

No. 10-0245

IN THE SUPREME COURT OF TEXAS

PATRICK O. OJO, On Behalf of Himself and
All Others Similarly Situated,

Plaintiff-Appellant,

vs.

FARMERS GROUP, INC., FIRE UNDERWRITERS ASSOCIATION, FIRE
INSURANCE EXCHANGE, FARMERS UNDERWRITERS ASSOCIATION, and
FARMERS INSURANCE EXCHANGE,

Defendants-Appellees.

On Certification From
The United States Court of Appeals
For The Ninth Circuit
No. 06-55522

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

In enacting the credit scoring provisions of the Texas Insurance Code, had the Texas Legislature “intended to prohibit all disparate impact claims, it certainly could have done so.” *Smith v. City of Jackson*, 544 U.S. 228, 239 n.11 (2005). But the Texas Legislature did not limit its prohibition of credit factors to those that *constitute intentional discrimination*. Instead, it broadly prohibited any credit “factors that constitute unfair discrimination.” Texas Ins. Code §§559.052-559.053.

Farmers does not cite a single Texas case holding that the “unfair discrimination” in Tex. Ins. Code §§559.052 and 559.053, is limited to intentional discrimination. Rather, Farmers’ Brief (“Br.”) asserts that “Unfair Discrimination” is defined in Tex. Ins. Code §§544.002(a)(1) and 560.002(c)(3)(C) to prohibit practices that discriminate “because of” or “based on” a policyholder’s race, and contends that those terms require discriminatory intent. (Br. 13) But, Farmers cites no Texas decision supporting its assertion that either of these terms prohibit only intentional discrimination.

To the contrary, the federal cases Farmers cites do not restrict “because of race” or “based on race” to intentional discrimination, as Farmers contends. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Supreme Court held that the “because of race” provision in Title VII, 42 U.S.C. §2000e-2(a), broadly encompasses disparate racial impacts as well as intentional discrimination. *Griggs*, 401 U.S. at 429-36. While *Griggs* relied primarily on the purpose of Title VII to eliminate all forms of employment discrimination (*Id.* at 430), later Supreme Court cases explained that *Griggs* “represented the better reading of the statutory

text as well.” *Smith*, 544 U.S. at 235; *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990-91 (1988). Texas courts concur. *Tex. Parks & Wildlife Dep’t v. Dearing*, 240 S.W.3d 330, 339 (Tex. App. Austin 2007, pet. denied).

Indeed, only last month, the Supreme Court reaffirmed *Griggs* – in a decision overlooked by Farmers – and unanimously upheld a disparate racial impact claim under Title VII. *Lewis v. City of Chicago*, ___ U.S. ___, No. 08-974, 2010 U.S. LEXIS 4165 (U.S. May 24, 2010). Justice Scalia explained that Title VII prohibits “employment practices that cause a disparate impact *on the basis of* race.” *Id.* at *6, *21 (emphasis added).

Farmers also asserts that comparable ““because of race”” language in the Fair Housing Act (“FHA”), 42 U.S.C. §3604, was an ““obstacle”” to disparate impact liability. (Br. 20-21 nn.7-8) In fact, the Seventh Circuit case Farmers cites, like virtually all federal courts, broadly construed ““because of race”” in the FHA to encompass disparate racial impacts and held that phrase was *not* an ““obstacle”” to disparate impact liability. *Metropolitan Hous. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1288-89 (7th Cir. 1977); *accord Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996); *Dehoyos v. Allstate Corp.*, 345 F.3d 290, 297-98 n.5 (5th Cir. 2003).

None of the lower court cases Farmers cites holds that ““because of race”” in the FHA or Title VII is limited to intentional discrimination. All of those cases address different language in different statutes. None have relevance here. Farmers grasps at straws in claiming that the Supreme Court has not yet addressed whether the FHA allows disparate impact claims. (Br. 20-21 nn.7-8) In *Huntington v. Huntington Branch, NAACP*, 488 U.S.

