

22-3094

Saint-Jean v. Emigrant Mortg. Co.

PARK, *Circuit Judge*, dissenting:

In this case, the district court sent untimely claims to an improperly instructed jury two separate times. To affirm the resulting judgment, the majority blesses significant legal errors and upends established doctrine.

First, this suit is time-barred. The statute of limitations for claims under both the Fair Housing Act and the Equal Credit Opportunity Act is two years. But Plaintiffs did not file suit until 2011 and 2014, even though their claims accrued between 2003 and 2008. Equitable tolling can extend statutory deadlines only if Plaintiffs exercise diligence and show extraordinary circumstances. The district court found neither, and the majority's decision to affirm based solely on fairness defies binding precedent, breaks with other circuits, and unsettles doctrine surrounding analogous statutes.

Second, even if the claims were timely, the district court's charge allowed the jury to find disparate-impact discrimination based only on a "substantial adverse impact," with no showing of disproportionate effects on minority borrowers. The majority's approval of the erroneous jury instructions based on commentary outside the instruction itself also stretches our precedent.

Third, the district court erred in presenting the Plaintiffs' claims to the jury even though a provision in their loan agreement explicitly released such claims. The majority reads into federal law novel grounds for invalidating such knowing and voluntary releases based on an unprecedented public-policy analysis.

I would vacate the judgment of the district court with instructions to dismiss Plaintiffs' claims as untimely. Short of that, I would vacate and remand for a new trial with a proper disparate-impact instruction after dismissing the released claims. I respectfully dissent.

I. BACKGROUND

A. Facts

Plaintiffs claim that Emigrant discriminated against them by targeting minority homeowners with unfavorable loans. Emigrant offered STAR NINA ("no income, no asset") loans to subprime borrowers with low credit scores, no proof of income, and substantial home equity between 1999 and 2008. All such loans included an 18% penalty interest rate after 30 days in default. Most borrowers were white.

Plaintiffs received and defaulted on STAR NINA loans between 2004 and 2008. Plaintiffs found these loans through their self-selected, third-party brokers. Although Emigrant's advertising allegedly targeted minority communities, Plaintiffs do not claim to have seen these ads. Like many borrowers, Plaintiffs chose the STAR NINA program because they wanted to borrow against their home equity but lacked the credit or verifiable income required for other loans. Plaintiffs received and signed the same set of documents as other STAR NINA borrowers. These documents included standalone sheets explaining their payment obligations and the penalty default rate. Plaintiffs, like other borrowers, either had counsel at closing or chose to disregard Emigrant's suggestion that they retain counsel.

Despite receiving the same loans on the same terms as thousands of other borrowers, Plaintiffs sued Emigrant for “targeting them” with unfavorable loans based on their race. As relevant here, Plaintiffs alleged disparate-impact and intentional discrimination in violation of the Fair Housing Act (“FHA”), the Equal Credit Opportunity Act (“ECOA”), and the New York City Human Rights Law (“NYCHRL”). The FHA and ECOA limit suits to two years from the alleged violation, and the NYCHRL has a three-year limitation.

Plaintiffs filed their claims three to ten years after closing on their loans. The original Plaintiffs, the Saint-Jeans, closed on a \$370,000 loan in January 2008 and defaulted in September of that year. They claim to have noticed discrimination because of the number of black Emigrant debtors during their foreclosure proceedings in the spring of 2009. They met with a lawyer about their potential claims in July 2009. But for reasons unexplained in the record, the Saint-Jeans did not file this suit until April 2011—more than three years after closing on their loan.

The other Plaintiffs joined the Saint-Jeans’ amended complaint in October 2014—three and a half years later. Ms. Commodore had closed and defaulted on her loan back in 2004—a decade before suing. The Saintils had closed and defaulted in 2006—eight years before suing. The Smalls had closed and defaulted in 2007—seven years before suing. Finally, Mr. Howell had closed and defaulted in 2008—six years before suing. None of these Plaintiffs offered any evidence of their efforts to investigate potential claims relating to their loans before joining this suit. Howell, Commodore, and the Smalls joined only after the Saint-Jeans’ lawyer approached them in 2013.

B. Proceedings Below

Emigrant argued that Plaintiffs' suit was untimely, but the district court denied its motions to dismiss, for summary judgment, and for judgment as a matter of law. Although all claims were filed more than three years after Plaintiffs closed on their loans, the district court held that the discovery rule and equitable tolling rendered the claims timely. First, the district court concluded that the FHA and ECOA "are silent as to the discovery rule," so it applied the rule to Plaintiffs' claims because Emigrant's scheme of discriminatory lending "would be invisible to individual borrowers" without conferring with counsel.

