example, HUD guidance has made clear what factors a landlord must consider in determining how many people may occupy an apartment. Before this guidance, many landlords imposed arbitrary and unnecessarily restrictive limits (such as permitting no more than one person per bedroom) that ran afoul of the Fair Housing Act's ban on discrimination against families with children. Congress added this protected class in the 1988 amendments, as evidence mounted that banning families with children has a discriminatory effect on African Americans, who are more likely to continue renting after having children, as well as on women. *See, e.g.*, *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 988 (4th Cir. 1984) (no-child policy resulted in building evicting 75 percent of people of color, compared with 26 percent of white residents). In 1991, HUD's General Counsel issued guidance to all regional offices as to what occupancy standards had an unjustifiable disparate impact on this new protected class. HUD later reaffirmed these standards by official notice. *See Fair Housing Enforcement – Occupancy Standards: Notice of Statement of Policy*, 63 Fed. Reg. 70,982 (Dec. 22, 1998).

HUD made clear that building owners and others usually could permissibly limit occupancy to two people per bedroom (but not to fewer), but could only impose such limits after carefully ensuring that they were necessary given the residence in question and the age of the residents. A family of five might comfortably live in a spacious two-bedroom apartment – particularly one with a den or study that could function as a

bedroom – but not a mobile home with two bedrooms. Similarly, an infant might permissibly share a bedroom with its parents, whereas a teenager might not. 63 Fed. Reg. at 70,985. The relevant factors thus are clearly enough defined that landlords should have little trouble determining whether it is appropriate to impose a two-person-per-bedroom limit, though regrettably many landlords pay the HUD guidance no heed.[7] So long as a landlord follows the HUD guidance, it can be confident that it is applying the less discriminatory alternative required by the disparate impact doctrine.

The disparate impact doctrine thus lends itself to the development of clear standards and agency guidance, as controversies over the legitimacy of certain practices are quickly resolved one way or the other.[8] By contrast, it is difficult to say in advance

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[7] For example, one management company recently evicted a family of five from the 1464-square-foot apartment with two bedrooms and a den/study that the family had occupied for almost a decade. In settling a complaint against the company, HUD reiterated the obligation to take into account the size and characteristics of the property before limiting occupancy. *See* Press Release: HUD, Connecticut Management Company Settle Claim Alleging Discrimination Against Families With Children (Aug. 16, 2013), http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2013/HUDNo.13-124 (last visited Dec. 22, 2014).

[8] This will likely prove true for today's emerging controversies, such as claims that apartment buildings act improperly in imposing "blanket bans" on residents with any criminal history, no matter how old, minor, or otherwise irrelevant to a prospective tenant's ability to meet the qualifications of tenancy. *Cf.* Texas Br. at 47-48 (pointing to EEOC guidance on use of criminal history in employment decisions); National Leased Housing Assn. Br. at 15-

whether an intentional discrimination claim will succeed against a given practice. The same practice may give rise to liability or not depending on what evidence regarding intent emerges during litigation.

### 2. Disparate Impact Doctrine Promotes Individualized Consideration and Entrepreneurial Thinking

The less discriminatory alternative usually is one that features more individualized decision-making rather than exclusion pursuant to overly broad categorical judgment. Far from requiring race-conscious decision-making, these solutions thus ensure that each individual can be considered fairly on the merits. Once individuals are given such consideration, entities remain free to exclude them for valid reasons. In fashioning the grounds for exclusion, entities simply must use a finer scalpel.

Thus, petitioners and their amici have it precisely backwards in contending that disparate impact analysis "is fundamentally outcome-oriented," AIA Br. at 10, or that it "strikes at the heart of the concept of fair discrimination," *id.* at 21. To the contrary: the disparate impact doctrine requires entities to

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17 (describing problems posed by screening for criminal history). We are sympathetic to such claims, as the bans in question disproportionately exclude people of color, and apartment buildings can achieve their legitimate objectives with more finely-tuned policies that have a less discriminatory sweep. But the larger point is that, one way or the other, this issue can be resolved quickly, including through litigation and agency guidance, leaving apartment buildings on notice as to whether engaging in this practice exposes them to liability.

substitute *fair* discrimination for *unfair* or irrational discrimination.

