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 *AMICUS CURIAE* THE HOUSING EQUALITY CENTER OF PENNSYLVANIA IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Supreme Court Rules

Statutes

Other Authorities

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, Housing Equality Center of Pennsylvania ("HECP") was established in 1956 and is the oldest fair housing agency in the United States. HECP has existed since before Congress passed the Fair Housing Act (the "FHA").[2]

HECP combats discrimination in housing against all classes protected under the FHA: race, color, religion, sex, handicap, familial status, and national origin. HECP dedicates approximately 60% of its resources to investigating potential violations and, when necessary, litigating to eliminate violations. HECP spends the other approximately 40% of its resources educating and training housing professionals, nonprofits, housing authorities, and others to promote compliance with fair housing laws and to prevent discrimination. The vast majority of HECP's operating funds originate from federal and local government grants to combat discrimination.

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[1] In accordance with Supreme Court Rule 37.6, *amicus curiae* HECP affirms that the position it takes in this brief has not been approved or financed by Petitioners, Respondent, or their counsel. Neither Petitioners, Respondent, nor their counsel had any role in authoring, nor made any monetary contribution to fund the preparation or submission of, this brief. Pursuant to Supreme Court Rule 37.3, *amicus curiae* HECP states that all parties have consented to the filing of this brief; evidence of written consent of all parties has been filed with the clerk.

[2] 42 U.S.C. §§ 3601-3619 (2013).

Over the past nearly sixty years, because of HECP's efforts, tens of thousands of housing units have been opened to members of protected classes, and victims of housing discrimination have collected almost two million dollars in damages. In fiscal years 2012 and 2013, HECP was responsible for 12% of complaints for which the Department of Housing and Urban Development issued a consent order remedying discrimination.

Many of HECP's causes of action have included disparate impact claims. HECP thus has a strong interest in showing that limiting the FHA to cases where intent must be proved directly would significantly weaken the FHA's effectiveness.

While HECP believes that FHA disparate impact claims must remain to combat all aspects of discrimination, HECP's experience in cases involving discrimination based on familial status demonstrates that the FHA must continue to provide a remedy when facially neutral policies make housing unavailable because of familial status. Disparate impact claims are often the only means by which to combat these violations. Accordingly, HECP has a strong interest in ensuring that this Court not reverse decades of settled law and instead hold that disparate impact claims continue to be cognizable under the FHA.

SUMMARY OF THE ARGUMENT

Under the FHA, it is unlawful "[t]o refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion,

sex, familial status, or national origin."[3] In addressing whether disparate impact claims are cognizable under this language, Petitioners' brief focuses almost exclusively on one protected class – race. However, the FHA plays an important role in addressing housing discrimination against each of these protected classes.

For instance, HECP has filed numerous cases on behalf of mothers, fathers, and children who have suffered unlawful discrimination because of their familial status. Such familial status cases often involve a private policy mandated by a landlord or condominium association that imposes occupancy limits stricter than those required by law. These policies often have serious adverse consequences for families – for example, a two-person-per-unit policy forcing a married couple to vacate their two-bedroom apartment upon the birth of their first child.[4] In these instances, and many others, facially neutral private occupancy limits make housing unavailable to families.

Such occupancy limits also harm families with children far more than others. By way of example, if a uniform two-person-per-bedroom limit had been applied to all one-, two-, or three-bedroom units in the United States between 2007 and 2009, 16% of families

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[3] 42 U.S.C. § 3604(a) (2013). The FHA also makes it unlawful "[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap . . . ." 42 U.S.C. § 3604(f)(1) (2013).

[4] *See, e.g.*, *Fair Housing Council of Orange Cnty., Inc. v. Ayres*, 855 F. Supp. 315, 316 (C.D. Cal. 1994).

with children would have been excluded from their dwellings, while only 1% of other households would have been affected.[5] Due to the current economy and certain demographic trends that are driving an increase in multigenerational families, these disparities have likely increased in recent years.[6]

An examination of lawsuits across the country challenging these occupancy limits demonstrates that facially neutral policies can improperly discriminate against families and – because these policies usually lack any demonstrable intentional bias – can often only be remedied by disparate impact claims. Reviewing these cases also demonstrates that applying a disparate impact analysis does not prevent governments or private entities from instituting reasonable and appropriate occupancy restrictions. Rather, continuing to apply disparate impact analysis under the FHA, as courts have done for decades, prevents occupancy limits that discrimate based on familial status.

