IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

FELIX PUELLO, CESAR V. CANDELARIO, and VICTORIA E. CANDELARIO on behalf of themselves and all others similarly situated, all others similarly situated,

Plaintiffs,

vs. Civil Action No. 08-10417-MLW

CITIFINANCIAL SERVICES, INC., CITIGROUP INC., and CITIMORTGAGE, INC.,

Defendants.

AMICUS CURIAE BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW OF THE BOSTON BAR ASSOCIATION

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Dated: August 11, 2008

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The Lawyers' Committee for Civil Rights Under Law of the Boston Bar Association ("Lawyers' Committee") hereby submits this Amicus Curiae Brief in the above captioned matter to clarify points of law relating to the availability of disparate impact claims under the Fair Housing Act ("FHA"), 42 U.S.C. § 3601, and the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. §1691.

STATEMENT OF INTEREST

The Lawyers' Committee for Civil Rights Under Law of the Boston Bar Association is a non-profit organization located at 294 Washington Street, Suite 443, Boston, MA 02108. The Lawyers' Committee was established in 1968 to provide pro bono legal representation to victims of race and national origin discrimination. Since its formation, the Lawyers' Committee has brought dozens of actions to correct civil rights injustices in the Commonwealth of Massachusetts and has maintained a particular focus on fair housing practices.

The recent increase in subprime lending in the mortgage industry has had a disproportionately detrimental effect on individuals and communities of color across the nation. Numerous studies have documented that African-Americans and Latinos are significantly more likely to receive subprime mortgages than similarly-situated white borrowers. This trend holds true even after factoring in credit history and other objective criteria that may influence the terms of a loan. For instance, a 2006 study by the Center for Responsible Lending found that

> African-American borrowers with prepayment penalties on their subprime home loans were 6 to 34 percent more likely to receive a higher-rate loan than if they had been white borrowers with similar qualifications. Results varied depending on the type of interest rate (i.e., fixed or adjustable) and the purpose (refinance or purchase) of the loan. . . . Latino borrowers . . . were 29 to 142 percent more likely to receive a higher-rate loan than if they had been non-Latino and white.

Debbie Gruenstein Bocian, Keith S. Ernst and Wei Li, CENTER FOR RESPONSIBLE LENDING *Unfair Lending: The Effect of Race and Ethnicity on the Price of Subprime Mortgages* 3-4 (2006). A report by the Center for Community Change revealed that

> Lower-income African-Americans receive 2.4 times as many subprime loans as lower-income whites, while upper-income African-Americans receive 3.0 times as many subprime loans as do whites with comparable incomes. . . . Lower-income Hispanics receive 1.4 times as many subprime loans as do lower-income whites, while upper-income Hispanics receive 2.2 times as many of these loans.

Calvin Bradford, *Risk or Race? Racial Disparities and the Subprime Refinance Market: A Report of the Center for Community Change* vii (2002).

The importance of homeownership among African Americans and Latinos exacerbates the subprime crisis for these demographic groups. According to a study by the Pew Hispanic Center, in 2002, "61 percent of the average net worth of Latino households is derived from home equity," and "home equity accounted for 63 percent of mean total net worth" for African American households. Rakesh Kochhar, PEW HISPANIC CENTER, *The Wealth of Hispanic Households: 1996 to 2002* 17, 20 (2004). In contrast, home equity accounted for only 38.5 percent of the mean net worth of white households the same year. Id. at 20. An increase in foreclosures due to subprime lending, therefore, has a particularly acute effect on minority communities and significantly decreases their overall wealth and opportunities.

The Lawyers' Committee, being dedicated to eradicating the causes and effects of race and national origin discrimination, therefore has a compelling interest in preserving the legal avenues allowing minority borrowers redress against lenders' discriminatory practices.

ARGUMENT

Plaintiffs brought this action under the FHA and the ECOA, alleging that Defendants have engaged in racially discriminatory mortgage lending practices. (First Am. Class Action Compl. at ¶¶ 1, 2.) Defendants have moved this Court to dismiss the Complaint pursuant to Fed.

R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. (Mem. of Law in Supp. of Mot. to Dismiss the First Am. Compl. ("Mot. to Dismiss") at 1.) This brief will address the issue, raised in Defendants' Memorandum, of whether disparate impact claims are cognizable under the FHA and ECOA.

I. CONTRARY TO DEFENDANTS' CLAIMS, STATUTORY TEXT IS NOT THE SOLE CONSIDERATION WHEN DETERMINING WHETHER DISPARATE IMPACT CLAIMS MAY BE BROUGHT UNDER CIVIL RIGHTS STATUTES.

Defendants inaccurately argue that disparate impact claims are not allowed under either the ECOA or the FHA because those statutes do not include supposed "required language." (Mot. to Dismiss at 12.) Contrary to Defendants' arguments, no such "required language" is necessary to allow disparate impact claims under a civil rights statute, and, to the extent that statutory language is relevant, the language of the ECOA and FHA allows such claims.

In support of Defendants' "required language" argument, Defendants rely on the Supreme Court's decision in Smith v. City of Jackson, 544 U.S. 228 (2005), for the inaccurate proposition that "textual analysis," is "determinative of the question of whether a statute gives rise to disparate impact claims." (Mot. to Dismiss at 13, 15.) Neither City of Jackson nor any of the other cases to which Defendants cite supports the contention that "Congress' omission of the 'adverse effects' language dispositively signals its intent to bar disparate impact claims under the ECOA and the FHA." (Id. at 15.)

