5-21-2018

Brief of Fred T. Korematsu Center for Law and Equality as Amicus Curiae in Support of Plaintiff-Appellee and for Affirmance

Fred T. Korematsu Center for Law and Equality

No. 17-35898

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FAIR HOUSING CENTER OF WASHINGTON,

Plaintiff-Appellee,

v.

BREIER-SCHEETZ PROPERTIES, LLC, a Washington corporation and FREDERICK BREIER-SCHEETZ, an individual,

Defendants-Appellants.

On Appeal from the United States District Court for the Western District of Washington, No. 16-CV-00922-TSZ

BRIEF OF FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE AND FOR AFFIRMANCE

Melissa R. Lee
Robert S. Chang
Jessica Levin
RONALD A. PETERSON LAW CLINIC
SEATTLE UNIVERSITY SCHOOL OF LAW
1215 East Columbia St.
Seattle, WA 98122
Tel.: (206) 398-4394
Fax: (206) 398-4162

Counsel for *Amicus Curiae*
Fred T. Korematsu Center for Law and Equality

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), undersigned counsel for *amicus curiae* make the following disclosures. The Fred T. Korematsu Center for Law and Equality is a research and advocacy organization based at Seattle University, a non-profit educational institution under Section 501(c)(3) of the Internal Revenue Code. The Korematsu Center does not have any parent corporation or issue stock and consequently there exists no publicly held corporation which owns 10 percent or more of its stock.

STATEMENT REGARDING CONSENT TO FILE

The Korematsu Center sought consent via email and voicemail to file this amicus brief from all parties, but counsel for Defendants-Appellants did not respond. This proposed amicus brief is therefore accompanied by a motion for leave to file pursuant to Federal Rule of Appellate Procedure 29(a).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Statutes

State Statutes

Regulations

Cases

Other Authorities

STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Fred T. Korematsu Center for Law and Equality (Korematsu Center) is a non-profit organization based at Seattle University School of Law that works to advance justice through research, advocacy, and education. Inspired by the legacy of Fred Korematsu, who defied the military orders during World War II that ultimately led to the incarceration of more than 110,000 Japanese Americans, the Korematsu Center works to advance social justice for all. It has a special interest in examining and eradicating the subtle ways that discrimination operates in our social structures. The Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University.

INTRODUCTION & SUMMARY OF THE ARGUMENT

Half a century ago, Congress passed the Fair Housing Act (FHA) as Title VIII of the Civil Rights Act of 1968. 42 U.S.C. §§ 3601-3619 (2012). Passage of the FHA was spurred in part by the Kerner Commission Report,[2] which identified residential segregation and unequal housing as significant causes of social unrest at the time. *Texas Dep't of Hous. and Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*,

---

[1] *Amicus* certifies that, pursuant to Federal Rule of Appellate Procedure 29(c)(5), no party's counsel authored this brief in whole or in part, nor did any party or party's counsel contribute money that was intended to fund preparing or submitting this brief. No person—other than the *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

[2] The Commission was established by President Lyndon Johnson by Exec. Order No. 11365, 3 C.F.R. 675 (1966–1970 Comp).

__ US __, 135 S. Ct. 2507, 2516 (2015) (citing *Rep. of the Nat'l Advisory Comm'n on Civ. Disorders* at 1 (1968) [hereinafter Kerner Comm'n Rep.]). The Kerner Commission concluded that the United States was "moving toward two societies, one black, one white—separate and unequal." *Id.* (quoting Kerner Comm'n Rep. at 1). Based on its findings, the Kerner Commission recommended a comprehensive, national fair housing law to address the segregation of communities across the country. *Id*. Shortly thereafter, the assassination of Dr. Martin Luther King, Jr. reinforced the need to address the state of civil rights in the United States. *Id.* Congress passed the Fair Housing Act in April, 1968, in an attempt to address discrimination in housing "on the basis of 'race, color, religion, or national origin.'"[3] *Id.* (quoting Civil Rights Act of 1968, Pub. L. No. 90-284, § 804, 82 Stat. 83).

Twenty years after its passage, Congress amended the Act to include "familial status"[4] as a prohibited category of discrimination, addressing two studies sponsored by the United States Department of Housing and Urban Development (HUD), which found that policies prohibiting children were used as a pretext to discriminate on the basis of race. Tim Iglesias, *Moving Beyond Two–Person–Per–*

[3] The FHA was amended in 1974 to include sex as a protected class. Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (1974).

[4] "Familial status" is defined as a household with one or more people under the age of eighteen (18) living with a parent or guardian. 42 U.S.C. § 3602(k).

