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 *AMICI CURIAE* OF GAIL HERIOT AND PETER KIRSANOW IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether disparate impact claims are cognizable under the Fair Housing Act.

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IDENTITY AND INTEREST OF AMICI CURIAE

Gail Heriot and Peter Kirsanow ("Amici") are two members of the eight-member U.S. Commission on Civil Rights (the "Commission").[1] This brief is being filed solely in their capacity as private citizens and not on the Commission's behalf.

On December 7, 2012, the Commission held a briefing that examined an official "guidance" of the Equal Employment Opportunity Commission (the "EEOC") on employers' use of criminal background checks on job applicants. *See EEOC Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (April 25, 2012)("Criminal Background Guidance"). The resulting report, which includes Statements by both Heriot and Kirsanow, can be found on the Commission's web site. *See* U.S. Commission on Civil Rights, *Assessing the Impact of Criminal Background Checks and the Equal Employment Opportunity Commission's Conviction Records Policy* (Dec. 2013).

The EEOC based its authority to issue this guidance in large part on disparate impact theory. Since African Americans and Hispanics are more likely than whites or Asians to have criminal records, the EEOC takes the position that an employer may not rule out job applicants with such records un-

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[1] No party counsel authored this brief in whole or in part, and no such counsel or party made a monetary contribution to its preparation or submission. No person other than the *amici* or their counsel made a monetary contribution to its preparation or submission. All parties have filed with the Clerk blanket consents to the filing of amicus briefs.

less the employer can prove a "business necessity" for doing so.[2] Under the EEOC's analysis, the fact that an employer is not motivated by the job applicant's race or national origin is irrelevant in determining liability.

The Amici believe that their knowledge gleaned from their Commission work and elsewhere puts them in a special position to inform the Court about the serious problems that accompany disparate impact liability in employment and why such problems should not be exported to housing.

SUMMARY OF ARGUMENT

First, contrary to the conclusion drawn in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), Congress did not intend to adopt disparate impact liability when it passed Title VII in 1964. *See* Hugh Davis Graham, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-1972 at 387 (1990)("THE CIVIL RIGHTS ERA")("Burger's interpretation in 1971 of the legislative intent of Congress in the Civil Rights Act would have been greeted with disbelief in 1964"). Instead, disparate impact liability was the brainchild of EEOC lawyers attempting to turn what they regarded as a weak statute into a strong one. No inference can be drawn that when Congress passed the Fair Housing Act of 1968 it was well-disposed toward disparate impact liability. Congress did not acquiesce in *Griggs* until 1991. See *infra* at Part I.

Second, the implications of disparate impact liability are sprawling and boundless, have worked a profound change on the labor market, and are incon-

[2] See *infra* at Part II.A. for further explanation.

sistent with concepts of equal treatment (as opposed to equal results). *All* job qualifications have a disparate impact on some "protected group." The same would be true of all qualifications for the sale or rental of a home. If disparate impact liability is imported into the housing context, the degree of interference with both an owner's right to control the disposition and use of his or her property and with state and local regulatory authority would be extreme and unjustified. See *infra* at Part II.A.

Moreover, if the experience in the employment context is any guide, applying disparate impact to housing law may do more harm than good *even for its intended beneficiaries*. Empirical evidence suggests, for example, that employers who are discouraged from checking into the criminal backgrounds of job applicants may simply avoid hiring from pools that they (correctly or incorrectly) perceive as high risk. Landlords and others governed by the Fair Housing Act may do the same, if, for example, private litigants or the Department of Housing and Urban Development were to take the position that landlords must show "business necessity" before tenants can be ruled out on account of their criminal record. See *infra* at Part II.B.

Finally, disparate impact liability raises troubling constitutional issues. In *Ricci v. DeStefano*, 557 U.S. 557 (2009), petitioners argued that they were the victims of disparate *treatment* (i.e. actual racial discrimination), while respondents argued that their actions had been necessary to avoid the possibility of a disparate impact lawsuit. The Court resolved that conflict in favor of the victims of actual race discrimination. But one important question was

left unanswered. As Justice Scalia put it in his concurrence,

> [This decision] merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII ... consistent with the Constitution's guarantee of equal protection?

Id. at 594.

Amici believe that there is a strong likelihood that the issue will ultimately have to be resolved against disparate impact liability's constitutionality. Congress intended to benefit women, African Americans and Hispanics in particular when it adopted disparate impact liability in 1991. Indeed, race discrimination is inherent in the doctrine. Congress has offered no principled basis for upholding disparate impact liability under Title VII in the face of strict scrutiny. We are doubtful that such a basis can be offered. There is no good reason to export this potentially unconstitutional doctrine to the housing context. See *infra* at Part III.

ARGUMENT

DISPARATE IMPACT LIABILITY WAS NOT CONTEMPLATED BY THE 88TH CONGRESS WHEN IT PASSED TITLE VII IN 1964, HAS BEEN BAD PUBLIC POLICY AND IS OF DUBIOUS CONSTITUTIONALITY; IT SHOULD NOT BE USED AS A MODEL FOR INTERPRETING THE FAIR HOUSING ACT PASSED IN 1968.

I. Any Argument that Congress Intended to Adopt Disparate Impact Liability When It Passed Title VII, And Therefore Must Have Also Intended to Adopt It for the Fair Housing Act in 1968, Can Be Safely Dismissed, Since Congress Had No Such Intention in 1964.

A. "Creative" EEOC officials, concerned about what they considered to be an otherwise "powerless" agency implementing "an apparently weak statute," supplanted Title VII's original design with a disparate impact framework that they believed would be more effective in coping with the major problems of their time.

