96-7398

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 96-7398

Richard Salute, et al.,

Plaintiffs-Appellants,

v.

Stratford Greens Garden Apartments,
a co-partnership, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of New York

**BRIEF *AMICUS CURIAE* OF
THE NATIONAL FAIR HOUSING ALLIANCE, INC.,
ADVOCACY, INC., THE AMERICAN COUNSELING ASSOCIATION,
THE ARC, THE BAZELON CENTER FOR MENTAL HEALTH LAW,
THE CALIFORNIA ALLIANCE FOR THE MENTALLY ILL,
THE CENTER FOR PUBLIC REPRESENTATION, AND
THE DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, INC.**

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INTEREST OF AMICI CURIAE[1/]

The National Fair Housing Alliance, Inc. (NFHA) is a non-profit corporation representing more than eighty private fair-housing centers throughout the United States. The NFHA seeks to promote the federal policy "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. The NFHA

[1/] The parties have consented to the filing of this brief. Their letters of consent are on file with the Clerk of the Court.

attempts to achieve this purpose by, inter alia, conducting research into the nature and effects of housing discrimination, advocating for effective programs of fair housing enforcement and compliance, and sponsoring national educational conferences on fair housing issues and fair housing litigation. In addition, the NFHA attempts to identify and eliminate housing practices that are discriminatory or otherwise create barriers to equal access to housing, including practices that disproportionately impact groups whose members Congress has sought to protect. Such barriers include a landlord's refusal to accept tenants who receive government housing subsidies. The NFHA has a direct interest in the construction and application of federal statutes guarding against discrimination in housing. To this end, the NFHA seeks leave to participate as amicus curiae in cases that may involve important interpretations of those laws.

Advocacy, Inc. is the protection and advocacy agency designated by the Governor of Texas to protect the rights of persons with mental and/or physical disabilities in areas such as employment, education, and housing. Advocacy, Inc. has represented thousands of Texans with disabilities, including residents of a group home for adults with mental retardation, whose case reached the United States Supreme Court. See City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985). Since 1981, Advocacy, Inc., in conjunction with persons with disabilities and their family members, has

identified and advocated the need for community integration in housing.

The American Counseling Association (ACA) is the nation's largest organization representing professional counselors. Professional counselors work in a variety of settings, including schools, colleges and universities, mental health clinics, social service programs, private practice, community health agencies, government, and business and industry. The mission of ACA is to enhance human development throughout the life span, and to promote the counseling profession and the interests of ACA clients. The present case is of interest to ACA and the thousands of professional counselors who are engaged in assisted living programs, the education and training of mentally retarded persons, and the treatment and assistance of those in need of mental health, substance abuse, and rehabilitation services. Fair access to housing for these vulnerable populations is vitally important to their well-being and quality of life.

The Arc is the largest national voluntary organization in the United States devoted solely to the welfare of the more than seven million people with mental retardation. Together, more than 1,200 state and local chapters of The Arc work to ensure that people with mental retardation can realize the opportunity to live, learn, work and play in their communities. Since its inception, The Arc has vigorously challenged attitudes and public policy, based on false stereotypes, that have authorized or encouraged

segregation of people with mental retardation in virtually all areas of life. It is the experience of The Arc that people with mental retardation have the capability to enjoy and contribute to the life of the community. For over a decade, a top priority of The Arc has been to make community-based supports, including an appropriate variety of housing options, available to people with mental retardation. The issue before this Court relates directly to the rights of persons with mental retardation seeking to live in community-based settings and is one of great interest to The Arc and its members.

The Bazelon Center for Mental Health Law is a national legal advocacy organization representing low-income adults and children with mental disabilities. The Center seeks their full integration into the community by protecting their rights to choice and dignity and expanding their access to housing and other support. Among others, the Center has been counsel of record or counsel for amici in a number of significant fair housing cases, including City of Edmonds v. Oxford House, Inc., 115 S. Ct. 1776 (1995), and Marbrunak, Inc. v. City of Stow, 974 F.2d 43 (6th Cir. 1992). The Center believes that people with mental disabilities should have the same housing choices as people without such disabilities, and has worked for the development of those options. Of all housing subsidy programs, the Section 8 program offers the broadest possible housing choice for people with disabilities. Strict enforcement of the Fair

Housing Act is required, and reasonable accommodations in rules, policies, or practices, such as that requested in this case, must be provided, so that the Center's constituents and clients may have an equal opportunity to use and enjoy the broadest possible range of dwellings. For these reasons, the Center joins in this brief as amicus curiae in support of appellants.

