No. 15-55576

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOMINIC HARDIE,

Plaintiff-Appellant,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of California (San Diego)
Honorable Gonzalo P. Curiel, District Judge

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, THE CENTER FOR EQUAL OPPORTUNITY, AND COMPETITIVE ENTERPRISE INSTITUTE IN SUPPORT OF APPELLEE NCAA AND AFFIRMANCE

JOSHUA P. THOMPSON,
WENCONG FA,
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amici Curiae Pacific Legal Foundation, The Center For Equal Opportunity, and Competitive Enterprise Institute

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae Pacific Legal Foundation, a nonprofit corporation organized under the laws of California, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

The Center for Equal Opportunity is a nonprofit corporation organized under the laws of Virginia. CEO has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

Competitive Enterprise Institute is a nonprofit corporation organized under the laws of the District of Columbia. CEI has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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INTEREST OF *AMICI CURIAE* [1]

Pacific Legal Foundation (PLF), Center for Equal Opportunity (CEO), and Competitive Enterprise Institute (CEI) respectfully submit this brief amici curiae in support of Appellee National Collegiate Athletic Association (NCAA).

PLF is a nonprofit, tax-exempt corporation organized under the laws of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has participated as amicus curiae in numerous cases involving disparate impact liability. *See Tex. Dep't of Hous. & Cmty Affairs v. Inclusive Cmtys. Project*, 135 S. Ct. 2507 (2015); *Twp. of Mt. Holly, N.J. v. Mt. Holly Gardens Citizens in Action, Inc.*, 134 S. Ct. 636 (2013), *cert. dismissed*; *Magner v. Gallagher*, 132 S. Ct. 1306 (2012), *cert. dismissed*; *Ricci v. DeStefano*, 557 U.S. 557 (2009); *Alexander v. Sandoval*, 532 U.S. 275 (2001). PLF has also participated as amicus curiae in virtually every major Supreme Court case on racial discrimination in the past forty years. *See Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Johnson v. California*, 543 U.S. 499 (2005); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City*

[1] In accordance with Fed. R. App. P. 29, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no person other than the Amici, their members, or their counsel have made a monetary contribution to this brief's preparation or submission. All parties, through their attorneys, have consented to the filing of this brief.

of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

Center for Equal Opportunity (CEO) is a nonprofit research, education, and public advocacy organization. CEO devotes significant time and resources to studying racial, ethnic, and gender discrimination by the federal government, the states, and private entities, and educating Americans about the prevalence of such discrimination. CEO advocates for the cessation of racial, ethnic, and gender discrimination. CEO has participated as amicus curiae in numerous cases relevant to the analysis of this case. *See Inclusive Cmtys. Project*, 135 S. Ct. 2507; *Schuette v. BAMN*, 134 S. Ct. 1623 (2014); *Fisher*, 133 S. Ct. 2411; *Twp. of Mt. Holly*, 134 S. Ct. 636; *Magner*, 132 S. Ct. 1306.

Competitive Enterprise Institute (CEI) is a nonprofit public interest organization dedicated to individual liberty, free enterprise, limited government, and the rule of law. To that end, CEI has participated as amicus curiae in many relevant cases. *See Inclusive Cmtys. Project*, 135 S. Ct. 2507; *Twp. of Mt. Holly*, 134 S. Ct. 636; *Magner*, 132 S. Ct. 1306; *Parents Involved*, 551 U.S. 701.

Amici submit this brief because we believe our public policy perspective and litigation experience in the area of equal protection and disparate impact liability will provide an additional viewpoint with respect to the issues presented, which will be helpful to this Court.