The passage of Title VII of the Civil Rights Act of 1964 was historic. But it was not intended to assert federal control over every aspect of the workplace. Its carefully limited purpose was to prohibit employment discrimination based on race, color, religion, sex and national origin. As Representative William M. McCulloch et al. put it:

> [M]anagement prerogatives and union freedoms are to be left undisturbed to the greatest extent possible. Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices.[3]

At the time, this was likely seen as an obvious, but important, point. Free enterprise has always been the engine that drives the nation's prosperity. For that and other reasons, the best way for the federal government to promote the general welfare, including the welfare of women and minorities, has usually been to allow peaceable and honest individuals the freedom to run their own business affairs. When exceptions become necessary (as they did in 1964), they were understood by most as precisely that—exceptions. They were not intended to swallow the rule.

Congressional leaders assured their colleagues that Title VII would not interfere with employer discretion to set job qualifications—so long as race, color, religion, sex and national origin were not among them. Senators Clifford Case (R-N.J.) and Joseph Clark (D-Pa.), the bill's co-managers on the Senate floor, emphasized this in an interpretative memorandum:

> There is no requirement in Title VII that employers abandon bona fide qualification

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[3] Statement of William M. McCulloch, et al., H.R. Rep. No. 914, 88th Cong., 2d Sess. (1964). McCulloch was the House Judiciary Committee's ranking member and was considered by many to have been indispensable in passing the Act.

> tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance.

Case & Clark Memorandum, 110 Cong. Rec. 7213. Note that Case and Clark used the term "bona fide qualification tests," meaning qualification tests adopted in good faith, and not "necessary" or "scientifically valid" qualification tests. To Case and Clark the issue was whether the employer chose a particular job qualification *because* he believed it would bring him better employees or *because* he believed it would help him exclude applicants based on their race, color, religion, sex or national origin. *See* Case & Clark Memorandum, 110 Cong. Rec. 7247 (Title VII "expressly protects the employer's right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications. Indeed, the very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color.").

Congress's intention to outlaw only discriminatory treatment and not disparate impact is made clear from Title VII's central prohibitions:

> Section 703. Unlawful employment practices
>
> (a) Employer practices

It shall be an unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's race, color, religion, sex, or national origin*; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive ... any individual of employment opportunities or adversely affect his status ... , *because of such individual's race, color, religion, sex, or national origin.*

42 U.S.C. sec. 2000e-2 (emphasis added).

To "discriminate" against an individual "because of" his "race, color, religion, sex or national origin" always requires some level of intentionality.[4] *See* Richard K. Berg, *Equal Employment Opportunity*

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[4] Amici believe that the term "discriminate" does not always require *conscious* intentionality. If an employer rejects a Hispanic job applicant, when he would have hired an applicant who is identical in every way except that he is not Hispanic, the employer is discriminating against the Hispanic applicant because of his race or national origin. To discriminate against an individual because of his race or national origin is to treat him differently from how one would have treated an otherwise identical person of a different race or national origin. The employer need not be consciously aware of the double standard he is applying. This is, however, a very great distance from a disparate impact liability, which does not require that the employer be motivated by race or national origin at all, consciously or unconsciously.

Under the Civil Rights Act of 1964, 31 Brook. L. Rev. 62, 71 (1964) ("Discrimination is by its nature intentional. It involves both an action and a reason for the action. To discriminate 'unintentionally' on grounds of race ... appears a contradiction in terms").

But just in case Section 703 were to be misinterpreted, the bill was amended in the Senate at the insistence of Republican Leader Everett Dirksen—without whose support the bill likely never would have gotten past the Southern filibuster. Dirksen insisted on adding the word "intentionally" to Section 706(g), which deals with judicial power to enforce the prohibitions of Section 703. As modified, Section 706(g)(1) read:

> (1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay ..., or any other equitable relief as the court deems appropriate....

42 U.S.C. sec. 2000e-5(g)(1).

In explaining why the term "intentionally" was added here, Senator Hubert Humphrey said, "Section 706(g) is amended to require a showing of intentional violation of the title in order to obtain relief.... The expressed requirement of intent is designed to make it wholly clear that inadvertent or accidental dis-

crimination will not violate the title or result in entry of court orders." 110 Cong. Rec. 12,723-28 (1964).[5] *See also* THE CIVIL RIGHTS ERA at 387 (1990); Daniel Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. Penn L. Rev. 1417 (2003) (both arguing that the 88th Congress would have been astonished at the application of disparate impact liability).[6]

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[5] Dirksen's amendment and Humphrey's explanation are not in perfect harmony, since the amendment applied only to judicial remedies, while Humphrey's explanation applies generally. Dirksen might possibly have intended to foreclose courts from intervening even in the case of unconscious disparate treatment and to leave such cases entirely to the EEOC's mediation efforts. An employer who engaged in unconscious discrimination would essentially be allowed "one free bite." If the employer continued its practices after EEOC mediation efforts, it would be difficult for the employer to maintain that its actions were unconscious.