The disparate impact doctrine has encouraged various entities to take a hard look at unexamined assumptions and to think creatively about better solutions. In doing so, it has unleashed considerable entrepreneurship. The result is good for business, good for consumers, and good for the economy.

A current example is the ongoing development of creative, less discriminatory refinements to the widely used credit score formulas. Those extending credit – whether for home loans, credit cards, or the like – have long relied on "credit scores," numbers that purport to measure how likely the prospective borrower is to make regular and timely debt payments.

Without question, it is legitimate and proper for those extending credit to rely on such an assessment; indeed, a uniformly applied formula for measuring creditworthiness is far preferable to subjective and discretionary assessments. But in practice, credit scores have taken into account only a small amount of the information that now is available. As a result, they have perpetuated the results of past denial of credit and other financial opportunities to certain communities.

For example, the major credit scoring companies traditionally have counted as positive events only the repayment of conventional credit. They have treated as non-events the regular and timely payment of other recurring expenses, such as utility and phone bills (though they do note the non-payment of those bills as negative events). In particular, they have ignored the

regular and timely payment of rent, even as they give great weight to almost identical mortgage payments. *See, e.g.*, Jonnelle Marte, *The Monthly Bill That Could Save – Or Destroy – Your Credit Score*, Wash. Post (Dec. 9, 2014), http://www.washingtonpost.com/news/get-there/wp/2014/12/09/the-monthly-bill-that-could-save-or-destroy-your-credit-score/ (last visited Dec. 22, 2014).

The result has been a vicious circle: it is difficult to qualify for credit unless one already has access to it or one's family has the wealth to secure credit despite a poor personal credit score, which is much less common for families of color than for white families.[9] Accordingly, communities that long have been excluded from opportunities to secure credit or build wealth remain shut out. Millions of people – disproportionately people of color – have good income and pay their bills on time every month, yet are considered "subprime" borrowers by official measures. These "credit invisibles" pay significantly higher rates for loans, if they can secure conventional loans at all. They are impaired in their ability to buy a house or a car, or to get a small-business loan to start an enterprise. *See* David Bornstein, *'Invisible' Credit? (Read This Now!)*, N.Y. Times (Oct. 2, 2014), http://opinionator.blogs.nyt

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[9] A recent study found that the median white family has 13 times the net worth of the median African-American family. See Rakesh Kochnar & Richard Fry, Pew Research Center, *Wealth Inequality Has Widened Along Racial, Ethnic Lines Since End Of Great Recession* (Dec. 12, 2014), http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/ (last visited Dec. 22, 2014).

imes.com/2014/10/02/invisible-credit-read-this-now/?_r=0 (last visited Dec. 22, 2014).

While this situation is regrettable, it does not represent a Fair Housing Act violation unless a less discriminatory alternative is available. Until recently, there was a good reason for not considering consistent rental payments in credit scores: such payments were not reported.

Now, multiple companies are developing mechanisms by which this information will reach credit scorers. One of the major credit scorers is creating a tool through which property managers can report rent payments. *See supra* Marte, *Monthly Bill*. Other companies are competing to create tools by which renters themselves can report their payments. *See* Ann Carrns, *Paying The Rent On Time Can Enhance Your Credit Report*, N.Y. Times (Feb. 4, 2014), http://www.nytimes.com/2014/02/04/your-money/paying-the-rent-on-time-can-enhance-your-credit-report.html?_r=0 (last visited Dec. 22, 2014).

Disparate impact doctrine has helped create the environment in which such innovation can flourish. It has fostered a data-driven culture that thrives on better information and fairer measurements. And it creates a marketplace for such innovations, because alternatives that are proven to be effective but less discriminatory must be adopted. The disparate impact standard thus is a dynamic one that both responds to and shapes technological developments.

## III. Disparate Impact Claims Complement Discriminatory Treatment Claims Rather Than Adding to the Burden of Litigation

Of course, there sometimes will be good-faith disagreements about whether a policy with substantial discriminatory effects is truly necessary or whether a proposed alternative is sufficiently effective. There also, unfortunately, will always be entities that make little or no effort to comply with their Fair Housing Act obligations, including those based on discriminatory intent as well as those based on disparate impact. In these instances, where litigation is necessary, the disparate impact doctrine has proven to be an important tool for making the housing industry's practices more sensible as well as less discriminatory. In the process, it has not significantly added to the number of Fair Housing Act suits filed or the burden of litigating such suits.