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[5] Tim Iglesias, *Moving Beyond Two-Person-Per-Bedroom: Revitalizing Application of the Federal Fair Housing Act to Private Residential Occupancy Standards*, 28 Ga. St. U. L. Rev. 619, 647 (2012).

[6] *Id.* at 621-22, n.3 ("Census Bureau data released in September [2010] showed that the number of multifamily households jumped 11.7 percent from 2008 to 2010, reaching 15.5 million, or 13.2 percent of all households. It is the highest proportion since at least 1968, accounting for 54 million people." (quoting Michael Lou, *'Doubling Up' in Recession-Strained Quarters*, N.Y. Times, Dec. 28, 2010, at A1)).

ARGUMENT

I. The FHA protects families from housing discrimination.

In 1968, the FHA was passed to prohibit housing discrimination against certain protected groups and to further the policy of "provid[ing], within constitutional limitations, for fair housing throughout the United States."[7]

In 1988, the FHA was amended to include a prohibition on discrimination because of "familial status."[8] Under the FHA, "familial status" generally means one or more children under eighteen living with a parent or legal guardian.[9]

The legislative record demonstrates that the FHA, as amended, was intended to ensure that families could secure suitable housing and would not be deprived of housing they could afford because of their familial status.[10] In recommending the passage of the 1988 amendment, the House Committee on the Judiciary stated that the FHA was part of a "long tradition" by Congress and the courts, including this Court, of "protecting families as 'perhaps the most fundamental social institution of our society.'"[11] The Committee reported that "families with children . . . have been the victims of unfair and discriminatory

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[7] 42 U.S.C. § 3601 (2013).

[8] Pub. L. No. 100–430, § 5(k)(2), 102 Stat. 1619 (1988).

[9] 42 U.S.C. § 3602(k) (2013).

[10] H.R. Rep. No. 100-711, at 19 (1988), 1988 WL 169871.

[11] *Id.* (quoting *Trimble v. Gordon*, 430 U.S. 763 (1977)).

housing practices."[12] The Committee further reported that "[i]n many parts of the country families with children are refused housing despite their ability to pay for it" and that "discrimination against families with children prevents millions of American families from realizing this goal" of a "decent home and suitable living environment."[13]

In amending the FHA to include familial status, Congress made clear its intention to ensure a meaningful remedy for housing discrimination that deprived families of decent homes. As one court has explained, in amending the FHA, Congress sought to "alleviate the squeeze on affordable housing stock for families with children and to protect such families from eviction or inability to find reasonably priced places to live."[14]

II. Cases nationwide demonstrate that facially neutral occupancy limits can improperly deny housing to families and that disparate impact claims are necessary to address this wrongful discrimination.

Numerous cases brought by HECP, private plaintiffs, and the federal government provide examples of facially neutral occupancy policies that discriminate against families by restricting the

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[12] H.R. Rep. 100-711, at 13.

[13] H.R. Rep. 100-711, at 19.

[14] *United States v. Lepore*, 816 F. Supp. 1011, 1017 (M.D. Pa. 1991) (citing 134 Cong. Rec. H4611 (daily ed. June 22, 1988) (statement of Rep. Miller)).

housing options available to them. Even where there is no animus underlying these occupancy restrictions, the policies have the same harmful effect as facially discriminatory policies, because both types of discrimination make housing unavailable in a manner that disproportionately affects families. Without the availability of disparate impact liability in cases like these, families would be left with no remedy for their injuries.

A. Facially neutral policies can severely and disproportionately harm families, forcing them from homes or restricting access to desired housing.

In 2005, plaintiffs Timothy Moroney and Christen Muscari, with the assistance of co-plaintiff HECP, filed an action in federal district court against the owners and managers of seven apartment complexes in Pennsylvania.[15] The apartment complexes all had in place policies limiting occupancy of two-bedroom units to three people. Mr. Moroney and Ms. Muscari lived in one of these two-bedroom units with their young son. When Ms. Muscari was eight months pregnant with the couple's second child, the family was informed they would have to vacate their apartment, because the three-person limit prohibited them from living in the two-bedroom unit with both of their children. HECP challenged the facially neutral policy under the disparate impact theory and eventually obtained a settlement under

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[15] *See Moroney v. Audubon Apartments Ltd. P'ship*, No. 05-5231 (E.D. Pa. filed Nov. 4, 2005).

which the apartment complexes changed their occupancy policies.