[6] Indeed, while Title VII was under consideration, an Illinois hearing examiner, interpreting the more loosely worded Illinois Fair Employment Practices Act, concluded that an employer could not administer a general intelligence test to job applicants, despite a lack of intent to discriminate on the basis of race, because African Americans had not received the kind of education necessary to do well on the test. *Myart v. Motorola, Inc.*, No. 63C-127 (Ill. F.E.P.C. 1964), reprinted in 110 Cong. Rec. 5662 (1964). Title VII supporters were frantic to assure their colleagues that their proposed law would not permit such a result. Just in case, the "Tower Amendment" was added stating that notwithstanding any other provision, employers are free "to give and to act upon the results of any professionally developed ability test provided that such test is not designed, intended or used to discriminate because of race ...." In the view of many observers, the hearing examiner had badly overreached. *See Hiring Tests Wait for the Score: Case Involving Motorola's Employment Test Raises Issue of Whether Employers Can Use Screening Devices That Might Discriminate Against*

In addition, by denying the newly-created EEOC both substantive rulemaking authority and the authority to adjudicate cases or to issue cease and desist orders, Title VII's Congressional supporters attempted to ensure Title VII's reach could not be expanded. The power to issue regulations might be interpreted to authorize limited prophylactic measures, and Congress evidently wished to make it clear that Title VII was already as broad as they intended it to be. The EEOC was to be a mediating agency *only*.

EEOC officials soon began issuing guidances as an alternative to substantive regulations. Alfred W. Blumrosen, BLACK EMPLOYMENT AND THE LAW 52 (1971). Given most employers' eagerness to stay on the right side of the law, these guidances can be as effective as regulations at influencing employer practices. An advantage from the EEOC's perspective is that they are not subject to notice and comment requirements and thus tend to receive less public scrutiny or government oversight. They are also fiendishly difficult to challenge in court.[7]

"Deprived" Persons, BUS. WEEK 45 (Feb. 13, 1965)(reporting that Title VII would not permit that result). Not surprisingly, the decision was eventually overturned. *Motorola, Inc. v. Ill. Fair Employment Comm'n*, 34 Ill.2d 266, 215 N.E.2d 286 (1966). *But see Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (interpreting the Tower Amendment to impose on employers a duty to use only those tests that have been proven in court to be job-related and using it as the primary textual support for adopting the disparate impact liability). *See also* George A. Rutherglen & John J. Donohue III, EMPLOYMENT DISCRIMINATION: LAW AND THEORY 158 (3d ed. 2012) (critically questioning the *Griggs* interpretation of the Tower Amendment).

[7] The fact that Title VII makes EEOC investigations and mediations confidential, 42 U.S.C. 2000e-8(e), adds to the degree to

Blumrosen, the EEOC's first "Chief of Conciliations" and disparate impact liability's primary architect, was unabashed in describing the extent to which the EEOC was (and in his view should be) aggressive in its interpretation of Title VII:

> Creative administration converted a powerless agency operating under an apparently weak statute into a major force for the elimination of employment discrimination. ... [Legal education] rarely deals with the affirmative aspects of administration. Rather, the law schools provide elaborate intellectual equipment to *restrict* the efforts of administrators. Constitutional law and administrative law are still largely concerned with what government may not do, rather than with how it should decide what it may do. Students impatient with the negativism of present legal education would be better equipped as lawyers if they would focus sharply on the question of "how we can best fulfill the purposes which brought our agency into being" rather than on the question of "whether the courts will sustain this course of action."

Id. at 53 (emphasis in original).

Blumrosen was part of the generation of civil rights policymakers profoundly influenced by the turbulence of the late 1960s—something that is easy to forget today. *See id.* at 3. He repeatedly pushed the EEOC to interpret Title VII with an eye toward

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which EEOC policymaking has tended to escape both public scrutiny and government oversight.

effectuating what he perceived as its broad purpose—increasing African-American employment as quickly as possible—rather than with an eye towards what the courts would be likely to uphold. Among other things, he urged that employers be forced to adhere to "fair qualification standards." *Id.* at 255-269. He argued that there are three relevant issues:

> (1) Does the standard ... exclude a higher proportion of minority group members ... ? (2) If so, is this exclusion justified by business necessity ... ? (3) Is the employer entitled to require this capability in his applicants without providing training programs ... ?

Id. at 255.

Blumrosen's sense of urgency led him to an approach that was fundamentally anti-democratic—something he implicitly conceded when he wrote of his lack of concern over whether courts would sustain it. Regardless of the merits of his approach, it was simply not shared by Congress. Deference to such an approach would be similarly anti-democratic.

Historian Hugh Davis Graham wrote concerning this period in the EEOC's history:

> The EEOC legal staff was aware from the beginning that a normal, traditional, and literal interpretation of Title VII could blunt their efforts [based on disparate impact theory] against employers who used either professionally developed tests or bona fide seniority systems. The EEOC's own official history of these early years records with unusual candor the

> commission's fundamental disagreement with its founding charter, especially Title VII's literal requirement that the discrimination be intentional.

THE CIVIL RIGHTS ERA at 248-49.

Writing for the NAACP's THE CRISIS in 1968, EEOC Commissioner Samuel Jackson reiterated this policy:

> [The] EEOC has taken its interpretation of Title VII a step further than other agencies have taken their statutes. It has reasoned that in addition to discrimination in employment, it is also an unlawful practice to fail or refuse to hire, to discharge or to compensate unevenly ... on criteria which prove to have a demonstrable racial effect without a clear and convincing business motive.

Note Jackson's admission that the new approach was "in addition to discrimination in employment." Yet discrimination is what Title VII bans, not job qualifications that "prove to have a demonstrable racial effect." It would be hard to find a clearer confession that the EEOC's action was in fact a deliberate effort to go beyond the statute's actual prohibition.

Jackson attempted to justify the EEOC's departure from Title VII's intent requirement by asserting that "Congress, with its elaborate exploration of the economic plight of the minority worker, sought to establish a comprehensive instrument with which to adjust the needless employment hardships resulting from the arbitrary operation of personnel practices, as well as purposeful discrimination." Samuel C.

