



WRITTEN STATEMENT OF
THE AMERICAN CIVIL LIBERTIES UNION

For a Hearing on

“A General Overview of Disparate Impact Theory”

**Submitted to the Subcommittee on Oversight and Investigations
of the U.S. House of Representatives Committee on Financial Services**

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ACLU Racial Justice Program
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Good morning Chairman McHenry, Ranking Member Green and distinguished members of the Subcommittee. My name is Dennis Parker, and I am the Director of the Racial Justice Program of the American Civil Liberties Union. By way of disclosure, I am also one of the lawyers in the *Adkins v. Morgan Stanley* case, a case brought under the Fair Housing Act charging Morgan Stanley with practices connected with its role in encouraging the creation of toxic, highly risky mortgages which resulted in disparate rates of foreclosure for African Americans in Detroit.

Congress passed the Fair Housing Act nearly fifty years ago to address problems of residential segregation and conditions of poverty which blocked access to opportunity to communities of color and led to bitterness, frustration and civil unrest.

From the outset, the bipartisan sponsors and supporters of the Fair Housing Act recognized that, given the pervasiveness and complexity of housing discrimination, it was necessary to prohibit all forms of discrimination including that resulting from discriminatory intent, as well as acts neutral on their face which had a discriminatory effect¹.

In order to achieve the broad anti-discrimination goals of the act, Congress, the government agencies charged with enforcing the act, and each of the courts which have interpreted the act have recognized that the disparate impact standard is a necessary tool in fighting discrimination in all of its forms and that, without the disparate impact standard, practices that have the same discriminatory consequences as intentional discrimination would be shielded from the reach of the law. That recognition was so strong that both at the time that the statute was passed and on subsequent occasions, Congress has resisted attempts to limit the application of the law only to instances of intentional discrimination.

Further evidence of the legality and the efficacy of the disparate impact standard can be seen in the fact that between the enactment of the Fair Housing Act in 1968 and the time when Congress made significant amendments to the act in 1988, all nine courts of appeals which considered the issue, concluded that the act permitted the use of disparate impact claims to fight discrimination in all of its forms.

In 1988, against the backdrop of the unanimous approval of disparate impact claims by all courts, Congress extended the coverage of the act to prohibit discrimination based on familial status and disability. At the same time, Congress added specific exemptions relating to convictions for certain narcotics offenses, regarding the maximum number of occupants permitted to occupy a dwelling and an exemption specifying that nothing in the act prohibits appraisers from taking factors into consideration other than race, color, religion, national origin, sex, handicap, or familial status. Given the absence of any language in the statute that would

¹ Senator Edward W. Brook, a co-sponsor of the Fair Housing Act observed that the Act “recognize[d] the manifold and insidious ways in which discrimination works its terrible effects,” and aimed to undo the “practical result” of discriminatory policies and break the “dreary cycle of the middle-class exodus to the suburbs and the rapid deterioration of the central city.” 114 Cong. Rec. 2085 (1968) at 2279-80. For a detailed discussion of the legislative history of the Act, see Brief of Current and Former Members of Congress as *Amici Curiae* in Support of Respondents, *Township of v. Mt. Holly Garden Citizens in Action, Inc.*, (2013) (No.11-1507), available at: <https://www.aclu.org/racial-justice-womens-rights/township-mt-holly-v-mt-holly-gardens-citizens-action-inc-amicus-brief>.

prohibit discrimination for any of the actions covered by the exemptions, the inclusion of the language specifying the exemptions would only make sense if those actions would otherwise be barred on a disparate-impact theory. Congress also enhanced the Department of Housing and Urban Development's authority to interpret the Fair Housing Act by giving the agency the power to conduct formal adjudications and to issue regulations interpreting the Act.