Bedroom: Revitalizing Application of the Federal Fair Housing Act to Private Residential Occupancy Standards, 28 Ga. St. U. L. Rev. 619, 628 (2012).

The recent judicial recognition of disparate impact liability under the FHA furthers Congressional intent to address housing discrimination, as "[i]t permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment. In this way disparate-impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping." *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2522.

In an effort to aid this Court's consideration of the potentially far-reaching impact of this case, *amicus* first places occupancy standards in historical context to demonstrate that for the past 150 years they have disproportionately affected families of color. *Amicus* then explains that occupancy standards, like the one here, continue to have the same discriminatory effect. Second, amicus argues that disparate impact cases—where more subtle forms of discrimination are at play, *id.*—warrant the deterrent influence of punitive damages awards.

ARGUMENT

I. OCCUPANCY RESTRICTIONS REDUCE ACCESS TO HOUSING FOR FAMILIES OF COLOR.

A. Occupancy Restrictions Were Historically Used to Exclude Communities of Color from Housing.

Since their inception, occupancy standards—typically a limit on the number of occupants in any given unit—have had a detrimental effect on marginalized

communities. The earliest occupancy standards in the United States targeted immigrant groups, whom the white members of the community often perceived as immoral and unsanitary. In 1870, the City of San Francisco passed the first occupancy law, the Lodging House Ordinance or cubic air law, at the behest of the Anti-Coolie Association. Ellen Pader, *Housing Occupancy Standards: Inscribing Ethnicity and Family Relations on the Land*, 19 J. Architectural & Plan. Res. 300, 308 (2002) [hereinafter Pader, *Housing Occupancy Standards*]; Charles J. McClain, *In Search of Equality: The Chinese Struggle Against Discrimination in Nineteenth-Century America* 45 (1994). The law required a minimum of 500 cubic feet of air space per person in lodging houses, violation of which could result in criminal fines of up to $500 or imprisonment of up to 90 days. Elmer Clarence Sandmeyer, *The Anti-Chinese Movement in California* 51 (1973).

Proponents of the cubic air law grounded their call for legislation in explicitly racist ideas, characterizing Chinese immigrants as "moral leper[s]," and propagating a fear of the spread of contagious disease due to the crowded conditions and general undesirability that such proponents ascribed to the Chinese community. Sandmeyer, *supra*, at 51. The law was aimed less at protecting public health than at capitulating to racial animus and deterring Chinese immigrants from settling or remaining in the area. McClain, *supra*, at 45-46. Though the criminal penalties could be assessed against both landlords and tenants, the law was almost

exclusively enforced against renters in the Chinatown neighborhood of San Francisco, where residents had no other option but to share small spaces. Pader, *Housing Occupancy Standards*, *supra*, at 308; McClain, *supra*, at 65-66.

Just a few years later, in 1879, New York City enacted a similar occupancy standard, requiring at least 600 cubic feet of air space per person. Pader, *Housing Occupancy Standards*, *supra*, at 308. In contrast to the campaign in San Francisco, advocates of the law in New York highlighted public health as the rationale for passing occupancy standards in their community. The reformers advocated for "cubic air" as the appropriate measure because they believed in "miasmas," the idea that breathing in one's own exhaled air could be toxic, and that without enough air space people could drown in their own breath. *Id*.

However, racial prejudices were also at work in the background, with a desire by higher class, white Protestant reformers to cause new, largely Eastern European immigrants,[5] thought to be genetically inferior, to assimilate and lead "moral" lives by imposing a value of physical privacy upon them. *Id*. at 309. Many of the people pushing for housing reforms judged the conditions of the tenements in New York City's Lower East Side to be "emotionally, morally, and physically

[5] During this period, large numbers of immigrants resided in the tenements in New York City's Lower Eastside neighborhood. The tenements were filled primarily by Jewish, Polish, Italian, and Slavic populations that were considered to be ethnically non-white. Pader, *Housing Occupancy Standards*, *supra*, at 306.

unhealthy." *Id*. at 306. At that time, most people believed that bad housing conditions, including what they considered to be overcrowding, "directly produced illness, crime, intemperance, promiscuity, and the breakdown of the family." *Id.* "In a manner that continues today with occupancy standards, one sector of society's concept of moral living was being insinuated upon people with very different belief systems."[6] *Id*. at 309; *cf*. Dowell Myers et al., *The Changing*