INTRODUCTION

Plaintiff Dominic Hardie is a high school basketball coach who is prohibited from coaching in National Collegiate Athletic Association (NCAA)-sponsored tournaments because he has been convicted of a felony. He argues that this rule violates Title II of the Civil Rights Act of 1964 (Title II), which prohibits racial discrimination in places of public accommodation. *See* 42 U.S.C. § 2000a(a). Hardie does not claim that the NCAA rule prohibiting convicted felons from coaching in NCAA-sponsored high school tournaments intentionally discriminates against him on the basis of race. *See Hardie v. National Collegiate Athletic Ass'n*, 97 F. Supp. 3d 1163, 1165 (S.D. Cal. 2015) ("Plaintiff states that he is 'no longer pursuing his intentional discrimination claim under Title II.'"). Rather, he argues that the NCAA rule prohibiting convicted felons from coaching in NCAA-sponsored basketball tournaments violates Title II because it causes a disparate impact on his racial group. *See id*. at 1164. Whereas laws prohibiting disparate treatment require proof "that the defendant had a discriminatory intent or motive," laws prohibiting disparate impact ban "facially neutral . . . practices that have significant adverse effects on protected

groups . . . without proof that . . . those practices" were "adopted with a discriminatory intent." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986-87 (1988). Disparate impact statutes prohibit "practices, procedures, or tests neutral on their face, and even neutral in terms of intent" because of "the consequences of [such] practices," and regardless of the motivation behind them. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-32 (1971). Indeed, the absence of intentional discrimination based on a protected trait "is the very premise for disparate-impact liability in the first place, not . . . a defense to it." *Meacham v. Knolls Atomic Power Lab*., 554 U.S. 84, 96 (2008). The question presented in this case is whether Title II's prohibition on racial "discrimination or segregation" prohibits facially race-neutral practices with an adverse effect on racial groups. It does not.

As explained by the district court, straightforward statutory interpretation reveals that Title II does not authorize a cause of action for disparate impact. *Hardie*, 97 F. Supp. 3d at 1166-69. The language of Title II is identical, in all relevant respects, to that of Title VI, which the Supreme Court held does not permit a cause of action for disparate impact. *See Sandoval*, 532 U.S. at 280. Moreover, because of the constitutional problems associated with disparate impact liability, this Court should require Congress to speak clearly before interpreting a federal statute to push the outer limits of legislative authority. *See, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 299 (2001). The Court should apply the "clear statement rule" to hold that Plaintiff failed to provide

the "unmistakable clarity" in the statutory text required before concluding that Congress intended to wade into a constitutionally sensitive domain. *Dellmuth v. Muth*, 491 U.S. 223, 230-31 (1989).

Disparate impact liability invites what the Constitution forbids: differential treatment on the basis of race. Courts have interpreted antidiscrimination statutes either to prevent white plaintiffs from bringing suit or to impose additional requirements for white plaintiffs because of their race. *See, e.g.*, *Connecticut v. Teal*, 457 U.S. 440, 448 (1982) (suggesting that Title VII's disparate impact prohibition protects only minorities). Moreover, disparate impact provisions clash with the constitutional imperative that the law treat citizens as individuals because they require third parties to classify individuals as members of their racial groups. *See* 29 C.F.R. § 1602(b).

Disparate impact provisions are just as troubling in practice. First, disparate impact lawsuits result in racial quotas, which are usually verboten absent a specific finding of prior *de jure* discrimination. *See Croson*, 488 U.S. at 492. Second, disparate impact liability encourages race-conscious behavior, which burdens everyone, including minorities. *See Frank v. Xerox Corp.*, 347 F.3d 130, 133 (5th Cir. 2003). The equal protection concerns associated with disparate impact liability mean that a court should not impose such liability without a clear statement of congressional intent to do so. *See, e.g.*, *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 262 (1991)

(Marshall, J., dissenting) (applying clear statement rule when a construction of the statute collides with "important values").

ARGUMENT

I

TITLE II LACKS A CLEAR CONGRESSIONAL STATEMENT AUTHORIZING DISPARATE IMPACT CLAIMS

The primary dispute in this case revolves around a question of statutory interpretation: whether Title II encompasses a cause of action for disparate impact. This Court should employ a "clear statement rule" because it is faced with a question of statutory construction that "invokes the outer limits of Congress' power." *St. Cyr*, 533 U.S. at 299. The rule improves judicial decisionmaking by ensuring "that the legislature . . . intended to bring into issue, the critical matters involved in the judicial decision." *United States v. Bass*, 404 U.S. 336, 349 (1971). It also saves courts from "needlessly reach[ing] constitutional issues." *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001). In the end, courts enhance both legislative and judicial decisionmaking by requiring unequivocal evidence of congressional intent, as expressed in the statutory text, before concluding that Congress has "presse[d] the envelope of constitutional validity." *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality opinion).