The California Alliance for the Mentally Ill (CAMI) represents some 14,000 California residents who are parents, siblings, spouses, and children of the severely mentally ill or those who themselves are victims of these brain diseases -- some of whom are dually diagnosed as neurobiologically disordered and recovering from substance abuse. CAMI works on behalf of people with severe mental illnesses who are being successfully treated and are able to live independently. Contrary to the clear intent of Congress, the decision below could prevent New Yorkers with disabilities from renting residences because of their disabilities. If affirmed, the decision below may well have the effect of limiting the ability of such individuals to live in the community of their choice.

The Center for Public Representation is a public-interest law firm which represents people with disabilities. Among its several activities, the Center is the designated Protection and Advocacy system for individuals with mental illness in Massachusetts. See 42 U.S.C. § 10801 et seq. The Center represents numerous individuals with disabilities for

whom the Section 8 program is the best opportunity to secure the safe, affordable housing they desperately need to enhance and ensure their ability to live independently. The outcome of this case will affect the availability of such housing.

Disability Rights Education and Defense Fund, Inc. (DREDF) is a national disability civil-rights organization dedicated to securing equal citizenship for Americans with disabilities. Established in 1979, DREDF pursues its mission through education, advocacy, and law reform efforts. In its efforts to promote the full integration of citizens with disabilities into the American mainstream, DREDF has represented or assisted hundreds of people with disabilities who have been denied their rights and excluded from opportunities, including access to appropriate and affordable housing because of false and demeaning stereotypes, and has fought to ensure that people with disabilities have the remedies necessary to vindicate their right to be free from discrimination.

In the present case, amici fully support the appellants' position on all three issues raised on appeal. For the purpose of this brief, however, amici will focus solely on appellants' disparate-impact claim -- an issue of particular concern to amici because of the vital role that disparate-impact analysis plays in achieving the goals of the Fair Housing Act.

FACTS

Plaintiffs Richard Salute and Marie Kravette are both disabled. They have both sought to rent apartments from the defendant, Stratford Greens. Under public policies enacted by Congress and enforced by the Federal Government, Salute and Kravette are eligible for various forms of public assistance, including "Section 8" housing subsidies. But because of a private policy established by Stratford Greens -- a policy that rejects Salute, Kravette, and all other potential new tenants with (or without) disabilities who rely on Section 8 certificates to pay their rent -- they have been denied their rights under the Fair Housing Act.

Plaintiffs Salute and Kravette, along with Long Island Housing Services, brought a class action against Stratford Greens and its management, alleging that the refusal to rent Salute and Kravette apartments violated the requirements of the "Section 8" housing program, 42 U.S.C. § 1437f, and the Fair Housing Act, 42 U.S.C. § 3601 et seq. Initially, the District Court for the Eastern District of New York granted Kravette a preliminary injunction forcing Stratford Greens to rent her an apartment. See 888 F. Supp. 17, 21 (E.D.N.Y. 1995). Ten months later, the District Court reversed course, denying plaintiffs' motion for summary judgment as to liability and granting defendants' cross-motion for summary judgment. See 918 F. Supp. 660, 662, 668 (E.D.N.Y. 1996). After rejecting plaintiffs' Section 8 and Fair Housing Act "reasonable accommodation" claims, id. at

663-67, the court briefly discussed plaintiffs' disparate-impact claims under the Fair Housing Act. The court acknowledged that plaintiffs had submitted an affidavit showing that Stratford Greens' practice of excluding Section 8 certificate holders has a disproportionate impact on people with disabilities. Id. at 667; see J.A. 66-67 (affidavit based on research finding that Suffolk County residents with disabilities were up to three times as likely as those without disabilities to be eligible for Section 8). Nonetheless, the court denied plaintiffs' disparate-impact claims, holding that any landlord who consistently refused to rent housing to Section 8 tenants was immune from disparate-impact claims brought under the Fair Housing Act because Section 8 created a per se defense to such claims. The court's entire discussion of disparate impact is six sentences long, and cites only two authorities, one of which diametrically opposes the rationale of the decision below. 918 F. Supp. at 667-68.

INTRODUCTION AND SUMMARY OF ARGUMENT

Because discriminatory purpose or intent is often difficult to prove, disparate-impact claims play an essential role in the enforcement of the Fair Housing Act's antidiscrimination provisions. This Court, borrowing from Title VII jurisprudence, has established a burden-shifting scheme for such claims: Once plaintiffs have established a prima facie case of discriminatory impact, the burden shifts

to the defendants to show that the challenged policy or practice serves a bona fide and legitimate purpose, and that no alternative policy or practice would serve that purpose with less discriminatory effect.