A. The Supreme Court's decision in Smith v. City of Jackson clearly confirms that when interpreting a statute, courts should consider a variety of relevant evidence, including statutory text, legislative history, administrative enforcement, and case law interpreting the statute.

In Smith v. City of Jackson, the Supreme Court *upheld* the availability of disparate impact claims under the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 623. In doing so, the Court, while admittedly analyzing the language of the statute, emphasized

that statutory interpretation depends not only on the text, but also on the legislative history, statutory purpose, administrative enforcement, and case law interpretation of a statute. City of Jackson, 544 U.S. at 232-41. Defendants entirely ignore the Court's explanation that statutory text is *not* the only relevant factor when interpreting a statute. Defendants instead inaccurately suggest that "'adverse effects' language" alone was the basis for the Court's decision. (Mot. to Dismiss at 14.)

The Supreme Court based its decision in City of Jackson on numerous factors and not, as Defendants suggest, on a purely textual analysis. While the inclusion in the ADEA of the phrase "otherwise adversely affects" certainly influenced the plurality's holding, the Court also relied upon the following:

1. the legislative history of the ADEA,[1]
2. the purpose of the ADEA, especially in comparison to that of Title VII, 42 U.S.C. § 2000e,[2]
3. deference to regulating authorities' reasonable interpretation and enforcement of the statute,[3]
4. the Reasonable Factors Other Than Age (RFOA) provision, particularly as interpreted by the EEOC,[4]
5. the nature of the discrimination the ADEA regulates (age-based) as compared to the discrimination regulated by Title VII (race, national origin, etc.),[5]
6. unanimous Circuit Court treatment of the ADEA, supporting disparate impact claims.[6]

Thus, contrary to Defendants' contention that the text of the statute alone "provides the answer" (Mot. to Dismiss at 12), courts should look at a variety of factors, as the Supreme Court did in

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[1] See 544 U.S. at 232-33 (Majority); id. at 238 (Plurality Plus); id. at 248, 253-56 (O'Connor, J.).

[2] See id. at 234, 235 n.5 (Plurality Plus); id. at 248, 256-58, 262 (O'Connor, J.).

[3] See id. at 239-40 (Plurality Plus); id. at 243-47 (Scalia, J.); id. at 263-66 (O'Connor, J.). Notably, Justice Scalia's concurrence emphasized that, in his opinion, disparate impact claims are available under the ADEA not because of the text of the ADEA, but because of the need to defer to the regulating authorities' reasonable interpretation and enforcement of the statute. Id. at 243 (Scalia, J., concurring in part and concurring in the judgment) (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)).

[4] See id. at 240-41 (Majority); id. at 238-40 (Plurality Plus); id. at 245-46 (Scalia, J.); id. at 251-53, 263-67 (O'Connor, J.).

[5] See id. at 240-41 (Majority); id. at 236 n.7 (Plurality Plus); id. at 254-55, 258-59, 261 (O'Connor, J).

[6] See id. at 236-238 (Plurality Plus).

City of Jackson, to determine whether to allow disparate impact claims. See, e.g., Payares v. JP Morgan Chase & Co, et al., No. 07-cv-05540, Mins. of In Chambers Order Re: Mot. to Dismiss Case, at *4 (C.D.Cal. May 15, 2008); Garcia v. Country Wide Financial Corp., No. 07-cv-01161, Am. Order Granting in Part and Denying in Part Defs.' Mot. To Dismiss, at *7-11 (C.D.Cal. Jan. 17, 2008) (explaining that City of Jackson "did not hold that a statute *must* contain this 'effects' language in order to authorize disparate impact claims." (emphasis in original)).

Defendants' inaccurately argue that, in City of Jackson, Justice Stevens noted that the Court's decision in Griggs v. Duke Power Co., 401 U.S. 424 (1971), which was the landmark Supreme Court decision that allowed disparate impact claims under Title VII, "should more properly be understood as an interpretation of Title VII's text." (Mot. to Dismiss at 12.) Justice Stevens' discussion of Griggs actually reinforced the importance of non-textual factors when interpreting statutory text, such as the purposes underlying and administrative enforcement of a statute. He stated:

> While our opinion in Griggs relied primarily on the purposes of the Act, buttressed by the fact that the EEOC had endorsed the same view, we have subsequently noted that our holding represented the better reading of the statutory text *as well*.

City of Jackson, 544 U.S. at 235 (emphasis added). This statement in no way indicates that the Court had abandoned considerations beyond statutory text. Rather, it confirmed that Griggs relied primarily on factors other than the text of Title VII, but that the text *also* supports the Court's decision.

B. City of Jackson *did not* "hold" that the text of § 703(a)(1) of Title VII and § 4(a)(1) of the ADEA "focuses on 'the employer's actions with respect to the targeted individual."

Much of Defendants' mischaracterization of City of Jackson is based on the their wholly inaccurate reading of the Court's treatment of § 703(a)(1) of Title VII and § 4(a)(1) of the

ADEA. (See Mot. to Dismiss at 13-14.) In City of Jackson, *the Supreme Court did not pass on the availability of any claim, disparate impact or otherwise, under either* § 703(a)(1) of Title VII or § 4(a)(1) of the ADEA. Those sections of Title VII and the ADEA were *not before the court*. The Court discussed those issues, but such discussions were purely dicta. Defendants' claim that the Court "held" that the text of those provisions of Title VII and the ADEA "focus[] on 'the employer's actions with respect to the targeted individual'" and therefore address only certain types of discrimination is plainly wrong.