The clear statement rule reflects a presumption that " 'Congress does not exercise lightly' the 'extraordinary power' to legislate." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2256 (2013) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)). As its name indicates, the rule requires "the clearest statement of congressional intent," *St. Cyr*, 533 U.S. at 312 n.35, so that it can "be said with perfect confidence that Congress in fact intended" to wade into areas of "special constitutional concern[]." *Dellmuth*, 491 U.S. at 231. "[I]mperfect confidence will not suffice." *Id*.

The equal protection concerns associated with disparate impact liability makes the clear statement rule particularly appropriate here. Disparate impact liability undoubtedly reaches an area of important constitutional values given the threat it poses to individual liberty. *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 Harv. L. Rev. 493, 552-65 (2003) (discussing the tension between disparate impact laws and individualized treatment). Because of this tension, this Court should not interpret the statute to encompass disparate impact liability, without evidence of congressional intent that is "both unequivocal and textual." *Dellmuth*, 491 U.S. at 230.

The clear statement rule is also appropriate because disparate impact liability in federal antidiscrimination statutes threatens to " 'alter sensitive federal-state relationships.' " *Bass*, 404 U.S. at 349 (quoting *Rewis v. United States*, 401 U.S. 808,

812 (1971)). "The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers," not for its own sake, but "to ensure the protection of our 'fundamental liberties,'" including the individual right to equal protection of the laws. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (citations and quotations omitted). A healthy balance of power between the States and the Federal government reduces "the risk of tyranny and abuse from either front." *Gregory*, 501 U.S. at 458. For those reasons, federal statutes impinging upon important state interests "cannot . . . be construed without regard to the implications of our dual system of government." *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994).

Although the defendant in this case is a non-profit association, antidiscrimination statutes often impede the ability of state and local governments to carry out their own affairs. *See, e.g.*, *Inclusive Cmtys. Project*, 135 S. Ct. 2507 (state agency); *Magner*, 132 S. Ct. 1306 (municipal government). Entrepreneurial plaintiffs have used Title II to sue municipal governments over traditional uses of police power, such as the management of the local cemeteries. *See Tippins v. City of Dadeville, Ala.*, 23 F. Supp. 3d 1393, 1393-94 (M.D. Ala. 2014). Therefore, disparate impact liability in Title II would "radically readjust[] the balance of state and national authority," and Congress should be "reasonably explicit" that it intended this result. *BFP*, 511 U.S. at 544 (citations omitted).

Here, the clear statement rule is fatal to appellant's argument. There is no language, much less "unmistakably clear" language that would support disparate impact liability in Title II. *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 209 (1991). The statutory text lacks the terms "effect" or "affect," which serve as the most straightforward textual basis for disparate impact liability in other statutes. *See, e.g.*, *Smith v. City of Jackson*, 544 U.S. 228, 236 (2005) (ADEA); *Watson*, 487 U.S. at 991 (Title VII). In addition, Title II contains much of the same language as Title VI, which the Supreme Court interpreted to foreclose a cause of action for disparate impact liability. *See Sandoval*, 532 U.S. at 280-81. The only significant difference between Title II and Title VI is that the former includes the word "segregation,"[2] a word that connotes intentional discrimination. *See Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 205-06 (1973) (defining *de jure* segregation as "a current condition of segregation resulting from intentional state action"); *see also* 42 U.S.C. § 2000c(b) (specifying that "desegregation" mandate does not require "public schools to overcome racial imbalance").