15 (1988), defendants “conceded the applicability of the disparate impact test” under the FHA, and the Court held that “disparate-impact was shown.” *Id.* at 18. Subsequently, the Supreme Court held that the FHA should be given ““generous construction”” to ensure ““fair housing throughout the United States.”” *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995); 42 U.S.C. §3601.

This Court’s decisions interpreting Texas statutes applying federal law require that the Texas statute ““correlate”” with the federal statutes. *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 483 (Tex. 2001); *AutoZone, Inc. v. Reyes*, 272 S.W.3d 588, 592 (Tex. 2008). Accordingly, the “because of . . . race” provision in Texas Insurance Code §544.002(a)(1), should be construed to be consistent with the “because of . . . race” provision in the FHA and Title VII, as interpreted by the federal courts – and encompass disparate impacts.

This Court should also reject Farmers’ contention that the Texas Fair Housing Act (“Texas FHA”) does not apply. Farmers struggles to explain why the Texas FHA, which expressly incorporates FHA law does not point convincingly to the same construction of the credit scoring provisions. The Ninth Circuit has already held that the FHA prohibits disparate impact discrimination in the sale of dwelling insurance. *Ojo v. Farmers Group, Inc.*, No. 06-55522, 2010 U.S. App. LEXIS 7325, at *4-*7 (9th Cir. Apr. 9, 2010).

Farmers suggests that the later 2005 enactment of the credit scoring provisions in the Texas Insurance Code trumps the 1989 enactment of the Texas FHA. (Br. 32) Not so. Before Texas courts construe the credit scoring provisions to directly conflict with the FHA and the Texas FHA – and thereby permit disparate racial impact in the sale of homeowners

insurance – Farmers should be required to identify language in the credit scoring statute that clearly or explicitly shows that such conflict was intended. Use of the broad term “unfair discrimination” in Tex. Ins. Code §§559.052 and 559.053, and “unfairly discriminatory” in Tex. Ins. Code §560.002(c)(3)(C), does not come anywhere near evidencing such clear design. It certainly does not clearly or explicitly prohibit only those credit factors that *constitute intentional discrimination*, which the Legislature easily could have done.

Accordingly, since the Texas FHA is specifically designed to “provide rights and remedies substantially equivalent to those granted under federal law” with respect to discriminatory housing practices, including dwelling insurance practices (Tex. Prop. Code §301.002(3); 40 Tex. Admin. Code §819.124(b)(4)), the Texas FHA should be construed to bar disparate racial impacts. Indeed, this Court has consistently held that when the Legislature enacts a statute based on a federal statute, it is presumed to know “of the federal court’s construction” of that statute and to have “intended to adopt that construction” for the Texas statute. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000). Texas law is construed to “correlate” with and follow federal interpretation of similar language. *Toennies*, 47 S.W.3d at 483; *AutoZone*, 272 S.W.3d at 592.

In sum, the FHA and Texas FHA both prohibit disparate impact discrimination, it follows that the terms “unfair discrimination,” “because of . . . race” and “based . . . on . . . race” in Tex. Ins. Code §§544.002(a)(1), 559.052, 559.053 and 560.002(c)(3)(C), should be construed to encompass disparate impacts, as well as intent.

II. ARGUMENT

A. The Authorities Cited by Farmers Construe the Terms “Because of Race” and “Based on Race” Broadly to Encompass Disparate Racial Impacts as Well as Intentional Discrimination

Farmers’ principal contention is that the Texas Insurance Code allows insurers to use credit factors “even if doing so has racially disparate impacts.” (Br. 13) Farmers reasons that the words “because of . . . race” in Tex. Ins. Code §544.002(a)(1), or “based . . . on . . . race” in §560.002(c)(3)(C), only prohibit practices that are intentionally discriminatory, but do not prohibit disparate racial impacts. (Br. 13-17)

