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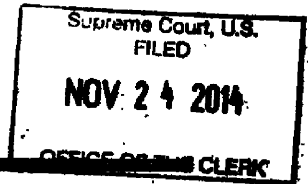

No. 13-1371

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 THE CONSUMER DATA INDUSTRY ASSOCIATION; NATIONAL CONSUMER REPORTING ASSOCIATION; AND THE NATIONAL ASSOCIATION OF PROFESSIONAL BACKGROUND SCREENERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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EEOC v. Freeman, No. 09cv2573, 2013 U.S. Dist. LEXIS 112368 (D. Md. 2013).............. 18, 19

EEOC v. Peoplemark, Inc., No. 1:08-CV-907, 2011 U.S. Dist. LEXIS 154429 (W.D. Mich. Oct. 17, 2011) 19

El v. Se. Pa. Transp. Auth., 479 F.3d 232 (3d Cir. 2007) 15

Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246 (2004) 21

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Kirtsaeng v. John Wiley & Sons, Inc.,
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Langlois v. Abington Hous. Auth.,
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NASA v. Nelson, 131 S. Ct. 746 (2011)...................... 8

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Fair Housing Act, Pub. L. No. 90-284,
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Implementation of the Fair Housing Act's
Discriminatory Effects Standard,
76 Fed. Reg. 70,921 (Nov. 16, 2011) 13

Implementation of the Fair Housing Act's
Discriminatory Effects Standard,
78 Fed. Reg. 11,460 (Feb. 12, 2013) ....*passim*

Other Authorities

114 Cong. Rec. 2,270 (1968) 23

114 Cong. Rec. 2,283 (1968) 23

114 Cong. Rec. 5,214 (1968) 24

114 Cong. Rec. 5,216 (1968) 24

114 Cong. Rec. 5,217 (1968) 24

114 Cong. Rec. 5,643 (1968) 23

114 Cong. Rec. 5,710 (1968) 24

ABA Section of Antitrust Law, *Consumer
Law Developments* (2009) 6

Bd. of Governors of the Fed. Reserve Sys., *Report to the Congress on Credit Scoring and Its Effects on the Availability and Affordability of Credit* (2007) 7, 16

Bryan A. Garner, *Garner's Modern American Usage* (3d ed. 2009) 21

Comment Submitted by Dennis E. Nixon, President and CEO, Int'l Bancshares Corp. (Jan 13, 2012), http://www.regulations.gov/ #!documentDetail;D=HUD-2011-0138-0030 14

Comment Submitted by Rebecca L. Peace, Chief Counsel, Pa. Pub. Hous. Auth. (Jan. 17, 2012), http://www.regulations.gov/#!documentDetail;D=HUD-2011-0138-0053 14

Comment Submitted by Robert W. Woody, Senior Counsel, Prop. Cas. Indus. of Am. (Jan. 17, 2012), http://www.regulations.gov/#!documentDetail;D=HUD-2011-0138-0084 14

Eang L. Ngov, *When "The Evil Day" Comes, Will Title VII's Disparate Impact Provision be Narrowly Tailored to Survive an Equal Protection Clause Challenge?*, 60 Am. U. L. Rev. 535 (2011) 22

EEOC, No. 915.002, *EEOC Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (Apr. 25, 2012), *available at* http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf 17

Experian, *Risk versus Reward: Identifying the Highest Quality Resident Using Rental Payment History* (2013), http://www.experian.com /assets/rentbureau/white-papers/experian-rentbureau-rental-history-analysis.pdf 7

Harry J. Holzer *et al.*, *Perceived Criminality, Criminal Background Checks and the Racial Hiring Practices of Employers*, 49 J. Law & Econ. 451 (2006)............................... 9

Peter M. Leibol *et al.*, *Civil Rights Act of 1991: Race to the Finish—Civil Rights, Quotas, and Disparate Impact in 1991*, 45 Rutgers L. Rev. 1043 (1993) 23

Roger Clegg, *The Civil Rights Act of 1991: A Symposium: Introduction*, 54 La. L. Rev. 1459 (1994) 23

Scoring and Analytics, Resident Scoring, CoreLogic SafeRent, http://www.corelogic.com/solutions/scoring-and-analytics.aspx#home-ResidentScoring 10

Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 Wash. & Lee L. Rev. 1347 (1983) 22

INTEREST OF THE *AMICI*[1]

The *amici* are associations whose members provide residential screening services to owners and managers of housing properties, including individual landlords, large multifamily apartment complexes, religious organizations providing housing services, assisted living and other vulnerable population housing providers, and public housing authorities. The *amici* are:

- The **Consumer Data Industry Association** (CDIA) is an international trade association that represents some 200 consumer data companies, who use lawfully obtained information such as unlawful detainer records, criminal record information, and credit reports to screen tenants for landlords.