[2] *Compare* 42 U.S.C. § 2000a(a) (prohibiting "discrimination or segregation on the ground of race, color religion or national origin" in places of public accommodation), *with* 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

Even if the word "segregation" could support an inference that Congress sought to authorize disparate impact claims, it would "remain just that: a permissible inference." *Dellmuth*, 491 U.S. at 232. That single word does not come close to "the clearest statement of congressional intent" necessary to establish disparate impact liability under the clear statement rule. *St. Cyr*, 533 U.S. at 312 n.35. Since "it cannot be said with perfect confidence" that Congress intended to authorize disparate impact liability under Title II, this Court should avoid reading the statute in a way that forces a confrontation between Title II and the Equal Protection Clause. *Dellmuth*, 491 U.S. at 231.

II

THE TENSION BETWEEN DISPARATE IMPACT AND THE EQUAL PROTECTION CLAUSE WARRANTS THE CLEAR STATEMENT RULE

This Court should require a clear congressional statement before wading into the deep conceptual tensions between disparate impact liability and the Equal Protection Clause. *See generally* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 Harv. L. Rev. 493 (2003) (discussing these conceptual tensions). There are two primary conflicts between statutory imposition of disparate impact liability and the constitutional mandate of equal protection. First, although the Equal Protection Clause forbids unequal treatment based on race, disparate impact statutes often require it. *See* John J. Donohue, *Understanding the Reasons For and*

Impact of Legislatively Mandated Benefits for Selected Workers, 53 Stan. L. Rev. 897, 898 (2001) (observing that the disparate impact cause of action may not be available to white males). Second, disparate impact liability—with its focus on aggregate effects on racial groups—conflicts with the constitutional requirement that the law treat "citizens as individuals, not as simply components of a racial . . . class." *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (citations and quotations omitted).

A. Statutory Liability for Disparate Impact Clashes with the Constitutional Imperative of Racial Neutrality in Governmental Decisionmaking

"[A]ny official action that treats a person differently on account of his race or ethnic origin is inherently suspect" under the Equal Protection Clause. *Fisher*, 133 S. Ct. at 2419 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 523 (1980) (Stewart, J., dissenting)). Congress may extend the prohibition on disparate treatment beyond the "state action" to which the Fourteenth Amendment applies. *Adarand*, 515 U.S. at 234 (citation and quotations omitted). It did just that by enacting Title II, which states that "[a]ll persons shall be entitled to the full and equal enjoyment of goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin." 42 U.S.C. § 2000a(a).

Other antidiscrimination statutes similarly prohibit disparate treatment. Title VII of the Civil Rights Act of 1964, for example, makes it unlawful for an employer

"to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). And Title VI of the Civil Rights Act extends this ban to recipients of federal funds. 42 U.S.C. § 2000d. These laws typify "the most easily understood" antidiscrimination rule by making it illegal to treat a "particular person less favorably than others because of a protected trait" such as race. *Ricci*, 557 U.S. at 577 (citations and quotations omitted).

Disparate impact liability, however, invites disparate treatment. The Supreme Court has never held that white plaintiffs can bring disparate impact claims, and if anything, has suggested that they cannot. *See Teal*, 457 U.S. at 448. ("When an employer uses a non job-related barrier in order to deny a *minority* or woman applicant employment or promotion, and that barrier has a significant adverse effect on *minorities* or women, then the applicant has been deprived of an employment *opportunity* because of . . . race, color, religion, sex, or national origin.") (emphasis added) (internal quotation marks omitted); *see also* Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 Nw. U. L. Rev. 1505, 1524-34 (2004). Under this asymmetrical approach, "a neutral employment practice that disadvantages [whites] is permissible, while the same practice would be unlawful if it were to disadvantage [minorities]." Donohue, *supra* at 898. That is

hardly compatible with the Equal Protection Clause's "central mandate" of "racial neutrality in governmental decisionmaking." *Miller*, 515 U.S. at 904. The Supreme Court has long rejected the notion that the presumption against racial classifications depends on "the race of those burdened or benefitted by a particular classification." *Croson*, 488 U.S. at 472. Rather, it is perfectly clear that an individual is deprived of her right to equal protection "when she is disadvantaged by the government because of . . . her race, whatever that race may be." *Adarand*, 515 U.S. at 230.