The district court also concluded that equitable tolling applied to Plaintiffs' claims because Emigrant's discriminatory lending scheme was "self-concealing." *See* Special App'x at 175 ("[D]iscriminatory mortgage lending is inherently self-concealing."). As part of its concealment analysis, the district court pointed to Emigrant's "overt and intentional acts," including allegedly rushing borrowers during closing and dissuading them from bringing counsel. *Id.* at 70. The district court held that Plaintiffs were entitled to equitable tolling because they "had little or no basis to fully understand their claims and the nature of a systemic" scheme. *Id.* But the district court made no findings about Plaintiffs' diligence in pursuing their claims or whether extraordinary circumstances prevented them from filing sooner.

Plaintiffs tried their case twice. The first jury returned a verdict for Plaintiffs, awarding \$950,000 in compensatory damages, but

found that the Saintils' waiver precluded their recovery. The district court rejected Emigrant's motions for judgment as a matter of law and for a new trial. But it ordered a new trial sua sponte because the award did not "succeed at restoring Plaintiffs to their pre-STAR NINA loan positions." The second jury awarded Plaintiffs \$722,048—that is, less—in compensatory damages, including nominal damages to the Saint-Jeans and Saintils.

The district court instructed both juries that they could find disparate-impact liability if the loans "actually or predictably had a substantial adverse impact on African-American or Hispanic borrowers." Emigrant repeatedly objected to this instruction for failing to require a comparison to non-minority borrowers. Plaintiffs' own proposed instructions had also included that element. The district court nevertheless omitted the comparative instruction from its disparate-impact charge.

Finally, Emigrant argued that the Saintils' 2010 loan-modification agreement barred their recovery in this suit. The Saintils had agreed to "release and forever discharge Emigrant . . . from any and all claims" arising from its prior loan. In exchange, Emigrant reduced the Saintils' interest rate and waived some of their interest and late charges. The district court, however, denied Emigrant's motion for summary judgment as to the Saintils' claims without explanation. After the first jury found that the Saintils had knowingly and voluntarily released their claims, the district court declared the provision void as against public policy. Acknowledging that no particular federal law supported invalidation, the district court considered the release in the context of its earlier "historical overview" of housing discrimination.

Based on this history and the Saintils' continuing struggle with payments, the district court allowed the Saintils' claims to proceed, and the second jury awarded them nominal damages.

II. TIMELINESS

It is undisputed that Plaintiffs failed to file their claims within the applicable statutes of limitations. The question is whether equitable tolling or the discovery rule excuses their delay. Neither does.

A. Legal Standards

The FHA provides that “[a]n aggrieved person may commence a civil action . . . not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice.” 42 U.S.C. § 3613(a)(1)(A). Until 2010, the ECOA stated that no action “shall be brought later than 2 years after the date of the occurrence.” 15 U.S.C. § 1691e(f) (2009). And New York law limits claims under the NYCHRL to those “commenced within three years.” N.Y. C.P.L.R. § 214(2).

Plaintiffs filed all of their claims outside the applicable statutes of limitations, whether they accrued at closing or upon default.¹ A

¹ The parties dispute when Plaintiffs were injured. Plaintiffs say it was when Emigrant discriminated against them, while Emigrant says any injury would have occurred when it “imposed a higher default interest rate.” Even accepting that “the relevant injury is discrimination and not the loan itself,” *ante* at 26, that means Plaintiffs' claims accrued at closing, when they suffered the dignitary harm of a discriminatory loan. But regardless whether the limitations period began at closing or default, Plaintiffs had a complete and present cause of action more than two years before they sued.

statute of limitations begins to run when a claim accrues. *See Clark v. Iowa City*, 87 U.S. (20 Wall.) 583, 589 (1875). Accrual is the date on which a plaintiff is first able to sue—usually the date on which the plaintiff is injured. *See Green v. Brennan*, 578 U.S. 547, 554 (2016); *see also Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997) (accrual occurs “when the plaintiff has a complete and present cause of action” (quotation marks omitted)).

The district court excused the untimeliness of Plaintiff’s lawsuits based on the discovery rule and equitable tolling. The discovery rule delays accrual until a plaintiff knows that he has been injured or learns of the cause of the injury.² *See, e.g., United States v. Kubrick*, 444 U.S. 111, 120 (1979) (noting that lower courts apply a discovery rule for medical-malpractice claims); *Kronisch v. United States*, 150 F.3d 112, 121 (2d Cir. 1998). But this rule typically applies only when a statute’s text provides for it. *Rotkiske v. Klemm*, 589 U.S. 8, 14 (2019) (“It is not our role to second-guess Congress’ decision to include a ‘violation occurs’ provision, rather than a discovery provision.”).