C. Defendants overstate the similarities between statutes and ignore key differences between Title VII, the ADEA, the FHA, and the ECOA.

Even if Defendants were correct, which they are not, that City of Jackson articulated a rule that limits statutory interpretation to text alone, Defendants overstate the similarities between the statutes examined in prior cases and the statutes at issue here. Differences in the structure of the statutes undermine Defendants' argument that § 3605(a) of the FHA and § 1691(a) of the ECOA "track the language of § 703(a)(1) of Title VII and § 4(a)(1) of the ADEA." (Mot. to Dismiss at 14.)

In City of Jackson, the Court emphasized the "key textual differences" of two sections within Title VII: one section, § 4(a)(2), allowed disparate impact claims, and the other section, § 4(a)(1), did not. City of Jackson, 544 U.S. at 236 n. 6. The Supreme Court noted that the internal textual differences between the two sections supported the theory that Congress's use of different language between subsections within the same statute demonstrated Congressional intent to have each subsection carry different meaning. Id. No such distinctions exist within either the FHA or ECOA. Instead, unlike Title VII and the ADEA, which each have two provisions barring discrimination in two distinct manners, in both the FHA and ECOA, the relevant sections banning discriminatory practices stand on their own and are not coupled with

another provision. See 42 U.S.C. § 3605(a); 15 U.S.C. § 1691(a)(1). Thus, whereas those differences within the ADEA and Title VII served to bolster the Court's decision in City of Jackson, the differences simply do not exist in either of the statutes at issue here.

The ECOA contains an additional major structural difference which Defendants overlook. The statute includes a section listing activities *not* constituting discrimination, which, notably, does not include disparate impact claims. 15 U.S.C. § 1691(b). In contrast, Title VII and the ADEA contain no such provision, complicating any comparison between the statutes. The fact that Congress would include this list of activities that do not fall within the scope of the Act but omit disparate impact claims from that list is instructive. See City of Jackson, 544 U.S. at 239 n.11 ("[I]f Congress intended to prohibit all disparate-impact claims, it certainly could have done so.").

Defendants also overlook a key difference between the language of the ADEA, § 623(a)(1), and the FHA, 42 U.S.C. § 3605(a), which suggests that these clauses may have different meanings. Subsection 623(a)(1) of the ADEA "makes it unlawful for an employer 'to fail or refuse to hire . . . *any individual* . . . because of *such individual's* age.'" City of Jackson, 544 U.S. at 236 n.6 (quoting 29 U.S.C. § 623(a)(1)) (emphasis in original). The term "individual" appears to refer only to a *single* individual, particularly considering its placement next to the subsequent paragraph which addresses "employees" in the aggregate. In contrast, § 3605(a) of the FHA makes it "unlawful . . . to discriminate against *any person*." 42 U.S.C. § 3605(a) (emphasis added). According to the definitions of the FHA, "'Person' includes one *or more* individual*s*," not just a single individual. 42 U.S.C. § 3602(d) (emphasis added); see also 29 U.S.C. § 630 (applying the same definition to the ADEA); 42 U.S.C. § 2000e(a) (applying the same definition to Title VII). This raises the possibility that Congress intended the term

"person," as used in the FHA's prohibition against discrimination, to refer to discrimination in an aggregate sense as well as discrimination against an individual.

These unique structural and textual characteristics in the FHA and ECOA support the availability of disparate impact claims under each statute. They certainly belie Defendants' contention that the Court may not consider extrinsic evidence such as legislative history because there is no ambiguity in the plain meaning of the statutes. (Mot. to Dismiss at 16.)

D. None of the other cases cited by Defendants supports the contention that statutory text is determinative.

After mischaracterizing the holding in City of Jackson, Defendants attempt to bolster their flawed statutory interpretation argument by citing several cases in which, they contend, the Supreme Court "followed this same analysis in interpreting other anti-discrimination statutes." (Mot. to Dismiss at 16.) None of these cases, however, supports such a claim.

Jackson v. Birmingham Board of Education

Defendants entirely misread the Court's decision in Jackson v. Birmingham Board of Educ., 544 U.S. 167 (2005). The Court in Jackson *did not address whether disparate impact claims were available* under Title IX, 20 U.S.C. § 1681, and it certainly did not hold that "only intentional discrimination claims are allowed under Title IX" based on the statute's text, as Defendants claimed in their Motion to Dismiss. (Mot. to Dismiss at 16.) The issue presented in Jackson instead was "whether the private right of action implied by Title IX encompasses claims of *retaliation*." Jackson, 544 U.S. at 171 (emphasis added). The Jackson Court held that a private right of action is available under Title IX "where the funding recipient retaliates against an individual because he has complained about sex discrimination." Id.

The phrase "disparate impact" (or variations thereof) appeared in the Jackson Court's opinion a total of four times, all in the same paragraph, and all in describing Alexander v.

Sandoval, 532 U.S. 275 (2001), which, as discussed infra, concerned the availability of a *private right of action* under a subsection of Title VI, *not* the availability of disparate impact claims. Jackson, 544 U.S. at 177-78. Nowhere in the opinion did the Court address the issue of whether disparate impact claims were available under Title IX, and thus this case is not relevant to Defendants' argument here.