In addition to *Moroney*, HECP has handled over a dozen similar disparate impact claims on behalf of those wrongfully denied housing because of their familial status. Unfortunately, occupancy policies such as the ones challenged by HECP are not unique – they exist in states across the nation and in a variety of housing situations.

The case of *Fair Housing Council of Orange County, Inc. v. Ayres*[16] largely mirrors the facts of *Moroney*. In *Ayres*, a married couple, the Goesers, lived together in a two-bedroom apartment in an apartment complex with over seventy units. The complex enforced a two-person-per-unit occupancy limit.[17] While living at the complex, Mrs. Goeser became pregnant. Shortly after the Goesers' son was born, the complex's manager told the Goesers that they were in violation of the two-person-per-unit policy and would be evicted if they did not vacate their apartment. The Goesers were forced to move shortly after their son was born.

The Goesers filed suit against the apartment complex alleging a violation of the FHA. The Goesers' claims detailed the effect the occupancy limit had on their family and provided census data showing that the occupancy limit had a disproportionately negative impact on families.[18] Finding that "the restriction

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[16] 855 F. Supp. 315 (C.D. Cal. 1994).

[17] *Id.* at 316.

[18] *Id.* at 318.

has a disparate impact on intact families with children," the court ruled that the defendant's policy violated the FHA.[19]

The choice between expanding a family and bearing the economic and non-economic costs of moving is not one faced only by families who rent their homes. In *Gashi v. Grubb & Ellis Property Management Services, Inc.*,[20] the Gashis, a married couple, owned a one-bedroom condominium. Shortly after Mrs. Gashi gave birth to a son, the family was informed that it was in violation of the condominium association's policy limiting occupancy to two persons per bedroom. The condominium association's occupancy requirement was more stringent than the local municipality's requirements, which would not have prevented the Gashis from remaining in their apartment.[21] Because of the condominium association's occupancy limit, the Gashis were forced to sell their condominium and relocate.[22]

The Gashis sued the condominium association, alleging that the occupancy policy had a disparate impact on families and violated the FHA. In addition to the evidence of the occupancy limit's impact on their family, the Gashis presented census data showing that over 30% of local households with children were three-person households but less than 10% of local households without children were three-person households, demonstrating that this

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[19] *Id.*

[20] 801 F. Supp. 2d 12 (D. Conn. 2011).

[21] *Id.* at 15.

[22] *Id.*

policy adversely affected families.[23] The court ruled that the condominium association's occupancy limit violated the FHA even though there was no evidence of discriminatory intent.[24] The court based its ruling on a finding of disparate impact.[25]

The facially neutral occupancy policies at the heart of *Moroney*, *Ayres*, and *Gashi* effectively demand that couples (a) remain in their home and not have children, (b) find a new home if they wish to have a child, or (c) have one parent leave the home upon the birth of a child.[26] And, as census data demonstrates, restrictive occupancy policies have a disproportionately negative impact on families. If disparate impact claims were not cognizable under the FHA, such occupancy limits would be allowed to stand.

In other instances, facially neutral occupancy restrictions prevent families from obtaining desired housing in the first place.

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[23] *Id.* at 16-17.

[24] *Id.* at 19.

[25] *Id.*

[26] It is important to note that localities often enact zoning regulations establishing the legal occupancy of a unit based on its square footage. *See, e.g.*, *Gashi*, 801 F. Supp. 2d at 15. None of the defendants in *Moroney*, *Ayres*, or *Gashi* established that the per-person limits at issue in those cases were based on a valid local zoning regulation; such limitations were instead arbitrary impositions with the latent intent to prohibit families with children from residing in the units.

In *Snyder v. Barry Realty, Inc.*,[27] Edward and Janet Snyder, who had five young children, relocated to Illinois when Mr. Snyder began a graduate program at Northwestern University. Mr. Snyder submitted an application to Barry for a three-bedroom apartment close to Northwestern. The Snyders were denied the apartment based on Barry's policy limiting occupancy in its three-bedroom units to four people (as part of its broader "bedroom plus one" policy). Barry enforced this policy even though the town's statutory occupancy requirements would have permitted the Snyders to reside in the three-bedroom apartment.[28]

In light of Barry's facially neutral policy, the court stated that "the Snyders' only viable option [under the FHA] is disparate impact."[29] After conducting a disparate impact analysis, the court concluded that the Snyders had established a prima facie case of discrimination based on familial status. The court emphasized that Barry's policy, while facially neutral, was "the functional equivalent of intentional discrimination,"[30] and forced "couples with more than one child to rent housing with a separate bedroom for each child."[31] In discussing the family's right to seek housing that suited their particular finances and needs, the court noted that

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[27] 953 F. Supp. 217 (N.D. Ill. 1996).