While the discovery rule delays the start of a limitations period, equitable tolling “pauses the running of, or ‘tolls,’ a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action.” *Arellano v. McDonough*, 598 U.S. 1, 6 (2023) (quotation marks omitted); *see Menominee Indian Tribe of Wis. v. United States*, 577 U.S.

² Accrual never depends, however, on a plaintiff’s knowledge of his legal rights—only of the facts that would allow him to sue. *See Valez ex rel. Donely v. United States*, 518 F.3d 173, 177 (2d Cir. 2008).

250, 255 (2016) (“[A] litigant is entitled to equitable tolling of a statute of limitations only if the litigant establishes two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.” (quotation marks omitted)).

“Generally, a litigant seeking equitable tolling bears the burden of establishing [these] two elements.” *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). First, a plaintiff must show a “level of diligence which could reasonably be expected in the circumstances,” *Gonzalez v. Hasty*, 651 F.3d 318, 322 (2d Cir. 2011) (quotation marks omitted), and that he “acted with reasonable diligence *throughout* the period he seeks to toll,” *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000) (emphasis added). “[T]he second prong of the equitable tolling test is met only where the circumstances that caused a litigant’s delay are both extraordinary *and* beyond its control.” *Menominee*, 577 U.S. at 257. “Extraordinary circumstances” thus refers “not to the uniqueness of a party’s circumstances, but rather to the severity of the obstacle impeding compliance with a limitations period.” *Harper v. Ercole*, 648 F.3d 132, 137 (2d Cir. 2011).

B. Equitable Tolling

The majority misapplies equitable tolling by excusing Plaintiffs of their burden to prove the threshold elements of diligence and extraordinary circumstances. In so doing, it creates a new fairness-based tolling rule for discrimination claims.

To begin, the majority mischaracterizes the district court’s equitable-tolling decision as factual and discretionary. *Ante* at 28-31.

But the district court committed an error of *law* by concluding that Plaintiffs did not need to prove diligence and extraordinary circumstances because “[t]he law prohibits a judge from exercising her discretion where these two elements are missing.” *Doe v. United States*, 76 F.4th 64, 71 (2d Cir. 2023).

The majority’s affirmance of the district court’s equitable-tolling decision disregards binding precedent. The majority says that Plaintiffs meet the requirements for equitable tolling because they “could not reasonably be expected” to learn of their cause of action through due diligence within the limitations period. *Ante* at 34. And “that alone would be enough” because “unfairness to a plaintiff who is not at fault” is the “core inquiry of our equitable tolling analysis.” *Id.* at 33. (quotation marks omitted). That analysis is novel and wrong. Plaintiffs here have shown neither diligence nor extraordinary circumstances, even though these are requisite “elements, not merely factors of indeterminate or commensurable weight.” *Menominee*, 577 U.S. at 256 (quotation marks omitted). The majority’s decision to excuse these deficiencies is untenable.

First, the majority simply assumes that all Plaintiffs were diligent. It concludes that Plaintiffs “through no lack of diligence of their own, were unaware of the facts of discrimination within the statutory period.” *Ante* at 34. But the district court made no findings at all about Plaintiffs’ diligence. Instead, the district court disregarded that requirement because the “nature of this type of discrimination” shows that Plaintiffs’ “ignorance of their claim was not for lack of due diligence.” Special App’x at 71. But a plaintiff’s actual “ignorance” is

irrelevant and a court may not assume that diligence would have been futile.

Plaintiffs did not satisfy their burden of showing diligence. The Saint-Jeans, the original Plaintiffs, closed on their loan in 2008. They claim to have noticed discrimination during their foreclosure proceedings in the spring of 2009. But they offered no evidence of their diligence between contacting an attorney in 2009 and filing this suit in April 2011. In other words, the Saint-Jeans *were aware* of potential claims in 2009. The other Plaintiffs fare no better. The record contains no evidence of diligence by Commodore, Howell, the Smalls, or the Saintils, all of whom joined the amended complaint in October 2014—six to ten years after closing on their loans and three and a half years after the Saint-Jeans filed suit. Of these Plaintiffs, Howell, Commodore, and the Smalls admitted that *the Saint-Jeans' attorney contacted them* in 2013 about potential claims, but they did not join this suit until October 2014. These Plaintiffs failed to pursue their claims diligently under any standard. Absent a showing of diligence, the district court had no discretion to afford equitable tolling.