Here, plaintiffs established a prima facie case by showing that people with disabilities were up to three times as likely as people without them to be eligible for Section 8 assistance. In an attempt to explain its policy of rejecting all Section 8 tenants, the defendants proffered business justifications that, far from being bona fide or legitimate, were fanciful. Yet the District Court granted defendants' motion for summary judgment.

In effect, the court below held that (1) Section 8 gave a landlord an affirmative right not to rent to Section 8 tenants, and (2) that the landlord's affirmative right trumps a tenant's right, under the Fair Housing Act, not to be discriminated against. As precedents from this Court make clear, that holding is incorrect because it misreads Section 8 and fails to harmonize Section 8 with the Fair Housing Act. Application of this Court's burden-shifting scheme for disparate-impact claims would reconcile the two federal statutes. Moreover, it would fully address any legitimate concerns that defendants may have. If a particular landlord actually would be unduly burdened by accepting Section 8 tenants, then the business-justification prong of this Court's disparate-impact test would give that landlord the opportunity to explain precisely (1) how renting property to

Section 8 tenants would be so burdensome, and (2) why standard procedures for screening potential tenants would not adequately address the landlord's concerns. But in the present case, the defendants simply had no bona fide and legitimate justifications for their refusal to lease apartments to Section 8 certificate holders. Therefore, the District Court's judgment should be reversed.

ARGUMENT

I. DISPARATE-IMPACT CLAIMS PLAY AN ESSENTIAL ROLE IN THE ENFORCEMENT OF THE FAIR HOUSING ACT.

Claims of disparate impact involve practices that are facially neutral in the treatment of different groups but that in fact fall more harshly on one group than another without sufficient justification. See Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977). In the housing context, disparate-impact analysis provides an important tool for counteracting unfair and discriminatory practices. See, e.g., Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 933 (2d Cir.), aff'd per curiam, 488 U.S. 15 (1988).

A. The Case Law and Legislative History of the Fair Housing Act Support the Availability of Disparate-Impact Claims.

In April 1968 Congress enacted the Fair Housing Act as Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73, 42 U.S.C. §§ 3601-3619, 3631, to ban certain types of discrimination in housing transactions. As

originally enacted, Section 804 of the Act, 42 U.S.C. § 3604 (1970), specifically made it unlawful to deny a person housing "because of race, color, religion, or national origin." Although Congress did not expressly define the phrase "because of" in the text of the Act, the legislative history demonstrates that Congress intended Title VIII to apply to actions that produce a discriminatory effect regardless of whether they are motivated by a discriminatory intent. See 114 Cong. Rec. 5214-22 (1968) (rejecting a Senate floor amendment that would have required proof of an intention to discriminate in certain circumstances); see also Huntington, 844 F.2d at 934-35 (citing legislative history); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 147 (3d Cir. 1977) (same), cert. denied, 435 U.S. 908 (1978); cf. Robert G. Schwemm, Housing Discrimination § 10.4(1), at 10-19 & n.85 (1995).

In the twenty years following the Act's passage, various circuits, including this Court, repeatedly held -- consistent with the Act's legislative history -- that no showing of discriminatory purpose or intent was required to make out a valid claim under the Fair Housing Act. See, e.g., United States v. Starrett City Assocs., 840 F.2d 1096, 1100 (2d Cir.), cert. denied, 488 U.S. 946 (1988); United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1217 (2d Cir. 1987), cert. denied, 486 U.S. 1055 (1988); Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1036-38 (2d Cir. 1979); Rizzo, 564 F.2d at 146-49; Betsey v. Turtle Creek Assocs.,

736 F.2d 983, 986-88 (4th Cir. 1984); United States v. Mitchell, 580 F.2d 789, 791-92 (5th Cir. 1978); Arthur v. City of Toledo, 782 F.2d 565, 574-75 (6th Cir. 1986); United States v. City of Black Jack, 508 F.2d 1179, 1184-85 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975); Keith v. Volpe, 858 F.2d 467, 482-84 (9th Cir. 1988), cert. denied, 493 U.S. 813 (1989). See generally Schwemm, supra, § 10.4(1), at 10-17 to 10-24.

This line of cases culminated in this Court's decision in Huntington, supra, which powerfully endorsed the notion "that discriminatory impact alone violates Title VIII." 844 F.2d at 934; see id. at 935 (holding "that a Title VIII violation can be established without proof of discriminatory intent"). The Supreme Court affirmed Huntington, but because the defendant had conceded the applicability of the Second Circuit's disparate-impact test, the Court declined to "reach the question whether that test is the appropriate one." 488 U.S. at 18. The Court noted, however, that it was "satisfied on this record that disparate impact was shown, and that the sole justification proffered to rebut the prima facie case was inadequate." Id.

