Immigrants' Rights and Fair Housing
How Fair Housing Laws Protect Noncitizens

David Loy
Legal Director, ACLU of San Diego & Imperial Counties
davidloy@aclusandiego.org, 619.398.4496

I. Fair Housing Law Protects All Persons

A. The Fair Housing Act protects "any person" from unlawful denial of housing based on race or national origin. 42 U.S.C. § 3604(a).

B. A law protecting "any person" protects everyone regardless of "status under the immigration laws." *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (Equal Protection Clause).

C. The Act "protects 'any person,' regardless of his immigration status," and it is no defense "to assert that those harmed by the [defendant's] actions are undocumented residents."[1] *Cent. Alabama Fair Hous. Ctr. v. Magee*, 835 F. Supp. 2d 1165, 1196 (M.D. Ala. 2011), *vacated as moot*, No. 11–16114–CC, 2013 WL 2372302 (11th Cir. May 17, 2013) (quoting *Plyler*, 457 U.S. at 210).

II. Immigration Status vs. Race or National Origin

A. A rule based on citizenship or immigration status does not discriminate because of race or national origin on its face. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973) (Title VII).

B. But such a rule may be challenged if one can show:

1. It is a "pretext to disguise what is in fact [race or] national-origin discrimination" under a disparate treatment theory. *Id.* at 92.

a. *Magee*, 835 F. Supp. 2d at 1192 (noting "court must be sensitive to the use … of illegal immigrant as a code for Latino or Hispanic, with the result that, while addressing illegal immigrants was the target, discriminating against

[1] A decision vacated as moot remains persuasive authority. *Rosenbloom v. Pyott*, 765 F.3d 1137, 1154 n.14 (9th Cir. 2014).

Latinos was the target as well"); *Espinoza v. Hillwood Square Mut. Ass'n*, 522 F. Supp. 559, 568 (E.D. Va. 1981) (plaintiff stated claim that HOA's "citizenship policy was a pretext for national-origin discrimination").

b. *Cf., e.g., Mhany Mgmt., Inc. v. County of Nassau*, 819 F.3d 581, 606 (2d Cir. 2016); *Ave. 6E Investments, LLC v. City of Yuma*, 818 F.3d 493, 504 (9th Cir. 2016) (pretext cases involving coded language).

2. It has an unjustified "effect of discriminating on the basis of [race or] national origin" under a disparate impact theory. *Espinoza*, 414 U.S. at 92.

a. The "assertion that the [defendant] was primarily discriminating against some other, non-protected group (in this case non-citizens) does not undermine [the] showing of a prima-facie case of disparate impact against Latinos." *Magee*, 835 F. Supp. 2d at 1196.

b. *Cf., e.g., Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2521-22 (2015); *Mhany*, 819 F.3d at 617-20; *Ave. 6E*, 818 F.3d at 503; *Sisemore v. Master Fin., Inc.*, 151 Cal. App. 4th 1386, 1418 (2007) (cases on disparate impact framework); 24 CFR § 100.500 (HUD disparate impact regulation).

C. "A requirement involving citizenship or immigration status will violate the Act when it has the purpose or [unjustified] effect of discriminating on the basis of national origin" or race. *HUD Office of General Counsel Guidance on Fair Housing Act Protections for Persons with Limited English Proficiency*, at 3 (Sept. 15, 2016) (brackets in original, citation and quotation marks omitted).[2]

D. HUD's guidance commands "considerable and substantial deference." *Castellano v. Access Premier Realty, Inc.*, No. 1:15-CV-0407-MCE-KJS, 2016 WL 1588430, at *5 (E.D. Cal. Apr. 20, 2016); *see also Barrientos v. 1801-1825 Morton LLC*, 583 F.3d 1197, 1214 (9th Cir. 2009).

[2] http://portal.hud.gov/hudportal/documents/huddoc?id=lepmemo091516.pdf.

E. Owner or landlord is not exposed to criminal liability for "harboring" an unauthorized immigrant merely by selling or renting a dwelling.

1. Crime of "harboring" requires the defendant to act while "knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law." 8 U.S.C. § 1324(a)(1)(A)(iii).

2. It may also require specific intent to conceal an individual from detection. *See, e.g., United States v. Belevin-Ramales*, 458 F. Supp. 2d 409, 410-11 (E.D. Ky. 2006) (noting "it is unclear whether the Ninth, Second or Fifth Circuits hold that the 'government does not have to prove that the Defendant harbored the alien with the intent to assist the alien's attempt to evade or avoid detection by law enforcement'" and holding such specific intent was required).

III. Judicial Resistance to Disparate Impact Claims

A. One circuit judge argued a disparate impact challenge to city's anti-immigrant housing ordinance because "ordinance that restricts or disadvantages aliens not lawfully present in the country has no … historic ties to the purposes of the FHA." *Keller v. City of Fremont*, 719 F.3d 931, 949 (8th Cir. 2013) (Loken, J.). Other judges on panel did not join that position. *See id.* at 953 (Colloton, J., concurring in part and concurring in judgment); *id.* at 953-60 (Bright, J., dissenting).

1. Judge Loken's position ignores history of race-based opposition to immigrants and the consequent "effect of perpetuating or reestablishing racially segregated communities or neighborhoods." *Id.* at 949 (Loken, J.).

2. Plaintiffs also failed "to identify a specific disparate impact, simply referring to the likelihood 'that enforcing the Ordinance would result in a reduction of the Hispanic population in Fremont.' And they make no attempt to identify the 'relevant population' to be compared, other than citing statistics showing that a large number of the City's foreign-born population came from Latin American countries. Is the relevant comparison the Ordinance's impact on all aliens not lawfully present, on all aliens, on all renters, or on the City's entire population?" *Id.* at 948 (Loken, J.).

B. District court rejected disparate impact challenge to rule that residents of a mobile home park must provide proof of citizenship or lawful residence. *De Reyes v. Waples Mobile Home Park Ltd. P'ship*, 205 F. Supp. 3d 782 (E.D. Va. 2016).

1. According to the court, to allow such a disparate impact claim "would essentially erase the FHA's requirement that discrimination be 'because of' race, color, religion, sex, familial status, or national origin … for the obvious reason that the vast majority of illegal aliens in the United States are persons of Latino descent; thus, any policy that targets illegal aliens in the United States will disparately impact Latinos. In other words, allowing plaintiffs in this case to satisfy the FHA's causation element simply by proving that the Policy disparately impacts Latinos would effectively eliminate the statute's 'because of' requirement, as essentially any policy aimed at illegal aliens will have a disproportionate effect on Latinos." *Id.* at 789.

2. That position proves too much, because it could apply to any practice with a large disparate impact. The practice may or may not be "necessary to achieve a valid interest," *Inclusive Communities Project*, 135 S. Ct. at 2523, but that goes to whether it is justified, not whether it is subject to disparate impact review at all.

3. It also conflicts with HUD's LEP Guidance. For example, if a landlord prohibits tenants who speak Spanish, the vast majority of people impacted would be Latino, yet HUD declined to immunize that practice from disparate impact review.