In practice, discriminatory treatment and disparate impact claims typically are brought together. As many courts have recognized, the line between these claims can be quite thin. *See* San Francisco Br. at 26-27. They require much the same evidence, since indicia of unjustified disparate impact can be evidence of discriminatory intent, while a disparate impact claim can rely in part on evidence of attitudes and assumptions that – while perhaps not sufficient to establish that a decision was directly motivated by discriminatory animus – considerably undermines any notion that the defendant has sought and implemented the least discriminatory alternative. *See, e.g., Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 990-91 (1988) (observing that one employee's remark that

"teller position was a big responsibility with 'a lot of money ... for blacks to have to count'" is evidence that "may not prove discriminatory intent, but [does] suggest a lingering form of the problem that Title VII was enacted to combat").

But resolution of claims under a disparate impact theory can be simpler. It is easier for a defendant to agree that a *practice* is unnecessarily discriminatory – and to change it – than to acknowledge that a person had discriminatory intent. And the result, whether through settlement or at the end of litigation, can produce clear guidance for other players in a way that a finding that an individual had discriminatory intent cannot.

Moreover, even the most unjustifiable of rules can be difficult to challenge under a discriminatory intent theory, because often they are the product of group-think rather than an individual. Like-minded industry officials tend to simultaneously adopt similar policies. Indeed, because both the lending and insurance industries are so dependent on secondary markets, there is a powerful disincentive to exercise independent judgment and stray from conventional wisdom, no matter how based on prejudice and stereotype the prevailing attitude may be. It is often futile as well as pointless in these industries to attempt to trace a policy to *any* sort of specific intent, discriminatory or otherwise.

Accordingly, our experience teaches us that it would be counterproductive to reframe an inquiry about the objective efficacy and necessity of concrete practices into one about discriminatory motives. *Cf. Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d

926, 935 (2d Cir. 1988) (trial court's "insistence on probing the 'pretextual' nature of appellees' justifications" was improper because it drew analysis "away from its proper focus"), *aff'd*, 488 U.S. 15 (1998). Conversations about discriminatory impact and less discriminatory alternatives can be productive and cooperative ones in which both parties seek mutually beneficial solutions. Potential adversaries can become partners instead.

Allegations of discriminatory intent, while sometimes necessary, make such non-confrontational discussions harder. They tend to end conversations rather than begin them. And focusing on a defendant's subjective sincerity rather than its objective actions simply introduces into litigation another layer of thorny evidentiary questions and intrusive inquiries. *See* San Francisco Br. at 27-28.

That said, it is no small thing for an entity to choose to adopt or maintain policies with substantial discriminatory effects rather than substituting policies that ameliorate those effects while still accomplishing legitimate purposes. As the above discussion has made clear, those entities and industries that set out in good faith to eliminate unnecessary discriminatory effects generally find themselves able to do so. The conduct at issue in successful disparate impact litigation is not innocent or accidental.

The choice to gratuitously inflict harm on the vulnerable populations the Act is meant to protect can readily be described as some form of "discrimination." It amounts to indifference to the patterns of segregation and unequal access to housing and credit that the Fair Housing Act was meant to end. If that

discrimination is not intentional, then it is at least negligent, perhaps reckless. In any event, such distinctions mean little to the person on the receiving end of the discriminatory act – the Act's intended beneficiary.

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The Fair Housing Act is justly celebrated as one of this country's landmark laws. It is no small accomplishment that intentional discrimination in housing, lending and insurance, once this country's official policy, is now outlawed. "Yet our tradition is to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring).

Almost fifty years after the Act's passage, we remain a country that, in many places, is literally divided by race and color. These divisions permit the unequal opportunities of the past to be routinely maintained and recreated by seemingly neutral requirements.

These barriers to housing opportunities – some the product of animus, some of carelessness – are not insurmountable. The disparate impact doctrine has greatly advanced the purposes of the Fair Housing Act, by forcing those once content to rely on stereotypes and unexamined assumptions to, instead, make more reasoned decisions based on evidence. And it has permitted constructive dialogue between all stakeholders by turning the conversation away from accusations of discriminatory animus and toward

practical solutions. Experience resoundingly demonstrates that we all benefit from the sounder policies that result.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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