No. 13-1371

In the Supreme Court of the United States

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

v.

THE INCLUSIVE COMMUNITIES PROJECT, INC.,
Respondent.

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

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AND THE MILWAUKEE BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

Amici are the National Association for the Advancement of Colored People and the Milwaukee Branch of the National Association for the Advancement of Colored People.

Founded in 1909, the National Association for the Advancement of Colored People ("NAACP") is the nation's oldest, largest, and most recognized civil rights organization. The mission of the NAACP is to ensure the political, educational, social, and economic equality of rights for all persons, and to eliminate racial hatred and racial discrimination. NAACP's former Washington Bureau Director, Clarence Mitchell, Jr., was a major force behind passage of Title VIII, and the NAACP has long advocated for fair housing through policy and litigation. *See, e.g.*, *NAACP v. Ameriquest Mortg. Co., et al.*, 635 F. Supp. 2d 1096 (C.D. Cal. 2009); *NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988); *NAACP v. Sec'y of HUD*, 817 F.2d 149 (1st Cir. 1987).

For over 90 years, the Milwaukee Branch of the NAACP ("Milwaukee NAACP") has continued the mission of the NAACP in the greater Milwaukee, Wisconsin region. In particular, the Milwaukee NAACP has a strong history of combating discrimination in homeowner's insurance, having spent over a decade

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[1] Petitioners' and Respondent's written letters of consent to amicus briefs have been lodged with the Clerk. Pursuant to Rule 37.6, counsel for amici authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity – other than amici, their members, and their counsel – contributed monetarily to the preparation or submission of this brief.

litigating the seminal case *NAACP v. American Family Mutual Insurance Company*, 978 F.2d 287 (7th Cir. 1992).

SUMMARY OF ARGUMENT

The NAACP agrees with the Respondent, the federal Courts of Appeals, and the United States Department of Housing and Urban Development ("HUD") that the Fair Housing Act of 1968 ("FHA"), as amended, 42 U.S.C. §§ 3601 *et seq.*, recognizes disparate impact claims. Based on its text and legislative history, as well as this Court's rationale in *Griggs v. Duke Power Co.*, 401 U.S. 429, 431 (1971), numerous federal courts have concluded correctly that the FHA calls for disparate impact liability. It would be inconsistent with this Court's sound precedent to provide a pathway for discrimination in housing and by housing-related industries that the Court has found impermissible in the employment sector.

Three property insurance trade organizations,[2] as amici in support of Petitioners, contend that disparate impact liability under the FHA "strike[s] at core principles of sound insurance practice" and will "upend fundamental tenets of the insurance business." Ins. Br. at 3-4. They argue that disparate impact liability under the FHA will force insurers "to forgo considering factors that correlate to risk" and will "work . a disruption" on the risk analysis and risk differentiation that are foundational elements of insurance. Ins. Br. at 5, 11.

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[2] Brief for the American Insurance Association, the National Association of Mutual Insurance Companies, and the Property Casualty Insurers Association of America as Amici Curiae Supporting Petitioners ("Ins. Br."), filed November 24, 2014.

They also argue that allowing disparate impact analysis under the FHA will "conflict" with the reverse-preemption provisions of the McCarran-Ferguson Act, and therefore Congress could not have intended to create disparate impact liability in the FHA. Ins. Br. at 9-10.

These concerns of the property insurance industry are unfounded. They fail to account for the "business justification" component of disparate impact analysis. Sound insurance practices – such as accounting for legitimate risk in underwriting and relying on actuarially sound distinctions in pricing policies – are protected from liability under disparate impact analysis. Insurance business practices, like other private sector housing practices that sometimes result in a disparate impact based on protected classification, are legally permissible under the FHA if they are necessary to achieve a legitimate business interest – such as risk assessment and differentiation.

The insurance trade organizations thus miss the point in focusing on practices that are actuarially sound and otherwise have business justification. Those practices are not threatened by disparate impact analysis and will not be affected by this Court's decision one way or the other. Rather, what are potentially affected by this Court's decision are practices that have a disparate impact and are *not* necessary to accomplish legitimate business needs. Contrary to the impression the insurance amici attempt to create, the insurance industry has a long history of such unnecessarily discriminatory practices, and such practices continue today, giving disparate impact analysis continued importance in accomplishing

the goals of the Congresses that enacted and later amended the FHA.

The McCarran-Ferguson argument also fails to inform the question of congressional intent under the FHA. The McCarran-Ferguson Act may occasionally reverse-preempt federal civil rights claims, including disparate impact claims under the FHA, but only in those situations where state law permits a specific insurance practice that otherwise would be banned by federal law. McCarran-Ferguson reverse-preemption can only be determined in the context of a specific state law and a specific insurance business practice. That a small number of potential FHA disparate impact claims may prove to be reverse-preempted under McCarran-Ferguson is no basis for "blanket" McCarran-Ferguson reverse-preemption of all disparate impact claims.

