Press Release

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WLF Asks High Court to Construe the Fair Housing Act the Way Congress Wrote It, Rejecting Disparate-Impact Liability

(Texas Dep't of Housing & Community Affairs v. The Inclusive Communities Project, Inc.)

"It is not HUD's prerogative to disregard statutory limitations in the Fair Housing Act because HUD decides that other remedies it has created out of whole cloth are better."—Cory Andrews, WLF Senior Litigation Counsel

WASHINGTON, DC—Washington Legal Foundation today asked the U.S. Supreme Court to clarify that the Fair Housing Act (FHA) does not reach otherwise lawful activities that are not motivated by discriminatory intent. Urging the Court to reverse decades of erroneous federal appeals-court precedent to the contrary, WLF's brief argues that the U.S. Department of Housing and Urban Development's (HUD) intrusive federal regulation of activity which, while free of discriminatory intent, is nonetheless thought to have a "disparate impact" on certain groups, distorts rather than facilitates a vibrant free-market system.

The lawsuit in *Texas Dep't of Housing & Community Affairs v. The Inclusive Communities Project, Inc.* centers on the proper scope of HUD's authority under the FHA to regulate housing discrimination. In its brief, WLF argues that because a plain reading of the FHA leaves no doubt that Congress meant to prohibit only intentional discrimination, *not* disparate impacts, HUD's contrary interpretation of the statute deserves no deference. Importantly, WLF explains, the FHA contains none of the "key" phrases the Court has recognized that Congress historically uses to signal disparate-impact liability—language that focuses on the effects of the decision maker's action rather than the motivation for the action.

In addition, WLF argues that Congress did not expand the FHA to encompass disparate-impact liability when it revised the statute in 1988. Although several federal appeals courts ruled prior to 1988 that the FHA encompassed disparate-impact liability, the 1988 amendments' failure to repudiate those rulings cannot plausibly be understood to constitute congressional acquiescence to the rulings. WLF further argues, given the severe market disruptions that would arise if disparate-impact analysis were routinely applied in FHA litigation, that Congress would have been explicit if it meant to create such liability. Threatened interference would be particularly acute in the business of property insurance, where companies must draw distinctions between classes of insureds based on the risks each presents.

Upon filing its brief, WLF issued the following statement by Senior Litigation Counsel Cory Andrews: "Congress's ability to carefully craft legislation provides one of its chief means to cabin administrative agency power. It is not HUD's prerogative to disregard statutory limitations in the Fair Housing Act because HUD decides that other remedies it has created out of whole cloth are better."

WLF is a national public interest law firm and policy center that regularly litigates in regulatory cases to ensure that federal agencies do not exceed the statutory limits imposed by Congress.

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