Jackson, EEOC vs. Discrimination, Inc, THE CRISIS 16-17 (January 1968). But the 1964 statute was no more "a comprehensive instrument with which to adjust ... needless employment hardships" than the No Child Left Behind Act is a comprehensive instrument by which the federal bureaucracy is given authority to "make schools better." A statute's text matters. The 88th Congress' general objective may have been to remove needless employment hardships or it may have been to impress its constituents with their earnestness. But the means it chose to accomplish its objective was to prohibit discrimination on the basis or race, etc., and that is what counts.

B. In deciding *Griggs v. Duke Power Co.*, this Court followed the EEOC's theoretical framework and not that of the original Title VII. Only later (and long after the Fair Housing Act's passage), when the Court attempted to limit the theory's application, did Congress come forward to amend Title VII to conform, at least in part, to the EEOC's expansive theoretical framework.

Griggs was the first Supreme Court decision adopting a disparate impact liability. In it, the Court cited the EEOC Guidelines on Employment Testing Procedures (August 24, 1966) as "expressing the will of Congress." *Id.* at 433-34 & n. 9. We believe this did not reflect Congress's actual intent.[8]

The *Griggs* Court stated that the "objective of Congress" in enacting Title VII "was to achieve equality of employment opportunities *and* remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Id.* at 429-30 (emphasis supplied). It held, therefore, that under Title VII, "practices, procedures, or tests neutral on their face, *and even neutral in terms of intent*, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Id.* (emphasis supplied). "The touchstone is business necessity," it stated. "If an employment practice which operates to exclude

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[8] The Guidelines on Employment Testing Procedures would not be entitled to *Chevron*-deference today. *See United States v. Mead Corp.*, 533 U.S. 218 (2001).

Negroes cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431.[9]

The Court's reliance on Congress's larger intent behind Title VII's enactment was curious in view of the pains members of the Senate had taken to avoid arguments based on its supposed larger intent. The original bill approved by the House of Representatives contained prefatory language to Title VII to the effect that "it is the national policy to protect the right of the individual to be free from ... discrimination."[10] Dirksen insisted that it be deleted. Although the record does not disclose why, the likely reason is that the operative provisions of Title VII speak for themselves and flowery language concerning Congress's general policy would only increase the likelihood that future courts would misinterpret them.

After *Griggs*, Title VII was interpreted to demand two things: (1) Employers must provide equality of opportunity to all persons regardless of race, color, sex, religion or national origin; and (2) In deciding upon job qualifications, they must provide at least equal results for women and minorities unless

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[9] *Griggs* may well have involved intentional discrimination. But if so, it was incumbent upon the plaintiffs to prove their case on that theory.

[10] 110 Cong. Rec. 12,811 (June 5, 1964). The full deleted sentence would have stated:

> Section 701 (a) The Congress hereby declares that the opportunity for employment without discrimination of the types described in section 704 and 705 is a right of all persons within the jurisdiction of the United States, and it is the national policy to protect the right of the individual to be free from such discrimination.

they can prove they were driven by business necessity to do otherwise. Up until *Ricci*, few remarked on it, but these dual requirements were at war with each other from the beginning. Equality of treatment and equality of results are very different.[11]

In the ensuing years, disparate impact's sweeping nature became increasingly evident. In *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988)(plurality opinion) and *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), this Court began to limit and clarify its applicability. Only then, in

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[11] The problem was compounded by establishing a stringent standard of proof for "business necessity" that few employers can dream of achieving in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). The employer there had hired an expert industrial psychologist to conduct a validation study to justify its use of standardized tests to hire and promote its employees. But the Court found the expert's report was not sufficiently scientifically rigorous. Among other things, the job qualifications had not been validated at the micro-level, i.e for each of an employer's job categories. But it is nearly impossible for any but the largest employers to generate enough data for statistically significant validation studies. Under *Albemarle*, unless a bank could scientifically prove that high-school graduates make better tellers than high-school dropouts, it could not require a high-school diploma for tellers, since proportionally more whites than African Americans possess such a diploma. Indeed, its proof would have to apply specifically to its own tellers, including its minority tellers, not just to tellers in general. It was Justice Blackmun in his concurrence who tentatively sounded the alarm: "I fear that a too-rigid application of the EEOC Guidelines will leave the employer little choice, save an impossibly expensive and complex validation study, but to engage in a subjective quota system of employment selection." 422 U.S. at 449 (Blackmun, J., concurring in the judgment). While *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), appeared to overrule *Albemarle*, the Civil Rights Act of 1991 restored the law to its pre-*Wards Cove* condition.

1991, did Congress pass legislation suggesting approval of disparate impact liability. Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 2(2), 3(2), 3(3), 105 Stat. 1071, 1074-5 (1991). This was 27 years after Title VII's passage and 23 years after the Fair Housing Act's passage. Consequently, there is no reason to believe that Congress intended to incorporate disparate impact liability into the Fair Housing Act in 1968.

Even if stare decisis considerations would cause the Court to apply *Griggs* to identically worded statutes, *see Smith v. City of Jackson*, 544 U.S. 228 (2005), they should not cause the Court to apply *Griggs* here. As discussed in Part II, the ramifications are too far reaching.

II. Disparate Impact Liability in the Employment Context Has Led to Unjustified Federal Control Over Ordinary Decisions by Employers, Provides Opportunities for Political Favoritism, Is Logically Incoherent and May Well Work to the Disadvantage of the Very Persons It Was Intended to Benefit.

A. Disparate impact liability in the employment context has been a sprawling, incoherent mess; expanding it to housing will only aggravate the problem.