Worse, several circuit courts have held that white plaintiffs must meet a higher burden of proof in bringing discrimination claims under federal antidiscrimination law. *See, e.g.*, *Taken v. Okla. Corp. Comm'n*, 125 F.3d 1366, 1369 (10th Cir. 1997) (white employees, as "members of a historically favored group," are not entitled to presumption that "discrimination is . . . the reason for the challenged [employment] decision"). According to the D.C. Circuit, for example, an inference of discrimination arises in promotion cases when the plaintiff is a member of a minority group. *Harding v. Gray*, 9 F.3d 150, 153 (D.C. Cir. 1993). But "[n]o such inference arises when . . . the plaintiff is a white man." *Id*. The Seventh Circuit has similarly imposed additional requirements on white plaintiffs in lawsuits involving federal antidiscrimination statutes. *Phelan v. City of Chi.*, 347 F.3d 679, 684 (7th Cir. 2003). Unlike minority plaintiffs, white plaintiffs must "show background circumstances that demonstrate that a particular employer has reason or inclination to discriminate

invidiously against whites or evidence that there is something 'fishy' about the facts at hand." *Id*. (citations and quotations omitted). Accordingly, disparate impact statutes either exclude whites altogether from their statutory protection or handicap them in bringing statutory discrimination claims. Either way, these statutes raise severe constitutional problems because they treat individuals differently on the basis of race.

B. Statutory Liability for Disparate Impact Clashes with the Constitutional Requirement That the Law Treat Citizens as Individuals Rather than as Components of Their Racial Group

Disparate impact liability also clashes with the constitutional requirement that the law treat "citizens as individuals, not as simply components of a racial . . . class." *Miller*, 515 U.S. at 911 (citations and quotations omitted). Liability based on disparate impact is triggered by "practices that are facially neutral in their treatment of different groups" just because they "fall more harshly on one group than another." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). The contrast with disparate treatment liability is stark. "An individual may allege that he has been subject to 'disparate treatment' because of *his* race, or that he has been a victim of a facially neutral practice having a disparate impact on his *racial group*." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 582 (1978) (Marshall, J., concurring in part and dissenting in part) (emphasis added).

Regulations implementing disparate impact provisions require third parties to classify individuals in broad racial categories of "African-American," "Hispanic," or

"Asian." *See, e.g.*, 29 C.F.R. § 1602(b) (requiring entities subject to Title VII to record the race of every applicant to their apprenticeship program). But "if the Federal Government is prohibited from discriminating on the basis of race, then surely it is also prohibited from enacting laws mandating that third parties . . . discriminate on the basis of race." *Ricci*, 557 U.S. at 594 (Scalia, J., concurring) (citations and quotations omitted). In *Buchanan v. Warley*, 245 U.S. 60, 82 (1917), for example, the Supreme Court invalidated a municipal ordinance that required *private* individuals to discriminate in property sales. The same rule should apply when Congress, through statutory commands, forces third parties to violate the Constitution's equal protection guarantee in other ways. *See Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 356 (D.C. Cir. 1998) (invalidating federal regulation that forced private businesses to recruit more minorities). Yet that is exactly what disparate impact laws require.

Disparate impact regulations define individuals within racial groups as the embodiment of their group identities, even though there is nothing intrinsic in those definitions that assures a commonality of experience. *See generally* Peter Wood, *Diversity: The Invention of a Concept* (2003). The term "Hispanic," for instance, does not describe a common social background, designate a common language, or even describe a common physical appearance. *See id.* at 25. The term "Asian" ensnares a wide variety of individuals, including the Japanese, Vietnamese, Indian, Chinese, and so forth. Disparate impact liability is therefore problematic because it

"embod[ies] stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." *Miller*, 515 U.S. at 912 (citation omitted).

Once the government "allocate[s] political rights by group identity, the assignment of group identity becomes the crucial determinant of everything else for the individual." Wood, *supra* at 43. Such a result cannot be countenanced under the Constitution. Racial preferences stigmatize recipient groups by implying that they are inferior and need special protection, thus generating a "politics of racial hostility." *Id*. at 173-74. "'Because that perception . . . can only exacerbate rather than reduce racial prejudice, it will delay the time when race will become [ ] truly irrelevant.'" *Adarand*, 515 U.S. at 229 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 525 (1980) (Stevens, J., dissenting)). All told, disparate impact statutes are in discord with constitutional guarantees of equal treatment and individualism.