Second, the majority also overlooks Plaintiffs' failure to prove extraordinary circumstances. It simply offers the conclusory statement that "Plaintiffs demonstrated that their inability to discover the discriminatory practice was an extraordinary circumstance." *Ante at*

32.³ To the majority, Plaintiffs' failure to recognize their claims "would be enough to support the district court's discretionary equitable tolling determination." *Id.* at 33. This is wrong.

Ignorance is not an extraordinary circumstance. Such circumstances must be "both extraordinary *and* beyond [a plaintiff's] control." *Menominee*, 577 U.S. at 257. "Nor can equitable tolling be premised on . . . ignorance of the right to bring a claim." *Watson v. United States*, 865 F.3d 123, 133 (2d Cir. 2017). The district court found only that the Saint-Jeans "alleged that they did not discover the discriminatory scheme underlying their claims until they met with counsel within the limitations period." Special App'x at 23. But that says nothing about the mortgage scheme being "extraordinary" or whether any external obstacle prevented the Saint-Jeans—or any of the other dilatory Plaintiffs—from exercising their rights within the limitations period.

In the employment-discrimination context, a plaintiff alleging discriminatory discharge can satisfy the extraordinary-circumstances requirement only if "it would have been *impossible* for a reasonably prudent person to learn that his discharge was discriminatory." *Miller v. Int'l Tel. & Tel. Corp.*, 755 F.2d 20, 24 (2d Cir. 1985) (emphasis added). Employment-discrimination claims thus "are not tolled or

³ The majority also offers that "the egregious nature of Emigrant's discriminatory lending practice . . . makes this case extraordinary." *Ante* at 35. But the nature of the claim has no bearing on whether an "extraordinary circumstance stood in [Plaintiffs'] way and prevented timely filing." *Menominee*, 577 U.S. at 255 (cleaned up).

delayed pending the employee's realization that [his employer's] conduct was discriminatory unless the employee was actively misled by his employer, [or] he was prevented in some extraordinary way from exercising his rights." *Id.* at 24.⁴ The same principle applies here.

The majority contends that its finding of extraordinary circumstances is "further supported by the fact that Emigrant took steps to conceal the discriminatory nature of the STAR NINA loan." *Ante* at 34. But its concealment analysis is unfounded.⁵ "Concealment by

⁴ The majority asserts that "equitable tolling has always been based on principles of fairness and equity." *Ante* at 33 (citing *Cerbone v. Int'l Ladies' Garment Workers' Union*, 768 F.2d 45, 48-49 (2d Cir. 1985)). But *Cerbone* affirmed a timeliness dismissal precisely because "fairness" applied only to "relieve a plaintiff who was 'actively misled by his employer' or who was 'prevented in some extraordinary way from exercising his rights.'" 768 F.2d at 49 (quoting *Miller*, 755 F.2d at 24).

⁵ The majority purports to ground its decision in "well-settled principles of equitable tolling and fraudulent concealment." *See ante* at 36. But these are distinct doctrines. *See Pearl v. City of Long Beach*, 296 F.3d 76, 81 (2d Cir. 2002) ("The taxonomy of tolling, in the context of avoiding a statute of limitations, includes at least three phrases: equitable tolling, fraudulent concealment of a cause of action, and equitable estoppel."). To be sure, "[o]ur Court has used 'equitable tolling' to mean fraudulent concealment of a cause of action." *Id.* at 82. But we have been clear that fraudulent concealment requires the plaintiff to establish "(1) that the defendant concealed from him the existence of his cause of action, (2) that he remained in ignorance of that cause of action until some point within four years of the commencement of his action, and (3) that his continuing ignorance was not attributable to lack of diligence on his part." *New York v. Hendrickson Bros.*, 840 F.2d 1065, 1083 (2d Cir. 1988); *see Phhphoto Inc. v. Meta Platforms, Inc.*, 123

mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry.” *Wood v. Carpenter*, 101 U.S. (11 Otto) 135, 143 (1879). Plaintiffs never alleged—let alone pleaded with the specificity Rule 9 requires—that Emigrant lied to them or otherwise attempted to cover up its alleged discrimination after execution of the loan documents.⁶

F.4th 592, 601-04 (2d Cir. 2024) (discussing “equitable tolling based on fraudulent concealment” under *Hendrickson Bros.*). In contrast, standard equitable tolling applies “only if the litigant establishes two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.” *Menominee*, 577 U.S. at 255 (quotation marks omitted). The majority errs by muddling the two doctrines to conclude that any concealment entitles Plaintiffs to tolling—regardless of their ability to prove each element of fraudulent concealment or equitable tolling. For example, the majority cites *Baskin v. Hawley*, 807 F.2d 1120, 1123, 1130 (2d Cir. 1986), for the proposition that “[e]quitable tolling may be appropriate even if there are lengthy delays in filing.” *Ante* at 31. But *Baskin* concerns a jury’s finding of *fraudulent concealment*, not equitable tolling. *See Baskin*, 807 F.2d at 1129-32.

