

Disparate Impact Under FHA and ECOA: A Theory Without a Statutory Basis

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Executive Summary

The federal regulatory and enforcement agencies with fair lending responsibility, including the DOJ and the CFPB, have taken the position that violations of the Fair Housing Act (“FHA”) and Equal Credit Opportunity Act (“ECOA”) can be shown by use of the disparate impact discrimination theory. Under this theory, the government or private litigants can bring claims based solely on statistics that suggest an otherwise neutral policy disparately affects minorities. Unlike other illegal credit discrimination claims, disparate impact claims do not require the government or a private plaintiff to prove intent to discriminate. While many courts previously have agreed with this view and have allowed the use of the disparate impact theory in FHA and ECOA fair lending cases, all of those decisions rely on an interpretation of Supreme Court employment discrimination cases that more recent Supreme Cases has invalidated.

A recent line of Supreme Court cases has emphasized that the text of the statute—not vague notions of statutory purpose—determines whether a statute permits particular claims. One of these cases, the Court’s 2005 decision in *Smith v. City of Jackson*, clarified that the Court’s decisions that disparate impact claims are permitted in employment cases were based on a specific language in Title VII and not the statute’s broader purpose. The Court explained that Title VII contains two different provisions that prohibit discrimination, the second of which provides that an employer may not take actions that negatively “affect” a person’s employment on the basis of race, sex, and other attributes. The *City of Jackson* Court explained that this “effects” language permits disparate impact claims and does not require a showing of intent. However, a close reading of the FHA and ECOA reveals that they have only the language which the Supreme Court explained requires claimants to prove intent to discriminate—and neither has the “effects” language that the Court explained permits disparate impact claims.

No federal court of appeals has addressed whether the FHA or ECOA permit disparate impact claims in light of *City of Jackson*, although two have questioned whether such use of the disparate impact theory in such cases remains appropriate in light of *City of Jackson*.¹ The Supreme Court nearly had the opportunity to address this issue with respect to the FHA in *Magner v. Gallagher*. However, shortly before the Court was scheduled to hear the case, the City of St. Paul, Minnesota withdrew its appeal. The City’s stated reason for withdrawing its case was concern that its victory in the

¹ *Garcia v. Johanns*, 444 F.3d 625, 633 n.9 (D.C. Cir. 2006) (noting that ECOA lacks the “effects” language that the Court in *City of Jackson* held was the basis for disparate impact claims under Title VII); *Gallagher v. Magner*, 636 F.3d 380, 383 (8th Cir. 2010) (Colloton, J., dissenting) (noting that no federal court of appeals has addressed whether FHA permits disparate impact claims and that the issue warranted reconsideration).

Supreme Court could set back civil rights enforcement by eliminating the future use of the disparate impact theory.

Despite the fact that the Supreme Court seems poised to accept review of challenges to disparate impact, government agencies continue to assert the disparate impact doctrine in policy statements, enforcement cases and supervisory examinations. But a new chapter to this story may have opened now that a New Jersey township has asked the Court to determine whether the FHA permits disparate impact claims.² The Supreme Court may yet have an opportunity to correct agency misinterpretation and return fair lending enforcement to the prohibition of intentional illegal discrimination.

Disparate Impact Claims Are Not Cognizable Under the FHA or ECOA³

Disparate impact claims are distinct from disparate treatment claims because plaintiffs are not required to show any intent to discriminate under disparate impact theory. To establish a disparate impact claim, a government agency or private plaintiff must show that an otherwise neutral practice disparately affects qualified members of a protected class. If a claimant establishes a disparate effect on a protected class, then the burden shifts to the defendant to offer a “legitimate business justification” for the challenged practice. If the defendant satisfies this burden, then the claimant must demonstrate either that the justification is a sham or that another practice known to the defendant both serves the same business purpose and has a smaller disparate effect on the protected class.⁴

Government agencies with fair lending enforcement powers banded together in the interagency Policy Statement on Discrimination in Lending in 1994 to assert that liability for violations of the Equal Credit Opportunity Act (“ECOA”) and the Fair Housing Act (“FHA”) could be based on evidence of disparate impact.⁵ At the same

² *Township of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, No. 11-1507 (U.S., petition filed June 11, 2012).