ARGUMENT

I. THE FAIR HOUSING ACT PROVIDES FOR CLAIMS OF DISPARATE IMPACT.

The Fair Housing Act of 1968 ("FHA"), as amended, codified at 42 U.S.C. §§ 3601 *et seq.*, provides protection from intentional discrimination *and* discrimination by effect. For forty years, the federal courts have consistently held that disparate impact applies in FHA cases. *See* Robert G. Schwemm, Housing Discrimination: Law and Litigation § 10:4 at 10-35 (2014) (documenting the "strong consensus" among the courts that the Fair Housing Act includes a discriminatory effect standard and observing that "[n]ot a single court of appeals currently espouses the

view that the effect theory is inappropriate for Fair Housing Act cases.").

The NAACP has used the disparate impact theory effectively in countless cases to ensure that governmental entities and private businesses, including insurance companies, do not institute unjustified practices and policies that have a widespread and disproportionate negative effect upon protected classes. For example, in *Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15, 17 (1988), the NAACP successfully challenged a zoning restriction that only allowed the construction of multifamily housing projects in the town of Huntington's "urban renewal area." *Id.* at 16. The Supreme Court upheld the decision of the Second Circuit to strike the restriction, noting that the NAACP had successfully demonstrated a disparate impact on the town's low-income and black residents. *Id.* at 18. This is just one example of the many cases that the NAACP has brought using the disparate impact theory in order to eradicate housing segregation across the nation.

The NAACP agrees, for the reasons stated by Respondent The Inclusive Communities Project, Inc., and the other amici supporting Respondent, that the Fifth Circuit's decision below should be affirmed. In this brief, the NAACP will respond to arguments by several insurance industry amici on how disparate impact affects the business of insurance. As the Milwaukee NAACP successfully argued in *NAACP v. American Family Mutual Insurance*, 978 F.2d 287 (7th Cir. 1992), disparate impact theory in the FHA has allowed and currently allows insurance carriers to conduct their business, including the assessment of

risk, in a non-discriminatory manner. And, as the *American Family* court held, the McCarran-Ferguson Act does not automatically bar application of the FHA. *Id.* at 289.

II. DISPARATE IMPACT IS CONSISTENT WITH SOUND FINANCIAL RISK ANALYSIS.

A. Far From Prohibiting Legitimate Risk Analysis, The Disparate Impact Paradigm Encourages It.

The insurance groups mischaracterize disparate impact analysis in an effort to paint it as threatening legitimate and necessary insurance industry practices. In fact, as set forth in HUD regulations, and as applied by the appellate court below, the FHA's disparate impact test is explicitly crafted to avoid that result. The industry groups can suggest otherwise only by completely ignoring the "business justification" prong of disparate impact analysis.

Specifically, a business practice that has a disparate impact on a protected group is nevertheless legal under the FHA if it "is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests." 24 C.F.R. § 100.500(b), and those interests cannot be served by another practice that has a less discriminatory effect. "Not every housing practice that has a disparate impact is illegal. We use [the disparate impact framework] to distinguish the artificial, arbitrary, and unnecessary barriers proscribed by the FHA from valid policies and practices crafted to advance legitimate interests." *Graoch Assoc. #33, L.P v. Louisville/Jefferson Cnty. Metro Human Relations*

Comm'n, 508 F.3d 366, 374-5 (6th Cir. 2007); *see also Nat'l Fair Hous. Alliance v. Prudential Ins. Co. of Am.*, 208 F Supp. 2d 46, 59 n.8 (D.D.C. 2002) (insurers' ability to assess risk on legitimate grounds is preserved in light of the "business justification" element of disparate impact analysis).

Assessment of risk is a legitimate interest of property insurers. Identifying specific characteristics that affect risk, conducting actuarial assessments of those characteristics, and establishing fair prices that account for them are all legitimate, substantial, nondiscriminatory business practices. They meet the "legally sufficient justification" prong of the disparate impact analysis and should normally survive a disparate impact attack.

The insurance industry amici acknowledge that "discrimina[tion] among insureds based on factors that are not legitimately related to risk would undermine the sound actuarial principles on which the provision of insurance is based." Ins. Br. at 15. What they do not acknowledge is that many of their practices do just that; i.e., they rely on factors that are not legitimately related to risk, yet result in discrimination. Insurance industry amici suggest that "actuarial" principles govern all aspects of their business, but actuarial and risk assessments are relevant to just *some* aspects of the insurance business. As we show below, the "business of insurance" is not a unitary enterprise, designed to follow mechanically from actuarial calculations. Rather, it is a cluster of related practices, many totally removed from actuarial calculation but nonetheless carrying the potential for discriminatory effects.

1. Past Intentional Discrimination Sets the Stage for the Unjustified Impediments That Continue to Limit Equal Access to Homeowner's Insurance.