[6] Even in recent history, local governments have enacted occupancy standard ordinances as a way to discourage or even make it impossible for unwanted groups to reside in those communities. *See, e.g.*, Ellen J. Pader, *Space of Hate: Ethnicity, Architecture and Housing Discrimination,* 54 Rutgers L. Rev. 881, 889 (2002) [hereinafter Pader, *Space of Hate*] (discussing *United States v. Town of Cicero*, Civil Action No. 93-cv-01805 (N.D. Ill. 1993), in which DOJ sued the town for discriminatory enforcement of a restrictive occupancy code in a Chicago suburb aimed at "achiev[ing] their objective of preventing, or discouraging, Hispanic families with children from becoming resident of the Town", and *United States v. City of Waukegan,* Civil Action No. 96-cv-04996 (N.D. Ill. 1996), where the city unsuccessfully attempted to impose occupancy restriction of nuclear family plus two relatives to discourage the settlement of new Latino residents); Charisse Jones, *Crowded Houses Gaining Attention in Suburbs*, USA Today, Jan. 30, 2006, https://usatoday30.usatoday.com/ news/nation/2006-01-30-overcrowding-suburbs_x.htm (reporting on occupancy ordinances in communities around the country targeted at Latino immigrant communities); Stephanie McCrummen, *Anti-Crowding Law Repealed Latinos Were Focus of Manassas Ban on Extended Families in Homes*, Wash. Post, Jan. 12, 2006, https://www.washingtonpost.com/archive/politics/2006/01/12/anti-crowding-law-repealed-span-classbankheadlatinos-were-focus-of-manassas-ban-on-extended-families-in-homesspan/41265b42-15eb-4001-913e-ea76f55395de/?utm_term=.d58a5ab2d6be (reporting on repeal of occupancy ordinance by Virginia city targeting Latino community that restricted extended families from living together under threat of civil rights lawsuits and federal investigation); *c.f. Ave. 6E Inv., LLC. V. City of Yuma, Ariz.,* 818 F.3d 493, 506-07, 513 (9th Cir. 2016) (reversing summary judgment for defendants of disparate impact claims where application for

Problem of Overcrowded Housing, 62 J. Am. Plan. Ass'n, 66, 67 (Winter 1996) (noting that harms to health associated with overcrowding have long been assumed, but never definitively established). Even so, it was not until 1968 that Congress took steps to comprehensively remedy the problem of segregation and discrimination in housing by enacting the Fair Housing Act.

B. The Fair Housing Amendments Act Was Enacted to Combat Discrimination Against Families and to Address the Use of No Children Policies as a Proxy for Racial Discrimination.

Twenty years after passing the Fair Housing Act, Congress enacted the Fair Housing Amendments Act of 1988 (FHAA). Pub. L. No. 100-430, 102 Stat. 1619 (1988). Among other amendments, the FHAA added disability and familial status to the list of categories protected against discrimination in housing, and removed the $1000 cap on punitive damages. Robert G. Schwemm, *Housing Discrimination Law and Litigation*, § 5.3, at 5-6 (1990). Two studies commissioned by HUD supported the decision to add familial status as a protected category. Both published in 1980, the studies documented the widespread impact of excluding families with children from private rental housing. *See generally*, Jane G. Greene & Glenda P. Blake, *A Study of How Restrictive Rental Practices Affect Families with Children* (research conducted for Off. of Pol'y Dev. and Res., HUD) (1980)

---

rezoning denied amidst evidence of City's capitulation to racial animus toward Latino residents of neighboring community).

(documenting pervasive discrimination against families with children in rental housing); Robert W. Marans et al., *A Report on Measuring Restrictive Rental Practices Affecting Families with Children: A National Survey* (prepared for Off. of Pol'y Dev. and Res., HUD) (1980) (establishing that families with children have more limited housing choices, face longer search times, and higher costs for housing).

These studies also demonstrated that families of color were more likely to be impacted by no-children policies. Greene & Blake, *supra*, at 3 ("minorities were the most heavily burdened by serious problems caused by restrictive [no-children] rental policies"); Marans et al., *supra*, at 53 (minority households more likely to be renters and therefore more likely to experience effects of no-children policies). When the FHAA was enacted, legislators recognized that familial status was sometimes used as a "smokescreen" for racial discrimination in housing. 134 Cong. Rec. H4688 (1988) (remarks of Rep. Dellums); Schwemm, *supra*, § 11.6(1), at 11-86. In enacting the FHAA, Congress understood that discrimination against families with children had a disproportionate impact on families of color and served to exacerbate racial segregation.[7] H.R. Rep. No. 711, 110th Cong., 2d Sess. 21 (1988).

[7] Prior to passage of the FHAA, two circuit courts upheld FHA claims on the basis of race, relying on evidence that no-children policies had a disparate impact on families of color. *See Betsey v. Turtle Creek Ass'n*, 736 F.2d 983, 988 (4th Cir.