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[1] All parties consent to the filing of this brief, and consent to its filing has been lodged with the Clerk. No counsel for a party wrote this brief in whole or in part and neither a party nor counsel for a party has made a monetary contribution intended to fund its submission.

- The **National Consumer Reporting Association** (NCRA) is a national trade organization of consumer reporting agencies and associated professionals that provide products and services to credit grantors, employers, landlords and all types of general businesses. NCRA's membership includes 70 percent of the mortgage credit reporting agencies in the United States that can produce a credit report meeting Fannie Mae, Freddie Mac and HUD requirements for mortgage lending.

- The **National Association of Professional Background Screeners** (NAPBS) is an association of over 700 employment and tenant background screening firms that search publicly available state criminal background and other information to enable employers and landlords to provide their customers with safe places to live and work.

SUMMARY OF ARGUMENT

Amici are associations whose members perform residential screening. The services their members provide enable landlords and property managers to ensure safe, healthy, and economically sustainable living spaces for individuals and families. They agree with petitioners that the text of the Fair Housing Act (FHA) does not permit disparate impact claims to lie.

Amici write because of the negative practical impact that this Court's ratification of FHA disparate impact liability will have on the use of responsible tenant screening. *Amici*'s members supply housing providers with race-neutral predictive information about whether a particular housing applicant is likely to meet his or her economic obligations, or whether that applicant poses a risk of harm to others. The potential combination of a recently promulgated rule by the Department of Housing and Urban Development (HUD) and a decision by this Court in favor of respondents creates a Hobson's choice for *amici*'s member customers. Such a decision forces them to choose between limiting their use of crucial credit and criminal record information or face the prospect of extensive administrative and civil litigation under the FHA over their neutral, non-discriminatory tenant screening policies. That result will have profoundly negative policy consequences—consequences that this Court should not infer Congress intended to inflict in the absence of express statutory language.

The FHA lacks the necessary language to create disparate impact liability. Unlike similar statutes in the voting rights and employment areas, the FHA does not contain "effects" language permitting a cause of action to lie in the absence of purposeful discrimination. Here, Congress used the phrase "because of", a phrase that has a readily definable and understood meaning requiring a direct relationship between intent and result. To the extent legislative history is relevant in this circumstance, it is only to demonstrate the absence of congressional debate and scrutiny that typically accompanies the insertion of an effects standard into the civil rights laws.

The canons of statutory construction, such as the plain language rule, exist to prevent courts from usurping the role of the legislature. When the courts do usurp that role, a standards-free miasma of conflicting authority results. That is exactly what happened under the FHA, where the Circuit Courts of Appeal have adopted a variety of analytically incompatible tests for determining whether disparate impact exists and how to apply it. Thus, in this instance, the haphazard manner in which the lower appellate courts have applied disparate impact serves only to reinforce the impropriety of its existence.

ARGUMENT

I. THIS COURT'S RATIFICATION OF DISPARATE IMPACT LIABILITY WILL INTERFERE WITH THE RESPONSIBLE USE OF TENANT SCREENING.

The text of the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, (FHA) prohibits anyone from refusing "to sell or rent after the making of a bona fide offer or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a). Like petitioners, *amici* do not dispute that the FHA embodies Congressional intent to ban disparate treatment of individuals because they belong to a particular race, religion, color, or other protected class, and endorse both the ends that the direct prohibition advances and the means Congress chose to advance it.

The issue in this case is whether the text of the FHA gives plaintiffs the right to bring lawsuits not based on intentional discrimination, but on so-called "disparate impact" theory. *Amici's* members are in the business of screening potential tenants, enabling landlords to provide safe and economically viable living spaces. They provide the race-neutral data such as credit information, eviction history, and criminal records that housing providers need to make sound leasing decisions.

Amici write to bring this Court's attention to the negative and far-reaching policy effects that flow from reading disparate impact liability into the

statute. Those consequences should not be assumed to be intended by Congress in the absence of express statutory language, and as section II of this brief shows, that language (and the debate that would ordinarily accompany it) are absent from the FHA's legislative consideration.

A. The Use of *Amici's* Consumer Reports Advances Important and Legitimate Interests.

Amici conduct residential screening pursuant to the terms of the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*[2] Their clients—property owners and management companies—typically receive three different kinds of race-neutral information about prospective tenants: (1) financial information, including a credit score, credit report, income verification and rent payment history; (2) eviction information, consisting of unlawful detainer records; and (3) criminal background information consisting of damage to persons (including sex offender information) and property. Each of these categories provides the landlord with reliable predictors regarding the tenant's ability to pay and general suitability for a particular property. *Cf.* Bd.