Contrary to the insurance industry amici's assertion, insurers do not always use objective, actuarially-based risk analysis to justify their business practices. The "business of insurance" consists of much more than assessing the "risk of loss." Insurance companies direct sales teams and sales agents. They have marketing departments. They operate claims departments. They establish pricing strategies by taking into account both actuarial determinations and non-actuarial factors, such as profitability levels, competitor prices, rating territory boundaries, and loss trending assumptions. Any of these practices may result in unjustified, illegitimate race disparities.

For decades before and after the FHA's enactment in 1968, insurers unabashedly treated homeowners seeking insurance differently based on their race or the racial composition of the neighborhoods in which they lived.[3] The term "redlining" originally referred to the

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[3] Homeowner's insurance is but one area in which insurers have engaged in intentional discrimination. *See, e.g.*, *United States v. Mort. Guar. Ins. Corp.*, No. 2:11-00882-RCM, 2012 WL 1606235 (W.D. Pa. Apr. 30, 2012) (consent order settling challenge to practice of denying mortgage insurance to applicants on maternity leave, resulting in differential treatment on the basis of sex and familial status); *Thompson v. Metro. Life Ins. Co.*, 149 F. Supp. 2d 38, 42 (S.D.N.Y. 2001) (challenging policies steering African Americans to substandard and "significantly more expensive" life insurance).

widely-used practice of color-coding neighborhoods, typically defined by their racial or ethnic composition, to describe where insurance products would be limited or denied. *See, e.g.*, Carol A. Heimer, *The Racial And Organizational Origins Of Insurance Redlining*, Vol. X, No. 3 J. Intergroup Relations 42, 49 (Autumn 1982). As late as the 1960s, homeowner's insurance underwriting guidelines utilized such maps to indicate where agents should avoid writing policies or should issue policies only after special review or with different terms. *Id.*

Even though courts found such disparate treatment unlawful under the FHA as early as 1979, *see Dunn v. Midwestern Indem. Mid-Am. Fire & Cas. Co.*, 472 F. Supp. 1106 (S.D. Ohio 1979), this and similar practices persisted long afterward. A treatise on insurance redlining recounts stark examples of explicitly discriminatory practices in the 1970s and 1980s:

> In 1977 the chief actuary of the New York Department of Insurance stated: "Take Harlem, for example. They don't need any insurance because they don't have anything of value to insure." In 1988 some American Family Mutual Insurance Company agents were instructed in writing to "*quit writing* all those *blacks*." In 1994 the Texas commissioner told the U.S. Senate Committee on Banking, Housing, and Urban Affairs that "we still find insurance companies making underwriting decisions based on all kinds of factors that have nothing to do with a statistically measured or measurable probability of risk."

Gregory D. Squires, *Race, Politics, and the Law: Recurring Themes in the Insurance Redlining Debate*,

in Insurance Redlining: Disinvestment, Reinvestment, and the Evolving Role of Financial Institutions 6-7 (Gregory D. Squires ed., 1997) (internal citations omitted) [hereinafter "Insurance Redlining"].

During the 1990s, discriminatory treatment was revealed by a study in which African-American testers with addresses in African-American neighborhoods were paired with white testers with addresses in white neighborhoods to contact homeowner's insurance companies in nine different cities. Gregory D. Squires & Jan Chadwick, *Linguistic Profiling: A Continuing Tradition of Discrimination in the Home Insurance Industry?*, 41 Urb. Aff. Rev. 400, 404, 407 (2006), *available at* http://uar.sagepub.com/content/41/3/400. In 221 tests, the white caller received more favorable treatment nearly twice as often as the African-American caller did. *Id.* at 405.[4]

Such discriminatory insurance practices create or entrench precisely the kind of segregated living patterns that the FHA was designed to dismantle. *See Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (noting Congress's purpose in enacting the FHA "to replace the ghettos by truly integrated and balanced

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[4] Although this brief focuses on race, insurers also have engaged, and continue to engage, in disparate treatment based on other FHA-protected categories. *See, e.g., Nevels v. W. World Ins. Co., Inc.*, 359 F. Supp. 2d 1110, 1118 (W.D. Wash. 2004) (defendant did "not deny that Plaintiffs' [property] insurance policies were cancelled because Plaintiffs cared for individuals with mental disabilities"); *Wai v. Allstate Ins. Co.*, 75 F. Supp. 2d 1 (D.D.C. 1999) (insurer refused coverage for homeowners who operated group homes for adults, resulting in differential treatment on the basis of disability).

living patterns" (internal quotation marks omitted)). As observed by a presidential commission the year the FHA was passed, "[i]nsurance is essential to revitalize our cities. Without insurance, buildings are left to deteriorate; services, goods and jobs diminish. Efforts to rebuild our nation's inner cities cannot move forward. Communities without insurance are communities without hope." President's National Advisory Panel on Insurance in Riot Affected Areas, Meeting the Insurance Crisis of Our Cities 1 (U.S. Gov't Print. Office 1968).