III

THE PRACTICAL EQUAL PROTECTION PROBLEMS WITH DISPARATE IMPACT WARRANT THE CLEAR STATEMENT RULE

Beyond these conceptual problems, disparate impact statutes also raise serious equal protection concerns in practice. The Supreme Court has long understood "that the inevitable focus on statistics in disparate-impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures." *Watson*, 487 U.S. at 992. Although racial quotas are forbidden absent a specific finding of past *de jure* discrimination, *see Croson*, 488 U.S. at 492, they are the only way for an entity to erase all prospect of a disparate impact lawsuit under federal law. And if quotas and preferential treatment "become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted." *Watson*, 487 U.S. at 993. Anyone subject to disparate impact liability will be "careful to ensure that the quotas are met." *Id*.

Lawsuits claiming illegal disparate impact under Title VII forecast the litigation that will materialize if this Court creates a cause of action for disparate impact liability under Title II. Racial quotas have long been imposed in Title VII litigation through court mandates and consent decrees. In *Lewis v. City of Chi.*, No. 98-cv-5596, 2014 WL 562527 (N.D. Il. Feb. 13, 2014), for example, a federal district court ruled in favor of firefighter applicants, who alleged that the City's written examination

resulted in a disparate impact on black applicants. The court ordered the City to remedy the violation by hiring 132 black applicants "chosen by lot" from the plaintiff class of the approximately 6,000 black applicants who sat for the examination at issue. *Id*. at *1.

Consent decrees in disparate impact cases also produce racial quotas. The consent decree in *United States v. New Jersey*, No. 10-cv-91, 2012 WL 3265905 (D.N.J. June 12, 2012) required the state's police department to promote 48 blacks and 20 Hispanics to the position of sergeant. *Id*. at *5. The decree was entered over 468 written objections, including many from officers who did well on the promotional exam, and were concerned about getting skipped over for lower scoring applicants. *Id*. at *2. In *United States v. Austin*, No. 1:14-cv-00533-LY (W.D. Tex. Nov. 7, 2014), the Department of Justice sued the City of Austin for a disparate impact resulting from the City's examination for entry-level firefighters, and the parties settled the same day. Although the complaint explicitly disclaimed any intentional discrimination by the City, the consent decree included quota-based hiring of 12 black and 18 Hispanic applicants. *Id*. The use of racial quotas in the consent decree created visible victims: 300 firefighters stood against the decree at the Austin City Council hearing, and accused the City of turning the matter into a "race issue" to intimidate the

City Council to approve it. Bob Nicks, *City Council Consent Decree Vote Result*, Austin City First (May 20, 2014).[3]

The threat of disparate impact liability can also lead to discrimination against minorities. For example, in *Frank*, 347 F.3d at 133, Xerox instituted a "Balanced Workforce Initiative" to ensure that racial and gender groups were proportionally represented. As a consequence, the company discriminated against black workers in Houston because they were "overrepresented" in relation to the City's population. Disparate impact liability also makes it more expensive for businesses to move to areas with high minority populations. Richard A. Posner, *The Efficiency and Efficacy of Title VII*, 136 U. Pa. L. Rev. 513, 519 (1987). In one case, a company sought to build a plant in an area with fewer minorities after it was unable to meet affirmative action goals in areas with larger minority populations. *Terry Props., Inc. v. Standard Oil Co. (Ind.)*, 799 F.2d 1523, 1527 (11th Cir. 1986). All these examples show that the disparate impact doctrine is just as dangerous in practice as it is in theory. Because of these tensions—both practical and conceptual—between disparate impact liability and the Equal Protection Clause, the Supreme Court has been wary to read federal antidiscrimination statutes to encompass disparate impact liability. *See Sandoval*, 532

[3] http://www.austinsafetyfirst.org/news-updates/city-council-consent-decree-vote-results.