Farmers overlooks that the FHA provision that is the basis of appellant Ojo’s claim provides that “it shall be unlawful . . . [t]o discriminate against any person [with respect to housing] . . . because of race.” 42 U.S.C. §3604(b). Federal courts have consistently held that the FHA provision prohibits disparate impact discrimination as well as intentional discrimination. In fact, the principal cases cited by Farmers actually reject Farmers’ grudgingly narrow view of the term “because of race” that they assert would confine its meaning to intentional discrimination. (Br. 20-21 & nn.7-8)

In *Metropolitan Hous.*, for example, the court adopted the view that “because of race” in the FHA included disparate racial impacts. 588 F.2d at 1288. The Seventh Circuit followed the interpretation by the Supreme Court in *Griggs*, 401 U.S. at 429-36, construing the “because of [such individual’s] race” language in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a), governing employment discrimination, to encompass disparate racial impacts. *Metropolitan Hous.*, 588 F.2d at 1288-89, citing *Griggs*, 401 U.S. at 431. As

explained by the Seventh Circuit, a narrow reading of “because of race” might require racial animus. However, “[t]he broad view is that a party commits an act ‘because of race’ whenever the natural and foreseeable consequence of that act is to discriminate between races, regardless of his intent.” *Metropolitan Housing*, 558 F.2d at 1288.

Farmers’ reliance on *Metropolitan Hous.* is therefore surprising. Contrary to Farmers’ negative interpretation that the “because of” language was an “obstacle” to disparate impact liability, *Metropolitan Hous.* held: “The important point to be derived from *Griggs* is that the Court did not find the ‘because of race’ language to be an obstacle to its ultimate holding that intent was not required under Title VII.” *Id.*¹

This reasoning is even more apt with respect to Tex. Ins. Code §§544.002(a)(1), 559.052, and 559.053, where the “because of . . . race” text is read in context with the broad term “Unfair Discrimination.” In light of *Griggs*, and the circuit cases uniformly construing the FHA to encompass disparate impacts, including several in the Fifth Circuit, the Texas Legislature was well aware when it used the term “Unfair Discrimination” that it was prohibiting all forms of discrimination, including disparate impacts, unless it specifically

¹ Farmers notes that the Supreme Court confined 42 U.S.C. §1981 to intentional discrimination in *Gen. Bldg Contractors Ass’n, Inc. v. Penn.*, 458 U.S. 375, 389 (1982). (Br. 18) But that was because 42 U.S.C. §1981 originated in the Civil Rights Act of 1866, and the Supreme Court had to go to the legislative history to assess the meaning of the phrase: “All persons . . . shall have the same right.” *Id.* at 383. The Court’s interpretation of 42 U.S.C. §1981 has not limited the Supreme Court’s more expansive understanding of either Title VII or the FHA, to include disparate impacts, as shown by the Court’s recent decision in *Lewis*.

prohibited only intentional discrimination. *Dehoyos*, 345 F.3d at 297-98. As this Court has held, the Legislature is presumed to “adopt” the construction of the federal statute on which the state statute is modeled. *City of Garland*, 22 S.W.3d at 360; *Toennies*, 47 S.W.3d at 474.

1. Because the Texas FHA Expressly Adopted the FHA, the Texas FHA Likewise Prohibits Disparate Impact Discrimination in the Sale of Dwelling Insurance

Congress enacted the “because of race” provisions in Title VII, 42 U.S.C. §2000e-2(a)(1)-(2), in the 1964 Civil Rights Act. Only four years later, Congress enacted the FHA as part of the 1968 Civil Rights Act. The FHA incorporates the “because of race” language found in Title VII, and provides “it shall be unlawful” to “refuse to sell or rent . . . , or otherwise make unavailable or deny, a dwelling to any person because of race” or “[t]o discriminate . . . in the provision of services . . . in connection therewith, because of race.” 42 U.S.C. §§3604(a), (b).