One problem with disparate impact theory is that all job qualifications have a disparate impact. It is no exaggeration to state that there is always some protected group that will do comparatively poorly with any particular job qualification. As a

group, men are stronger than women, while women are generally more capable of fine handiwork. Chinese Americans and Korean Americans score higher on standardized math tests and other measures of mathematical ability than most other ethnic groups. Subcontinent Indian Americans are disproportionately more likely to have experience in motel management than Norwegian Americans, who more likely have experience growing durum wheat. African Americans are over-represented in many professional athletics as well as in many areas of the entertainment industry. Unitarians are more likely to have college degrees than Baptists. See *Watson v. Fort Worth Bank & Trust*, *supra*, (recognizing that disparate impact liability applies to subjective as well as objective job qualifications).[12]

Some of the disparities are surprising. Cambodian Americans are disproportionately likely to own or work for doughnut shops and hence are more like-

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[12] Consider the large number of "rental qualifications" or "loan qualifications" that could have a disparate impact based on race, color, religion, sex or national origin: If it isn't all of them, it is very close. Employment rates, income, wealth, family size, credit history, as well as likelihood that one plays a musical instrument or runs a small business out of the home will vary according to race, color, religion, sex, or national origin. If the law were to foreclose consideration of issues where there is a disparate impact without a provable business necessity, it would have a profound effect on landlords and creditors. Interpreting the Fair Housing Act to include disparate impact liability would be more consequential than interpreting the Age Discrimination in Employment Act to include it. *See Smith v. City of Jackson*, 544 U.S. 228. The ADEA contains an affirmative defense for any "reasonable factor other than age"—a much lower standard than business necessity.

ly to have experience in that industry when it is called for by an employer. *See* Seth Mydans, *Long Beach Journal: From Cambodia to Doughnut Shops*, N.Y. Times, May 26, 1995. The reasons behind other disparities may be more obvious: Non-Muslims are more likely than Muslims to have an interest in wine and hence develop qualifications necessary to get a job in the winemaking industry, because Muslims tend to be non-drinkers.

The result is that the labor market is anything but free and flexible. All decisions are subject to second-guessing by the EEOC or by the courts. This is a profound change in the American workplace—and indeed in American culture. Note that disparate impact liability applies to promotions and terminations too. *See George v. Farmers Electric Cooperative, Inc.*, 715 F.2d 175 (5th Cir. 1983); *Wilmore v. Wilmington*, 699 F.2d 667 (3d Cir. 1983).

Supporters of disparate impact liability sometimes argue that disparate impact's ubiquity is not a problem, because the EEOC has agreed to abide by a "four-fifths rule." Under the Uniform Guidelines on Employee Selection Procedures, if a particular job qualification leads to a "selection rate for any race, sex, or ethnic group" that is "greater than four-fifths" of the "rate for the group with the highest rate" it will not be regarded by federal enforcement agencies as evidence of adverse impact." This is cold comfort. First of all, particularly when the population is broken into multiple ethnic groups, selection rates of less than four-fifths relative to the ethnic group with the highest rate are the rule and not the exception.

Consider, for example, the horse racing industry. Of the five top-grossing North American jockeys

of 2012, all are Hispanic males. Height and weight restrictions make it less likely that an African- or Irish-American male will qualify. Furthermore, this supposed limitation on disparate impact is not binding on private litigants (and does not even guarantee which approach federal agencies will take).

Moreover, while the "four-fifths" rule purports to be practical, it is useless in practice. Prior to adopting a particular job qualification, employers usually have no way of knowing what the selection rates will be. All they can be sure of is that the results won't be equal across the board, since nothing ever is.

The upshot of this is that hiring and firing practices must be shrouded in secrecy. Employers do not dare advertise clear job qualifications for fear they will attract a lawsuit. Performance tests, indeed any kind of innovative hiring practices, are invitations to a lawsuit. Wise employers try to be on good terms with the EEOC, knowing that when everything is potentially illegal, the name of the game is to avoid antagonizing the regulator.[13]

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[13] Disparate impact liability's supporters similarly argue that the EEOC has not attempted to push disparate impact to its logical limits. Apparently, we are not to worry about a body of law that makes everything potentially illegal until the day the EEOC officials are seen by these supporters as actually enforcing that law. But partial enforcement is simply an opportunity for political favoritism. Moreover, Amici note that there has been a marked uptick in the interest of government agencies in disparate impact liability over the past few years. For example, the Department of Education has also implemented a policy of prohibiting disparate impact in school discipline. *See* Statement of Gail Heriot in U.S. Commission on Civil Rights, School Discipline and Disparate Impact 97 (2012); *see also* Statement

A good example of how disparate impact liability works in practice is the *Criminal Background Guidance*. It does not prohibit or restrict employers from inquiring into applicant's arrest and conviction record. But it makes it less likely they will be willing to by requiring them to jump through hoops before they can decline to hire an applicant on account of such a record, and making it more likely they will be sued if they do.

The *Criminal Background Guidance* first requires employers to conduct an analysis based on the so-called "Green Factors," named for *Green v. Missouri Pacific Railroad*, 549 F.2d 1158, 1160 (8th Cir. 1977). Those factors are (1) the nature and gravity of the offense; (2) the time passed since the offense and/or completion of the sentence; and (3) the nature of the job held or sought. Employers cannot have rules that screen out applicants with criminal records that are not adjusted to take account of these factors. Second, in addition, employers must in most cases conduct "individualized assessments," which include "notice to the individual that he has been screened out because of a criminal conviction" and "an opportunity for the individual to demonstrate that the exclusion should not be applied due to his particular circumstances." *Criminal Background Guidance* at 14.