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[2] In general terms, the FCRA regulates consumer information and sets the circumstances under which such information (including public record information) can be used. *See* 15 U.S.C. § 1681a(d), (f) (defining consumer report and consumer reporting agency, respectively). *See generally* ABA Section of Antitrust Law, *Consumer Law Developments* 117-19 (2009) (summarizing function and scope of FCRA).

of Governors of the Fed. Reserve Sys., *Report to the Congress on Credit Scoring and Its Effects on the Availability and Affordability of Credit* S1-S2 (2007) (noting that credit scores act as predictors of default and not as proxies for race). For example, individuals who have not skipped or been late in rent payments have a roughly six percent rate of default; prospects with a rental debt default at a rate of nearly one in four.[3] A member of two *amici* trade associations, CoreLogic SafeRent, estimates the cost of eviction as roughly two and a half times the monthly rent, and NAPBS's members have found that amount to average about $2,500-3,000 per apartment in the less expensive markets in the middle of the country. This figure does not include the soft costs of lost rental time, impact to property reputation and recruiting of an additional qualified tenant. Owners looking to maintain viable properties properly seek to avoid these costs, and *amici*'s services help them do so.

Residential screening also advances public safety. The government's interest in providing safe housing through a state housing authority is no different than that of a private landlord. *E.g., HUD v. Rucker,* 535 U.S. 125, 134-35 (2002) (affirming the ability of public housing authorities to have no-fault evictions to protect health and safety interests); *see*

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[3] *See* Experian, *Risk versus Reward: Identifying the Highest Quality Resident Using Rental Payment History* 4 (2013), http://www.experian.com/assets/rentbureau/white-papers/experian-rentbureau-rental-history-analysis.pdf.

also Preventing Crime in Federally Assisted Housing—Denying Admission and Terminating Tenancy for Criminal Activity or Alcohol Abuse, 24 C.F.R. § 5.850 *et seq.* (2013) (defining times when public housing authorities may or must terminate tenants involved in particular types of criminal activity); *cf. NASA v. Nelson*, 131 S. Ct. 746, 758 (2011) (acknowledging the legitimate needs of the government as employer to screen employees for drug use and other elements of their background). Many of *amici's* clients are state and local public housing authorities, all of which have to comply not only with Federal guidelines (to the extent that they receive federal funding), but also with their own local requirements. In addition, under the so-called "Address Discrepancy" rule, users of consumer reports must take reasonable steps to prevent identity theft when address or other discrepancies appear between a tenant's application and the information provided by the consumer reporting agency.[4] The responsible use of tenant screening

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[4] *See* Duties of Users Regarding Address Discrepancies, 12 C.F.R. § 41.82 (2013); *see also* Identity Theft Red Flags and Address Discrepancies, 72 Fed. Reg. 63,718, 63,718 (Nov. 9, 2007) (setting forth rationale for the "Address Discrepancy" rule implementing the Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108–159, 117 Stat. 1952). The presence of robust tenant screening serves broader ends. In 2001, President Bush signed Executive Order 13,224, which prohibits U.S. citizens and businesses from entering into "any transaction or dealing" with anyone on the Treasury's Office of Foreign Asset Control's (OFAC's) watch list. Exec. Order No. 13,224, 3 C.F.R. 786, 788 (2002). As a result, *amici's* tenant screens routinely include checks of this database for their client

advances all of these interests—economic stability, protection from identity theft, and general public safety. Indeed, some evidence exists that the use of a background screening may actually *reduce* the incidence of racial discrimination by shattering subconscious stereotypes.[5]

1. *Amici*'s Members Developed Race-Neutral Tools to Help Property Owners Evaluate Tenants and Comply with Fair Housing Laws.

Amici's members have developed objective tools to aid housing providers in making rental decisions and complying with fair housing laws. *Amici* frequently implement tenant-scoring models designed to balance different risks of default against the ability of an applicant to pay and public safety. In these models, each landlord decides acceptable tolerances for different categories of risk. Using an applicant's race-neutral information, the presence or absence of certain factors will dictate an applicant's suitability on the landlord's objective scale.

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landlords. While the requirement would still legally exist, as a practical matter in many instances, the OFAC search may well not be run if *amici* do not do it.

[5] *See* Harry J. Holzer *et al., Perceived Criminality, Criminal Background Checks and the Racial Hiring Practices of Employers*, 49 J. Law & Econ. 451, 452 (2006).

For example, a landlord might score prospective tenants on a hundred-point scale, renting only to those who score above seventy. Based on the variables selected by the landlord, the model then scores the tenant based on consumer report information. The landlord could decide how many points to allocate for particular rent or debt-to-income ratios, and balance that risk against other positives, such as a good credit history and no history of late rental payments. Rent default models also weigh other risk factors, such as past evictions for nonpayment of rent, history of filing for bankruptcy, tax liens, and collections activity.