Alexander v. Sandoval

The Supreme Court's decision in Alexander v. Sandoval also has very little relevance with regard to the availability of disparate impact claims under the FHA or ECOA because the issue presented in Sandoval was *not* whether disparate impact claims were available under § 601 of Title VI, but whether a *private right of action* existed to enforce regulations under § 602 of Title VI. 532 U.S. at 278; see also Payares, at *3 ("Sandoval itself held *only* that no private right of action was available to enforce regulations enacted by federal agencies to prohibit disparate impact discrimination under a statute previously held to prohibit only intentional discrimination." (emphasis added)); Osborne v. Bank of America, Nat. Ass'n., 234 F.Supp.2d 804, 809-12 (M.D.Tenn. 2002) ("Properly construed then, Sandoval holds *only* that regulations may not create private rights of action where no such right was intended by Congress." (emphasis added)). In fact, the Court specifically assumed, for the sake of narrowing its discussion to the issue of whether a private right of action existed, that § 602 of Title VI *could* be used to proscribe activities that had a disparate impact on protected classes. Sandoval, 532 U.S. at 282.

To the limited extent that Sandoval's dicta on disparate impact claims (see Mot. to Dismiss at 16), is relevant here, the Court's discussion actually *undercuts* Defendants' argument that courts should focus exclusively on statutory text in determining the availability of disparate impact claims. The Sandoval Court's recognition that § 601 of Title VI only prohibits

intentional discrimination, and therefore not disparate impact claims, was based entirely on precedent, not textual analysis. See 532 U.S. at 280 (citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Guardians Assn. v. Civil Serv. Comm'n of New York City, 463 U.S. 582 (1983); Alexander v. Choate, 469 U.S. 287 (1985)); see also Payares, at *3 ("Sandoval merely acknowledged that disparate impact claims under Section 601 had been foreclosed in 1978, by the Court's decision in Regents of Univ. of Cal. v. Bakke"). More importantly, the precedent cited in Sandoval, and the cases which Defendants erroneously imply hinged on the absence of "adverse effects" language, developed out of extensive examination of evidence *beyond the statutory text*, including *legislative history, Congressional intent, agency interpretation,* and other factors. See Bakke, 438 U.S. at 284-85 ("We must, therefore, seek whatever aid is available in determining the precise meaning of the statute before us" by examining the "voluminous legislative history," "congressional intent," "background of both the problem that Congress was addressing and the broader view of the statute that emerges from a full examination of the legislative debates."); Guardians, 463 U.S. at 592, 599-601; id. at 609-11 (Powell, J., concurring in the judgment) (discussing the interpretation of "the federal agency given enforcement authority," legislative history, structure of Title VI, and Congressional intent); see also Choate, 469 U.S. at 292-97, 299 (relying in large part on the Rehabilitation Act's legislative history, statutory objectives, and interpretations by the Courts of Appeals).

Other Cases that Defendants Miscite

In the seminal case Griggs v. Duke Power Co., 401 U.S. 424 (1971) (see Mot. to Dismiss at 16), the Court's analysis was not, as Defendants suggested, limited to the "'adverse effects' language" found in Title VII. The Court instead considered a broad array of factors, including "the objective of Congress in the enactment of Title VII," the legislative history of the statute,

and "[t]he administrative interpretation of the Act by the enforcing agency." 401 U.S. at 429, 433-35.

The Supreme Court's decision in Raytheon Co. v. Hernandez, 540 U.S. 44 (2003) (see Mot. to Dismiss at 16), did not address the availability of disparate impact claims beyond acknowledging that such claims were available under Title VII. Id. at 52-55. The Court's passing reference to discriminatory effects certainly does not stand for the broadly-applicable rule that Defendants would infer. Id. at 53.

E. The Court is still bound by First Circuit precedent holding that disparate impact claims are available under the FHA.

Even if Defendants were correct, which they are not, that cases such as City of Jackson articulated a rigid rule of decision regarding the "'adverse' effects language," such a rule does not overturn controlling First Circuit precedent by implication. Defendants acknowledge that the First Circuit has clearly stated that disparate impact claims are available under the FHA in Langlois v. Abington Hous. Auth., 207 F.3d 43, 50 (1st Cir. 2000). (Mot. to Dismiss at 16 n.6.) See also Macone v. Town of Wakefield, 277 F.3d 1, 5 (1st Cir. 2002). Defendants urge, however, that Langlois is "no longer good law" based on the decisions in City of Jackson, Jackson, Sandoval, and Raytheon. This contention overreaches.

The Supreme Court laid out the proper course of analysis for lower courts charged with determining the effect of intervening case law in Agostini v. Felton, 521 U.S. 203, 237-38 (1997). In Agostini, the Court explained that lower courts should refrain from declaring controlling law overruled by analogy, stating, "[w]e do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, *by implication*, overruled an earlier precedent." Id. at 237 (emphasis added). The Court reaffirmed the principle that "the Court of Appeals should follow the case which *directly* controls, leaving to this Court the prerogative of

overruling its own decisions." Id. (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989)) (emphasis added). Likewise, a District Court should adhere to binding precedent unless and until the court that created the precedent reconsiders "its continued vitality." Id. at 238.

However, as explained supra, nothing in City of Jackson or any other recent case indicates a new rule of statutory interpretation that forecloses inquiry into extrinsic evidence. In this case, examination of the legislative history, administrative enforcement, and precedent case law, along with the statutory text of the FHA and ECOA, is fully appropriate and consistent with recent Supreme Court jurisprudence.

II. BASED ON STATUTORY TEXT, ADMINISTRATIVE ENFORCEMENT, LEGISLATIVE HISTORY, AND DECADES OF CASE LAW, DISPARATE IMPACT CLAIMS ARE ALLOWED UNDER THE FHA AND ECOA.