2. *The "Business of Insurance" Consists of Many Business Practices That Are Not Actuarially Based.*

Not all homeowner's insurance business practices are actuarially based. For example, marketing and advertising campaigns, sales techniques, agent office placements, insurance product design and benefits, and processes for settling claims and renewing policies are not based on actuarial analysis or modeling. These ordinary business practices, which do not explicitly assess or classify risks, are no different for insurers than for other businesses subject to the Fair Housing Act. Yet such business practices may have significantly different impacts on different populations, with no business justification for that disparity. *See, e.g.*, Robert W. Klein, *Availability and Affordability Problems in Urban Homeowners Insurance Markets, in* Insurance Redlining at 47-48 (identifying several non-risk related barriers that can influence the availability and affordability of homeowners insurance in urban markets, including agent bias, prejudicial views of decision-making personnel, adverse selection, agent

commission structures, etc.); Jay D. Schultz, *Homeowners Insurance Availability and Agent Location*, *in* Insurance Redlining at 83 (analyzing impact of agent locations on availability of insurance); Dana L. Kaersvang, *The Fair Housing Act and Disparate Impact in Homeowners Insurance*, 104 Mich. L. Rev. 1993, 2013-17 (2006) (identifying several insurer business practices with a disparate impact that may not be justified by business necessity).[5]

Indeed, even insurance "underwriting guidelines," the rules that determine whether an applicant is eligible to purchase homeowner's insurance, may not be actuarially based. *See* D.J. Powers, *The Discriminatory Effects of Homeowners Insurance Guidelines*, *in* Insurance Redlining at 119 ("Today, we still find

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[5] During the Notice and Comment period in advance of HUD's promulgation of the disparate impact regulation now at 24 C.F.R. § 100.500, many commenters specifically addressed how the proposed disparate impact regulation should apply in cases against insurance companies. *See, e.g.*, Shanna Smith, *Comments of National Fair Housing Alliance and Other Civil Rights Organizations Regarding Docket No. FR-5508-P-01, Implementation of the Fair Housing Act's Discriminatory Effect Standard* (2012), *available at* http://www.regulations.gov/#!documentDetail;D=HUD-2011-0138-0076 (last visited Dec. 18, 2014) (discussing less discriminatory alternative in the context of insurance litigation); Barbara Arwine, *Comments of Lawyers' Committee for Civil Rights Under Law Regarding Docket No. FR-5508-P-01, Implementation of the Fair Housing Act's Discriminatory Effect Standard* (2012), *available at* http://www.regulations.gov/#!documentDetail;D=HUD-2011-0138-0075 (last visited Dec. 18, 2014) (highlighting usefulness of disparate impact analysis in "a wide variety of homeowners' insurance cases" and citing specific examples of objectionable insurance practices).

insurance companies making underwriting decisions based on all kinds of factors that have nothing to do with a statistically measured or measurable probability of risk." (quoting *Senate Committee on Banking, Housing, and Urban Affairs*, 103rd Cong. (1994) (statement of J. Robert Hunter, former Texas Insurance Commissioner))). "Underwriting guidelines are typically not the result of careful, statistical studies. Rather, they are often based on hunches and subjective stereotypes about classes of consumers and types and geographic location of property." *Id.* at 137; *see also generally id.* at 125-33. "Historically, underwriters have relied on experience, market knowledge, intuition and oral history more than statistical insights when evaluating risk." *See* Gail McGiffin, *Are Underwriters Smarter Than Predictive Models?*, Ernst & Young, LLP (Dec. 9, 2013), *available at* http://iireporter.com/are-underwriters-smarter-than-predictive-models/ (last visited Dec. 18, 2014).

During the underwriting process, human judgment interacts with actuarial calculations. As a starting point, an underwriting score may be calculated based on actuarial criteria. *See* Donald Light, *Transforming Underwriting: From Risk Selection to Portfolio Management*, Celent, 6-7, 12 (2004), *available at* http://www.edmblog.com/weblog/files/insurance_transformingunderwriting_celent_wp.pdf (last visited Dec. 18, 2014). The score is then subject to a discretionary review to determine whether the application is accepted, rejected, or in need of further review. *See id.* at 7. There is significant variation among insurers in how this process is actually implemented, and varying levels of quality control. *See id.* Even when underwriting scores are available, "half or more of the

underwriting decisions may be ultimately made by human underwriters." *Id.* at 7. *See also* McGiffin at 7 ("Few, if any, underwriting decisions are truly binary. That's why insurers still need teams of people who know how to balance the nuances of risk quality, emerging exposures, market contexts and competitive strategies as they make critical underwriting decisions.").