“[W]hen Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.” *Smith*, 544 U.S. at 233. Here, both Title VII of the Civil Rights Act of 1964, prohibiting employment discrimination, and the FHA (Title VIII of the Civil Rights Act of 1968), prohibiting housing discrimination, contain the “because of . . . race” language.

Farmers asserts, however, that the Department of Housing and Urban Development (“HUD”), which administers the FHA, does not recognize disparate impact claims against insurers under the FHA. (Br. 31) Farmers fails to mention that subsequent to the 1995

decision it cites, HUD announced it would enforce the FHA against all forms of discrimination involving housing, including homeowners insurance. *See* John F. Stanton, *The Fair Housing Act and Insurance: An Update and the Question of Disability Discrimination*, 31 Hofstra L. Rev. 141, 178-84 (2002) Indeed, in this case, at the request of the Ninth Circuit, the government filed an *amicus* brief supporting appellant's position that the ban on racial discrimination in housing applies to homeowners insurance. (Ninth Cir. No. 06-55522, Docket No. 65 at 9-12) The government emphasized that this included "the application of disparate impact analysis to claims of insurance discrimination." *Id.* at 20-21.

Further, under its authority to adopt regulations to enforce the FHA, HUD adopted a regulation prohibiting any refusal "to provide . . . property or hazard insurance for dwellings or providing such . . . insurance differently *because of race*." 24 C.F.R. §100.70(d)(4). Farmers also ignores that the Ninth Circuit unanimously held *en banc*, that the FHA and its regulatory scheme, which prohibit disparate impact discrimination, apply to the sale of dwelling insurance. *Ojo*, 2010 U.S. App. LEXIS 7325, at *4-*7.

The Legislature enacted the Texas FHA in 1989 to "provide for fair housing practices in this state" and "provide rights and remedies substantially equivalent to those granted under federal law." Tex. Prop. Code §301.002(3); *Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521, 531 n.8 (5th Cir. 1996).

The Texas FHA contains a provision virtually identical to 42 U.S.C. §3604, that prohibits discrimination with respect to "the sale or rental of, or in any other manner make unavailable or deny a dwelling to another because of race" or "in providing services . . . in

connection with a sale or rental of a dwelling because of race.” Tex. Prop. Code §301.021(a), (b). Further, the Texas Workforce Commission adopted a regulation, like the FHA regulation, applying the Texas FHA ban on discrimination to the “providing” of “property or hazard insurance for dwellings” “differently based on race.” 40 Tex. Admin. Code 819.124(b)(4).

As noted above, this Court presumes that when the Legislature adopts a federal statute, it intends that the Texas statute be construed in the same way. *AutoZone*, 272 S.W.3d at 592. Accordingly, the Texas FHA, like the FHA, ought to be viewed as prohibiting disparate racial impacts in the sale of dwelling insurance.

2. Texas Insurance Code §560.002 Defines Unfair Discrimination to Include Insurance Rates that Are “Based Wholly or Partly on . . . Race,” Which Encompasses Disparate Impact Discrimination

Texas Insurance Code §§559.052-559.053, prohibits credit factors that “constitute unfair discrimination.” Those provisions do not define unfair discrimination. But in §560.002, enacted as part of the credit scoring legislation, the Texas Legislature defined an insurance rate as “unfairly discriminatory” if it “is based wholly or partly on the race . . . of the policyholder” even though “based on sound actuarial principles.” Tex. Ins. Code §560.002(c)(3)(C).

Further, as discussed above, Texas had previously enacted §544.002, entitled “Unfair Discrimination,” where the Texas Legislature defined that term, in relevant part, as follows: “A person may not refuse to insure . . . or charge an individual a rate that is different from

the rate charged to other individuals for the same coverage because of the individual's race" Tex. Ins. Code §544.002(a)(1). The Code provides no actuarial justification for race discrimination. Tex. Ins. Code §544.003(b).