If and when the Supreme Court considers the issue of whether the FHA and ECOA allow disparate impact claims, the Court will consider, as it has done in the past, not only the statutory text, but also the legislative history underlying the acts, regulatory interpretation and enforcement by the relevant federal agencies, and the treatment of the statutes by the courts. See, e.g., Griggs, 401 U.S. at 429, 433-35 (focusing on Congressional objectives, legislative history, and administrative interpretation); Choate, 469 U.S. at 292-97, 299 (focusing on legislative history, interpretation by the Courts of Appeals, and statutory objectives). This analysis reveals that Congress intended to allow disparate impact claims under each of the statutes, that all of the relevant enforcement agencies have endorsed the availability of disparate impact claims, that all of the Circuit Courts to consider the issue have allowed disparate impact claims under the FHA, and that the courts that have considered the ECOA have held similarly.

A. The text of the FHA and ECOA supports the availability of disparate impact claims.

Even disregarding the relevant legislative history, agency interpretation, and precedent regarding the FHA and ECOA, the text of the statutes themselves may be read as allowing disparate impact claims. The FHA states that

> It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.

42 U.S.C. § 3605(a). As explained supra, this language may reasonably be interpreted as encompassing disparate impact claims when it prohibits "discriminat[ion] against any person." 42 U.S.C. § 3602(d) (defining "person" as "one *or more* individual*s*") (emphasis added). The ECOA states that

> It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction . . . on the basis of race, color, religion, national origin, sex or marital status, or age . . .

15 U.S.C. § 1691(a)(1). Particularly when considered along with the list of activities which do not constitute discrimination, which does not include activities with a disparate impact on protected groups, this language may reasonably be understood as allowing for disparate impact claims. 15 U.S.C. §§ 1691(a), (b) (see supra at 7).

B. The legislative history underlying the FHA and ECOA supports allowing disparate impact claims under each statute.

Since the early 1970s, the Supreme Court has placed a strong emphasis on the legislative history and purposes underlying civil rights statutes when determining the availability of disparate impact claims. See General Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 386-391 (1982) (analyzing 42 U.S.C. § 1981); Griggs, 401 U.S. at 429-30 (analyzing Title VII). Not only does City of Jackson not abolish this analytical framework, it actually reaffirms

the relevance of legislative history and Congressional purpose. City of Jackson, 544 U.S. at 232-35.

1. *The Fair Housing Act*

In 1967, Lyndon B. Johnson created the National Advisory Commission on Civil Disorders in order to identify the causes of recent race riots. The Commission's Kerner Report warned that the "nation is moving toward two societies, one black, one white – separate and unequal." See *Report on the Nat'l Advisory Comm'n on Civil Disorders* 1, 13 (1968). The report pointed to residential segregation and racism as primary causes of the riots and recommended, among other things, comprehensive legislative reform to eradicate housing discrimination. Within two months, Congress enacted the Fair Housing Act. 42 U.S.C. § 3601.

Upon enacting the FHA, the primary sponsor of the Act, Senator Mondale, noted in the Congressional Record that the Act was necessary "to undo the *effects*" of discriminatory governmental action. 114 Cong. Rec. 2699 (emphasis added). He also stated that although the Supreme Court had outlawed explicit racial zoning laws, "ordinances *with the same effect*, although operating more deviously in an attempt to avoid the Court's prohibition, were still being enacted." Id. (emphasis added). Another key sponsor of the Act, Senator Brooke, stated that African Americans were "surrounded by a pattern of discrimination based on individual prejudice, often institutionalized by business and industry, and Government practices." Id. at 2526. The purpose of the Act clearly included remedying the effects of discrimination, as well as prohibiting continued intentional discrimination.

Throughout the lengthy floor debate concerning Title VIII in the Senate,[7] a number of Congressmen spoke to the significance of the Act in eliminating the negative effects of discrimination in housing. See, e.g., id. at 2279-81 (1968) (remarks of Senator Brooke) and at 3421 (remarks of Senator Mondale). At one point, Senator Baker introduced an amendment that would have required evidence of discriminatory intent in order to prove a violation of Title VIII. Id. at 5214. Adopting this amendment would have shown conclusively that Congress wanted to limit the Act to claims of disparate treatment and not disparate impact. The Senate rejected the amendment, id. at 5221-22, with Senator Percy emphasizing that if "racial preference" were required to violate the FHA, "proof would be impossible to produce." Id. at 5216 (quoted in Resident Advisory Bd. v. Rizzo, 425 F.Supp. 987, 1022 (D.C.Pa. 1976)). Several other senators argued against the amendment due to the difficulty of proving intent. 114 Cong. Rec. 5220 (Senator Dominick arguing that the amendment "increases the opportunity for discrimination"); see also id. at 5218, 5220-21 (Senators Mondale and Hart on the difficulty of showing discriminatory intent).

Congress has since ratified the use of disparate impact analysis under the FHA through its amendments to the Act. In 1988, Congress passed the Fair Housing Amendments Act ("FHAA") in order to include new prohibitions against discrimination based on familial status or handicap. Pub. L. No. 100-430, 102 Stat. 1619 (1988), codified at 42 U.S.C. § 3601. In doing so, Congress used language similar to that which the FHA already employed with regard to race. Compare 42 U.S.C. § 3604(f)(1), (2) with 42 U.S.C. § 3604(a), (b). Prior to this point, all eight Circuit Courts that had confronted the issue had allowed disparate impact claims under the FHA. Since courts are to presume that Congress "adopt[s prior judicial] interpretation when it re-enacts a statute

[7] The legislative history is somewhat incomplete because Title VIII was adopted from Senator Mondale's floor amendment to the 1968 Civil Rights Act. See Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 147 n. 29 (3rd Cir. 1977).

without change," Lorillard v. Pons, 434 U.S. 575, 580 (1978), this Court should presume that the FHAA adopted the practice of allowing disparate impact claims under the FHA.