Once landlords were no longer allowed to use no-children policies to exclude families, they increasingly turned to facially neutral occupancy standards. Although the FHA did not establish national occupancy standards, the law allows for "reasonable local, State or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S.C. §3607(b)(1). Though this provision only explicitly addresses legislatively created occupancy standards, it has been interpreted to allow for private occupancy restrictions. In 1991, the general counsel for HUD, Frank Keating, issued a policy statement regarding the factors HUD would consider in evaluating occupancy restrictions by private housing providers against claims of discrimination on the basis of familial status. Memorandum from HUD General Counsel Frank Keating to all Regional Counsel regarding "Fair Housing Enforcement Policy: Occupancy Cases" (Mar. 20, 1991), *reprinted in* Fair Housing Enforcement—Occupancy Standards Notice of Statement of Policy 63 Fed. Reg. 70,256 (filed Dec. 18, 1998) [hereinafter Keating Memo]. In the memo, Mr. Keating explicitly stated that he did not intend to create occupancy policies or requirements, but was providing guidance to his department

---

1984) (holding plaintiffs established prima facie case of discrimination on the basis of race where evidence that conversion to all-adult building had a greater adverse impact on tenants of color); *Halet v. Wend Investment Co*., 672 F.2d 1305, 1308-09, 1311 (9th Cir. 1982) (upholding claim for racial discrimination under FHA where evidence that adults-only rental policy had a discriminatory effect on families of color).

for the evaluation of familial status discrimination claims. *Id*. at 70,256. The Keating Memo established two persons per bedroom as a generally acceptable occupancy limit under the FHA, but indicated that was not the only factor investigators would consider. *Id.* at 70,256-57. According to the Keating Memo, it was the policy of HUD to also consider the size of the bedrooms and the unit as a whole, the age of the children, the configuration of the unit, any other physical limitations of the housing, applicable state or local law, and any other relevant factors. *Id.* at 70,257. Keating's policy statement remained the relevant guidance until HUD promulgated regulations related to disparate impact in 2013. *See* 24 C.F.R. § 100.500 (Discriminatory effect prohibited); *c.f. MHANY Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 618-19 (2d. Cir. 2016).

C. Occupancy Standards Should Be Closely Scrutinized Due to the Discriminatory Impact on Families of Color.

Studies show that occupancy standards continue to have a disproportionate discriminatory effect on families of color due to a variety of economic, demographic, and cultural factors. According to studies, the non-Hispanic white population is less likely to live in overcrowded conditions than their counterparts from communities of color. HUD, *Measuring Overcrowding in Housing* at 12 (Sept. 2007), https://www.huduser.gov/publications/pdf/measuring_overcrowding_in_hsg.pdf. Latino and Asian households, particularly those whose members are not native-born, are the most likely to live in crowded

housing, with overcrowding most prevalent among the Latino population. *Id.*, at 12, 17; Myers et al., *supra*, at 70 (recent immigrants have highest rates of overcrowding, and Latino and Asian households as a whole are most overcrowded).

The first reason for this dynamic is that compared to non-Hispanic whites, people from other ethnic or racial groups, especially Asians and Latinos, are far more likely to live with their families at the early and late stages of the life cycle, when they are young and not yet married, and when they are elderly. Iglesias, *supra*, at 649; *see* Jonathan Vespa et al., U.S. Census Bureau, *America's Families and Living Arrangements: 2012* 7-8 (August 2013), https://www.census.gov/content/dam/Census/library/publications/2013/demo/p20-570.pdf (multigenerational living arrangements more common among Asian, Black and Latino households); Gary Painter & Zhou Yu, *Immigrants and Housing Markets in Mid-Size Metropolitan Areas*, 44 Int'l Migration Rev. 442, 468 (2010) (immigrants more likely to live in multi-generational households).

Non-Hispanic whites also have fewer children per household compared with other racial groups. African-Americans tend to have slightly more children, while Asians, and Latinos have the most children per household. Iglesias, *supra*, at 649; *see* U.S. Census Bureau, *America's Families and Living Arrangements: 2017, Table AVG1. Average Number of People Per Household, By Race and Hispanic*

Origin, Marital Status, Age, And Education of Householder: 2017 (November 2017), https://www.census.gov/data/tables/2017/demo/ families/cps-2017.html; *c.f.* Painter & Yu, *supra*, at 455, 458 (immigrants more likely to have children in the home).