There is little or no distinction between the "because of . . . race" language in Tex. Ins. Code §544.002(a)(1), and the "based . . . on . . . race" language in Tex. Ins. Code §560.002(c)(3)(C). Indeed, while the federal regulation addressing dwelling insurance incorporates the "because of race" language from the statute (24 C.F.R. §100.70(d)(4)), the Texas FHA regulation governing dwelling insurance states "[i]t is unlawful to discriminate . . . by . . . providing [property or hazard insurance for dwellings] differently *based on race*." 40 Tex. Admin. Code §819.124(b)(4) (emphasis added).

In fact, the term "based . . . on . . . race" in Tex. Ins. Code §560.002(c)(3)(C), has the same meaning as "because of race" in the FHA, and thus encompasses disparate racial impacts. The strongest evidence of that is found in the use of the term of "based on" in the amendments to the federal and Texas statutes governing employment discrimination. In the Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071, Congress codified the elements and burden of proof in disparate impact cases arising under the "because of race" provisions in 42 U.S.C. §2000e-2(a) recognized 20 years earlier. Congress added new subsection (k) to §703 of Title VII, which provides, in relevant part:

An unlawful employment practice based on disparate impact is established under this [subchapter] only if— (i) the complaining party demonstrates that a respondent *uses a particular employment practice that causes a disparate impact on the basis of race* . . . and the respondent fails to demonstrate that

the challenged practice is job related . . . and consistent with business necessity

42 U.S.C. §2000e-2(k)(1)(A)(i) (emphasis added). Thus, Congress treated “based on” as the equivalent of “because of” – both encompass disparate racial impacts.²

Following the 1991 amendment of Title VII, the Texas Legislature in 1993 enacted a “corresponding” disparate impact discrimination statute, Tex. Lab. Code §21.122, using the same “based on” language as the federal statute. *See Dearing*, 240 S.W.3d at 350. That provision is construed by Texas courts to “correlat[e] . . . state law with federal law in the area of discrimination.” *Id.* at 351. The underlying substantive provision of Texas law prohibiting all forms of discrimination by employers is likewise virtually identical to 42 U.S.C. §2000e-2(a), and proscribes various “unlawful employment” practices that “adversely affect” employees “because of race.” Tex. Lab. Code §21.051.

As noted above, the Supreme Court only last month unanimously upheld as cognizable, a disparate impact claim “on the basis of race” under Title VII, 42 U.S.C. §2000e-2. *Lewis*, 2010 U.S. LEXIS 4165, at *6, *20. The Court concluded, “Congress allowed claims to be brought against an employer who uses a practice that causes disparate impact, whatever the employer’s motive.” *Id.* at *21. Justice Scalia explained that “a

² Title VII was amended in response to a perceived narrowing of “the employer’s exposure to liability on a disparate-impact theory” in employment cases by the decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 655-56 (1989); *Dearing*, 240 S.W.3d at 342, quoting *Smith*, 544 U.S. at 240.

plaintiff establishes a prima facie disparate-impact claim by showing that the employer ‘*uses* a particular employment practice that causes a disparate impact’ on one of the prohibited bases.” *Id.* at *13 (emphasis in original). One of the prohibited bases is “‘because of such individual’s race.’” *Id.* at *12, citing 42 U.S.C. §2000e-2(a)(1)(2).

In *Lewis*, the Supreme Court also quoted Judge Posner’s apt reasoning that disparate impact liability is “‘‘‘primarily intended to lighten the plaintiff’s heavy burden of proving intentional discrimination after employers learned to cover their tracks.’’’” *Id.* at *18, quoting *Finnegan v. TransWorld Airlines, Inc.*, 967 F.2d 1161, 1164 (7th Cir. 1992). Indeed, appellant Ojo’s complaint alleges that insurers use credit factors to cover their tracks after their deliberate redlining tactics were unmasked. (ER 4-5¶¶14-20)³

No comparable change was needed in the FHA or Texas FHA, as Farmers demands (Br. 31), because the Supreme Court had never limited or questioned the fact that the FHA prohibited disparate impact discrimination. Like the interpretation of the “because of” language in Title VII by *Griggs*, 401 U.S. at 429-36, federal courts have consistently construed the FHA “because of” provision in 42 U.S.C. §3604(a) and (b) to encompass disparate impacts. *Simms*, 83 F.3d at 1555; *accord Dehoyos*, 345 F.3d at 297-98.