Insurance industry amici assert that insurance rating practices are "nothing more than the allocation of pooled risks by establishing rates." Ins. Br. at 14. But actuarially-derived insurance rates may be modified or ignored for reasons unrelated to risk. This is because state laws often permit insurance companies to modify their rates based on business judgment and competition. Even the Casualty Actuarial Society's Statement of Principles Regarding Property and Casualty Insurance Ratemaking acknowledges that, although the actuary's role is to derive an estimation of future costs resulting from the transfer of risk, "other business considerations are also a part of ratemaking"; those considerations may include marketing, underwriting, and finance. *See* Board of Directors of the Casualty Actuarial Society, *Statement of Principles Regarding Property and Casualty Insurance Ratemaking*, Casualty Actuarial Society 4:143-44 (May 1988).

For example, despite what a company's actuaries may determine is a fair and reasonable rate for a specific insurance product in a specific geographic rating territory based on expected loss costs, company executives may reject that determination for competitive reasons, *i.e.*, in order to beat a competitor's

price and sell more policies. *See, e.g.*, Meryl Golden & Mike Miller, *Introduction to Price Optimization*, Earnix, 7, 10 (2014), *available at* http://www.naic.org/documents/committees_c_d_auto_insurance_study_group_140317_materials.pdf (last visited Dec. 18, 2014) (listing certain competitive adjustments that are often made to predicted loss costs during the rate-setting process). The actuarially-determined rates might be rejected or modified by business executives in order to penetrate (or withdraw from) a specific market. *See id.* at 7. Or they might be adjusted in response to agent input or customer responses. *Id.* So, while market forces may indeed support the use of efficient, risk-based calculations, Ins. Br. at 15, those same market forces, to be competitive, provide incentives to modify actuarially-derived rates in order to penetrate – or avoid – specific markets and specific business prospects.

3. Insurers Continue to Engage In Practices That Result In Adverse Racial Impacts But Cannot Be Justified By Actuarial Risk.

Due in large part to enforcement of the FHA and other anti-discrimination statutes, insurance practices that overtly discriminate on the basis of race have become significantly less common, but insurance underwriting is still tainted by "practices that are fair in form, but discriminatory in operation." *Griggs v. Duke Power Co.*, 401 U.S. 429, 431 (1971). A comprehensive study of the availability and price of homeowner's insurance in 33 metropolitan neighborhoods, conducted by the National Association of Insurance Commissioners ("NAIC") in the mid-

1990s, found that the racial composition of a neighborhood had a statistically significant relationship to the number and cost of insurance policies in that neighborhood that could not be adequately justified based on actuarial risk factors. Klein, *in* Insurance Redlining at 44-45. Regression analysis showed that none of the potentially legitimate business explanations for those disparities, including loss costs, demographic variables, and housing characteristics, could account for the disparate racial impact. *See generally id.* at 43-78.[6]

When insurance company practices produce such disparate effects that they cannot be justified by actuarial principles, the FHA requires the insurer to identify the practice causing these effects and search for less discriminatory alternatives. These alternatives would align underwriting more closely with actuarially-

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[6] Findings at the local level echo NAIC's national research. One study found that homeowners in the most heavily minority areas of Rochester, New York received premiums nearly three times higher than those in the surrounding towns, which were overwhelmingly white. *See* Barbara Van Kerkhove, *The Homeowners Insurance Gap: How Race and Neighborhood Composition Explain Cost and Access Disparities in Rochester and Monroe County, NY* 3 (2005), *available at* http://faceraceroc.org/wp-content/uploads/2013/05/H-Home-Insurance-Redlining.pdf (last visited Dec. 18, 2014). After testing variables that might legitimately explain these differences, the report concluded that almost all of those variables had no correlation, or were negatively correlated, to racial disparities in premiums. *Id.* at 5; *see also* N.J. Citizen Action et al., *Insurance Redlining: Is It Happening in Your Neighborhood?* (2004) (analysis of four New Jersey cities finding significantly higher costs of homeowner's insurance for Hispanic customers, and no significant variations in house price or unit size that accounted for this disparity).

sound risk factors. Accordingly, it is at least misleading to assert, as the insurance industry does, that "insurers would have to forgo considering factors that correlate to risk." Ins. Br. at 5. Disparate impact analysis requires precisely the opposite. An insurer's consideration of factors resulting in adverse effects will not give rise to disparate impact liability if those factors actually correlate to actuarial risk and there is no less discriminatory means of achieving that goal. *See* 24 C.F.R. § 100.500(c); HUD, Final Rule, Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,475 (Feb. 15, 2013).[7]