U.S. at 293 (no cause of action for disparate impact liability under Title VI); *cf. Ricci*, 557 U.S. at 580-93 (Title VII's disparate impact provisions must not be interpreted in way that violates the statute's prohibition on disparate treatment).

The Court's recent decision approving disparate impact liability under the Fair Housing Act is distinguishable. *See Inclusive Cmtys. Project*, 135 S. Ct. at 2525. There the Court observed that disparate impact liability has existed in "the substantial majority of the Court of Appeals for the last several decades" without giving rise to "dire consequences." *Id*. By contrast, many courts faced with the question of whether Title II encompasses disparate impact liability have generally avoided deciding the issue. *See, e.g.*, *Arguello v. Conoco, Inc.*, 207 F.3d 803, 813 (5th Cir. 2000) ("assuming arguendo that disparate impact claims are cognizable under Title II"); *Jefferson v. City of Fremont*, 73 F. Supp. 3d 1133, 1146, 2014 WL 5794330, at *7 (N.D. Cal. Nov. 6, 2014) ("This Court need not reach the question of whether disparate impact may be alleged under Title II."); *Robinson v. Power Pizza, Inc.*, 993 F. Supp. 1462, 1464-65 (M.D. Fla. 1998) (applying disparate impact analysis due to the parties' agreement). Many others have squarely rejected a Title II disparate impact claim. *See, e.g.*, *Akiyama v. U.S. Judo Inc.*, 181 F. Supp. 2d 1179, 1184-85 (W.D. Wash. 2002); *LaRoche v. Denny's, Inc.*, 62 F. Supp. 2d 1366, 1370 n.2 (S.D. Fla. 1999).

Antidiscrimination litigation under Title II also arises from a different context than litigation under the Fair Housing Act. "[D]isparate impact liability in the fair housing context does not . . . redistribute zero-sum assets from whites to minorities." *See, e.g.*, Brief for John Dunne et al. as Amicus Curiae Supporting Respondents at 7, *Inclusive Cmtys. Project* 135 S. Ct. 2507 (No. 13-1371). That reasoning is inapplicable here. If "public accommodation" were to encompass high school, collegiate, and professional athletics, *see* Note, *A Public Accommodations Challenge to the Use of Indian Team Names and Mascots in Professional Sports*, 112 Harv. L. Rev. 904, 912 (1999), then teams in the National Football League would have to draft more white players at the expense of racial minorities, given the limited number of available draft slots. *See Inclusive Cmtys. Project*, 135 S. Ct. at 2536 (Alito, J., dissenting). This means that disparate impact liability in the zero-sum context of Title II would simply redistribute opportunities on a racial basis rather than increase "opportunities to [people] of all races." *Croson*, 488 U.S. at 469. The Constitution does not tolerate such a result.

CONCLUSION

Even if the statutory text of Title II were ambiguous—and it is not—this Court should refuse to recognize disparate impact liability under Title II without "unmistakably clear" language from Congress. *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202-03 (1991). That is because disparate impact liability raises equal protection problems. While the Equal Protection Clause stresses individualized treatment, disparate impact liability is inherently focused on racial groups. Disparate impact liability also raises equal protection problems in practice, because it has led to racial quotas and other forms of racial discrimination. In light of these problems, this Court "should not lightly assume that Congress intended to infringe constitutionally protect liberties" such as those enshrined in the Equal Protection Clause of the Fourteenth Amendment. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trade Council*, 485 U.S. 568, 575 (1988).

The judgment of the district court should be affirmed.

DATED: December 30, 2015.

Respectfully submitted,

JOSHUA P. THOMPSON
WENCONG FA

By /s/ Joshua P. Thompson
JOSHUA P. THOMPSON

Counsel for Amici Curiae
Pacific Legal Foundation,
The Center For Equal Opportunity,
and Competitive Enterprise Institute

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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DATED: December 30, 2015.

/s/ Joshua P. Thompson
Attorney for Amici Curiae

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/s/ Joshua P. Thompson
JOSHUA P. THOMPSON