³ For a more complete and thorough analysis of why the FHA does not permit disparate impact claims in light of *City of Jackson*, see Kirk D. Jensen & Jeffrey P. Naimon, *The Fair Housing Act, Disparate Impact Claims, and Magner v. Gallagher: An Opportunity to Return to the Primacy of the Statutory Text*, 129 Banking L. J. 99 (Feb. 2012); for an analysis of why the ECOA does not permit disparate impact claims, see Peter N. Cubita & Michelle Hartmann, *The ECOA Discrimination Proscription and Disparate Impact—Interpreting the Meaning of the Words That Actually Are There*, 61 BUS. LAW. 829 (2006).

⁴ *E.g., Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989). The Supreme Court has clarified that *Wards Cove* continues to apply to civil rights laws other than Title VII. *Smith v. City of Jackson*, 544 U.S. 228, 240 (2005) (“While the relevant 1991 amendments expanded the coverage of Title VII, they did not amend the ADEA or speak to the subject of age discrimination. Hence, *Wards Cove*’s pre-1991 interpretation of Title VII’s identical language remains applicable to the ADEA.”). Similarly, because the Civil Rights Act of 1991 did not amend the FHA or ECOA, the *Wards Cove* standard is the standard that would apply to disparate impact claims under the FHA and ECOA if such claims can be brought at all.

⁵ *Policy Statement on Discrimination in Lending*, April 15, 1994. Federal Reserve Regulatory Service, Page 6-58.1.

time, the Federal Reserve Board amended its commentary to Regulation B implementing ECOA adopting the same theory.⁶ Despite this assertion, the agencies recognized that factors such as borrower's income, continuity of income, adequacy of collateral, and availability of funds to close, among other factors that are differentially distributed among applicants, continue to be relevant to credit decisions.⁷

Notwithstanding the adoption of the disparate impact theory, fair lending enforcement activity after 1994 continued to be focused on cases where disparate treatment, rather than disparate impact, could be proven. However, recent statements by agency officials have raised the visibility of disparate impact as an enforcement option⁸ just when court precedent has called the appropriateness of the doctrine into question.

The Supreme Court Reaffirms the Primacy of the Statutory Text

To justify the use of disparate impact theory under the FHA and ECOA, the lower courts have primarily relied on the broadly-construed purposes of the FHA and ECOA or legislative history at the expense of the plain language of the statutes.⁹ In 2005, the United States Supreme Court undermined this reasoning in *Smith v. City of Jackson*¹⁰ when it reaffirmed that the text of an anti-discrimination statute is dispositive of whether disparate impact is available.

The question before the Court in *City of Jackson* was whether the Age Discrimination in Employment Act ("ADEA") permits disparate impact claims. To resolve this question, the Court first examined its prior interpretations of parallel anti-discrimination provisions in Title VII. The Court focused on *Griggs v. Duke Power Co.*, in which it originally held that Title VII permits disparate impact claims. In examining its Title VII jurisprudence, the Court clarified that the text of an anti-discrimination statute, not merely a broad interpretation of the statute's purpose, resolves whether the statute permits disparate impact claims.

Essential to understanding *City of Jackson* and *Griggs* is to realize that Title VII contains two, distinct provisions prohibiting different discriminatory employment practices. These two provisions, contained in § 703 of Title VII, state:

- (a) It shall be an unlawful employment practice for an employer -
 - (1) to fail or refuse to hire or to discharge any individual, or otherwise to *discriminate against* any individual with

⁶ 12 C.F.R. Part 202, Commentary 202.6 at 6(a) 2 recodified at 12 C.F.R. Part 1002.

⁷ *Policy Statement, supra*, FRRS page 6-58.6.

⁸ *See, e.g.*, Remarks of Richard Cordray before the National Community Reinvestment Coalition, April 18, 2012, *available at* <http://www.consumerfinance.gov/speeches/prepared-remarks-by-richard-cordray>.

⁹ *See, infra* Section II.D.

¹⁰ 544 U.S. 228 (2005).

respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual’s race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual’s race, color, religion, sex, or national origin.¹¹

Justice Stevens’ plurality opinion in *City of Jackson* clarified that the Court’s holding in *Griggs* that Title VII did not require a showing of discriminatory intent was based squarely on the “effects” language in the *second* anti-discrimination provision.¹² Indeed, the opinion in *Griggs* quoted only section 703(a)(2).¹³ Section 703(a)(2), explained Justice Stevens, “focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer.”¹⁴ Put differently, “Congress had ‘directed the thrust of the Act [Title VII] to the *consequences* of employment practices, not simply the motivations.’”¹⁵ Justice Stevens reasoned that Section 703(a)(2) not only “prohibits actions that ‘limit, segregate, or classify’ persons,” but also “prohibits such actions that ‘deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual’s” race or age.¹⁶ The phrase “otherwise adversely affect” was critical to the plurality opinion’s conclusion. Although Justice Stevens acknowledged that the *Griggs* Court had also relied on the purposes of Title VII, the Court had “subsequently noted that our holding [in *Griggs*] represented the better reading of the statutory text.”¹⁷