⁶ The majority nevertheless concludes that “there is sufficient evidence that Emigrant took steps to conceal the discriminatory nature of STAR NINA loans.” *Ante* at 35-36. This active-concealment analysis finds no support in the record. First, the majority says that “Plaintiffs testified that Emigrant rushed them to sign stacks of documents at closing.” *Id.* at 35. But simply feeling “rushed” at closing cannot constitute active concealment when Plaintiffs received and signed these documents *before* closing. Second, it claims that the default rate was “included only in a separate rider to the loan, further obfuscating the true financial impact.” *Id.* at 35. But this ignores the fact that all Plaintiffs *signed* this standalone sheet acknowledging their payment obligations and the default interest rate. *See, e.g.*, Exhibit

The majority's misguided reasoning threatens to unsettle equitable tolling doctrine beyond this case. The majority discards the prerequisites of diligence and extraordinary circumstances for equitable tolling, replacing them with a fairness-based discovery rule for discrimination claims. *See ante* at 27 (“[T]he district court did not abuse its discretion in exercising its equitable power to toll the statute of limitations until the date when Plaintiffs knew or had reason to know of their injury—that they were victims of Emigrant’s sophisticated and systemic pattern of discriminatory lending.”). It insists that concealment—which was not proved here—is unnecessary for its holding because “avoiding unfairness to the plaintiff is reason enough to equitably toll a statute of limitations.” *Id.* at 36 n.7. But that is wrong—unfairness is not sufficient for equitable tolling; courts must find both diligence and extraordinary circumstances *before* weighing the equities.

C. Discovery Rule

The majority also leaves open the district court’s expansive misunderstanding of the discovery rule. *Id.* at 27 n.6. It incorrectly suggests that the discovery rule applies to all federal causes of action. *See id.* at 25 (“Claims under the FHA, like other federal causes of action, accrue when a plaintiff knows or has reason to know of the injury that

App’x at 585. Finally, we are told that Emigrant “dissuaded Plaintiffs from bringing lawyers to closing.” *Ante* at 35. But the record again disproves this falsity: Emigrant *encouraged* the Saint-Jeans to retain counsel, *see* Exhibit App’x at 623 (“The hiring of an attorney is not required but is definitely recommended.”), and Howell was, in fact, represented by outside counsel, *see* Joint App’x at 840-42.

serves as the basis for the action.” (quotation marks omitted)). But “[t]his expansive approach to the discovery rule is a bad wine of recent vintage.” *Rotkiske*, 589 U.S. at 14 (quotation marks omitted).

The discovery rule requires a statute-by-statute textual inquiry that neither the FHA nor ECOA can support. The applicable limitations provisions are clear in their focus on the *occurrence*—rather than *discovery*—of discrimination. See 42 U.S.C. § 3613(a)(1)(A) (FHA) (“not later than 2 years after the occurrence”); 15 U.S.C. § 1691e(f) (2009) (ECOA) (no “later than 2 years after the date of the occurrence”). Whether these statutes implicitly incorporate the discovery rule is a matter of first impression in this Circuit. The Supreme Court has held that a similar statute of limitations in the Fair Debt Collection Practices Act (“FDCPA”) does not incorporate the discovery rule. See *Rotkiske*, 589 U.S. at 10, 14-15; 15 U.S.C. § 1692k(d) (“within one year from the date on which the violation occurs”). As with the FDCPA, the statutory language in the FHA and ECOA “unambiguously sets the date of the violation as the event that starts the . . . limitations period.” *Rotkiske*, 589 U.S. at 13. Such language represents Congress’s decision to reject the discovery rule for these statutes, and we are not free to decide otherwise.⁷

⁷ Some district courts have concluded that the FHA’s status as a tort analogue, see *Curtis v. Loether*, 415 U.S. 189, 195 (1974), means that the statute of limitations does not begin to run until “the wrongful act or omission results in damages,” see, e.g., *Fair Hous. Just. Ctr., Inc. v. JDS Dev. LLC*, 443 F. Supp. 3d 494, 501 (S.D.N.Y. 2020) (citing *Wallace v. Kato*, 549 U.S. 384, 391

The two other courts of appeals that have considered the question agree. The Ninth Circuit has held that the FHA is not subject to the discovery rule. *See Garcia v. Brockaway*, 526 F.3d 456, 465 (9th Cir. 2008) (en banc) (“Holding that each individual plaintiff has a claim until two years after he discovers the [violation] would contradict the text of the FHA, as the statute of limitations for private civil actions begins to run when the discriminatory act occurs—not when it’s encountered or discovered.”). And the Fifth Circuit has held the same in the ECOA context. *See Archer v. Nissan Motor Acceptance Corp.*, 550 F.3d 506, 508 (5th Cir. 2008). In short, the FHA and ECOA make clear that the discovery rule does not apply to Plaintiffs’ claims. The district court erred by relying on the rule and the majority’s tacit endorsement of that error is misguided.