³ All references to “ER” or “SER” refer to the Appellant’s Excerpts of Record and Appellees’ Supplemental Excerpts of Record, respectively, filed in the 2006 appeal before the Ninth Circuit, Case No. 06-55522.

The additional modifying language in §560.002 confirms that disparate impacts are prohibited in the Texas credit scoring provision by providing that an insurance rate is “unfairly discriminatory if the rate . . . is based wholly or partly on the race . . . of the policyholder or an insured.” Tex. Ins. Code §560.002(c)(3)(C). Such language strongly suggests that when a higher insurance rate “is based wholly” on race it refers to the motive or intent for the insurer’s action, but when the higher rate is based “partly on race,” the focus is the adverse effect and its cause.

In sum, both the *because of race* and *based on race* language in the Texas Insurance Code should be construed consistent with federal law to encompass disparate impacts, as well as intentional discrimination.

B. The Texas Insurance Commissioner’s Letter Contains an Incorrect and Unreasonable Understanding of Texas Insurance Laws Defining Unfair Discrimination

Finding no support in either the statutory language or case law, Farmers falls back repeatedly on the Texas Insurance Commissioner’s January 21, 2005 letter. (Br. 11, 22, 23, 26) But that letter is entitled to no deference because the Commissioner’s view of the Texas Insurance Code is demonstrably incorrect. The letter in pertinent part, states:

To approach the development of a credit scoring policy, it is important to understand the distinction between unfair discrimination, intentional discrimination and disproportionate impact. *The Texas Insurance Code defines unfair discrimination to be the unequal treatment of individuals in the same class or hazard.* Underwriting or rating classifications are not unfair, though, if they are actuarially supported. On the other hand, *overt* classifications or *discriminations based on race*, color, religion or national origins *are intentional discrimination* and are prohibited by law, regardless of actuarial support.

(SER 152-53) From this premise, the Insurance Commissioner expressed the belief that he had legal authority to prohibit a credit practice that is “either unfair or intentionally discriminatory” but not one “that has a disproportionate impact if it produces an actuarially supported result.” (SER 153)

Respectfully, the Commissioner mistakenly overlooks that there are two provisions in the Texas Insurance Code entitled “Unfair Discrimination.” The provision referenced by the Commissioner as defining “Unfair Discrimination” prohibits insurers from treating “individuals of the same class and of essentially the same hazard” differently in policy premiums, rates or benefits. Tex. Ins. Code §544.052.

But the race discrimination provision the Commissioner references nowhere contains the words *overt* or *intentional discrimination*, as he claims. Rather, the statute defines “Unfair Discrimination” with respect to protected classes and states that: “A person may not . . . charge an individual a rate that is different from the rate charged to other individuals for the same coverage because of the individual’s: (1) race, color, religion or national origin.” Tex. Ins. Code §544.002(a)(1).⁴

⁴ As noted in the opening brief (AOB 28), because the letter was not a regulation or formal policy, and was issued one year after plaintiff’s injury, the federal district court refused to consider it: “[T]he Court declines to consider the documents as evidence.” (ER 116:23 n.26) The Ninth Circuit panel majority also refused to consider it. *Ojo v. Farmers Group, Inc.*, 565 F.3d 1175, 1185 n.13 (9th Cir. 2009).