The *City of Jackson* Court also clarified that the first anti-discrimination provision of Title VII permits disparate treatment claims but “does not encompass disparate-impact liability.”¹⁸ Similarly, Justice O’Connor, with whom Justices Kennedy and Thomas joined in dissent, thought it “obvious” that § 703(a)(1) does not authorize disparate impact claims, but rather “plainly requires discriminatory intent.”¹⁹ The phrase “discriminate against . . . because of” is the key text in § 703(a)(1) supporting a

¹¹ Title VII § 703(a), 42 U.S.C. § 2000e-2(a) (emphasis added).

¹² *City of Jackson*, 544 U.S. at 234.

¹³ *Griggs*, 401 U.S. at 426 (quoting Section 703(a)(2), but omitting quotation of Section 703(a)(1)).

¹⁴ *City of Jackson*, 544 U.S. at 235-36 (emphasis in original).

¹⁵ *Id.* at 234 (quoting *Griggs*, 401 U.S. at 432 (emphasis in original)).

¹⁶ *Id.* at 235-36 (emphasis in original).

¹⁷ *City of Jackson*, 544 U.S. at 234.

¹⁸ *Id.* at 236-38.

¹⁹ *Id.* at 249 (O’Connor, J., dissenting).

requirement of discriminatory intent. Critically, § 703(a)(1) does not contain the “effects” language present in § 703(a)(2).

After clarifying its Title VII jurisprudence, the Court then held that the ADEA also permits disparate impact claims because it contains a parallel provision to the disparate impact provision of Title VII (§ 703(a)(2)). This holding is consistent with other Supreme Court opinions holding that various statutes which contain “effects” or “results” language permit disparate impact claims. The Court has held that the Americans with Disabilities Act (“ADA”), which prohibits “utilizing standards, criteria, or methods of administration . . . that have the *effect* of discrimination,” permits disparate impact claims.²⁰ The Court reached the same conclusion with respect to the Rehabilitation Act, which incorporates by reference the standards applicable under the ADA,²¹ and the Voting Rights Act,²² which prohibits any voting prerequisites or standards “*result[ing]* in a denial” of the right to vote “on account of race or color.”²³ In contrast, the Court has consistently held that statutes lacking “effects” or “results” language do not create a disparate impact cause of action.²⁴

City of Jackson is but one in a continuing line of Supreme Court cases reminding courts and litigants to look to the text of the statute when determining whether a particular cause of action exists.²⁵ The most recent reminder of this tenet came in the May 2012 decision in *Freeman v. Quicken Loans, Inc.*²⁶ In *Freeman*, the Court reiterated that “[v]ague notions of statutory purpose provide no warrant for expanding [a statute’s] prohibition beyond the field to which it is unambiguously limited” *City of Jackson* is, to date, the clearest example of this rule applied to the availability (or lack thereof) of disparate impact claims in anti-discrimination statutes.

The Texts of the FHA and ECOA Lack the “Effects” Language Which the Supreme Court has Held is the Statutory Basis for Disparate Impact Claims

As demonstrated in the chart below, the FHA and ECOA contain very similar language to the disparate treatment wings of Title VII and the ADEA, but contain nothing resembling the disparate impact provisions of those statutes.

²⁰ *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003) (emphasis added).

²¹ *Alexander v. Choate*, 469 U.S. 287, 299 (1985).

²² *Chisom v. Roemer*, 501 U.S. 380, 404 (1991).

²³ 42 U.S.C. § 1973(a) (emphasis added).

²⁴ *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 178 (2005) (Title IX); *Alexander v. Sandoval*, 532 U.S. 275, 280-81 (2001) (Title VI); *Castenada v. Pickard*, 648 F.2d 989, 1001 (5th Cir. 1981) (Equal Education Opportunities Act); *Robinson v. Paragon Foods, Inc.*, 2006 WL 2661110, at *6 (N.D. Ga. Sept. 15, 2006) (Title II).

²⁵ E.g., *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001) (“Without [statutory intent], a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.”); *Wards Cove*, 490 U.S. at 655 n.9; *Watson*, 487 U.S. at 991.

²⁶ *Freeman v. Quicken Loans, Inc.* No. 10-1042, 2012 WL 1868063, at *12-13 (U.S. May 24, 2012).