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[7] The disparate impact standard is equally vital to eliminate unjustified discriminatory effects of insurance practices on the basis of other characteristics protected by the FHA. *See, e.g.*, *Jones v. Travelers Cas. Ins. Co. of Am.*, No. 13-CV-02390, 2013 WL 4511648 (N.D. Cal. Aug. 22, 2013) (insurer ended coverage for rental property upon discovering it housed Section 8 tenants, resulting in alleged disparate impact on the basis of race, sex, age, and familial status); *Fuller v. Teachers Ins. Co.*, No. 06-cv-00438, 2007 WL 2746861 (E.D.N.C. Sept. 19, 2007) (denying motion to dismiss disparate impact claims based on insurer's cancellation of coverage for group home for people recovering from drug and alcohol addiction because of the unjustified adverse impact on individuals with mental and physical disabilities); Pennsylvania Coalition Against Domestic Violence & Women's Law Project, *Insurance Discrimination Against Victims of Domestic Violence* 4-7 (1998), *available at* http://www.womenslawproject.org/brochures/Insurance_discrimDV.pdf (last visited Dec. 18, 2014) (detailing property and casualty insurance policies that had disparate adverse impact on the basis of sex by precluding coverage for domestic violence victims).

4. The Disparate Impact Standard Distinguishes Between Those Aspects of the Insurance Business That Are Based On Legitimate Actuarial Considerations and Those That Are Not.

Insurance companies often make pricing and underwriting decisions that are affected by considerations other than risk. These aspects of the insurance business have been found to cause racial disparities that cannot be explained by risk of loss. *See e.g.*, Klein, *in* Insurance Redlining, at 72-73 (concluding that the "relationship between race and the availability of insurance persists, even imperfectly controlling for the risk of loss."). The purpose and design of the disparate impact standard is to root out such practices that cannot be justified on the basis of legitimate actuarial factors.

Indeed, measured against the reality of the insurance business, it is not surprising that the core claim advanced by the insurance industry amici has been rejected by courts as overly "sweeping," *Prudential*, 208 F. Supp. 2d at 60, and even "fanciful," *DeHoyos v. Allstate Corp.*, 345 F.3d 290, 297 n.5 (5th Cir. 2003). The court in *Prudential* elaborated:

> Essentially, [Prudential's] argument turns on the purportedly unique nature of the insurance industry, which must "discriminate" based on an assessment of risk. However, this argument is unavailing in light of the availability of the "business justification" defense. Plaintiffs do not challenge Prudential's right to evaluate homeowners insurance risks fairly and

> objectively. Rather, plaintiffs allege that the underwriting policies and practices employed by Prudential are *not* purely risk-based. Furthermore, defendants cannot point to anything in the FHA itself that would justify this Court in carving out an exception for a particular type of organization.

208 F Supp. 2d at 60.

The Fifth Circuit similarly observed that the insurance industry's "ominous" description of how disparate impact will force federal courts to act as "super actuar[ies,] although colorful, is incorrect." *DeHoyos*, 345 F.3d at 297 n.5. Courts are regularly called upon to evaluate whether a practice with a disparate impact is nevertheless justified by a business necessity, and the "attempt to distinguish the business of insurance from other businesses is unpersuasive." *Id.* The court also noted that the supposed conflicts between disparate impact enforcement and state insurance laws "are entirely conjectural." *Id.* at 299 n.7; *see also Moore v. Liberty Nat'l Life Ins. Co.*, 267 F.3d 1209, 1220-23 (11th Cir. 2001) (noting that "Liberty National argues that racial discrimination is acceptable in the Alabama insurance context so long as those racial distinctions have an actuarial basis," and holding that "[a]bsent more convincing evidence that racial discrimination in the insurance context is an integral part of Alabama's regulatory scheme, Liberty National's argument must fail.").[8]

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[8] We also observe that the federal financial regulatory agencies have embraced the use of disparate impact analysis as part of their regulation of lenders, who also are in the business of financial risk

The insurance industry's reliance on "actuarial necessity" as the linchpin of the "business of insurance" is a chimera in this context – a sophisticated-sounding catchphrase that ignores whole swaths of the insurance business which may cause discriminatory effects but which are outside the domain of actuarial science. There is not, and never has been, an absolute homage to actuarially-required outcomes in the business or regulation of insurance.

Insurance industry amici's members have been operating profitably for decades in a world where every circuit court that has addressed the issue, as well as HUD, has found that disparate impact liability exists under the FHA – without the calamitous results amici predict. That is unsurprising. The disparate impact standard is specifically crafted not to endanger legitimate business practices, in insurance or in other aspects of the housing market. It is easily compatible