“The meaning of a term in different sections of a statute must be considered in the different contexts in which the word is found in the separate sections.” *Cortez v. Progressive Mut. Ins. Co.*, 61 S.W.3d 68, 72-73 (Tex. App. – Austin 2001, vacated pursuant to settlement) (distinguishing the predecessor provisions of Tex. Ins. Code §§544.002 and 544.052). In *Cortez*, the court held that “unfair discrimination” between “insureds of the same risk class” in art. 21.21-8 (now Tex. Ins. Code §544.052), is distinct from “unfair discrimination” with respect to specific protected classes such as “race,” which is separately addressed in article 21.21-6 (now Tex. Ins. Code §544.002). *Cortez*, 61 S.W.3d at 74. The Court of Appeals in *Cortez* in 2001 relied in part on the Insurance Commissioner’s understanding of the distinction. *Id.* But by the Commissioner’s 2005 letter, he lost sight of the fact that Tex. Ins. Code §544.002 prohibited “unfair discrimination” not *overt discrimination* as his letter incorrectly states.

In sum, the Commissioner’s mistaken views are not entitled to deference because the agency’s construction of a statute will be upheld only “so long as the construction is reasonable and does not contradict the plain language of the statute.” *Mid-Century Ins. Co. v. Ademaj*, 243 S.W.3d 618, 623 (Tex. 2007).

C. Neither the Legislative History Nor the Insurance Commissioner’s Regulation Limit the Prohibited Credit Scoring Factors to Those that Constitute Intentional Discrimination

Farmers also contends that the legislative history shows that the Texas Legislature intended to preclude disparate impacts liability with respect to credit scoring. But the legislative history quoted by Farmers (Br. 10, 19) does not support Farmers’ assertion that

the new provisions permitting credit scoring were enacted over opposition of legislators who raised the risks of disparate impact. (Br. 19)

The cited history reveals that the opponents were broadly concerned that “[c]redit scoring is discriminatory, especially against women, [and] minorities” and that “credit scoring has a significant impact on the rates charged individual policyholders” (Br. 19; ER 127), but those objections encompass all forms of race discrimination, not just disparate impacts. *Id.* There is no need to resort to the opponents’ view of legislation when the intended scope can be gleaned from the plain meaning of the statutory language itself. *Fleming Foods v. Rylander*, 6 S.W.3d 278, 285 (Tex. 1999). The statutes – Tex. Ins. Code §§544.002, 559.052 and 560.002 – all say “unfair” – not “intentional.” The Texas Legislature’s language was not accidental.

Farmers also contends that “actuarially sound insurance rates, by definition, are not ‘unfairly discriminatory.’” (Br. 27) The Texas regulation that Farmers cites does not authorize higher rates based on race. It provides: “The differences in rates charged due *solely* to credit scoring shall be based on sound actuarial principles” 28 Tex. Admin. Code §5.9941(a). Contrary to Farmers’ view, a rate can be actuarially sound and still be unfairly discriminatory “because of” or “based on” race. Tex. Ins. Code §§544.002(a)(1), 560.002(c)(3)(C). By omitting §544.002(a)(1), Texas Insurance Code §544.003(b) specifically provides there is no actuarial defense to unfair race discrimination.

In the next breath, however, Farmers concedes that “actuarial soundness is just one element of the ‘unfairly discriminatory’ test.” (Br. 27) Farmers is forced to that concession

precisely because Tex. Ins. Code §560.002(c)(3)(C) provides that actuarially sound rates can be unfairly discriminatory when “based wholly or partly on the race.”

The point of the regulation is that “actuarial soundness” is a necessary, but not alone sufficient, component of in rates based on credit scoring. (Br. 27) The regulation does not excuse unfair discrimination because of race – either intentional discrimination or disparate impact discrimination. To read it otherwise conflicts directly with Tex. Ins. Code §560.002(c)(3). Actuarial soundness may be part of the defense of business necessity, but appellant can still prevail by proving there are less discriminatory alternative credit factors available that work as well, yet the insurer refuses to adopt them. *Watson*, 487 U.S. at 997-98; *see* Tex. Lab. Code §21.122(a)(2); 42 U.S.C. §2000e-2(k)(1)(A)(ii).