	Disparate Treatment Language	Disparate Impact Language
Title VII	(a) It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to <i>discriminate against any individual</i> with respect to his compensation, terms, conditions, or privileges of employment, <i>because of</i> such individual’s race, color, religion, sex, or national origin;	(a) It shall be an unlawful employment practice for an employer – (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or <i>otherwise adversely affect</i> his status as an employee, because of such individual’s race, color, religion, sex, or national origin.
FHA	(a) In general. It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to <i>discriminate against</i> any person in making available such a transaction, or in the terms or conditions of such a transaction, <i>because of</i> race, color, religion, sex, handicap, familial status, or national origin.	None.
ECOA	(a) It shall be unlawful for any creditor to <i>discriminate against</i> any applicant, with respect to any aspect of a credit transaction—(1) <i>on the basis of</i> race, color, religion, national origin, sex or marital status, or age . . . ;	None.

The obvious similarities and glaring differences between the text of the FHA and ECOA and the text of Title VII and the ADEA are dispositive of Congress’s intent in enacting these statutes. The Supreme Court has explained that “when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.”²⁷ The converse is also true. Then-Judge John Roberts has explained that “[t]his use of different language in two statutes so analogous in their form and content, enacted so closely in time, suggests that the statutes differ in

²⁷ *City of Jackson*, 544 U.S. at 233-34.

their meaning.”²⁸ The similarities and differences are even more significant considering that Congress enacted Title VII (1964), the ADEA (1967), the FHA (1968), and ECOA (1974) in quick succession.²⁹

The ordinary meaning of the term “discriminate” used in both the FHA and ECOA further supports the position that the “discriminate . . . because of” and “on the basis of” language in those statutes requires a showing of intent. When terms are not defined in a statute, those terms are given their ordinary meaning.³⁰ “Discriminate” refers to the *intentional* treatment of one person differently than another.³¹ Engaging in a certain practice that has a disparate impact without discriminatory intent is not “discrimination” in the plain sense of the word, and yet courts and government agencies have nonetheless permitted disparate impact under the FHA and ECOA. In fact, the plaintiff’s bar has argued that disparate impact liability can be found even for actions intended to *prevent* discrimination if those actions have a disparate impact.³² Congress’s decision to use the term “discriminate” in the FHA and ECOA—and not to use any “effects” language as it did in other anti-discrimination statutes—signifies a deliberate decision *not* to permit disparate impact claims under the FHA and ECOA.

The Lower Courts Misunderstood Supreme Court Precedent and Misapplied Legislative History

The incorrect notion that the FHA permits disparate impact claims originated in three lower court decisions in the 1970s—*United States v. City of Black Jack*,³³ *Metropolitan Housing Development Corp. v. Village of Arlington Heights* (“*Arlington Heights II*”),³⁴ and *Resident Advisory Board v. Rizzo*.³⁵ None of these cases held that the statutory text of the FHA permitted disparate impact claims—indeed, one of these cases, *Arlington Heights II*, acknowledged that the text of the FHA indicated that the FHA requires that claims of discrimination include a showing of intent to discriminate.³⁶

²⁸ *Acree v. Republic of Iraq*, 370 F.3d 41, 61 (D.C. Cir. 2004) (Roberts, J., concurring).

²⁹ Pub. L. 90-284, April 11, 1968, 82 Stat. 73 (FHA); Pub. L. 88-352, July 2, 1964, 78 Stat. 241 (Title VII); Pub. L. 90-202, Dec. 15, 1967, 81 Stat. 602 (ADEA); Pub. L. 93-495, Oct. 28, 1974, 88 Stat. 1510 (ECOA).

³⁰ *See, e.g., Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995).

³¹ *See, e.g., Random House Unabridged Dictionary*, “Discriminate” (2006); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005) (“‘Discrimination’ is a term that covers a wide range of *intentional* unequal treatment.” (emphasis added)).

³² JOHN P. RELMAN, HOUSING DISCRIMINATION PRACTICE MANUAL § 2:24 (2005) (“A defendant with the best of intentions—indeed, *even a defendant who undertakes a particular policy in the express hope of eliminating any possible discrimination*—can still be held liable if a plaintiff pursues a disparate impact claim.” (emphasis added)).

³³ 508 F.2d 1179 (8th Cir. 1974).

³⁴ 558 F.2d 1283 (7th Cir. 1977).

³⁵ 564 F.2d 126 (3d Cir. 1977).