Finally, compared with other groups, Latinos and African-Americans have higher poverty rates, and are therefore more likely to rent housing and to live in smaller units. Iglesias, *supra*, at 649; Suzanne Maccartney et al., U.S. Census Bureau, *Poverty Rates for Selected Detailed Race and Hispanic Groups by State and Place: 2007-2011* 3 (February 2013), https://www.census.gov/prod/ 2013pubs/acsbr11-17.pdf; *Measuring Overcrowding in Housing*, *supra*, at 14 (overcrowding more common among renters). However, when occupancy standards prohibit greater numbers of people in a unit, "larger families may be priced out of the market or forced to move into run-down neighborhoods with larger, less expensive homes and often poorer quality services…this tends to segregate neighborhoods by race, ethnicity, and class and be implicated in affordability and homelessness problems." Pader, *Housing Occupancy Standards*, *supra*, at 303.

Some scholars have also argued that what is deemed "overcrowding" may for some be an expression of cultural values and preferences. "Sharing sleeping and other spaces is often part of a cultural emphasis on interdependency as a

personal and political goal, while sleeping alone, and other emphases on physically bounded private domestic space, help enculturate a greater emphasis on individualism." Pader, *Space of Hate*, *supra*, at 887; *cf.* Myers et al., *supra,* at 67 ("After a century of debate it is still in question whether so-called overcrowding is harmful to the people affected, or merely socially distasteful to outsiders who observe its presence among others."). The research supports this conclusion. Various studies have documented that, even after controlling for income and household size, some households continue to have higher levels of crowding. This suggests that some households choose to live in tighter quarters, even when they can afford more space. Myers et al., *supra*, at 72, 81 (noting that higher percentage of Asian and Latino households remain overcrowded even at incomes twice the median and endorsing the importance of acknowledging differences in cultural standards); *Measuring Overcrowding in Housing*, *supra*, at 13 (noting that for some, overcrowding appears to be a choice rather than a financial necessity).

From their inception, there has been a lack of empirical evidence to justify the imposition of what are considered "reasonable" occupancy standards. *See* Pader, *Housing Occupancy Standards*, *supra*, at 306-12; Myers et al., *supra*, at 68 (noting that "there is no basis in the scientific literature for choosing one standard of unacceptable crowding over another"). At the same time, there is a wealth of evidence demonstrating that families of color are most likely to experience the

negative effects of such restrictions, including paying a higher percentage of household income, having fewer choices in housing, having little choice in neighborhoods, and experiencing higher degrees of segregation. *See* Pader, *Housing Occupancy Standards*, *supra*, at 303; Iglesias, *supra*, at 649 (noting "strong disparate impact across racial lines" resulting from occupancy standards). As a result, while occupancy restrictions can sometimes serve to protect people from substandard living conditions, they should be closely scrutinized due to the risk that they will ultimately result in discrimination.

In those cases where a plaintiff proves that occupancy standards have caused a disparate impact, compensatory damages alone are likely insufficient to remedy the discrimination that occurred, and certainly do not deter other housing providers from enforcing occupancy standards that would continue to produce a disparate impact. *Smith v. Wade*, 461 U.S. 30, 54 (1983) ("The focus [of the common law punitive damages standard] is on the character of the tortfeasor's conduct—whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards."). The award of punitive damages, explicitly contemplated by 42 U.S.C. § 3613(c)(1), is an effective tool for judicial enforcement of some of the policy goals that catalyzed passage of the FHAA—namely, to deter housing providers from using familial status as a "smokescreen"[8]

[8] 134 Cong. Rec. H4688 (1988) (remarks of Rep. Dellums).

for racial discrimination, and to ameliorate patterns of racial segregation. *Supra* at p. 7-10.

II. AN AWARD OF PUNITIVE DAMAGES IS PARTICULARLY IMPORTANT IN DISPARATE IMPACT CASES BECAUSE IT RECOGNIZES AND DETERS SUBTLE FORMS OF DISCRIMINATION.

A. Punitive Damages Awards in Disparate Impact Cases Signal an Important Recognition that Disparate Impact Results from Discrimination and Perpetuates Inequality, Just as Disparate Treatment Does.

The discriminatory housing practices defined by the FHA contain language the Supreme Court has interpreted to permit disparate impact theories, as the statutory "text refers to the consequences of actions and not just to the mindset of actors." *Inclusive Cmtys. Project*, 135 S. Ct. at 2518, 2518-21 (disparate impact claims are allowed under the FHA and are consistent with its central purpose of eradicating discriminatory practices within the housing sector). As the Supreme Court has explicitly recognized, disparate impact liability under the FHA "permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment," preventing "segregated housing patterns that might otherwise result from covert and illicit stereotyping." *Id.* at 2522.

The FHA permits plaintiffs to recover punitive damages "if the court finds that a discriminatory housing practice has occurred or is about to occur." 42 U.S.C.