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assessment. Since at least 1994, all five federal financial regulatory agencies have used disparate impact analysis to assess liability under the various federal anti-discrimination laws they enforce, including the Fair Housing Act. *See, e.g.*, Interagency Task Force on Fair Lending, *Policy Statement on Discrimination in Lending*, 59 Fed. Reg. 18,266 (Apr. 15, 1994), *available at* http://www.occ.treas.gov/news-issuances/federal-register/94fr9214.pdf (last visited Dec. 18, 2014). *See also* Office of the Comptroller of the Currency, et al., *Interagency Fair Lending Examination Procedures*, app. at 26-28, *available at* http://www.federalreserve.gov/boarddocs/caletters/2009/0906/09-06_attachment.pdf (last visited Dec. 18, 2014). Indeed, the disparate impact doctrine has been an integral part of Regulation B, which prohibits discrimination in underwriting and pricing in *lending* transactions, since the regulation was promulgated in 1985. 12 C.F.R. § 202.6 n.2.

with insurance and other housing practices that are, in fact, "actuarially justified." [9]

B. The McCarran-Ferguson Act is Not a Universal Bar to Disparate Impact Analysis.

As our case in *NAACP v. American Family Mutual Insurance*, 978 F.2d 287 (7th Cir. 1992), illustrates, the McCarran-Ferguson Act does not serve as a universal bar to enforcement of the Fair Housing Act against insurers. The insurance industry amici contend that interpreting the FHA to permit disparate impact liability would "contravene the McCarran-Ferguson Act," Ins. Br. at 4, and would "impair state laws regarding differentiation among risks of the same class or hazard. . . ," *id.* at 11.[10] In an extreme stretch of false

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[9] In addition to asserting that disparate impact interferes with the actuarial analyses that insurers purportedly rely on, the insurance industry amici complain that it will be compelled to collect demographic data in violation of state law. Ins. Br. at 4-5, 16-17, 22-23. HUD's disparate impact rule does not impose any new recordkeeping requirement, so homeowner's insurers are no different from other businesses that are subject to the FHA. Apartment managers do not record the race of housing applicants or tenants. Real estate sales agents do not record the race of their buyers. Although some lenders are required by federal law to collect and report racial and gender demographic data of loan applicants, 12 U.S.C. § 2803, they are not required to collect or report data about the other protected class characteristics (such as religion, disability, or familial status).

[10] Another amicus in support of Petitioners raises this argument as well, but its brief suffers from the same infirmities as the

equivalence, the insurance industry amici posit that the passage of the McCarran-Ferguson Act in 1945 is conclusive of congressional intent in 1968 (when the Fair Housing Act was enacted) and in 1989 (when the Fair Housing Amendments Act was enacted) as to *all* housing transactions – even those unrelated to insurance. Ins. Br. at 3-4, 9-10.

The McCarran-Ferguson Act has no bearing on the Fair Housing Act disparate impact issue before the Court. The application of the McCarran-Ferguson Act is fact and state specific, and its application will have different results depending on the state and business practice at issue. The Court has limited the application of the reverse-preemption provisions of the McCarran-Ferguson Act only in the context of whether *a specific state law* purports to regulate *a specific insurance business practice*. *See e.g.*, *Humana Inc. v. Forsyth*, 525 U.S. 299, 303 (1999) (considering federal RICO charges in light of Nevada state policy on insurance fraud); *Barnett Bank of Marion Cnty. v. Nelson*, 517 U.S. 25 (1996) (interpreting federal statute on national bank's sale of insurance in the context of Florida state law prohibiting banks from selling most types of insurance); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 880-81 (1985) (examining whether McCarran-Ferguson protected Alabama preferential insurance tax statute). We have not located any decision of the Court applying the McCarran-Ferguson Act to interpret or invalidate the application of a federal law in all 50 states.

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insurance industry brief. *See* Brief of Washington Legal Foundation as Amicus Curiae in Support of Petitioners, filed November 24, 2014.

Most lower courts have concluded that the McCarran-Ferguson Act does *not* preclude Fair Housing Act claims from going forward against property insurers, because no state insurance law would be "invalidated, impaired, or superseded" by a finding of liability under the Fair Housing Act. *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1363 (6th Cir. 1995) (Ohio); *United Farm Bureau Mut. Ins. Co. v. Metro. Human Relations Comm'n*, 24 F.3d 1008, 1016 (7th Cir. 1994) (Indiana); *Am. Family Mut. Ins. Co.*, 978 F.2d at 296 (Wisconsin); *Mackey v. Nationwide Ins. Cos.*, 724 F.2d 419, 421 (4th Cir. 1984) (North Carolina). *Accord*, *Moore v. Liberty Nat'l Life Ins. Co.*, 267 F.3d 1209, 1220-23 (11th Cir. 2001) (Alabama insurance law would not be impaired if insurance discrimination claims under § 1981 and § 1982 were successful). This is so even if the claims against an insurance company are based on a disparate impact theory of liability. *Dehoyos*, 345 F.3d at 298-99 (Florida and Texas); *Prudential*, 208 F. Supp. 2d at 58-61 (Ohio); *Lumpkin v. Farmers Grp., Inc.*, No. 05-2868 Ma/V., 2007 WL 6996777, at *2 (W.D. Tenn. July 6, 2007) (Tennessee).