In other words, this guidance forces the employer to set himself up for an EEOC complaint and ultimately a lawsuit. He must inform a job applicant that his criminal record may prevent him from get-

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of Todd Gaziano in *id.* at 87. Disparate impact liability is a growth industry.

ting the job. If the applicant disagrees with the employer's judgment as to "business necessity," the applicant can effectively appeal to the EEOC. Ultimately, it is the EEOC's judgment, not the employer's, that will count. It is difficult to imagine a more significant interference with an employer's judgment. If landlords and homeowners are made subject to similar requirements, they can look forward to the same lack of control over their destiny.

Note that disparate impact theory is essentially incoherent. Even when it is applied only for the benefit of women and racial minorities, for every protected group that is benefitted by prohibiting a particular job qualification, there is always a protected group that is harmed. If the EEOC hoped to benefit African Americans and Hispanics by issuing its guidance on criminal background checks, it did so with the knowledge that other groups, including Quakers and women, will be disadvantaged by reducing employers' discretion to reject applicants with criminal records. Logically, an employer who eliminates a job qualification that had worked to the advantage of Quakers and women in the past must be required to demonstrate business necessity too.

Note also that disparate impact liability does not simply interfere with an employer's ability to "set his qualifications as high as he likes" and a job applicant's ability to draw the employer's attention to the characteristics that make him suited for the job in question. It also interferes with the ability of state and local governments to regulate employment. The EEOC takes the position that the Supremacy Clause vaults its interpretation of Title VII regarding criminal background checks over state legislation requir-

ing employers to run criminal background checks on certain kinds of hires (e.g. employees who work with the aged). *Criminal Background Guidance* at 24.

B. Disparate impact liability in the employment context may be doing more harm than good, and there is little reason to suspect the same won't be true in the context of housing.

Also troubling is the evidence that disparate impact liability may not even accomplish its goal of increasing the employment opportunities of women and minorities.

The *Criminal Background Guidance* is an example. In Harry J. Holzer, Steven Raphael & Michael A. Stoll, *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J.L. & Econ. 451 (2006)("*Perceived Criminality*"), the authors discussed the double effect of using criminal background checks. As they explain, it must be kept in mind that African-American and Hispanic men are not simply more likely to have a criminal record, they are likely to be perceived that way too. Consequently, if the *Criminal Background Guidance* discourages some employers from checking the criminal background of job applicants out of fear of liability, some will almost certainly shy away from hiring African-American or Hispanic males in the (not necessarily unfounded) belief that members of these groups are somewhat more likely to have criminal records than white or Asian American male applicants. Put differently, the EEOC's attempt to prevent the "disparate impact effect" creates an incentive for a "real discrimination effect."

Of course, prohibiting real discrimination is exactly what Title VII was supposed to do. Congress was well aware that some discrimination—call it "statistical discrimination"—is rooted in stereotypes that may or may not have some basis in fact. For example, women really are on average less physically able to lift heavy weights than men. But if an employer wanted an employee who was strong, well-educated, good with people, or mathematically inclined, Congress took the position that the employer should look for evidence of those characteristics and not depend on racial, gender, religion or national origin stereotypes. But the success of that approach depends upon the ability of employers to seek evidence of the actual desired traits. If the employer is looking for trustworthy employees who will not commit crimes, they need some source of information. The applicant's criminal record (or lack of a criminal record) is often the best method for separating the cases that are most likely to be a problem from those that are not. If employers are prohibited from using that method, they will be tempted, consciously or unconsciously, to use race as a proxy for criminal record.

Other employers may make adjustments to their hiring policies that are not in any way motivated by race, but which ultimately decrease the likelihood that African-American and Hispanic job applicants will be hired. Suppose, for example, an employer regularly hires young high school drop-outs as packers for his moving van business. Given the business location's demographics, this yields a labor pool that is disproportionately African American and Hispanic, but not overwhelmingly so. Until his lawyer instructed him that the requirement of "individualized

assessments" made excluding applicants with criminal records too risky, he had been doing criminal background checks on all job applicants and declining to hire most of those with a record. But after he stopped conducting those checks, he hired a young, white 19-year-old who ended up stealing from the customers. Another recent hire turned out to have a drug problem. The employer does not know it, but criminal background checks would have identified these employees as risky. All the employer knows is that he is not satisfied with his recent hires, so he decides to convert the full-time jobs that come open into part-time jobs and to advertise in the campus newspaper at a nearby highly competitive liberal arts college. He figures (rightly or wrongly) that the students there will likely be more trustworthy than the pool he had been hiring from. Given the school's demographics, this yields an overall labor pool that has proportionately fewer minorities. The EEOC guidance would have accomplished precisely the opposite its intentions.

From a policy standpoint, the obvious question is which effect dominates—the disparate impact or the disparate treatment effect. The evidence adduced in *Perceived Criminality* indicates that it may be the latter. That article examined the answers to interview questions provided by slightly over 3000 employers that hired workers without college degrees in four cities during the early 1990s. Approximately half of those employers either always or sometimes conduct criminal background checks on job applicants. Further data collected in 2001 in Los Angeles showed this number had climbed from 48.2% to 62.3% for that city specifically.

The article found that employers who conduct background checks were more likely to have recently hired an African-American applicant than employers who do not. Among those employers who were unwilling to hire ex-offenders, the employers who checked were 10.7% more likely to have recently hired an African American. This finding was highly significant.[14]

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[14] It is always difficult to distinguish cause from effect. In conducting studies of this kind, one could argue that the reason that employers who undertake background checks are more likely to hire African Americans is that they face labor pools that are heavily African American and are biased against African Americans. But the authors used statistical methods to account for this possibility as best they could and still found the evidence they found.