§ 3613(c)(1).[9] The award is governed by the common law punitive damages standard, and is a distinct analysis from the underlying liability theory.[10] Punitive damages may be awarded for a defendant's "reckless or callous disregard" of a plaintiff's federally protected rights. *See, e.g.*, *U.S. v. Tropic Seas*, 887 F. Supp. 1347, 1365 (D. Haw. 1995) (quoting *Smith*, 461 U.S. at 51 (in a disparate impact FHA case, stating that punitive damages may be awarded)). To be entitled to punitive damages, a plaintiff need *not* prove a defendant's "awareness that it is engaging in discrimination." *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 535, (1999).[11] Further, the conduct itself need not be outrageous to warrant punitive

[9] 42 U.S.C.§ 3602(f) defines discriminatory housing practice as "an act that is unlawful under section 3604, 3605, 3606, or 3617 of this title."

[10] Importantly, whether punitive damages are merited under either the common law punitive damages standard or the statutory punitive damages standard of 42 U.S.C. § 1981a(b)(1) is a different analysis than the underlying liability theory, which may or may not require the plaintiff to demonstrate intentional discrimination.

[11] Punitive damages are available under Title VII in cases alleging disparate treatment, as in *Kolstad*. 42 U.S.C. § 1981a(a)(1); *Kolstad*, 527 U.S. at 534. As set forth above, the FHA permits punitive damages in cases alleging disparate impact. 42 U.S.C. § 3613(c)(1). However, the statutory standard governing the award of punitive damages in Title VII is virtually identical to the federal common law standard that governs punitive damages in FHA cases. *Compare* 42 U.S.C. § 1981a(b)(1) ("A complaining party may recover punitive damages under this section against a respondent…if the complaining party demonstrates that the respondent engaged in a discriminatory practice…with malice or with reckless indifference to the federally protected rights of an aggrieved individual."), *with Smith*, 461 U.S. at 51 ("reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law, should be sufficient to trigger a jury's consideration of the appropriateness of punitive damages").

damages, nor driven by personal animosity or preference. *Fountila v. Carter*, 571 F.2d 487, 492 (9th Cir. 1978); *see also Kolstad*, 527 U.S. at 534-35 (the defendant's conduct itself need not be considered egregious).

In disparate impact cases, liability is premised on an adequate evidentiary showing that a particular facially neutral policy caused a particular discriminatory impact. *R.I. Comm'n for Human Rights v. Graul*, 120 F. Supp. 3d 110, 123-24 (D. R.I. 2015).[12] A prima facie case creates an inference of discrimination that shifts the burden of production to the defendant to show a valid interest served by its policy. *Id.* at 124. Assuming the defendant does not meet its burden,[13] the punitive damages inquiry allows the fact finder to engage with that inference of discrimination. The fact finder has the latitude to consider the defendant's role with respect to the disparate impact—though it may fall short of explicit or intentional discrimination—in recognition that disparate impacts may indeed flow from more subtle forms of bias. This is precisely the type of "discretionary moral judgment" that the punitive damages construct contemplates. *Smith*, 461 U.S. at 52; *see also*

[12] In a disparate impact case of alleged housing discrimination, a prima facie case requires "proof that a plaintiff has suffered an injury because a facially neutral policy deprives members of a protected group in disproportionate numbers of a benefit available to non-members of the group." *Id.*

[13] Alternatively, the defendant could meet its burden of production, but the plaintiff could then succeed in showing those reasons are pretextual or otherwise not legitimate. *See id.* at 131.

id. at 54-55 ("society has an interest in deterring and punishing *all* intentional or reckless invasions of the rights of others" (emphasis in original)).

B. The General Deterrent Effect of Punitive Damages in Civil Rights Litigation Discourages Behavior that Reinforces Systemic Inequality.

Punitive damages are particularly important in the context of civil rights cases alleging disparate impact, because many inequalities are perpetuated through facially neutral action, whether governmental or private. "The deterrent function of punitive damages operates both to deter the defendant from reoffending—an objective known as specific deterrence—and to deter others from committing similar tortious acts—general deterrence." Roseanna Sommers, *The Psychology of Punishment and the Puzzle of Why Tortfeasor Death Defeats Liability for Punitive Damages*, 124 Yale L.J. 1295, 1295 (2015) (internal quotations omitted); *see also* Kevin S. Marshall & Patrick Fitzgerald, *Punitive Damages and the Supreme Court's Reasonable Relationship Test: Ignoring the Economics of Deterrence*, 19 St. John's J. Legal Comment. 237, 243 (2005). Law and economics theory teaches that a rational defendant will refrain from engaging in unlawful conduct from which he or she benefits only when the expected cost of the conduct exceeds the expected benefit. A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 879-82 (1998).