Thus, by 1988, "a strong consensus had developed among the circuits that the proper meaning of Title VIII included a [disparate-impact] standard." Schwemm, supra, § 10.4(1), at 10-22. "It was against this background that Congress considered and passed the 1988 Fair Housing Amendments Act." Id. § 10.4(1), at 10-23. The 1988

amendments represented the most far-reaching changes in housing-discrimination law in twenty years. "Handicap" and "familial status" were added to the list of prohibited bases of discrimination, see Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619, 42 U.S.C. §§ 3602(h), 3602(k), 3604(f)(2),[2/] and the Act was bolstered by the inclusion of several new enforcement mechanisms, e.g., id. §§ 3610-3612, 3613(c)(2), 3614(d)(1). Significantly, Congress rejected all efforts to insert an intent requirement or to "change the operative language of Title VIII's substantive provisions concerning what is required to prove a violation." Schwemm, supra, § 10.4(1), at 10-23 (citation omitted). After citing the string of appellate decisions endorsing the disparate-impact theory, the 1988 Act's principal sponsor stated on the floor of the Senate that "Congress accepted this consistent judicial interpretation." 134 Cong. Rec. S12,449 (1988) (remarks of Sen. Kennedy); see also H.R. Rep. No. 711, 100th Cong., 2d Sess. 25 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2186 ("Acts that have the effect of causing discrimination can be just as devastating as intentional discrimination."). Thus, in the wake of the 1988 amendments, there can be no doubt that the Fair Housing Act's substantive prohibitions extend beyond practices motivated by discriminatory intent to cover those that simply produce a discriminatory effect.

[2/] The Act refers to persons with a "handicap," id., but a term showing greater respect is "persons with disabilities," and therefore amici will use the terms interchangeably.

Since 1988, federal courts, as well as the United States Department of Housing and Urban Development (HUD), have followed this Court's approach in Huntington, consistently recognizing the availability of disparate-impact claims under the amended Act. See, e.g., Casa Marie, Inc. v. Superior Court of Puerto Rico, 988 F.2d 252, 269 n.20 (1st Cir. 1993); LeBlanc-Sternberg v. Fletcher, 67 F.3d 412, 425 (2d Cir. 1995); Orange Lake Assocs., Inc. v. Kirkpatrick, 21 F.3d 1214, 1227-28 (2d Cir. 1994); Doe v. City of Butler, 892 F.2d 315, 323 (3d Cir. 1989); Edwards v. Johnston County Health Dep't, 885 F.2d 1215, 1223 (4th Cir. 1989); Mountain Side Mobile Estates v. Secretary of HUD, 56 F.3d 1243, 1250-57 (10th Cir. 1995); Jackson v. Okaloosa County, 21 F.3d 1531, 1543 (11th Cir. 1994); see also HUD v. Mountain Side Mobile Estates, P-H: Fair Housing--Fair Lending Rptr. ¶ 25,053, at 25,492 (HUD Secretary 1993); P-H: Fair Housing--Fair Lending Rptr. ¶ 3.5 (Sept. 1, 1993).

In recent years, only one federal appellate court -- the Seventh Circuit -- has deviated from this consensus. See, e.g., Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1529-34 (7th Cir. 1990) (holding that racial steering claims under Title VIII require proof of discriminatory intent); id. at 1533 (stating that some housing practices do not "lend themselves to [the] disparate impact method"); NAACP v. American Family Mutual Ins. Co., 978 F.2d 287, 290-93 (7th Cir. 1992) (doubting whether Title VIII claims are "subject to proof under a disparate-impact formula") (citing Village

of Bellwood, 895 F.2d at 1529-30), cert. denied, 508 U.S. 907 (1993); Knapp v. Eagle Property Management Corp., 54 F.3d 1272, 1280 (7th Cir. 1995) (employing a novel per se defense to reject plaintiffs' disparate-impact claim) (citing NAACP, 978 F.2d at 290, and Village of Bellwood, 895 F.2d at 1533). Thus, the Seventh Circuit's case law is clearly at odds with the precedents of this, and every other, United States Court of Appeals.