[28] *Id.* at 219.

[29] *Id.*

[30] *Id.* at 221.

[31] *Id.*

"[m]any (if not most) families cannot afford to provide separate bedrooms for each of their children."[32]

A similar occupancy restriction prevented the plaintiff in *United States v. Badgett*[33] from obtaining her desired housing. In *Badgett*, a mother, Donna Mayeaux, seeking to rent a one-bedroom apartment for herself and her five-year-old daughter, was turned down on the basis of the apartment complex's one-person-per-bedroom policy. The one-person-per-bedroom restriction was "far in excess of restrictions imposed by the applicable municipal code."[34] In fact, the size of the one-bedroom apartments in the complex well exceeded the "legally required minimum for two people" under the local municipal code.[35]

The Eighth Circuit held that the apartment complex's facially neutral policy violated the FHA because it had a disparate impact on families. The court noted that renting a two-bedroom apartment would require a "significant increase in cost" for Ms. Mayeaux and explained that "the issue is not whether any housing was made available to Mayeaux, but whether she was denied the housing she desired on impermissible grounds."[36]

The circumstances in *Badgett* demonstrate the need for a disparate impact remedy under the FHA. The district court – which the Eighth Circuit

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[32] *Id.*

[33] 976 F.2d 1176 (8th Cir. 1992).

[34] *Id.* at 1179.

[35] *Id.* at 1177-78.

[36] *Id.* at 1179-80.

ultimately reversed – had "found a housing policy requiring single occupancy for one-bedroom apartments to be facially neutral and therefore not to be a violation of the Fair Housing Act."[37] Unless this Court acknowledges that disparate impact claims are cognizable under the FHA, facially neutral policies such as these will be allowed to proceed unchecked, even though they drive families from available housing simply for having children.

B. Facially neutral policies can mask hidden, and often unprovable, discriminatory intent.

Facially neutral policies are especially dangerous because they can be used to mask discriminatory intent. When those in control of private housing policies want to restrict families' access to housing but wish to avoid being seen as intentionally discriminatory, they may resort to strict occupancy limits that have the same effect as intentional discrimination. Disparate impact analysis enables courts to scrutinize such wrongful policies and identify them for what they truly are: a guise for discriminatory actions.

For instance, in *United States v. Lepore*,[38] a husband and wife, Charles and Lori Meiler, lived in a mobile home on a lot leased from the defendants. The park had a policy prohibiting children. When Mrs. Meiler became pregnant, the couple raised concerns about the policy. Following the Meilers' complaints,

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[37] *Id.* at 1177.

[38] 816 F. Supp. 1011 (M.D. Pa. 1991).

the park abandoned its policy expressly prohibiting children but kept in place a two-person occupancy limitation on all mobile homes, irrespective of size. This occupancy limitation was more stringent than the local government's and would exclude all families comprised of two parents with one or more children and single parent families with two or more children.[39]

Shortly after the birth of their daughter, the park owners demanded that the Meilers vacate their lot because they were in violation of the occupancy limit. The Meilers incurred significant time and expense trying to locate new housing. They "sought but were unable to locate a space for their trailer in another mobile home park."[40] They considered selling their mobile home, but "[d]ue to their limited income and savings . . . were unable to purchase another home."[41] Because they had a newborn baby, they "were reluctant to live with relatives and were concerned with the consequent disruption in their own lives and that of their relatives."[42] In light of these issues, Mrs. Meiler feared being "thrown out on the street with her newborn child,"[43] and Mr. Meiler "was concerned that he would have to leave his wife and infant child and live elsewhere," so that his wife and daughter could remain in their current home.[44]

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[39] *Id.* at 1015.

[40] *Id.* at 1013.

[41] *Id.*

[42] *Id.* at 1013-14.

[43] *Id.* at 1024.

[44] *Id.* at 1013-14.