Because compensatory damages awards are often quite small in fair housing cases, punitive damages are necessary to encourage rational decision-making, and

thus achieve general deterrence, for at least three reasons. First, punitive damages may be necessary to deter more subtle forms of housing discrimination because victims of housing discrimination may or may not perceive a facially-neutral occupancy standard as constituting a harm, precisely because of its apparent neutrality. *See* Keith Hylton, *Reply: Punitive Damages and the Economic Theory of Penalties*, 87 Geo. L. J. 421, 460-61 (1998). Even if a particular family perceived an occupancy standard as a harm, there is little incentive for that family to seek to vindicate their rights: the family may lack the resources necessary to bring a suit, and the probability of recovery is low, creating a lack of incentive for individuals discriminated against and for attorneys to bring these types of suits. *Id.* at 461; Johanna M. Lundgren, Note, *A Weakened Enforcement Power: The Fifth Circuit Limits Punitive Damages Under the Fair Housing Act in Louisiana Acorn Fair Housing v. LeBlanc*, 46 Loy. L. Rev. 1325, 1336 (2000)[14] ("Punitive damages serve the intent of the Fair Housing Act by providing an incentive for private

[14] The Fifth Circuit in *Louisiana Acorn Fair Housing v. LeBlanc* held that punitive damages in FHA cases were not available unless the fact finder had awarded compensatory damages as well. 211 F.3d 298, 301-03 (5th Cir. 2000). However, this Court has noted that a "finding of actual damages is not a condition to the award of punitive damages under the Civil Rights Act of 1968." *Fountila*, 571 F.2d at 492 (citing *Rogers v. Loether*, 467 F.2d 1110, 1112 n.4 (7th Cir. 1972), *aff'd sub nom. Curtis v. Loether*, 415 U.S. 189 (1974)). And the fact finder here awarded compensatory damages, rendering the compensatory-punitive damages link announced in *LeBlanc* inapplicable. Findings of Fact and Conclusions of Law at 7 (Oct. 5, 2017), ECF No. 60 (awarding to FHCW "actual damages of $27,302.").

individuals to bring suit under the Act, an incentive not provided by the possibility of compensatory damages because very few cases brought under the Act involve significant economic losses." (citation omitted)); *see* Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 Am. U. L. Rev. 1393, 1426 (1993) (punitive damages give parties *and* attorneys an incentive to bring suit).

Second, punitive damages are also necessary in disparate impact fair housing cases because compensatory damages alone do not likely fully encapsulate the larger societal harm of housing discrimination. Occupancy restrictions that result in housing discrimination do not affect just the individuals who sue—the only ones who will receive compensatory damages. *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 871 (9th Cir. 2017) (compensatory damages are "intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." (citation omitted)). Apart from harm to the plaintiffs, housing discrimination affects others similarly situated to the plaintiffs, and society as a whole, as it can lead to housing segregation, from which many further consequences flow:

> The existence of discrimination based on familial status has detrimental consequences for Rhode Island communities, including 'condemn[ing] large groups of inhabitants to dwell in segregated districts or under depressed living conditions in crowded, unsanitary, substandard, and unhealthful accommodations;' contributing to intergroup tension; compromising the public health, safety, and

> general welfare; and creating substantial burdens on the public revenues for the relief of these undesirable effects.

Graul, 120 F. Supp. 3d at 117-18 (quoting R.I.G.L. § 34-37-1(c)); *see also* Robert G. Schwemm, *Compensatory Damages in Federal Fair Housing Cases*, 16 Harv. C.R.-C.L. L. Rev. 83, 98 (1981) ("[T]he right to buy or rent a home, free from racial discrimination, carries with it the opportunity to find new employment, to enroll one's children in different schools, and many other advantages.").

Finally, punitive damages are warranted where the benefits that flow to the defendant from the unfair housing practices exceed the value of the harm when measured by compensatory damages alone. *See* Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 32 (1982) ("expected liability must be raised to a level that exceeds [a defendant's]…valuation of the cost of avoidance"); Polinsky & Shavell, *supra*, at 907-08; *see also LeBlanc*, 211 F.3d at 306 (King, J., dissenting) (disagreeing with the majority's adoption of a compensatory-punitive link in the FHA, because "the behavior exhibited by this defendant has been unlawful for thirty years and is reminiscent of the blatant violations challenged shortly after the Act became effective. And yet, he emerges from this case with no financial disincentive to continue his practices. Nor are other landlords in the community hereby discouraged from engaging in similar practices."); *see also* Lundgren, *supra*, at

1338 ("violations of housing discrimination law will likely persist as long as racist landlords find it financially viable to engage in acts of discrimination").