³⁶ *Arlington Heights II*, 558 F.2d at 1288 (acknowledging that a “narrow view of the phrase [‘because of race’]” in the statute would require intent to discriminate).

Instead, these courts focused on cases decided under other laws and what the courts viewed as the broad purpose of the FHA. The basis for these courts' analysis has been undermined by subsequent Supreme Court precedent.³⁷

Other lower courts subsequently followed these original three FHA disparate impact decisions and incorporated the now-undermined rationale set forth in those opinions. Although some federal district courts have considered this issue after *City of Jackson*, the courts have generally been unwilling to hold that the pre-*City of Jackson* circuit court precedent has been overturned by *City of Jackson*. Some of these lower courts have sought to justify this position, in spite of the FHA's text, based on other factors, including the legislative history of the FHA and agency interpretations of the FHA.³⁸ These district court decisions cannot be squared with the Supreme Court's holding in *City of Jackson* and other cases. The language of the FHA is plain, and accordingly the analysis of the FHA must begin *and end* with the statutory text.³⁹ Resort to legislative history is unnecessary and unwarranted.

Even if the legislative history of the FHA was relevant to the interpretation of the statutory text, the legislative history shows that the FHA was not intended to permit claims of "discrimination" without proof of intent to discriminate. The two principle proponents of the FHA—Senators Brooks and Mondale—both explained during the debates that the FHA was intended to address only intentional discrimination, not disparate impact.⁴⁰ The United States Solicitor General confirmed this in 1988 when it

³⁷ The *Black Jack* court relied exclusively on constitutional equal protection cases to support its conclusion that the FHA permits disparate impact claims. *Black Jack*, 508 F.2d at 1185. Soon after, the Supreme Court effectively undermined *Black Jack* when it overruled the equal protection cases the *Black Jack* court had relied upon and held that equal protection violations require a showing of discriminatory intent. *Washington v. Davis*, 426 U.S. 229, 238-39, 244 n.12 (1976).

The *Arlington Heights II* court concluded that the FHA permitted disparate impact claims in spite of the plain language of the statute, relying on the broad purpose of the FHA. *Arlington Heights II*, 558 F.2d at 1288-89. The *Rizzo* court similarly concluded that the FHA permitted disparate impact claims by looking to the broad purpose of the statute rather than the plain language of the statute. *Rizzo*, 564 F.2d at 126. *Rizzo* also relied on *Black Jack* and *Arlington Heights II*. *Id.* at 147, 148 n.31. As discussed above, *City of Jackson* clarifies that disparate impact must be permitted by the language of the statute, not merely the broad purpose of the statute, that therefore undermines the holding of *Arlington Heights II*.

For a more detailed description of lower court cases that initially held that the FHA permits disparate impact claims, see Jensen & Naimon, *supra* note 3, at 125-29.

³⁸ See, e.g., *National Community Reinvestment Coalition v. Accredited Home Lenders*, 573 F. Supp. 2d 70, 77-79 (D.D.C. 2008).

³⁹ See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001); see also *id.* ("We have never accorded dispositive weight to context shorn of text . . . in interpreting statutes generally . . . legal context matters only to the extent it clarifies text.").

⁴⁰ 114 Cong. Rec. at 3427 (1968) (Sen. Brooks) ("A person can sell his property to anyone he chooses as long as it is by personal choice and not because of *motivation of discrimination*." (emphasis added)); *Id.* at 5643 (Sen. Mondale) ("The bill permits an owner to do everything that he could do anyhow with his property . . . except to refuse to sell it to a person *solely on the basis of his color*. *That is all it does*." (emphasis added)).

argued in a brief before the United States Supreme Court that the text of the FHA does not permit disparate impact claims, and that the legislative history confirms this reading of the statute.⁴¹

Lower court decisions concluding that ECOA permits disparate impact claims similarly rest on a shaky foundation that has crumbled in light of *City of Jackson*. Instead of analyzing the language of ECOA, courts have relied on non-statutory references to disparate impact under ECOA.⁴² At the root of these non-statutory references are two congressional committee reports related to a *subsequent* amendment to ECOA that did not alter the “discriminate against . . . on the basis of” language in ECOA.⁴³ The 1976 amendments to ECOA expanded the prohibited bases of ECOA to include race, age, and other attributes, but did not add “effects” language to ECOA or otherwise change the basic “discriminate against . . . because of” structure of the statute.⁴⁴

Reliance on contemporary legislative history is generally not appropriate where the language of the underlying statute is clear. It is never appropriate where, as here, the purportedly relevant congressional committee reports are from a *subsequent* Congress that did not even amend the relevant text of the statute. The Supreme Court has specifically noted that inferring the intent of an earlier Congress from the legislative history of a later Congress is “hazardous.”⁴⁵ Indeed, such uses of legislative history has been criticized as lending itself “to a kind of ventriloquism” which can be employed “to make words appear to come from Congress’s mouth which were spoken or written by others (individual Members of Congress, congressional aides, or even enterprising lobbyists).”⁴⁶ Committee reports from a subsequent Congress ought to have no place in determining Congress’s intent in enacting ECOA.