D. Title VII and the ADEA

The majority’s opinion also departs from precedent involving analogous antidiscrimination statutes. The Supreme Court instructs that “cases interpreting Title VII and the [Age Discrimination in Employment Act (“ADEA”)] provide essential background and instruction” for interpreting the FHA. *Texas Dep’t of Hous. and Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 533 (2015). The same is true of the ECOA. *See Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) (“[When Congress uses the same language in two statutes having similar purposes, . . . it is appropriate to presume that Congress

(2007)). These courts mistake the injury: discrimination results in damages immediately. That is why dignitary harm alone is recoverable. Here, for example, the jury awarded nominal damages to the Saint-Jeans and Saintils.

intended that text to have the same meaning in both statutes.”). Like the FHA and ECOA, Title VII and the ADEA provide that the limitations period begins with the occurrence—not the discovery—of an unlawful act. *See* 42 U.S.C. § 20003-5(e)(1). Timeliness precedents under these analogous statutes thus guide this Court’s reading of the FHA and ECOA.

Title VII claims accrue at the time a plaintiff learns of the discriminatory *act*, not when he realizes that the act was discriminatory. *See Flaherty v. Metromail Corp.*, 235 F.3d 133, 137 (2d Cir. 2000) (“It has long been settled that a claim of employment discrimination accrues for statute of limitations purposes on the date the employee learns of the employer’s discriminatory conduct.”); *Miller*, 755 F.2d at 24 (holding the same under the ADEA). This Court applies this principle broadly: “As with *all discrimination claims*, plaintiffs’ claims accrued when they knew or should have known of the discriminatory *action*”—not the discriminatory nature of that action. *Washington v. County of Rockland*, 373 F.3d 310, 319 (2d Cir. 2004) (Sotomayor, J.) (emphases added). Other circuits agree.⁸

⁸ *See, e.g., Ayala v. Shinseki*, 780 F.3d 52, 58 (1st Cir. 2015); *Hamilton v. 1st Source Bank*, 928 F.2d 86, 88-89 (4th Cir. 1990) (“To the extent that notice enters the analysis, it is notice of the employer’s actions, *not* the notice of a discriminatory effect or motivation, that establishes the commencement of the pertinent filing period.”); *Pacheco v. Rice*, 966 F.2d 904, 906 (5th Cir. 1992) (“To allow plaintiffs to raise employment discrimination claims whenever they begin to suspect that their employers had illicit motives would effectively eviscerate the time limits prescribed for filing such complaints.”);

The majority barely acknowledges our Title VII and ADEA jurisprudence. Not only does this raise doubts about the soundness of the majority's legal reasoning, it leaves open the possibility that its new fairness-based approach to equitable tolling will reach far beyond this case.

III. JURY INSTRUCTIONS

The majority also overlooks the district court's erroneous jury instruction on disparate-impact liability, which required no finding that Emigrant harmed Plaintiffs more than borrowers of other races. The district court's instruction allowed the jury to find disparate impact based on only a "substantial adverse impact" on minority borrowers, not a "disproportionately" adverse impact. This contradicted the plain meaning of "disparate impact" and binding precedent. The legal error is obvious: for an impact to be "disparate," a comparison is necessary. The district court's general-verdict form thus left open

Amini v. Oberlin Coll., 259 F.3d 493, 498-99 (6th Cir. 2001) ("[T]he starting date for the . . . limitations period is when the plaintiff learns of the employment decision itself, not when the plaintiff learns that the employment decision may have been discriminatorily motivated."); *Thelen v. Marc's Big Boy Corp.*, 64 F.3d 264, 267 (7th Cir. 1995) ("A plaintiff's action accrues when he discovers that he has been injured, not when he determines that the injury was unlawful."); *Humphrey v. Eureka Gardens Pub. Facility Bd.*, 891 F.3d 1079, 1081-82 (8th Cir. 2018); *Lukovsky v. City & County of San Francisco*, 535 F.3d 1044, 1048-51 (9th Cir. 2008) ("Plaintiffs argue that their claims did not accrue until they knew both that they were not being hired *and* of the Defendants' alleged discriminatory intent. . . . [But] the claim accrued when the plaintiffs received notice they would not be hired."); *Hulsey v. Kmart, Inc.*, 43 F.3d 555, 558-59 (10th Cir. 1994).

the possibility that the jury imposed liability without considering, much less finding, any disproportionate effects on minority borrowers. This error requires vacatur.