B. The Second Circuit Has a Well-Developed Burden-Shifting Scheme for Disparate-Impact Claims.

In analyzing disparate-impact claims brought under the Fair Housing Act, this Court has relied heavily on the Supreme Court's interpretations of the employment discrimination provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. See Huntington, 844 F.2d at 935 (citing Griggs v. Duke Power Co., 401 U.S. 424, 429-36 (1971)); see also Starrett City Assocs., 840 F.2d at 1101 (Title VII and Title VIII have the same antidiscrimination objectives); cf. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (1972) (relying on Title VII decisions to help interpret Title VIII). Thus, the burden-shifting schemes prevalent in employment discrimination law, see, e.g., Griggs, 401 U.S. at 429-36, generally apply to Fair Housing Act cases as well.

To assert a disparate-impact claim, plaintiffs must establish a prima facie case "by showing that the challenged practice of the defendant 'actually or predictably results in

racial discrimination; in other words that it has a discriminatory effect.'" Huntington, 844 F.2d at 934 (quoting City of Black Jack, 508 F.2d at 1184-85). The plaintiffs typically present statistical evidence showing that the defendant's practice has a proportionately greater impact on protected class members (e.g., racial minority group members, or persons with disabilities) than on others. See, e.g., Huntington, 844 F.2d at 938 (statistics showing that 28% of the area's minority residents, but only 11% of its white residents, were eligible for public housing helped establish "a substantial adverse impact on minorities").

Once plaintiffs have established a prima facie case of disparate impact, the burden shifts to the defendant to justify both the ends and the means of the challenged practice. Specifically, the defendant (1) must present "bona fide and legitimate" reasons for its action, and (2) must show the unavailability of any "less discriminatory alternative" that could have served those ends. Huntington, 844 F.2d at 939 (citing Rizzo, 564 F.2d at 149). The defendant's justification for its actions must have been the actual justification at the time the actions were taken; post hoc rationalizations cannot serve as "bona fide" reasons. Id. at 940.

Plaintiffs carry the ultimate burden of persuading the court that "in the end . . . the adverse impact [outweighs] the defendant's justification." Id. at 936; see also id. at 935; Rizzo, 564 F.2d at 148 n.32. But just as

plaintiffs in a disparate-impact case need not prove discriminatory intent, they also need not prove that the defendant's proffered justifications were "pretextual." Huntington, 844 F.2d at 939.

II. PLAINTIFFS MADE OUT A VALID DISPARATE-IMPACT CLAIM.

A straightforward application of this Court's burden-shifting scheme would mandate reversal of the District Court's judgment because the plaintiffs clearly made out a valid disparate-impact claim.

A. Plaintiffs Made a Prima Facie Showing of Disparate Impact.

Plaintiffs in the case at bar established a prima facie case by showing that defendants' refusal to lease apartments to Section 8 certificate holders had a substantially greater adverse effect on people with disabilities than it had on those without disabilities. Using disability and income data from the 1990 Federal Census, Dr. Andrew A. Beveridge, the Director of the Program of Applied Social Research at Queens College, analyzed Section 8 eligibility of people with and without disabilities in Suffolk County, New York. He found that "[a]ny denial of housing rentals to individuals with Section 8 certificates would have a marked disproportionate impact on the disabled." J.A. 64. According to Dr. Beveridge's analysis, the disproportionate representation of persons with disabilities among those people eligible for Section 8 certificates was

statistically significant. J.A. 64, 66-67. To reach this conclusion, Dr. Beveridge considered the four criteria used by the Census to determine whether individuals were counted as persons with disabilities: whether an individual's disability (1) limited the individual's kind or amount of work, (2) prevented the individual from working altogether, (3) limited the person's mobility beyond the home (e.g., the ability to shop or to visit a doctor's office), or (4) made it difficult for the person to take care of his or her personal needs (e.g., bathing, dressing, or getting around inside the home). J.A. 63 (quoting the census questionnaire). For each of the four categories, Dr. Beveridge found that, regardless of household size, a much larger percentage of the people with disabilities were eligible for Section 8. J.A. 64-67. Among two-person households, for example, people with disabilities were approximately three times as likely to be eligible for Section 8. J.A. 66-67 (depending on which criteria of disability one focuses upon, between 36% and 47% of the people with disabilities, but only 12% to 15% of those without disabilities, were eligible for Section 8).