Other housing providers might use a score like that provided by CoreLogic SafeRent's tenant screening score—an empirically derived and statistically validated measure of a person's likelihood to meet their rental obligations. *See generally Scoring and Analytics, Resident Scoring,* CoreLogic SafeRent, http://www.corelogic.com/solutions/scoring-and-analytics.aspx#home-ResidentScoring (last visited Nov. 21, 2014). In a way similar to the other model discussed above, the landlord would then determine which score would trigger risk mitigation measures. An analogous process occurs with respect to past criminal activity, again depending on the landlord's tolerance for risk. Arson convictions or convictions for violent crimes have a different effect on a rental decision than nonviolent drug possession. Some landlords will not rent to ex-offenders with particular kinds of criminal pasts; others are barred by law from renting to those persons.

In each instance, the housing provider's calibration of specific criteria depends on a variety of factors, including state law requirements, the rent needed to turn a profit, the class of property in question, the type of tenant being served (i.e. students seeking university-area group housing, seniors seeking assisted living or retirement housing, families seeking housing near a school or education facility, etc.) and the provider's judgment about the demands of a particular property or market. Dozens, if not hundreds, of potential criteria can appear in a given screening model.

Whatever those criteria may be, race is not among them. These models exist for the purpose of establishing objective, uniformly-applied criteria for a particular property. Once these risks have been identified, the landlord can attempt to ameliorate the risk of default by taking certain steps. A landlord might, for example, require an additional security deposit of the first and last month's rent, or require a co-applicant to guarantee the lease obligations. If the tenant cannot or will not comply with these conditions, the application will be denied.

B. Disparate Impact Liability will Harm the Public Interests Served by Residential Screening.

This Court's ratification of disparate impact liability would negatively affect *amici* and their customers. When this same issue arose in *Mount Holly Garden Citizens in Action, Inc. v. Twp. of Mount Holly*,[6] the United States relied on the history of appellate decisions as a means to denigrate the effects of affirmance. (*See* Br. for The United States as Amicus Curiae Supporting Respondents at 22 & n. 5, *Twp. of Mount Holly v. Mount Holly Garden Citizens in Action, Inc.*, No. 11-1507 (Oct. 2013) [hereinafter *Mt. Holly* U.S. *amicus*]; U.S. Br. in Opp. at 15-16.) Reliance on that history is misplaced for two reasons.

First, the U.S. position ignores the "dramatic change" that an adverse ruling by this Court will have on the litigation climate. *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1366 (2013) (noting that a court should consider the litigation consequences of adopting an unsettled interpretation among the circuits, even if those consequences have not yet occurred); *see also Cent. Bank of Denver v. Denver,* 511 U.S. 164, 188-89 (1994) (noting the particularly thorny litigation problems attending aiding and abetting liability in the absence of authorizing statutory language); Implementation of

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6 658 F.3d 375 (3d Cir. 2011), *cert. granted* 133 S. Ct. 2824 (2013), *and cert. dismissed* 134 S. Ct. 636 (2013).

the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,472 (Feb. 12, 2013) [hereinafter Final Rule] (rejecting concerns over frivolous litigation). As this Court has noted, defense against a government investigation or charge of a disparate impact is notoriously expensive and complex. *See Watson v. Ft. Worth Bank & Trust,* 487 U.S. 977, 993 (1988). (plurality opinion) (noting the expense of litigation of disparate impact suits, and the potentially ruinous liability). This Court's ratification of disparate impact liability will open a floodgate of potentially ruinous litigation over a variety of routine tenant screening practices, as well as the legal requirements that engender them, simply on the agency's subjective evaluation of the FHA's purposes.

Second, an adverse ruling will reinstate a more stringent disparate impact rule than exists in any other context. *See Am. Ins. Ass'n v. HUD*, No. 13-00966, 2014 U.S. Dist. LEXIS 157904, at *44-45 (D.D.C. Nov. 7, 2014) (vacating HUD rule). Shortly after this Court granted *certiorari* in *Gallagher v. Magner,* 619 F.3d 823, 833 (8th Cir. 2010), 132 S. Ct. 548 (2011) (*cert. granted* on Nov. 7, 2011 to resolve a split in the circuits), *and cert. dismissed,* 132 S. Ct 1306 (2012) (settled before oral argument), the Department of Housing and Urban Development serendipitously decided that the three decades of confusion in the lower courts had gone on long enough. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. 70,921, 70,921 (Nov. 16, 2011).