McCarran-Ferguson may occasionally reverse-preempt disparate impact FHA claims, but only in those situations where a specific insurance practice is permitted by state law. *See, e.g.*, *Ojo v. Farmers Grp., Inc.*, 356 S.W.3d 421, 434 (Tex. 2011) (Texas law permits race-neutral credit scoring that has a racially disparate impact, and permitting a challenge to such a practice "would frustrate the regulatory policy of Texas."); *Saunders v. Farmers Ins. Exch.*, 537 F.3d 961, 968 (8th Cir. 2008) (Missouri's law would be "frustrated and interfered with" if a plaintiff could challenge

insurance prices under the FHA). In such circumstances, compliance with state law will be deemed a "business justification" sufficient to defeat a disparate impact claim. But even those decisions do not call into question the legitimacy of disparate impact claims in general.[11]

Nor is disparate impact analysis exclusive to federal law. Many states allow disparate impact claims as a matter of state law, even against insurance companies, and thus disparate impact analysis does not necessarily "directly conflict" with state laws. For example, California, North Carolina, and the District of Columbia expressly provide by statute for disparate impact fair housing claims without exemptions for any particular type of business, including homeowner's insurers. *See* Cal. Gov't Code § 12955.8 (2012); N.C. Gen. Stat. § 41A-5(a)(2) (2009); D.C. Code § 2-1401.03 (2012). Additionally, several states' supreme courts

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[11] The insurance industry amici rely heavily on their own cases, *American Insurance Ass'n v. United States Department of Housing & Urban Development, et al.*, No. 13-00966, 2014 WL 5802283 (D.D.C. Nov. 7, 2014) ("*AIA*"), and *Property Casualty Insurers Ass'n of America v. Donovan*, No. 13 C 8564, 2014 WL 4377570 (N.D. Ill. Sept. 3, 2014) ("*PCIA*") to support their arguments that the Fair Housing Act does not support disparate impact claims, cannot be reconciled with the "business of insurance," and violates McCarran-Ferguson. Ins. Br. at 2-3, 9, 20-23. *AIA* must be disregarded. The court's decision in that case has been appealed by the government to the U.S. Court of Appeals for the D.C. Circuit, and squarely conflicts with 40 years of precedent from almost every federal court in the nation. And the court in *PCIA* never even questioned disparate impact as a mode of analysis in the abstract. It merely instructed HUD to reconsider its recent regulation on disparate impact to address more fully the concerns of the insurance industry.

have interpreted their state fair housing laws to encompass disparate impact claims, even if their statutes do not explicitly use that term. *See, e.g.*, *Comm'n on Human Rights & Opportunities v. Sullivan Assocs.*, 739 A.2d 238, 255-56 (Conn. 1999); *Saville v. Quaker Hill Place*, 531 A.2d 201, 205-06 (Del. 1987); *Bowman v. City of Des Moines Mun. Hous. Agency*, 805 N.W.2d 790, 798-99 (Iowa 2011); *Malibu Inv. Co. v. Sparks*, 996 P.2d 1043, 1050-51 (Utah 2000); *State of Indiana, Civ. Rights Comm'n v. Cnty. Line Park, Inc.*, 738 N.E.2d 1044, 1049 (Ind. 2000). And according to at least one state court, "the disparate-impact approach does not unduly undermine the business of selling insurance [and] does not conflict with Ohio insurance law." *Toledo Fair Hous. Ctr. et al. v. Nationwide Ins. Co. et al.*, 704 N.E.2d 667, 670-71 (Ohio Com. Pl. 1997).

State fair housing laws are often in complete harmony with the federal Fair Housing Act. *See* Ins. Br. at 15-16 (citing state insurance laws that expressly prohibit discrimination based on race, color, religion, and national origin). Indeed, many state fair housing laws have been deemed "substantially equivalent" to the FHA[12] and so, to the same extent as the federal law, would apply the principles of disparate impact to homeowners insurers. Thus, contrary to the insurance industry amici's assertions, disparate impact claims

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[12] *See* 42 U.S.C. § 3610(f) (allowing HUD to certify any state agency for referrals of complaints when the agency enforces fair housing rights that are "substantially equivalent" to the Fair Housing Act). The list of equivalent state jurisdictions is available at http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/partners/FHAP/equivalency (last visited Dec. 18, 2014).

under the FHA do not automatically violate the McCarran-Ferguson Act. Accordingly, insurance industry amici's effort to derive from the McCarran-Ferguson Act any congressional intent to exclude disparate impact analysis from operation of the Fair Housing Act is fundamentally flawed in its entirety.

CONCLUSION

For the foregoing reasons, the NAACP respectfully requests that this Court hold that disparate impact liability is viable under the Fair Housing Act and affirm the judgment of the court of appeals.

Respectfully submitted,

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