Dr. Beveridge's findings clearly establish a prima facie case of housing discrimination. Although this Court has not enunciated specific guidelines governing the magnitude of disparate impact necessary to establish a prima facie case, the case law provides considerable guidance. In Huntington, for example, a prima facie case was established

with statistics showing that 28% of the area's minority residents, but only 11% of its white residents, were eligible for public housing. 844 F.2d at 938. Similarly, in Bronson v. Crestwood Lake Section 1 Holding Corp., 724 F. Supp. 148 (S.D.N.Y. 1989), statistics showing that minorities were 2.5 times more likely to be affected by the defendant's policy than non-minorities contributed to the court's finding that plaintiffs met their prima facie burden. Id. at 154-55; see also Keith v. Volpe, 858 F.2d at 484 (defendant's action had "twice the adverse impact on minorities as it had on whites"). Here, Dr. Beveridge's findings demonstrate that the discriminatory impact of defendants' policy on people with disabilities is of the same magnitude found to establish a prima facie case in other cases. Thus, plaintiffs met their burden of making a prima facie case of disparate impact.

B. Defendants' Factual Defenses Provided No Basis for a Grant of Summary Relief.

Defendants offered four justifications for their refusal to lease apartments to Section 8 certificate holders. Whether taken individually or together, these justifications fail to rise to the level of "bona fide and legitimate" reasons, as required under Huntington. 844 F.2d at 939; see also Rizzo, 564 F.2d at 149.

First, defendants contended that, while they require two months' rent as a security deposit, the Section 8 lease provides for only one month's rent as security deposit.

Defendants' contention is baseless. The Suffolk Community Development Corporation, which administers the Section 8 certificate program in Suffolk County and issued certificates to plaintiffs Salute and Kravette, guarantees up to two months' security to a landlord. J.A. 54.

Second, defendants expressed concern that the Section 8 lease makes it more difficult to evict Section 8 tenants. The Section 8 lease, however, merely requires landlords to "compl[y] with the requirements of local law," to provide tenants with notice of the grounds for eviction, and to advise tenants that they have ten days to respond to the notice. Similarly, the Section 8 statute and HUD's Section 8 regulations place relatively insignificant burdens on a landlord's ability to evict tenants.[3/] These requirements alone do not rise to the level of a burden on landlords justifying refusal to lease to Section 8 certificate holders. Moreover, defendant Stratford Greens made no particularized showing that it or any similarly situated landlord had actually encountered any special difficulty evicting Section 8 tenants. Thus, the record

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[3/] Landlords may terminate tenancies for serious or repeated violations of the lease's terms and conditions, for violations of federal, state or local law, or for other good cause. See 42 U.S.C. § 1437f(d)(1)(B)(ii), as amended for fiscal year 1996 by Pub. L. No. 104-134, § 203(c), 110 Stat. 1321 (1996); 24 C.F.R. § 882.215(c) (1996). Under the regulations' broad definition of "good cause," a landlord may terminate a tenancy because of, among other things, the landlord's desire to rent the unit for a higher price, to reclaim the unit for personal use, to renovate the unit, or to sell the property. See 24 C.F.R. §§ 882.215(c)(2) (1996). Of course, the landlord also may terminate if the tenant has been disturbing neighbors or destroying property. See id.

demonstrates that defendants' "proffered justification is [not] of substantial concern such that it would justify a reasonable [landlord's] . . . determination" to refuse to lease apartments to Section 8 certificate holders. Huntington, 844 F.2d at 939.

Third, defendants contended that the Section 8 lease requires landlords to repair damage caused by Section 8 tenants before evicting them. As plaintiffs demonstrated in their summary judgment papers, this contention is plainly in error. The Section 8 lease in no way requires landlords to repair damage caused by Section 8 tenants.[4/]

And fourth, defendants contended that Section 8 tenants are more disruptive than non-Section 8 tenants. Defendants offered no evidence in support of this blanket assertion, which appears to be based entirely on a stereotyped and uninformed view of Section 8 certificate holders. There is no legitimate reason to believe that all

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[4/] The relevant section of the lease provides:

> Maintenance and Repairs. 1. Tenant shall take good care of the apartment and fixtures therein and shall at Tenant's own cost and expense make, when needed, all repairs, replacements and decoration therein and thereto, whenever damage or injury to the same shall have resulted from misuse, or neglect by the Tenant, Tenant's family, employees or visitors. Tenant shall not drill into, drive nails or deface in any manner any part of the building, or permit the same to be done, and at the end or other expiration of the term, shall deliver up the demised premises in good order and condition.

J.A. 48.

Section 8 certificate holders are likely to be more disruptive than other tenants. Furthermore, even assuming arguendo that fear of disruptive tenants presented a bona fide and legitimate justification for defendants' refusal to lease apartments to Section 8 certificate holders, defendants failed to show that a less discriminatory alternative was unavailable. See Huntington, 844 F.2d at 939. In fact, a less discriminatory alternative to rejecting all applications from Section 8 certificate holders is clearly available: defendants can identify Section 8 tenants whose behavior is more likely to violate the lease simply by using standard screening procedures applicable to all tenants (e.g., asking the prospective tenant's current and previous landlords whether the tenant has a history of properly maintaining the property, in compliance with the terms and conditions of the lease).