During that rulemaking, HUD heard concerns from a number of different public and private interests about the disparate impact standard that it promulgated. *See* Final Rule, 78 Fed. Reg. at 11,464. These industries all gave examples of the harm that the rule would cause,[7] and recommended approaches differing from those suggested by HUD.[8] HUD dismissed these concerns, including a request that the rule codify examples of presumed legitimate screening criteria, such as rental history, credit

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[7] *See, e.g.*, Comment Submitted by Rebecca L. Peace, Chief Counsel, Pa. Pub. Hous. Auth. (Jan. 17, 2012), http://www.regulations.gov/#!documentDetail;D=HUD-2011-0138-0053. (arguing that use of credit scores could lead to disparate impact liability and reduce lending in lower income areas); Comment Submitted by Robert W. Woody, Senior Counsel, Prop. Cas. Indus. of Am. (Jan. 17, 2012), http://www.regulations.gov/#!documentDetail;D=HUD-2011-0138-0084 (arguing that disparate impact liability would have an adverse impact on race-neutral insurance underwriting); Comment Submitted by Dennis E. Nixon, President and CEO, Int'l Bancshares Corp. (Jan 13, 2012), http://www.regulations.gov/#!documentDetail;D=HUD-2011-0138-0030 (arguing that rule creates uncertainty in risk of loan underwriting).

[8] *Compare* Peace comment, *supra* note 7 (arguing for no burden shifting) *with* the Fourth, Sixth, Seventh and Ninth Circuits that apply a multi-factor test without burden shifting. *See, e.g., Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982); *Arthur v. Toledo*, 782 F.2d 565, 576 (6th Cir. 1986)); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977); *Keith v. Volpe*, 858 F.2d 467, 483 (9th Cir. 1988) (noting that the district court found liability under both a Third/Eighth and Fourth/Seventh Circuit test because the 9th Cir. had yet to adopt a standard).

checks, and court information. Final Rule, 78 Fed. Reg. at 11,471. Instead, the agency decided to leave that legitimacy to be determined on a "case by case" basis. *Id.* These rejections all were premised on the notion that the existence of the prior court of appeals decisions rendered nothing new about its rule. *See id.* at 11,467, 11,469-70.

1. Endorsement of Disparate Impact Liability Will Cast a Regulatory Pall over the Legitimate Use of Credit and Criminal Record Information.

While claiming Title VII as inspiration, *see* Final Rule, 78 Fed. Reg. at 11,466, the test created by HUD is materially more stringent. Title VII requires that the defendant offer a legitimate business justification "consistent with business necessity" for a practice that is discriminatory in effect, but consistency does not require perfection. 42 U.S.C. § 2000e-2(k)(1)(A)(i)); *see also, e.g., Griggs v. Duke Power Co.,* 401 U.S. 424, 436) (stating that nondiscrimination never requires an employer to hire a less qualified employee); *El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 242 (3d Cir. 2007) (upholding transit authority policy of not hiring those with criminal records). The burden then shifts to the plaintiff to show the availability of a less discriminatory means that protects the legitimate interest in the same way. *See Watson*, 487 U.S. at 998 (O'Connor, J.) (plurality opinion) ("Factors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the

challenged practice in serving the employer's legitimate business goals.").

The HUD rule triggers a different, more difficult burden-shifting standard. Once the plaintiff shows that a facially-neutral practice "actually or predictably" results in a disparate impact on a protected class or "the community as a whole." Final Rule, 78 Fed. Reg. at 11,482. The burden then shifts to the defendant to offer proof that the challenged practice is "*necessary*" to achieve one or more "substantial, legitimate, nondiscriminatory" interests, which the plaintiff may rebut through its own showing. *Id.* (emphasis supplied). HUD rejected requests to remove the word "necessary" from the rule. *See id.* at 11,471-72..

The language of the rule effectively requires the defendant to prove tailoring twice—a burden that does not exist under title VII, and it is one that would be uniform across all judicial circuits. A plaintiff challenging objective scoring models or reliance on other economic data only has to allege the disparate impact that will in many cases exist due to unfortunate, but nonetheless race-neutral realities. *See* Federal Reserve Report, *supra*, at S4, S6 (noting lower credit scores among certain populations but indicating that these scores indicate risk, not race).

The increased burden of defending a disparate impact claim will engender uncertainty over legitimate tenant screening practices. Even though the purpose of considering credit and criminal record information is unquestionably legitimate, making a

showing that each of these variables is completely "necessary" to achieve the same predictive results will be impossible. The rule presents the landlord with a Hobson's choice: either refrain from the prudent use of historical credit, civil and criminal record information in an objective scoring model, or expose itself to claims that it violated the Fair Housing Act.[9]

To make matters worse, HUD has indicated that it is considering recommending criminal history restrictions beyond the provisions of its recently promulgated rule.[10] *Amici* are not encouraged by the administrative overreach that has already occurred in the employment context with respect to the use of criminal records. *See EEOC v. Freeman*, No. 09cv2573, 2013 U.S. Dist. LEXIS 112368, at *54 (D.