A. Error

We review a district court's jury instructions de novo. "An instruction is erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury of the law." *Ashley v. City of New York*, 992 F.3d 128, 142 (2d Cir. 2021) (quotation marks omitted).

The district court's instruction here misstated the law. The Supreme Court has made clear that a disparate-impact claim requires a disproportionate effect on minorities. *See Inclusive Cmty's*, 576 U.S. at 524 ("[A] plaintiff bringing a disparate-impact claim challenges practices that have a 'disproportionately adverse effect on minorities' and are otherwise unjustified by a legitimate rationale." (quoting *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009))).⁹ The district court thus erred by

⁹ Although *Inclusive Communities*, 576 U.S. at 545, held "that disparate-impact claims are cognizable under the Fair Housing Act," we have yet to decide whether the ECOA provides for such liability. Appellants do not raise this issue on appeal, so we should "express no opinion about whether a disparate impact claim can be pursued under ECOA." *Garcia v. Johanns*, 444 F.3d 625, 633 n.9 (D.C. Cir. 2006); *see id.* ("Both Title VII and the Age Discrimination in Employment Act (ADEA) prohibit actions that 'otherwise adversely affect' a protected individual. The Supreme Court has held that this language gives rise to a cause of action for disparate impact discrimination under Title VII and the ADEA. ECOA contains no such language.")

instructing the jury that it could find liability based on a “significantly adverse impact” even if it found that non-minority borrowers suffered *the same impact*.

The majority, however, concludes that the district court’s instruction was close enough. That’s because a “substantial adverse impact” is “not significantly different” from the correct instruction, which would require a “significantly adverse or disproportionate” impact. *Ante* at 50. But even that instruction would not be proper.¹⁰ The disjunctive phrasing would permit liability for conduct that has only a “significantly adverse” impact, but not a disproportionate one. Such an instruction strays from *Inclusive Communities*. The majority ignores that precedent and misreads others.

For example, the majority notes that this Court used the phrase “significantly adverse or disproportionate” effect to describe

(citations omitted)); *cf. Golden v. City of Columbus*, 404 F.3d 950, 963 n.11 (6th Cir. 2005) (“Neither the Supreme Court nor this Court have previously decided whether disparate impact claims are permissible under ECOA. However, it appears that they are.”).

¹⁰ The majority maintains that “Emigrant included the ‘significantly adverse or disproportionate impact’ language in its own proposed jury instructions submitted to the district court.” *Ante* at 52 n.10. But Emigrant’s proposed instructions included the critical element of disproportionate impact: “In order to show a ‘significantly advance or disproportionate impact,’ Plaintiffs must show that a race-neutral practice or policy actually or predictably resulted in *discrimination against Black borrowers*. If Plaintiffs only raise an inference of discrimination, they have not proven a ‘significantly adverse or disproportionate impact.’” Joint App’x at 571 (footnote omitted) (emphasis added).

disparate-impact liability in *Regional Economic Community Action Program, Inc. v. City of Middletown* (“RECAP”), 294 F.3d 35, 53 (2d Cir. 2002). But *RECAP* did not concern the proper wording of a jury instruction. We have “cautioned that trial judges should not import uncritically language . . . developed by appellate courts for use by judges” into jury charges. *Gordon v. New York City Bd. of Educ.*, 232 F.3d 111, 118 (2d Cir. 2000) (cleaned up). Even if we could lift jury instructions from language in appellate opinions, *RECAP* stated that a “disparate impact analysis examines a facially-neutral policy or practice . . . for its *differential impact or effect on a particular group*.” *RECAP*, 294 F.3d at 52 (quotation marks omitted) (emphasis added). Indeed, we concluded that the plaintiff had failed to allege a disparate-impact claim because “[n]o comparison of the act’s disparate impact on different groups of people” in that case was “possible.” *Id.* at 53. The majority similarly overlooks comparisons among groups in our other disparate-impact precedents.¹¹ These cases make clear that disparate impact requires a *disproportionate* effect on a particular