The four justifications proffered by defendants were too weak to raise factual issues to be litigated at trial, much less to rebut the prima facie case made out by plaintiffs' expert, Dr. Beveridge. Plaintiffs carried their ultimate burden by showing that in the end the adverse impact on people with disabilities outweighs the defendants' justifications. Huntington, 844 F.2d at 936. Even assuming arguendo that the plaintiffs had not carried their burden and therefore were not entitled to a judgment as a matter of law, defendants at best created a factual dispute that the District Judge should not have resolved. Thus, the court

below erred in denying plaintiffs' motion for summary judgment as to liability and even more clearly erred in granting defendants' motion for summary judgment.

III. SECTION 8 DOES NOT CREATE A *PER SE* DEFENSE TO A DISPARATE-IMPACT CLAIM PREMISED ON A POLICY OF REFUSING SECTION 8 TENANTS.

The District Court reached an erroneous result because it did not even attempt to apply this Court's well-established burden-shifting scheme for disparate-impact cases under the Fair Housing Act. Instead, the District Court -- apparently relying on a Seventh Circuit decision clearly at odds with the precedents of this, and every other, Court of Appeals -- held that any landlord who consistently refused to rent housing to Section 8 certificate holders was immune from disparate-impact claims brought under the Fair Housing Act because Section 8 created a per se defense to such claims. That holding is founded on a misunderstanding of Congress's intent in enacting both Section 8 and the Fair Housing Act, and therefore contravenes this Court's established precedents on housing discrimination law.

A. Congress Did Not Create an Affirmative Right to Refuse Section 8 Tenants.

Central to the District Court's error was its understanding that Congress had created for private landlords an affirmative right to refuse Section 8 tenants. That understanding is mistaken.

While Congress did not require landlords to participate in Section 8, neither did it grant landlords an affirmative right not to participate. Congress did not adopt statutory language one way or the other. The District Court construed this statutory silence to mean that landlords have an absolute affirmative right to refuse to lease apartments to Section 8 certificate holders. 918 F. Supp. at 663 ("The Section 8 program is voluntary. A private landlord may choose not to accept any tenants who receive Section 8 assistance."). The mere fact that Congress did not require participation, however, does not mean that it created an affirmative right to refuse to participate -- particularly when a landlord's refusal to rent to a Section 8 tenant would contravene federal civil rights laws.

Congress's most direct statement regarding landlord participation came in Section 8's "take one, take all" provision, 42 U.S.C. § 1437f(t)(1)(A). That provision prevented a landlord who had already participated in the program (by leasing an apartment to a Section 8 tenant) from refusing to lease apartments to other Section 8 tenants because of their status as Section 8 certificate holders. Clearly, the "take one, take all" provision prohibited landlords from "picking and choosing" among potential Section 8 tenants; it gave landlords no affirmative right to reject them all.[5/]

[5/] The "take one, take all" provision was repealed for (continued...)

B. The Court Below Did Not Even Attempt to Harmonize the Two Federal Statutes at Issue Here.

Having misread Section 8 to create an affirmative right to reject "any tenants who receive Section 8 assistance," 918 F. Supp. at 663, the District Court then went on to assume that these supposed Section 8 rights of landlords trumped the rights of tenants under the Fair Housing Act. In so doing, the District Court did not even attempt to harmonize the two federal statutes at issue here.

The District Court's entire rationale is contained in one rather perfunctory paragraph. After stating (incorrectly[6]) that "plaintiffs' [disparate-impact] argument is based squarely on their assumption that defendants have violated [Section 8's "take one, take all" provision] and should be deemed participants in the Section 8 program," the court stated:

> Even if that assumption were correct, the [plaintiffs' disparate-impact] argument would be suspect. See Knapp v. Eagle Property Management Corp., 54 F.3d 1272, 1280-81 (7th Cir. 1995); but see Bronson v. Crestwood Lake, 724 F. Supp. 148, 153-55 (S.D.N.Y. 1989). However, because it is incorrect, I need go no further.

918 F. Supp. at 667-68.

The District Court cited only two cases in its discussion of plaintiffs' disparate-impact claim: the Seventh Circuit's decision in Knapp and the Southern District

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[5](...continued)
fiscal year 1996 by Pub. L. No. 104-134, § 203(a), 110 Stat. 1321 (1996).