⁴¹ Brief of United States as Amicus Curiae, *Town of Huntington v. Huntington Branch, NAACP*, No. 87-1961 (U.S. filed June 1988) (emphasis added and citations omitted), available at <http://www.usdoj.gov/osg/briefs/1987/sg870004.txt>. For a more detailed description of the legislative history of the FHA, see Jensen & Naimon, *supra* note 3, at 113-25.

⁴² *Cubita & Hartmann*, *supra* note 3, at 836 (discussing cases).

⁴³ S. Rep. No. 94-589, at 4-5 (1976); H.R. Rep. No. 94-210, at 5 (1975); see also *Cubita & Hartmann*, *supra* note 3, at 836-37 (discussing legislative history of ECOA). The 1976 amendments to ECOA expanded the prohibited bases of ECOA to include race, age, and other attributes, but did not add “effects” language to ECOA or otherwise change the basic “discriminate against . . . because of” structure of the statute. *Id.* at 838.

⁴⁴ As originally enacted, ECOA contained an anti-discrimination provision using only the “discriminate against . . . on the basis of” formulation found in section 703(a)(1) of Title VII and section 4(a)(1) of the ADEA: “It shall be unlawful for any creditor to discriminate against any applicant on the basis of sex or marital status with respect to any aspect of a credit transaction.” Pub. L. No. 93-495, tit. V, § 503, ECOA § 701(a), 88 Stat. 1500, 1521. An amendment to ECOA in 1976 expanded the prohibited bases, but did not add any “effects” language to the statute or otherwise alter the “discriminate against . . . on the basis of” formulation.

⁴⁵ *Jones v. United States*, 526 U.S. 227, 238 (1999) (quoting *Pension Benefit Guaranty Corporation v. LTV Corp.*, 496 U.S. 633, 650 (1990) (internal quotations and citations omitted)).

⁴⁶ *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 73 (Scalia, J., dissenting).

Although district courts post-*City of Jackson* continue to allow disparate impact claims under the FHA and ECOA based on circuit court cases decided before *City of Jackson*, no federal court of appeals has ruled on the issue since the 2005 decision and at least two have suggested that the question is far from settled. In *Garcia v. Johanns*, the D.C. Circuit observed that “[t]he Supreme Court has held that this [‘effects’] language gives rise to a cause of action for disparate impact discrimination under Title VII and the ADEA,” citing to *City of Jackson*, but noting that “ECOA contains no such language.”⁴⁷ In *Magner v. Gallagher*, five judges dissented from a denial of en banc rehearing, noting that “recent developments in the law,” primarily *City of Jackson*, “suggest that the issue [of disparate impact under the FHA] is appropriate for careful review by the en banc court.”⁴⁸ The City of St. Paul, Minnesota—the Petitioner in *Magner*—sought and received certiorari from the Supreme Court to review whether the FHA permits disparate impact claims.⁴⁹ After briefing, but before argument, the Supreme Court dismissed the case at the request of the City of St. Paul, despite that the city was confident it would win.

Because the Statutes Do Not Permit Disparate Impact, Agency Attempts to Apply Disparate Impact Under the FHA and ECOA Conflict With the Statutes

Recently, the Department of Housing and Urban Development (“HUD”)—the executive agency charged with administering, interpreting and enforcing the FHA—for the first time issued a proposed rule ostensibly to establish standards for determining whether an action or policy has a disparate impact in violation of the FHA.⁵⁰ The Federal Reserve Board (“FRB”) had previously asserted in Regulation B—the regulation that implements ECOA—that ECOA permits disparate impact claims.⁵¹ Relying on Regulation B, the Bureau of Consumer Financial Protection (“CFPB”) similarly has taken the position that ECOA permits disparate impact claims.⁵² And the Department of Justice (“DOJ”) has taken the position that both the FHA and ECOA permit disparate impact claims.⁵³ As discussed above, neither the FHA nor ECOA permit disparate

⁴⁷ 444 F.3d 625, 633 n.9 (D.C. Cir. 2006) (citations omitted).