C. Courts Have Already Signaled Approval of Punitive Damages in FHA Cases Brought Under Disparate Impact Theories.

Courts have signaled the availability of punitive damages in FHA cases involving disparate impact claims, recognizing that discrimination frequently results from facially neutral restrictions. *Tropic Seas*, 887 F. Supp. at 1360, 1361-66 (noting that "direct proof of unlawful discrimination is rarely available," denying defendants' motion on the availability of punitive damages and remanding for a trial on punitive damages, while also granting plaintiff-intervenor's motion for summary judgment on claim that an occupancy restriction created a disparate impact based on familial status); *see also Graul*, 120 F. Supp. 3d at 131-32 (granting summary judgment on liability for disparate impact of occupancy restrictions based on familial status, and, even though the parties had not moved on damages, noting that punitive damages were available in FHA disparate impact cases).

Knowing that he was violating the FHA, the defendant here continued to discriminate against families. Findings of Fact and Conclusions of Law at 7-8 (Oct. 5, 2017), ECF No. 60. Whether the defendant's conduct was egregious is immaterial; all that is necessary for the Court to uphold the award of punitive damages is that the defendant engaged in conduct with the perceived risk that he

was violating the federally protected rights of the plaintiff. *Kolstad*, 527 U.S. at 535.[15] The very fact that the defendant admitted he was aware that he was violating the FHA establishes the requisite mental state necessary for punitive damages. The trial court in this case found that "despite knowing that the FHA prohibits discrimination against families with children he feels free to restrict occupancy because 'that's what I wish to do.'" Findings of Fact and Conclusions of Law at 4 (Oct. 5, 2017), ECF No. 60.[16]

[15] Because the common law standard governing punitive damages in FHA cases is virtually the same as the statutory standard under 42 U.S.C. § 1981a—even though the underlying liability theory might involve either intentional discrimination or disparate impact, *see supra* note 10—courts have borrowed from case law interpreting other civil rights statutes in determining whether punitive damages are appropriate in FHA cases. *See, e.g.*, *Badami v. Flood*, 214 F.3d 994, 997 (8th Cir. 2000) (remanding for trial on punitive damages in a case involving housing discrimination based on the plaintiffs' familial status and instructing that "[a]lthough *Kolstad* concerned punitive damages in a Title VII employment discrimination case, and *Wade* addressed punitive damages in a § 1983 civil rights action, we believe the same standard for punitive damages applies in the Fair Housing Act context"); *see also Alexander v. Riga*, 208 F.3d 419, 430-32 (3rd Cir. 2000) (in a FHA case involving race discrimination, remanding for a trial on punitive damages and relying on *Curtis v. Loether*, 415 U.S. 189 (Title VII) and *Basista v. Weir*, 340 F.2d 74, 87 (3rd Cir. 1965) (§ 1983) in determining the district court had erred in failing to give a jury instruction regarding punitive damages).

[16] It is worth noting that the defendant has a law degree. Findings of Fact and Conclusion of Law at 4 (Oct. 5, 2017), ECF No. 60.

CONCLUSION

Amicus respectfully urges the Court to grant the relief requested by Appellee Fair Housing Center of Washington and affirm the lower court's holding. Doing so has the potential to increase access to fair housing by recognizing the possibility of veiled forms of discrimination and providing a disincentive for violating the FHA.

Respectfully submitted,

/s/ Melissa R. Lee
Melissa R. Lee
Robert S. Chang
Jessica Levin
with the assistance of law student
Cassidy Wisley-Paul

RONALD A. PETERSON LAW CLINIC
SEATTLE UNIVERSITY SCHOOL OF LAW
1215 East Columbia St.
Seattle, WA 98122
Tel.: (206) 398-4394
Fax: (206) 398-4162
Email: leeme@seattleu.edu
Email: changro@seattleu.edu
Email: levinje@seattleu.edu

Counsel for *Amicus Curiae*
Fred T. Korematsu Center for Law and Equality

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations set forth in Rules 29(d)and 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 5801 words.

Dated: May 21, 2018

/s/ Melissa R. Lee
Melissa R. Lee
Counsel for *Amicus Curiae*
Fred T. Korematsu Center for Law and Equality

CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF System

U.S. Court of Appeals Docket Number: 17-35898

I hereby certify that on May 21, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Jessica Levin
Jessica Levin
RONALD A. PETERSON LAW CLINIC
SEATTLE UNIVERSITY SCHOOL OF LAW
1215 East Columbia Street
Seattle, Washington 98122
Telephone: (206) 398-4167
Facsimile: (206) 398-4162
Email: levinje@seattleu.edu