[6] See Pls.' Reply Mem., June 16, 1995, at 29.

of New York's in Bronson. As both the court below and the Knapp court recognized, these two cases clearly conflict with each other. See 918 F. Supp. at 667-68; Knapp, 54 F.3d at 1280-81 (citing Bronson with a "But see" signal). Bronson follows Second Circuit precedents. See Bronson, 724 F. Supp. at 153-55 (citing Huntington, 844 F.2d at 934; Starrett City Assocs., 840 F.2d at 1100; Robinson, 610 F.2d at 1038; Otero v. New York Housing Authority, 484 F.2d 1122, 1134 (2d Cir. 1973)). Knapp follows precedents from the Seventh Circuit -- which, as noted supra at Point I-A of this Brief, is the only circuit whose interpretation of the Fair Housing Act is clearly at odds with Huntington and its progeny. Nonetheless, the court below rejected the reasoning of Bronson and accepted that of Knapp.

Knapp, after quoting from a series of Seventh Circuit opinions that disparaged disparate-impact analysis, see 54 F.3d at 1280 (citing NAACP v. American Family Mutual Ins. Co., 978 F.2d at 290; Village of Bellwood, 895 F.2d at 1533), went on to create a novel per se defense to a Fair Housing Act disparate-impact claim:

> Owner participation in the section 8 program is voluntary and non-participating owners routinely reject section 8 voucher holders. We assume that their non-participation constitutes a legitimate reason for their refusal to accept section 8 tenants and that we therefore cannot hold them liable for racial discrimination under the disparate impact theory.

Id. (emphasis added).

By "assum[ing]" that landlords' non-participation in the Section 8 program would always constitute a legitimate

reason for refusing to accept Section 8 tenants, id., the Knapp court avoided precisely the fact-sensitive analysis that Huntington's burden-shifting scheme demands. Creating an absolute per se defense relieved defendants of their burden to present "bona fide and legitimate" reasons for their actions and to show the unavailability of any "less discriminatory alternative" that could have served those ends. Huntington, 844 F.2d at 939; see id. at 937 (rejecting the notion of a per se defense, and holding that, "[t]hough a town's interests in zoning requirements are substantial, . . . they cannot, consistently with [the Fair Housing Act], automatically outweigh significant disparate effects").

The Knapp court -- and hence the court below -- held, in effect, that a landlord's supposed "right" not to participate in the Section 8 program was so powerful an interest that, in the end, it would inevitably outweigh any adverse impact. By that reasoning, even in a locale where the evidence of adverse impact was overwhelming -- say, hypothetically, where all Section 8 tenants had disabilities, and all persons with disabilities were eligible for Section 8 -- landlords who refused to participate in the program would be immune from all disparate-impact claims under the Fair Housing Act.

Such a result cannot be correct, as it makes no effort at all to harmonize Section 8 and the Fair Housing Act. See Digital Equip. Corp. v. Desktop Direct, Inc., 114 S. Ct. 1992, 2002 (1994) (referring to "the familiar

principle of statutory construction that, when possible, courts should construe statutes . . . to foster harmony") (citing, e.g., Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1018 (1984); United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S. 407, 437-38 (1921) (Holmes, J., dissenting)). Rather, the District Court merely allowed a perceived purpose of the former statute -- the supposed "right" of landlords not to participate -- to run roughshod over the almost universally acknowledged purposes of the latter -- to protect tenants from unfair and discriminatory practices and thereby to promote "open, integrated residential housing patterns." Otero, 484 F.2d at 1134.

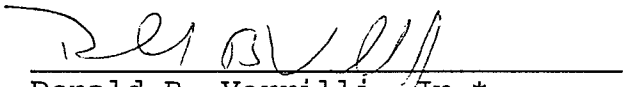
This Court need not choose between the two statutes; they can easily be reconciled. If Congress intended landlord participation in Section 8 to be voluntary, it must have done so because of a concern that participation would be unduly burdensome to some landlords. That concern is fully addressed through application of Huntington's disparate-impact test, which, after all, allows the defendant to proffer a business justification and then looks at other less discriminatory ways of meeting the landlord's legitimate arguments. See Huntington, 844 F.2d at 938. Thus, the statutes can be harmonized without creating a per se exemption from Fair Housing Act coverage. Here, however, as we have already seen, the actual business justifications that

defendants put forward either were fanciful or, at best, created factual issues that should have been tried.

CONCLUSION

Accordingly, this Court should reverse the judgment of the District Court and remand the case with instructions to grant the plaintiffs partial summary judgment as to liability.

Respectfully submitted,



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