⁴⁸ *Gallagher v. Magner*, 636 F.3d 380, 383 (8th Cir. 2010).

⁴⁹ Petition for Writ of Certiorari, 2011 WL 549171, *i (Feb. 14, 2011); *Gallagher v. Magner*, No. 10-1032.

⁵⁰ Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 76 Fed. Reg. 70921 (proposed Nov. 16, 2011) (the “HUD Proposed Rule”).

⁵¹ 12 C.F.R. § 202.6(a) n.2; *Id.* Pt. 202, Supp. I, Comment 6(a)-2 (“[T]he burdens of proof for such employment cases were codified by Congress in the Civil Rights Act of 1991 (42 U.S.C. 2000e *et seq.*)”).

⁵² CFPB Bulletin 2012-04 (Fair Lending) (Apr. 18, 2012) (the “CFPB Bulletin”), available at http://files.consumerfinance.gov/f/201404_cfpb_bulletin_lending_discrimination.pdf. The CFPB incorporated the FRB’s Official Staff Commentary into its commentary to Regulation B. 12 C.F.R. Pt. 1002, Supp. I, Comment 6(a)-2.

⁵³ E.g., Thomas E. Perez, Speech to 15th Annual Community Reinvestment Act and Fair Lending Colloquium (Nov. 7, 2011), available at <http://www.justice.gov/crt/opa/pr/speeches/2011/crt-speech-111107.html> (“The Civil Rights Division will make use of all the tools in our arsenal to root out discrimination, including disparate impact theory if the facts support its application.”).

impact claims. Accordingly, these efforts to support disparate impact are contrary to controlling law.

A close review of these agencies' positions shows that each is based on a now discredited interpretation of law. HUD bases its position on the holdings by federal courts of appeals that the FHA permits disparate impact claims.⁵⁴ Similarly, DOJ—in the interagency “Policy Statement on Discrimination in Lending”—bases its position on the holdings by federal courts of appeal prior to *City of Jackson*.⁵⁵ But as discussed above, *City of Jackson* now shows that these lower court decisions are incorrect and inconsistent with the language of the statute. In addition to basing its view on pre-*City of Jackson* cases,⁵⁶ the FRB also relied on Regulation B on the pre-enactment legislative history of ECOA.⁵⁷ And the CFPB, which now has authority over Regulation B, followed suit.⁵⁸ But as discussed above, this legislative history post-dates the enactment of ECOA and cannot change the plain meaning of the statutory text. The FRB also relied on 1991 legislation that amended Title VII but did not amend any other civil rights law.⁵⁹ But the Supreme Court has since clarified that the 1991 legislation only amended Title VII—and does not affect the interpretation of any other civil rights law.⁶⁰

A regulatory agency is not authorized to attempt to effectuate an interpretation of a statute by prohibiting conduct the statute permits. As Justice O'Connor has explained: “an agency’s legislative regulations will be upheld if they are ‘reasonably related’ to the purposes of the enabling statute, . . . [W]e would expand considerably the discretion and power of agencies were we to interpret ‘reasonably related’ to permit agencies to proscribe conduct Congress did not intend to prohibit.”⁶¹ “[R]egulations that would proscribe conduct by the recipient having only a discriminatory *effect* . . . do not simply ‘further’ the purpose of the [statute]; they go well *beyond* that purpose.”⁶²

⁵⁴ 76 Fed. Reg. at 70923.

⁵⁵ 59 Fed. Reg. 18266, 18268 (Apr. 15, 1994) (“The courts have recognized three methods of proof of lending discrimination under the ECOA and the FH Act: . . .”); *id.* at 18269 (“Although the precise contours of the law on disparate impact as it applies to lending discrimination are under development . . .”).

⁵⁶ 12 C.F.R. § 202.6(a) n.2.

⁵⁷ *Id.* Pt. 202, Supp. I, Comment 6(a)-2.

⁵⁸ CFPB Bulletin, at 1.

⁵⁹ 12 C.F.R. Pt. 202, Supp. I, Comment 6(a)-2.

⁶⁰ *Smith v. City of Jackson*, 544 U.S. 228, 240 (2005) (“While the relevant 1991 amendments expanded the coverage of Title VII, they did not amend the ADEA or speak to the subject of age discrimination.”).