Given the history of acceptance of the disparate impact standard, it was no surprise that in the years following the amendments, the Department of Housing and Urban Development (HUD), the Justice Department and the agencies charged with enforcing the fair housing and fair lending laws have interpreted the fair housing laws to permit disparate impact claims, have trained their employees to use disparate impact analysis, and have brought enforcement actions relying on disparate impact. During that same period, the two remaining circuit courts which had not previously addressed the question of the validity of the disparate impact standard joined the other nine circuits in approving of it.

On February 15, 2013, HUD reaffirmed the decades-long recognition of the availability of the disparate impact standard after going through a period of formal notice and comment. The regulation formally recognized the disparate impact standard as one way of proving discrimination. At the same time in the new regulation, HUD emphasized that this rulemaking did not propose new law.

The need for the disparate impact standard as a tool in fighting discrimination is as great or greater now than it has ever been. Problems of residential segregation and the accompanying limitation on access to fine schools, transportation, healthy environments and employment continue to plague the nation.

One striking example of the continuing need for an effective way of addressing the increasingly subtle way in which protected classes are denied access to fair housing can be seen in the wake of the economic crisis of 2008. Discriminatory lending practices, which included providing high risk subprime loans to members of communities of color became increasingly prevalent. Despite repeated attempts to blame the recipients of these mortgages for these loans with the suggestion that a combination of their greed and their lack of creditworthiness was the cause of their problems, the evidence shows that in 2005, 55 percent of subprime borrowers had sufficiently high credit scores to qualify for prime loans.² People of color were disproportionately included in that number. A joint report from HUD and the Department of the Treasury found that, as of 2000, “borrowers in black neighborhoods [were] five times as likely to refinance in the subprime market than borrowers in white neighborhoods,” even when controlling for income³. Even more striking was that “[b]orrowers in *upper-income* black neighborhoods were twice as likely as homeowners in *low-income* white neighborhoods to refinance with a subprime loan.”⁴

These communities had previously experienced a long history of intentional

² Rick Brooks & Ruth Simon, *Subprime Debacle Traps Even Very Credit-Worthy*, Wall St. J., Dec. 3, 2007.

³ U.S. Department of Housing and Urban Development. *Curbing Predatory Home Mortgage Lending* (2000) at 47-48, available at: <http://www.huduser.org/Publications/pdf/treasrpt.pdf>.

⁴ Stephen L. Ross & John Yinger. *The Color of Credit: Mortgage Discrimination, Research Methodology, and Fair-Lending Enforcement*, 24-25 (2002).

discrimination in the form of racial steering, redlining and lack of access to financial institutions offering fair borrowing options. The new practice of extending predatory terms of mortgages added new injury to the old. The combination of the new abusive lending practices and the history of discrimination resulted in a foreclosure crisis which had a particularly serious impact on communities of color and reversed many of the economic gains which had been realized by those communities over the past half century. The nature of the policies that had such a serious impact is such that they could only be addressed by disparate impact claims since no individual would be able to demonstrate the discriminatory consequences of the policies which fueled the subprime bubble without relying on evidence of the broad impact of those policies. Cases challenging the lending practices which brought about the economic crisis that threatened the economy as a whole, but had particularly serious consequences on individuals and communities of color illustrate that the disparate impact standard is a careful, measured way of protecting all Americans from discrimination. After plaintiffs have shown that a policy or practice has a disproportionate impact on protected classes, defendants are permitted the opportunity to demonstrate that there is a substantial legitimate reason for the practice and policy. The practice will only violate the fair housing act if its justification is not legitimate or if there is a less discriminatory way to achieve the same purpose.

By permitting the consideration of the multiple factors of impact, goals and the means of achieving those goals, the disparate impact standard permits challenges to barriers which prohibit equal opportunity to fair housing. It is common sense that any policy that unnecessarily excludes people from housing because of their race, gender, ethnicity, disability or any other protected class should be set aside in favor of one that serves everyone's needs fairly, effectively, and without discrimination.

The use of disparate impact is a common sense way of assuring effective and equal fair housing opportunity and should be protected. To do otherwise would undercut decades of progress and betray the efforts of the people nearly half a century ago who sought to assure fairness and equality in housing.

Thank you.