The legislative history of the FHAA reinforces Congressional intent to allow disparate impact claims. According to a House Report, "The Committee understands that housing discrimination against [members of a protected class] *is not limited to blatant, intentional acts* of discrimination. Acts that have the *effect* of causing discrimination can be just as devastating as intentional discrimination." H.R. Rep. No. 100-711, at 25 (1988) (emphasis added). The House Report cited a pair of FHA cases in the Fourth and Ninth Circuits that involved disparate impact: "[b]ecause minority households tend to be larger and exclusion of children often has a racially *discriminatory effect*, two federal courts of appeal have held that adults-only housing may state a claim of racial discrimination under Title VIII." Id. at 21 (emphasis added).

Much like the original FHA, the House also rejected an amendment that would have limited the availability of disparate impact claims. The amendment would have included the provision: "a zoning decision is not a violation of the Fair Housing Act unless the decision was made with the *intent* to discriminate on the basis of race or other prohibited criteria under the Act." Id. at 89 (emphasis added). Once again, the House rejected an amendment which had the express purpose of excluding disparate impact claims. Id.

Perhaps the clearest evidence of Congressional recognition that the FHA includes disparate impact claims comes from the principal sponsor of the FHAA, Senator Kennedy. The day after Congress signed the Act into law, Senator Kennedy said that "Congress accepted th[e] consistent judicial interpretation" of the Courts of Appeals, explaining that the FHA "prohibit[s] acts that have discriminatory effects, and that there is no need to prove discriminatory intent." 134 Cong. Rec. 23711-12 (1988).

2. *The Equal Credit Opportunity Act*

The legislative history and Congressional purpose for the ECOA show an even stronger basis for allowing disparate impact claims. The Senate Report that addressed the ECOA amendments of 1976 specifically endorsed disparate impact claims:

> In determining the existence of discrim ination . . . courts o r agencies are free to look at *the effects o f a creditor's pr actices* as well as the creditor's motives o r conduct in individual transa ctions. Thus judicial constructions of anti-discrimination legislation in the em ployment field, in cases such as Griggs v. Duke Power Company and Albemarle Paper Company v. Moody, are intended to serve as guides in the applic ation of this Act, especially with respect to the allocations of burdens of proof.

S. Rep. No. 94-589 (1976) (emphasis added) (citations omitted). This Senate Report did not accompany the original enactment of the ECOA, but instead accompanied amendments which expanded the breadth of the statute to include racial discrimination, further underscoring Congressional intent to make disparate impact claims available under the ECOA in race discrimination lawsuits. Consumer Credit Protection Act, Pub. L. No. 94-239 (1976).

Similar to the history of the FHA, Congress's subsequent amendments to the ECOA confirmed the availability of disparate impact claims under the Act. Congress amended the Act in 1996 as part of the Omnibus Consolidated Appropriations Act of 1996. Pub. L. No. 104-208, 110 Stat. 3009. At this point, courts had already analyzed the ECOA and found that it included disparate impact claims. See, e.g., Guisewhite v. Muncy Bank & Trust Co., 1996 WL 511525, at *4 (M.D.Pa. 1996); Sayers v. General Motors Acceptance Corp., 522 F. Supp. 835, 839-40 (D.C.Mo. 1981); Cherry v. Amoco Oil Co., 490 F.Supp. 1026, 1029-30 (N.D.Ga. 1980). Silence from Congress thus ratified the widely held interpretation of the courts. See Lorillard, 434 U.S. at 580.

C. The administrative agencies that enforce the FHA and ECOA have supported the availability of disparate impact claims under each statute.

Administrative treatment of the FHA and ECOA further supports the availability of disparate impact under each statute. As City of Jackson explained, 544 U.S. at 239, and as Justice Scalia's concurring opinion wholly relied upon, 544 U.S. at 243 (Scalia, J., concurring), an administrative agency's reasonable interpretation and enforcement of a statute warrants deferential treatment. Justice Scalia believed that the Court's decision in City of Jackson should have been guided solely by deference to the Equal Employment Opportunity Commission ("EEOC") under Chevron, 467 U.S. 837: "This is an absolutely classic case for deference to agency interpretation. The [ADEA] confers upon the EEOC authority to issue 'such rules and regulations as it may consider necessary or appropriate for carrying out' the [Act]." See City of Jackson, 544 U.S. at 243 (Scalia, J., concurring); see also Chevron, 467 U.S. at 844 ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations."). While the Lawyers' Committee believes that all of the factors surrounding a statute should be considered, not solely the text or the administrative treatment, it is clear that an administrative agency's regulations and enforcement of a statute bear consideration.