⁶¹ *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 614 (1983) (O’Connor, J., concurring); *see also id.* at 613 (“‘Reasonably related to’ simply cannot mean ‘inconsistent with.’”); *American Federation of Gov’t Employees, AFL-CIO v. Gates*, 486 F.3d 1316, 1321-22 (D.C. Cir. 2007) (“If the relevant statutory language is plain but is inconsistent with the [agency’s] regulations, we must hold the regulations invalid.”).

⁶² *Alexander v. Sandoval*, 532 U.S. 275, 286 n.6 (2001) (quoting with approval *Guardians*, 463 U.S. at 613 (O’Connor, J., concurring) (emphasis in original)).

The Future of Disparate Impact

Notwithstanding the Supreme Court's clarification in *City of Jackson*, no lower court has yet held that the FHA or ECOA do not permit disparate impact claims. Although the D.C. Circuit has signaled that ECOA does not permit disparate impact claims,⁶³ and five judges from the Eighth Circuit have argued that the issue of disparate impact under the FHA "is appropriate for careful review,"⁶⁴ lower courts have been reluctant to hold that the pre-*City of Jackson* case law was overruled by *City of Jackson* when *City of Jackson* does not directly address the FHA and ECOA.

Recent developments may give a basis for hope that future courts will give this issue more careful consideration. There seems to be a general consensus that the Supreme Court would have sided with the City of St. Paul in *Magner* and would have held that the FHA does not permit disparate impact claims. Indeed, the Mayor of the City of St. Paul stated as much in explaining the City's decision to withdraw its appeal, noting that the City was confident it would win.⁶⁵ Similarly, civil rights advocates and government officials were so concerned that they undertook great efforts to persuade the City of St. Paul to withdraw its appeal.⁶⁶ In light of the Supreme Court's decision to hear the *Magner* appeal, and the efforts by DOJ and other supporters of broad use of disparate impact theory to avoid Supreme Court scrutiny of the use of disparate impact theory in fair lending, it can be expected that courts will now be more willing to carefully review *City of Jackson* and its impact on the validity of prior court of appeals decisions under the FHA and ECOA. And the Township of Mount Holly's petition for certiorari raises hopes that the Supreme Court may yet have an opportunity to consider this important issue.

Recent Supreme Court precedent also gives hope that any final HUD rule adopting disparate impact under the FHA would not stand. In *Freeman v. Quicken Loans*, the Supreme Court unanimously rejected a HUD interpretation of the Real Estate Settlement Procedures Act that the court found to be "manifestly inconsistent with the statute."⁶⁷ Agency interpretations of statutes are entitled to deference only where there is an ambiguity in the statute and only if the agency's interpretation is reasonable.⁶⁸ But the *Freeman* Court unanimously reminded HUD that its interpretations are not entitled to

⁶³ *Garcia v. Johanns*, 444 F.3d 625, 633 n.9 (D.C. Cir. 2006).

⁶⁴ *Gallagher v. Magner*, 636 F.3d 380, 383 (8th Cir. 2010) (Colloton, J., dissenting).

⁶⁵ Press release, "City of St. Paul Seeks to Dismiss United States Supreme Court Case *Magner vs. Gallagher*" (Feb. 10, 2012), available at <http://www.stpaul.gov/index.aspx?NID=4874&ART=9308&ADMIN=1>.

⁶⁶ E.g., Joan Biskupic, "Analysis: Rights Groups Try to Avoid U.S. High Court Setback," *Reuters.com* (Mar. 2, 2012), available at <http://www.reuters.com/assets/print?aid=USTRE82117X20120302> (discussing efforts by civil rights advocates and government officials to persuade the City of St. Paul to withdraw its appeal out of concern that the Supreme Court would rule in favor of the City).

⁶⁷ *Freeman*, 2012 WL 1868063, at *5.

⁶⁸ E.g., *Presley v. Etowah Cnty. Comm'n*, 502 U.S. 491, 509-10 (1992).

deference when its interpretation “goes beyond the meaning that the statute can bear.”⁶⁹ The Court has previously explained that ““regulations that would proscribe conduct by the recipient having only a discriminatory *effect* . . . do not simply “further” the purpose of [the statute]; they go well *beyond* that purpose” and are not entitled to deference.⁷⁰ This analysis would be equally applicable to any final HUD rule. Where a statute like the FHA does not permit disparate impact claims, such claims cannot be authorized by regulation. *Freeman* suggests that HUD should exercise caution before attempting to promulgate a rule inconsistent with the underlying statute.

⁶⁹ *Freeman*, 2012 WL 1868063, at *5.

⁷⁰ *Alexander*, 532 U.S. at 286 n.6 (2001) (quoting with approval *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 613 (1983) (emphasis in original)).