Ultimately, the court in *Lepore* found that the park's occupancy restriction, while neutral on its face, was designed to continue the park's "no child" policy after the passage of the FHA amendments.[45] However, if an identical policy were enacted today in a building without a prior "no child" policy, but with the same "no child" animus and the same harmful results, there would likely be no evidence of such discriminatory intent, as "clever men may easily conceal their motivations."[46] Only under the FHA's disparate impact analysis could such a policy be challenged.

Research suggests that many families suffer stress and injuries like those suffered by the Meilers due to the lack of available housing. For instance, the lack of safe, affordable housing (created by discriminatory practices) forces families to expend time searching for housing. For low-income families, "these extra expenses (due to forced purchase and search costs) can be significant in terms of reducing money available for other needs, such as food, medical care, and transportation."[47]

Often, families end up choosing less-desirable housing because of restrictive policies or rules. Families may buy or rent more housing than desired, at more expense; accept inferior quality housing, where there are fewer occupancy standards; or accept an inferior location, which can negatively impact

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[45] *Id.* at 1021.

[46] *United States v. City of Black Jack, Missouri*, 508 F.2d 1179, 1185 (8th Cir. 1974).

[47] Iglesias, *supra*, note 5, at 634-35.

schooling options, jobs, and transportation availability.[48]

Sometimes, families choose to split up a desired composition because of the lack of options. This splitting up of a family "can conflict with deeply held cultural preferences/norms to live closely as a way of life and to keep together the intergenerational family, the extended family, or both."[49]

III. Continuing to recognize disparate impact claims will not prevent reasonable and appropriate occupancy restrictions.

Petitioners argue that recognizing disparate impact claims will extend the FHA's application farther than is feasible. History has shown that this concern is unfounded, both generally and in the context of familial status cases.

First, the 1988 amendment expressly provided that the FHA does not limit "the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling."[50]

Second, in disparate impact cases, courts have long applied a multi-prong, burden-shifting test to determine when a disparate impact on a protected class justifies a remedy under the FHA. As one court

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[48] *Id.* at 633-34.

[49] *Id.* at 633.

[50] 42 U.S.C. § 3607(b)(1) (2013).

succinctly put it, this test has three parts: first, "the plaintiff has the burden of proving a prima facie case of discrimination by a preponderance of the evidence"; second, "if the plaintiff sufficiently establishes a prima facie case, the burden shifts to the defendant to articulate some legitimate undiscriminatory [sic] reason for its action"; and third, "if the defendant satisfies this burden, the plaintiff has the opportunity to prove by a preponderance that the legitimate reasons asserted by the defendant are in fact mere pretext."[51]

Thus, a plaintiff alleging discrimination on the basis of familial status cannot obtain a remedy under the FHA simply by demonstrating that the policy at issue has a disparate impact on families. Rather, the policy will be upheld if the defendant can establish that the policy is necessary to further a substantial, legitimate interest. The burden-shifting approach long applied by courts requires a complex analysis and results in a high bar for establishing a violation of the FHA. For instance, the Tenth Circuit, when analyzing a three-person-per-home occupancy restriction in a mobile home park, found that the restriction was justifiable in light of concerns over quality of park life and sewer system limitations.[52] An analysis of disparate impact cases nationwide

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[51] *Badgett*, 976 F.2d at 1178 (quoting *Pollit v. Bramel*, 669 F. Supp. 172, 175 (S.D. Ohio 1987).

[52] *Mountain Side Mobile Estates P'ship v. HUD*, 56 F.3d 1243, 1257 (10th Cir. 1995).

reveals that plaintiffs face significant challenges to prevailing in these cases.[53]

Disparate impact claims remain crucial to protect families from policies that have the effect of disproportionately denying them autonomy over their housing choices. Thus, the federal courts' approach to FHA disparate impact claims over the past several decades strikes an effective balance between the need to protect legitimate interests in housing decision-making and the need to protect against facially neutral discrimination (and covert discriminatory intent).

CONCLUSION

HECP respectfully submits that this Court should endorse decades of jurisprudence and hold that disparate impact claims continue to be cognizable under the FHA.

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[53] Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Over Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 Am. U. L. Rev. 357, 357 (2013) ("In general, plaintiffs have obtained positive outcomes in only 20% of their FHA disparate impact claims considered on appeal. Further, plaintiffs' positive FHA disparate impact outcomes have been affirmed only 33.3% of the time, compared with defendants' affirmance rate of 83.8%.").

December 23, 2014

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