1. *The Fair Housing Act*

Every agency in charge of implementing, enforcing and administering the FHA has unmistakably shown support for allowing disparate impact claims. The Department of Housing and Urban Development ("HUD"), which has the authority to issue federal regulations and bring claims under the FHA, has endorsed the availability of disparate impact claims. The Secretary of HUD, who has "[t]he authority and responsibility for administering th[e] Act," 42 U.S.C.§

3608(a), has determined and argued successfully through litigation that a disparate impact analysis is applicable to the FHA. See, e.g., Pfaff v. HUD, 88 F.3d 739, 745 (9th Cir. 1996); HUD v. Mountain Side Mobile Estates P'ship, 1993 WL 307069 (1993). Much like the EEOC's position regarding the ADEA, HUD's interpretation of the FHA is entitled to significant deference. See City of Jackson, 544 U.S. at 239-40; id. at 244-45 (Scalia, J., concurring).

The Department of Justice ("DOJ") and the Attorney General also have enforcement responsibilities, see, e.g., 42 U.S.C. §§ 3610(g)(2)(C), 3614, and the DOJ has successfully argued that courts must allow disparate impact claims. See Pfaff, 88 F.3d at 745; Mountain Side Mobile Estate P'ship v. Sec'y of Hous. and Urban Dev., 56 F.3d 1243, 1250-51 (10th Cir. 1995); United States v. City of Black Jack, Missouri, 508 F.2d 1179, 1184-85 (8th Cir. 1974).

HUD has also described its position on the issue of disparate impact claims through enforcement handbooks, related regulations, and reports to Congress. An FHA enforcement handbook states that "even in cases where there is absolutely no evidence of discriminatory intent, a discriminatory impact claim may result in a finding of liability." *Title VIII Complaint Intake, Investigation and Conciliation Handbook*, 8024.01 CHG-1 at 2-28 (1998). Another HUD handbook informs all HUD auditors that the FHA "prohibitions extend to actions, which have disparate impact because of any of the prohibited bases." *Consolidated Audit Guide for Audits of HUD Programs*, 2000.04 REV-2 CHG-1 at 1-8 (2001).

A HUD regulation that invokes the FHA states that recipients of Community Development Block Grants are presumed to be "affirmatively furthering fair housing unless . . . [t]here is evidence that a policy, practice, standard or method of administration, although neutral on its face, operates to deny or affect adversely in a significantly disparate way . . . fair housing to [minorities]." 24 CFR § 570.904(a)(1)(ii).

At a Senate hearing, the Assistant Secretary for Fair Housing and Equal Opportunity told Congress that the "standards to determine discrimination [in home insurance under the FHA, as in all other covered areas] will be based on the principles of overt discrimination, disparate treatment and disparate impact." See *Homeowners Ins. Discrimination: Hearing Before the Sen. Comm. On Banking, Housing, & Urban Affairs*, 103d Cong. 793 at 20 (1994) (statement of Roberta Achtenberg).

HUD is not the only agency to interpret the FHA to allow disparate impact claims. In 1994, ten different agencies that regulate financial institutions – the Office of Federal Housing Enterprise Oversight, the Department of Justice, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Federal Housing Finance Board, the Federal Trade Commission, and the National Credit Union Administration, along with HUD – issued a joint "Policy Statement on Discrimination in Lending." In the Policy Statement, the agencies confirmed that disparate impact claims were cognizable under the FHA, as well as the ECOA, and that "[e]vidence of discriminatory intent is not necessary." See 59 Fed. Reg. 18266, 18269-70 (Apr. 15, 1994).

2. *The Equal Credit Opportunity Act*

Administrative interpretation of the ECOA also confirms the availability of disparate impact claims. Congress has delegated the duty of implementing the ECOA to the Federal Reserve Board ("the Board"), which it has done by issuing a group of regulations broadly known as Regulation B. See 12 CFR §§ 202.1-16. These regulations and their commentaries overtly allow for disparate impact claims:

> The legislative history of the Act indicates that the Congress intended an '*effects test*' concept, as outlined in the em ployment field by the S upreme Court in the cases of Griggs v. Duke Power Co., 401 U.S. 424 (1971), and Albemarle Paper Co. v. Moody , 422 U.S. 405 (1975), to be a pplicable to a creditor's determination of creditworthiness.

12 C.F.R. § 202.6(a) n.2 (emphasis added). Thus, not only are federal regulations in place allowing disparate impact claims under the ECOA, but the agency in charge of implementing the Act is strongly in favor of the same.

D. The Circuit Courts have endorsed the availability of disparate impact claims under the FHA and ECOA.

When interpreting civil rights statutes, in addition to the text of the statute, Courts must consider prior case law. See City of Jackson, 544 U.S. at 236-38. This principle was reiterated by the Supreme Court this year, in CBOCS West, Inc. v. Humphries, 128 S.Ct. 1951 (2008). In CBOCS, the Court reaffirmed that statutory text is not the only consideration when determining the availability of causes of action and held that retaliation claims are available under 42 U.S.C. § 1981, despite the absence of express statutory text allowing such claims. 128 S.Ct. at 1954. The Court placed a special emphasis on the importance of *stare decisis*, stating that "considerations of *stare decisis* strongly support our adherence to that view. And those considerations impose a considerable burden upon those who would seek a different interpretation that would necessarily unsettle many Court precedents." Id. at 1958. More importantly, the Court even said that a change in judicial approaches to statutory interpretation, such as the approach that Defendants argue flows from City of Jackson, is not enough to overturn "well-established prior law. Principles of *stare decisis,* after all, demand respect for precedent whether judicial methods of interpretation change or stay the same." Id. As explained below, the overwhelming case law interpreting the FHA and ECOA supports the availability of disparate impact claims under each statute.