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9 The landlord or manager cannot insulate itself from liability by *actively* considering race to defend against a disparate impact suit, as that practice violates the Act. *See Ricci v. DeStefano*, 557 U.S. 557, 579 (2009) (reversing district court for allowing disparate treatment to avoid disparate impact liability, and noting that the argument "turn[s] upon the City's objective — avoiding disparate-impact liability — while ignoring the City's conduct in the name of reaching that objective.").

10 *See* Final Rule, 78 Fed. Reg. at 11,478 (referring to "recent guidance" issued by the EEOC, namely EEOC, No. 915.002, *EEOC Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (Apr. 25, 2012), *available at* http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf.).

Md. 2013) (noting that "[t]he story of the present action has been that of a theory in support of facts to support it" and that agency overreach puts employers in the impossible position of either "ignoring criminal history and credit background, thus exposing themselves to potential liability for criminal and fraudulent acts committed by employees, on the one hand, or incurring the wrath of the EEOC for having utilized information deemed fundamental by most employers"). Today, property owners and managers rely on the provisions of state laws to make decisions regarding the use of criminal records. For example, some states give landlords broad discretion to evict tenants involved in criminal activity.[11] Other states make property managers liable for allowing criminality to persist on their

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[11] *E.g.*, N.J. Stat. § 2A:18-61.1 (providing broad grounds for eviction of tenants with criminal convictions); Fla. Stat. § 760.29(5)(d) (clearly stating that the State's Fair Housing Act doesn't prohibit "conduct against a person because such person has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance"); Ga. Code Ann. § 8-3-205(b)(4) ("Nothing in this [State Fair Housing] article prohibits conduct against a person because such person has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance."); 310 Ill. Comp. Stat. 10/25(e) (the housing projects Authority may consider "convict[ions] of a criminal offense relating to the sale or distribution of controlled substances" when making tenant selections); Wash. Rev. Code § 59.20.080(1)(f) (allowing landlords to proceed directly with an unlawful detainer action against mobile home tenants allegedly engaged in criminal activity).

premises.[12] If the lower court is correct, the landlord relies on those state laws at its peril. A HUD enforcement policy akin to that described by the EEOC and apparently pursued in *Freeman*, 2013 U.S. Dist. LEXIS 112368, and *EEOC v. Peoplemark, Inc.*, No. 1:08-CV-907, 2011 U.S. Dist. LEXIS 154429 (W.D. Mich. Oct. 17, 2011), will only further discourage landlords and property managers from relying on racially-neutral screening tools to protect persons and property. *Cf. Am. Ins. Ass'n*, 2014 U.S. Dist. LEXIS 157904, at *39 (D.D.C. Nov. 7, 2014) (noting that application of the HUD rule would result in race-based insurance decisions instead of ones based on actuarial science).

If Congress had intended to authorize HUD to create these kinds of policy results through disparate impact lawsuits, one would expect the statute to authorize those lawsuits. Not only is evidence of that intent lacking from the statute and its legislative history, but it is that very absence that caused the lower appellate courts to imagine inconsistent and textually irreconcilable disparate impact causes of action when none can colorably be found. There is no gap in the statute for the agency to fill.

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[12] *E.g.*, *Beatty v. NAACP*, 194 A.D.2d 361, 364 (N.Y. App. Div. 1993) (management liable for breaching duty under N.Y. Real Prop. Law § 231 for allowing drug dealers on premises).

II. THE TEXT OF THE FAIR HOUSING ACT DOES NOT PERMIT DISPARATE IMPACT CLAIMS.

The FHA makes it illegal to refuse "to sell or rent after the making of a bona fide offer or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a). The question presented is whether that language gives plaintiffs the right to bring "disparate impact" lawsuits. Such suits generally enable plaintiffs to prevail on a claim of discrimination under the FHA when a neutral policy, adopted without prohibited intent, has a disproportionately adverse effect on members of a protected class. *See, e.g., Fair Hous. in Huntington Comm. Inc. v. Town of Huntington*, 316 F.3d 357, 366 (2d Cir. 2003) (stating that a plaintiff must only demonstrate that an outwardly neutral practice actually or predictably has a disproportionate effect on a protected class); *Magner*, 619 F.3d at 833 (indicating that a showing of intent is not necessary to establish a disparate impact claim).

A. The Plain Language of the Statute Does Not Permit Disparate Impact Suits.

Like any statute, the interpretation of the FHA begins with its plain language. "Statutory construction must begin with the language employed by Congress and the assumption that ordinary meaning of the language accurately expresses the legislative purpose." *Gross v. FBL Fin. Servs. Inc.*,

557 U.S. 167, 175 (2009) (quoting *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004)). *Amici* agree with the thorough construction of the statute that Petitioners provide in their brief. (*See* Pet. Br. 19-29) The phrase "because of" has a readily discernible, historically consistent and well-understood meaning: "on account of," or as the direct, "but for" cause of a given condition. *Gross,* 557 U.S. at 176; *see also* Bryan A. Garner, *Garner's Modern American Usage* 91 (3d ed. 2009) (describing "because" in a similar way). Congress's use of the words "refuse" or "otherwise deny," require the link between intent and discrimination to be a direct one.