Similarly, research has been undertaken attempting to confirm or refute the hypothesis that easy availability of criminal background information benefits black males as a group overall by comparing the black-to-white wage ratio in states that make criminal records broadly available to that in states that do not. Shawn D. Bushway, *Labor Market Effects of Permitting Access to Criminal History Records*, 20 J. CONTEMP. CRIM. JUSTICE 276 (2004). Bushway's data did indeed show that states that make criminal records broadly available have higher black-to-white wage ratios, but those data were too skimpy for this difference to be statistically significant. Bushway has called for more research. *Id.* at 288-89.

III. Since Congress's Purpose in Adopting Disparate Impact Liability in 1991 Was to Confer an Economic Benefit on Racial Minorities (and Women), It Must Be Subjected to Strict Scrutiny—Scrutiny That It Likely Cannot Withstand.

A. The application of disparate impact liability was intended to be and in fact is racially discriminatory.

To Amici's knowledge, the EEOC has never brought a disparate impact investigation or lawsuit on behalf of white males. While the Uniform Guidelines on Employee Selection Procedures do not explicitly limit the disparate impact liability to cases in aid of women and minorities, such a policy can be inferred from the EEOC's enforcement history. Indeed, it is difficult to avoid.

This Court has never entertained a disparate impact case on behalf of anyone other than women and racial minorities, and its past decisions indicate it did not expect to. In *Griggs*, the Court repeatedly noted that the purpose of disparate impact liability was to assist African Americans or non-whites in particular. One of the "objective[s] of Congress in the enactment of Title VII," it wrote, "was to "remove barriers that have operated in the past to favor an identifiable group of *white* employees over other employees." *Id.* at 429-30 (emphasis added). It concluded that if "an employment practice which operates to exclude *Negroes* cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431 (emphasis added). This language was consistent with the EEOC's Guidelines on Employment Testing Procedures (August 24, 1966) upon which

the Court relied, which referred to the problem of "inadvertently excluding qualified minority applicants through inappropriate testing procedures" and the need to be "[m]indful of the special concerns of minorities."

In 1981, the Commission issued a report that flatly stated that disparate impact liability "cannot be sensibly applied to white males" given that the purpose of the liability is to uproot historical and contemporary sexism and racism. U.S. Commission on Civil Rights, Affirmative Action in the 1980s: Dismantling the Process of Discrimination 17 n.20 (1981). Contemporary commentators agreed. *See, e.g.*, Martha Chamallas, *Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 U.C.L.A. L. Rev. 305, 366-68 (1983) ("In sum, disparate impact has been inherently one-sided. Blacks and women may object to a test that tends to reduce job opportunities for them. ... It is probable that the courts, in an effort to reduce the intrusion on employer discretion, will continue to limit disparate impact challenges to those brought by minorities."); David A. Strauss, *The Myth of Color Blindness*, 1986 Sup. Ct. Rev. 99 (arguing that affirmative action and disparate impact theory are conceptually related).

The only court to address the issue squarely also agreed that disparate impact theory is ordinarily unavailable to white males. *Livingston v. Roadway Express, Inc.*, 802 F.2d 1250, 1252 (10th Cir. 1986) ("in impact cases ... a member of a favored group must show background circumstances supporting the inference that a facially neutral policy with a disparate impact is in fact a vehicle for unlawful discrimina-

tion."). While a few white, male private litigants have attempted to employ a disparate impact theory in Title VII cases, to our knowledge none has ever secured a judgment in his favor.

That was the zeitgeist when Congress undertook to amend Title VII in the early 1990s. Members who supported adding disparate impact liability to the statute perceived it as applying to women and racial minorities in particular. *See, e.g.*, Statement of Sen. Glenn, 137 Cong. Rec. 29,064 (1991) ("The Civil Rights Act of 1991 would reverse ... *Wards Cove v. Atonio* and restore ... *Griggs* .... In *Griggs*, the Supreme Court held that practices which disproportionately exclude qualified women and minorities ... are unlawful unless they serve a business necessity."); Statement of Sen. Metzenbaum, 137 Cong. Rec. 33,483 (1991) (The 1991 amendments provide "that employment practices which disproportionately exclude women or minorities are unlawful, unless employers prove both that these practices are 'job related ...' and that they are 'consistent with business necessity.'"); Statement of Sen. Dodd, 137 Cong. Rec. 29,026 (1991) ("[I]n *Wards Cove Packing Co. v. Atonio*, the Supreme Court overturned an 18-year precedent set by the *Griggs* ... decision regarding ... discrimination based upon the disparate impact of business hiring of minorities."); Statement of Sen. Kohl, 137 Cong. Rec. 29,048 (1991) ("Under this proposal employers must justify work rules if ... the rules have a disparate impact on women and minorities."); Statement of Rep. Ford, 137 Cong. Rec. 13,530 (1991) ("The *Griggs* standard worked well .... Under *Griggs*, employers who chose to use selection practices with a significant disparate impact on women or minorities had to defend the practices by showing business ne-

cessity."); Statement of Rep. Stenholm, 137 Cong. Rec. 13,537 (1991) ("The substitute creates a new standard of 'business necessity' that a business must meet to defend an employment practice whose result is a 'disparate impact'—meaning the percentage of the employer's work force comprising women, minorities, or a given religious group, does not almost identically match that group's percentage in the available labor pool."); Statement of Rep. Fish, 137 Cong. Rec. 13,539 (1991) ("The complaining party in a disparate impact case carries the heavy burden of linking adverse impact on women or members of minority groups to a specific practice or practices unless the employer's own conduct essentially forecloses the possibility of establishing such linkage."). For additional examples, *see* Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 Nw. L. Rev. 1505, 1539 n.169 (2004)("*Upside Down*").