D. Permitting a Disparate Impact Claim Compliments and Does Not Interfere with the Texas Department of Insurance’s Role in Regulating Insurance Rates

Farmers contends that allowing disparate impact race discrimination claims would somehow interfere with Texas regulation of insurance rates. (Br. 24) This is simply a back-door effort to inject the McCarran-Ferguson Act (15 U.S.C. §1012) issue pending before the Ninth Circuit into the Texas law issue certified to this Court.

Since Texas law prohibits unfair discrimination because of race in insurance rates, appellant’s pursuit of his FHA claim compliments rather than conflicts with state law. Indeed, the Texas FHA contemplates private suits for disparate impact discrimination as a supplement to agency enforcement. Tex. Prop. Code §301.151. Similarly, an FHA suit

offers a remedy enforceable in federal court that is ““supplementary to any remedy any State might have.”” *Owens v. Okure*, 488 U.S. 235, 248 (1989).

As a supplementary remedy, appellant’s FHA claim is not preempted by the McCarran-Ferguson Act since it does not interfere, frustrate or conflict with state law. *Humana Inc. v. Forsyth*, 525 U.S. 299, 311-14 (1999). Duplication is not conflict. The Supreme Court held that federal law does not interfere with state regulation when the conduct barred by federal law is also prohibited by state law, even when the federal law provides different and stronger remedies. *Humana*, 525 U.S. at 305, 311-14. The Fifth Circuit has expressly held that an FHA disparate impact claim is not reverse-preempted by Texas insurance law. *Dehoyos*, 345 F.3d at 295 & n.4.

Contrary to Farmers’ contentions, a disparate impact claim does not insert courts into matters where they have no business. In a disparate impact case such as this one, where appellant challenges Farmers’ use of credit scores, the insurer will have a full opportunity to defend the business justifications for its policies. *See Affordable Hous. Dev. Corp. v. City of Fresno*, 433 F.3d 1182, 1194 (9th Cir. 2006) (“[A] defendant may rebut a plaintiff’s showing of disparate impact by ‘supplying a legally sufficient, nondiscriminatory reason’”). “In engaging in the unremarkable task of determining whether specific conduct falls within the ambit of federal civil rights law, a court would no more become a ‘super actuary’ than the court becomes a ‘super entrepreneur’ each time the court must determine whether a discriminatory practice constitutes a business necessity.” *Dehoyos*, 345 F.3d at 298 n.5.

“We do not believe that disparate impact theory need have any chilling effect on *legitimate* business practices.” *Watson*, 487 U.S. at 993.

In light of these authorities, Farmers’ reliance on *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 564 (7th Cir. 1999) is misplaced. *Doe* precludes a federal court from delving into actuarial issues regarding the *terms* of disability insurance policies. *Doe* acknowledges, however, that federal courts are not precluded from addressing claims of racial discrimination by insurers in denying *access* to insurance either by “refusing to sell” or by charging “a higher price.” *Doe*, 179 F.3d at 562-63.

III. CONCLUSION

For the foregoing reasons, this Court should hold that the term “unfair discrimination” in Texas Insurance Code §§559.052 and 559.053 encompasses disparate impact discrimination and is not limited to intentional discrimination.

DATED: June 21, 2010

Respectfully submitted,

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DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the City and County of San Francisco, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 100 Pine Street, Suite 2600, San Francisco, California 94111.

2. That on June 21, 2010, declarant served the **APPELLANT'S REPLY BRIEF** by depositing a true copy thereof in a United States mailbox at San Francisco, California in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 21, 2010, at San Francisco, California.

s/Tamara J. Love

TAMARA J. LOVE

FARMERS REDLINING (APPEAL)

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