Disparate impact suits, by their nature, involve practices that are both adopted with legitimate intent, and whose discrimination is unintentional and therefore *indirect.* They require a court to unravel "the myriad of innocent causes that may lead to statistical imbalances." *Smith v. City of Jackson,* 544 U.S. 228, 241 (2005) (internal citations omitted) (interpreting effects-based disparate impact language in the Age Discrimination in Employment Act). When Congress intends to create effects-based liability, it has done so with particular language that can be found, for example, in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(2), or in section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973(a). In each of these instances, Congress chose telltale phrases such as "adversely affect" or "in a manner which results in" to indicate that it wished to create liability based on disparate impact. The FHA does not contain any such language.

B. The Congressional Debate Historically Accompanying the Enactment of Effects-Based Liability is Missing in This Instance.

There is no need to refer to the legislative history to determine the meaning of statutory language that does not exist. To the extent that the FHA's history is relevant, it serves to demonstrate that the inclusion of disparate impact liability is also missing from the FHA's Congressional consideration. In both the Title VII and Voting Rights Act context, the existence and scope of effects-based liability repeatedly engendered vigorous Congressional debate over the fundamental policies behind the civil rights laws, and the best ways to achieve those policies.[13]

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[13] *See, e.g., Local 28 of the Sheet Metal Workers' Int'l Assoc. v. EEOC*, 478 U.S. 421, 452-53 (1986) (recounting the House and Senate statements designed to reassure Title VII opponents that racial quotas would not be required to avoid liability); Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 Wash. & Lee L. Rev. 1347, 1389-96 (1983) (describing controversy of section 2's legislative history from its critics' perspective); Eang L. Ngov, *When "The Evil Day" Comes, Will Title VII's Disparate Impact Provision be Narrowly Tailored to Survive an Equal Protection Clause Challenge?*, 60 Am. U. L. Rev. 535, 548 (2011) (legislators vehemently questioned, both during the initial passage of the Civil Rights Act of 1964 and during the two-year battle over the 1991 amendments, whether a racially imbalanced workforce would create the need for a

The intense debate that occurred in these contexts (and before HUD during its rulemaking) is missing from consideration of the FHA. No Committee reports for the FHA exist because it was introduced as an amendment. *See* 114 Cong. Rec. 2,270 (1968) (Sen. Mondale's introduction of Amendment number 524). Statements by the sponsors indicated that discriminatory intent was the key element of an FHA claim. Senator Mondale urged his colleagues to adopt the bill because it permitted a homeowner to sell or rent property in any way he wished, "except refuse to sell it to a person solely on the basis of his color." *Id.* at 5,643; *see also id.* at 2,283 (remarks of Sen. Brooke) ("A person can sell his property to anyone he chooses, as long as it is by personal choice and not because of motivations of discrimination."). As introduced, the FHA applied to all homeowners. *Id.* at 2,270. The FHA was amended on the floor not to broaden the bill and allow disparate impact claims, but to narrow the reach of the statute by permitting homeowners to engage in purely private discrimination as long as they owned less than three homes, did not use real estate agents and did not advertise their illegitimate

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racial quota); *Compare* Peter M. Leibol *et al.*, *Civil Rights Act of 1991: Race to the Finish—Civil Rights, Quotas, and Disparate Impact in 1991*, 45 Rutgers L. Rev. 1043, 1085-86 (1993) (criticizing administration's interpretation of legislative compromise of Civil Rights Act of 1991 from perspective of bill authors), *with* Roger Clegg, *The Civil Rights Act of 1991: A Symposium: Introduction*, 54 La. L. Rev. 1459, 1461, 1466-67 (1994) (disparaging the premise of disparate impact as "poisonous policy" and "ridiculous jurisprudence").

racial preferences. *See* 42 U.S.C. § 3603(b) (existing statutory language, codifying the so-called "Dirksen amendment"); 114 Cong. Rec. at 5,710 (providing the text of Sen. Dirksen's amendment in the nature of a substitute). The Senate rejected an amendment that would have allowed homeowners to discriminate against buyers using real estate agents, and the opponent of that amendment viewed the language that appears in the existing law as a "reasonable compromise." *See* 114 Cong. Rec. at 5,214 (Baker amendment No. 555); *id.* at 5,216 (Sen. Percy, an opponent of the broader Baker amendment, viewing existing language as both a "reasonable approach" and a "reasonable compromise"); *see also, id.* at 5,217 (Sen. Baker discussing the differences between the Dirksen and Baker amendments).