Contemporaneous media reports also support the understanding that the amendments' disparate impact provisions apply only to women and minorities. *See, e.g.*, Robert Pear, *With Rights Act Comes Fight to Clarify Congress's Intent*, N.Y. Times (November 18, 1991) (Under the amendments, "[i]f workers show that a particular practice tends to exclude women or minority members, then the employer must show that the practice is 'job-related ... and consistent with business necessity.'").

More recent scholars have agreed that "[w]hat authority there is supports the view that employment practices with disparate impacts on historically dominant classes are, as a matter of law, not actionable under Title VII." Richard A. Primus, *Equal Pro-*

tection and Disparate Impact: Round Three, 117 Harv. L. Rev. 493, 528 (2003). *See* John J. Donohue III, *Understanding the Reasons for and Impact of Legislatively Mandated Benefits for Selected Workers*, 53 Stan. L. Rev. 897 (2001) ("I conclude that disparate impact analysis will not protect white males as a matter of theory. ... The first prong of a disparate impact case—finding a practice that adversely affects a member of a protected class—will not be met since white males will not be deemed to be 'protected' under this doctrine.")

But there is increasing recognition that this raises thorny constitutional issues. One scholar has argued that he used to "firmly announce" to his students that disparate impact theory "was not available to whites and males." *See Upside Down* at 1505. When the Court began taking the position that strict scrutiny must be employed on behalf of members of majority as well as minority races, *see Grutter v. Bollinger*, 539 U.S. 306 (2003), he began to realize that applying disparate impact theory only on behalf of women and racial minorities would raise serious constitutional difficulties. He therefore urged a reinterpretation of disparate impact liability so that it would also apply to white males.

There are several problems with such a reinterpretation, which would, in essence, extend the reach of a statute whose reach is already extraordinary. Among other things, there is no evidence that Congress would have supported such an extension. Suppose Congress had passed an unconstitutional tax on Hispanics. It would be improper for a court to simply impose that tax on everyone, since that court has no evidence that Congress would have been willing to

tax all Americans if it had known its original tax would be found unconstitutional. The proper thing to do would be to nullify the original tax and let Congress decide whether to promulgate legislation imposing a generally applicable tax. The same logic applies here.

Moreover, even if there were overwhelming evidence that Congress would prefer a generally applicable disparate impact doctrine to no disparate impact doctrine at all, it would make no difference. Even generally applicable disparate impact theory is racially discriminatory. The Constitution protects individuals from race discrimination, not groups. If disparate impact theory is applied to help African Americans where they are under-represented and whites where they are under-represented, the result is more race discrimination, not color-blindness. It doesn't make a white applicant for a job as a New Haven firefighter feel better to know that the playing field would be tilted in his favor if he were applying for a position in the NBA if he is only qualified for the firefighting job.

B. In the absence of a compelling purpose and narrow tailoring, Title VII's disparate impact liability must fail.

A racially discriminatory law is permissible only if it serves a compelling purpose and is narrowly tailored to fit that purpose. *See Fisher v. University of Texas*, 133 S. Ct. 2411 (2013). Congress did not attempt to offer a principled basis for upholding disparate impact liability under Title VII in the face of strict scrutiny: They apparently didn't think they had to. Amici are dubious that such a basis can be offered.

A few scholars have tried to step up to the plate, but their efforts have been unavailing. Professor Richard Primus suggests the argument that disparate impact doctrine may have been regarded by Congress as "a prophylactic measure that is necessary because deliberate discrimination can be difficult to prove." *Primus* at 520. Ultimately, despite his view that the *Griggs* approach to Title VII is "normatively desirable," he rejects this argument as "neither technically smooth nor normatively desirable." *Id.* at 523. We agree that for the reasons Primus discusses, this does not describe Congress's motive in 1991. It cannot account for the allocation of burdens and defenses. It therefore cannot be put forth to justify disparate impact doctrine. Congress would need to re-vamp the law extensively to fit this square peg into that round hole.

So what compelling purpose can be offered? And what evidence is there that it is narrowly tailored to serve that purpose? Amici submit that the evidence that this doctrine has systematically advanced the employment opportunities of underrepresented racial minorities and/or women is nonexistent. *See* Ian Ayres & Peter Siegelman, *The Q-Word as Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas*, 74 Tex. L. Rev. 1487 (1996)(disparate impact liability may make employers more reluctant to hire minority employees because it makes firing or demoting them later more risky). There is certainly no showing that it has actually served a compelling purpose or that it is narrowly tailored to that purpose. This sprawling and incoherent doctrine unduly complicates the American labor market in a time that the national economy can ill-afford such a blow to its vitality.

Exporting this doctrine to housing law would only make things worse.

CONCLUSION

Something is wrong. The Reverend Martin Luther King, Jr. famously looked forward to when his children would be judged by the content of their character rather than the color of their skin. Current law turns this hope on its head. Race may under certain circumstances be taken into account. *See United Steelworkers v. Weber*, 443 U.S. 193 (1979) (permitting some minority preferences). But under the EEOC's recent guidance, the content of one's character, at least as revealed by one's criminal record, cannot be without risking litigation. While

much of this is an issue for another day, the one thing that can be done now is avoid exporting the issue into new areas. This Court should reverse the Court of Appeals.

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Respectfully submitted,

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