The eleven Circuit Courts that have considered the issue are unanimous in allowing disparate impact claims under the FHA, bolstering the Plaintiffs' position. See, e.g., Casa Marie, Inc. v. Superior Court of Puerto Rico, 988 F.2d 252, 269 n.20 (1st Cir. 1993); United States v. Starrett City Assocs., 840 F.2d 1096, 1100 (2nd Cir. 1988); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 147-48 (3rd Cir. 1977); Smith v. Town of Clarkton, 682 F.2d 1055, 1065 (4th Cir. 1982); Simms v. First Gibraltar Bank, 83 F.3d 1546, 1555 (5th Cir. 1996); Arthur v. City of Toledo, 782 F.2d 565, 575 (6th Cir. 1986); Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977); City of Black Jack, 508 F.2d at 1184 (8th Cir.); Keith v. Volpe, 858 F.2d 467, 482-84 (9th Cir. 1988); Mountain Side, 56 F.3d at 1250-51 (10th Cir.); Jackson v. Okaloosa County, 21 F.3d 1531, 1543 (11th Cir. 1994); see also Miller v. Poretsky, 595 F.2d 780, 790 n.10 (D.C. Cir. 1978) (declining to reach the issue but noting general consensus that such claims are cognizable).

Additionally, numerous courts have considered the availability of disparate impact claims under the ECOA and have all found that such claims may be brought. See, e.g., Golden v. City of Columbus, 404 F.3d 950, 963 n.11 (6th Cir. 2005) ("Neither the Supreme Court nor this Court have previously decided whether disparate impact claims are permissible under ECOA. However, it appears that they are."); Dismuke v. Connor, 2007 WL 4463567, at *4 (W.D.Ark. 2007) ("A credit applicant may prove unlawful discrimination under ECOA using … [a] disparate impact analysis."); Boykin v. KeyCorp, 2005 WL 711891, at *7 (W.D.N.Y. 2005) (vacated on other grounds in 521 F.3d 202 (2nd Cir. 2008)) (citing Powell v. American General Finance, Inc., 310 F.Supp.2d 481 (N.D.N.Y. 2004)); Smith v. Chrysler Financial, 2003 WL 328719 at *6 (D.N.J. 2003) ("the ECOA provides a private right of action for disparate impact liability claims."); Wide ex rel. Estate of Wilson v. Union Acceptance Corp., 2002 WL

31730920, at *2 (S.D.Ind. 2002) ("Disparate impact analysis clearly is available to demonstrate discrimination under the ECOA."); Osborne, 234 F.Supp.2d at 809-12 n.4 (finding that disparate impact claims are available under the ECOA and that "one may conclude from the face of the statute that Congress intended the ECOA to extend beyond intentional discrimination"); Faulkner v. Glickman, 172 F.Supp.2d 732, 737 (D.Md. 2001) (a "credit applicant may prove discrimination in violation of the ECOA by relying on … [a] disparate impact analysis"); Coleman v. General Motors Acceptance Corp., 196 F.R.D. 315, 325-26 (M.D.Tenn. 2000), *modified on other grounds,* 296 F.3d 443 (6th Cir. 2002) ("there is abundant support indicating that a disparate impact theory can be used in ECOA cases."); AB & S Auto Service, Inc. v. South Shore Bank of Chicago, 962 F.Supp. 1056, 1060 (N.D.Ill.1997) (confirming the availability of disparate impact claims based in part on legislative history); Latimore v. Citibank, F.S.B., 979 F.Supp. 662, 664 n.7 (N.D.Ill. 1997) (the "ECOA encompass[es] 'disparate impact'/'discriminatory effect' claims, as well as 'discriminatory intent' claims."); Guisewhite, 1996 WL 511525, at *4 ("As the legislative history of the Equal Credit Opportunity Act makes clear, [plaintiff] may ground his claim on either a disparate impact theory or a disparate treatment analysis.").

The courts that have considered the issue since Sandoval and City of Jackson have confirmed that disparate impact claims remain available under the FHA and ECOA. See Payares, at *3-4 ("this Court must follow binding Ninth Circuit precedent allowing disparate impact claims of discrimination to be brought under both the FHA and the ECOA; precedent which, as it happens, appears to be well-reasoned, consistent with Congressional intent, in accord with the law in other circuits, and reflective of good public policy."); Ramirez v. GreenPoint Mortgage Funding, Inc., 2008 WL 2051018, at *4 (N.D.Cal. 2008) (finding that defendant had

not met the burden of showing that disparate impact claims are no longer available under the FHA or ECOA); Zamudio v. HSBC North American Holdings Inc., 2008 WL 517138, at *2 (N.D.Ill. 2008) ("it is well established that a disparate-impact claim is available under both the ECOA and FHA."); Garcia at *7-11 (holding that City of Jackson did not require a statute to have "effects language" for disparate impact claims and that the City of Jackson Court relied on much more than textual analysis); Beaulialice v. Fed. Home Loan Mortg. Corp., 2007 WL 744646, at *4 (M.D.Fla. 2007) ("Neither [City of Jackson] nor Sandoval prohibit disparate impact claims under either statute [the FHA or ECOA]." (internal citations omitted)).

CONCLUSION

This Court should deny Defendants' Motion to Dismiss because Defendants cannot cite any authority for the proposition that disparate impact claims are no longer available under the FHA and ECOA.

Dated: August 11, 2008

Respectfully submitted,

/s/ Michael E. Aleo
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CERTIFICATE OF SERVICE

I, Michael E. Aleo, hereby certify that this document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing, and paper copies will be sent to those indicated as non registered participants on August 11, 2008.

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