It is not difficult to imagine the Congressional debate that would have ensued if the words "quota," "proportional representation" or similar language became entwined with a landlord's economic decision to lease a property, or a local zoning commission's land use decision, especially if that decision formed the basis for criminal liability. *See* 42 U.S.C. § 3631, 42 U.S.C. § 3617. This national conversation did not occur because Congress did not include the language that would have triggered it: the FHA's legislative history is the dog that did not bark.

C. The Splits in the Courts of Appeal Reflect Nothing More than an Attempt to Legislate a Standard in the Absence of Authorizing Language

The United States, as well as HUD dismiss the variations among the courts of appeal as insignificant. *See, e.g.*, Final Rule, 78 Fed. Reg. at 11,460 (describing "small degree of variation"); (BIO of The United States as Amicus Curiae at 17, *Twp. Of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, No. 11-1507 (May 2013).[14] *But see Am. Ins. Ass'n*, 2014 U.S. Dist. LEXIS 157904, at *44-45 (D.D.C. Nov. 7, 2014) (vacating HUD rule and describing the government's construction of the FHA as an "artful misinterpretation" that is "too clever by half").

The government's position ignores the profound analytical conflicts in these decisions, which exemplify the cacophony one would expect when the courts create a cause of action not contemplated by the statutory text. The Courts of Appeal differ not only on whether burden-shifting even exists, but also on the nature of those burdens,

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[14] This Court, however, has never squarely addressed the question. *See Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15, 18 (1988) (per curiam) (because the appellants did not challenge the applicability of a disparate impact test, the Court "d[id] not reach the question whether that test is the appropriate one").

which entities they apply to, and how they ought to shift. For example, the Fourth Circuit requires plaintiffs suing public entities to show some evidence suggesting discriminatory intent before the burden shifts to the defendant. *Town of Clarkton,* 682 F.2d at 1065. Those suing private defendants need not make that showing, and the defense burden for private entities is "different and more difficult." *Betsey v. Turtle Creek Assocs.,* 736 F.2d 983, 988 & n.5 (4th Cir. 1984). Upon that showing, the burden shifts back to the defendant to justify its actions. *See id.* at 988. This distinction between public and private defendants appears absolutely nowhere in the statute, which preempts state law. 42 U.S.C. § 2615.

The Seventh Circuit, in contrast, has created a multi-factor test that requires some showing of intent against every defendant, but the burden of production always resides with the plaintiff. *Metro. Hous.*, 558 F.2d at 1290. The Sixth Circuit adopted three of those factors, but does not shift the burden from the plaintiff. *Arthur*, 782 F.2d at 575. The First Circuit allows the defeat of a *prima facie* case of disparate impact upon the defendant's offering of a legitimate business justification, but does not require that the justification be narrowly tailored. *Compare Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 51 (1st Cir. 2000), *with* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (requiring the plaintiff to demonstrate that the employment practice is inconsistent with business necessity). In other words, when a defendant establishes a legitimate business justification for its action, the plaintiff's disparate impact claim fails. *See Langlois,* 207 F.3d at 51.

These diverging and wholly inconsistent interpretations among the Courts of Appeal and federal agencies represent nothing more than *ad hoc* attempts to legislate policy in the absence of authorizing statutory language. *Cf. Cent. Bank of Denver*, 511 U.S. at 186 (noting comparable inconsistency in the courts of appeal regarding aiding and abetting liability under the securities laws, and finding that no such liability exists). It is therefore no answer to suggest, as the government did in *Mount Holly*, that HUD's development of regulations and "reasonable interpretations" will solve the problems with inconsistent standards, and that the Court should defer to the agency's interpretation of legislative silence. (*See* U.S. BIO at 16-17; *Mt. Holly* U.S. *amicus* at 9.) Executive agencies enforcing a policy in the absence of statutory authority is no different than legislating from the bench: either result improperly diminishes the power of the legislative branch. In the absence of sufficient Congressional intent, the agency interpretation is entitled to no deference. *See Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (finding that an agency is not entitled to deference unless the traditional devises of judicial construction yield no "clear sense of congressional intent")); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). The words necessary to instill that level of deference to an agency do not appear in the FHA.

III. CONCLUSION

Affirming the lower court's decision will engender an onslaught of administrative and private litigation, harming communities where objective screening practices have helped to ensure safe, healthy and affordable housing. Had Congress intended to thrust disparate impact considerations into the use of legitimate, race-neutral criteria in residential screening, land use, and a variety of other areas, *amici* respectfully suggest that it would have said so explicitly.

For the foregoing reasons, the judgment of the Court of Appeals should be REVERSED.

Respectfully submitted,

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