¹¹ See *Tsombanidis v. West Haven Fire Dept.*, 352 F.3d 565, 575 (2d Cir. 2003) (“The basis for a successful disparate impact claim involves a comparison between two groups.”); *MHANY Mgmt., Inc. v. County of Nassau*, 819 F.3d 581, 617 (2d Cir. 2016) (“The district court concluded that Plaintiffs had established a prima facie case of disparate impact, finding that Garden City’s [zoning decision] had a significant disparate impact on minorities because it largely eliminated the potential for the type of housing that minorities were disproportionately likely to need.” (quotation marks omitted)). See also *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 933 (2d Cir. 1988) (“A disparate impact analysis examines a facially-neutral policy or practice . . . for its *differential impact or effect on a particular group*.” (emphasis added)).

group of people.¹² A jury instruction that omits this requirement fails to inform the jury of the law.¹³

B. Prejudice

The jury here returned only a general-verdict form, so the error in the jury instruction means that “a new trial will be required, for there is no way to know that the invalid claim . . . was not the sole basis for the verdict.” *United N.Y. & N.J. Sandy Hook Pilots Ass’n v.*

¹² Our sister circuits take a similar approach. The Ninth Circuit has required a “significant, adverse, and disproportionate effect on a protected class” to show disparate impact under the FHA. *Sw. Fair Hous. Council, Inc. v. Maricopa Domestic Water Improvement Dist.*, 17 F.4th 950, 962 (9th Cir. 2021) (emphasis added). The Fourth and Fifth Circuits agree that “disproportionate”—not merely “substantial”—adverse effects are necessary. *See Reyes v. Waples Mobile Home Park Ltd.*, 903 F.3d 415, 424 (4th Cir. 2018); *Inclusive Cmty. Project, Inc. v. Lincoln Prop. Co.*, 920 F.3d 890, 903 (5th Cir. 2019); *see also id.* at 913 (Davis, J., concurring in part and dissenting in part).

¹³ The majority says that the district court’s instruction “mirrors, nearly word-for-word, the model instruction” from *Sand’s Modern Federal Jury Instructions*. *See ante* at 50-51. But those model instructions plainly state that disparate-impact liability requires a “substantial discriminatory impact”—meaning an impact “plainly disproportionate to how it affects other people.” *Id.* at 51. The district court’s phrase of choice—“substantial adverse impact”—does not include the comparative element of “discriminatory” or “disproportionate.” The ordinary meaning of “adverse” is merely “unfavorable,” “harmful,” or “opposed to one’s interests.” *See Adverse*, Merriam-Webster’s Collegiate Dictionary 19 (11th ed. 2020). Absent any clarifying instruction from the district court, we must presume that the jury gave the term its ordinary meaning. *See, e.g., Victor v. Nebraska*, 511 U.S. 1, 12-16 (1994) (evaluating jury instructions according to their ordinary meaning).

Halecki, 358 U.S. 613, 619 (1959); see *Hathaway v. Coughlin*, 99 F.3d 550, 554-55 (2d Cir. 1996) (“[W]here jury instructions create an erroneous impression regarding the standard of liability, it is not harmless error because it goes directly to plaintiff’s claim, and a new trial is warranted.” (citing *Hendricks v. Coughlin*, 942 F.2d 109, 113-14 (2d Cir. 1991))). The jury may have returned a verdict for Plaintiffs because it found that Emigrant’s conduct had an adverse—but not disproportionate—impact on minority borrowers. As a result, the error requires remand for a new trial.

The majority asserts that Emigrant was not prejudiced by any error in the disparate-impact instruction because “*read as a whole*, the charge made clear to the jury that, to find for Plaintiffs, the jury had to compare the impact on Plaintiffs to similarly situated non-Black or Hispanic borrowers.” *Ante* at 52 (emphasis added). In support, the majority points to a sentence near the beginning of the jury colloquy in which the district court said that “the plaintiffs . . . claim that the defendants . . . violated their rights . . . by offering loans on terms that were grossly unfavorable to the borrowers and by allegedly making those loans disproportionately to African-American and Hispanic communities.” Joint App’x at 2438-39; *ante* at 52. But that was merely the judge’s comment on Plaintiffs’ claims, not a jury instruction. See *United States v. Tracy*, 12 F.3d 1186, 1201 (2d Cir. 1993) (distinguishing “the court’s own comments” from its charge in a jury colloquy).

“Disparate impact” requires a jury to find an impact that is disparate. But the district court here instructed the jury that a “substantial adverse impact” is enough. That instruction was wrong, contrary

to precedent, and prejudicial. The error cannot be saved by a separate comment describing Plaintiffs' claims preceding the jury instruction.

IV. SAINTILS' RELEASE

Finally, a claims-release provision in the Saintil Plaintiffs' renegotiated loan agreement barred their recovery in this suit. The first jury found as much in denying damages to the Saintils because they had "knowingly and voluntarily agreed to release their claims against Emigrant." The district court nevertheless voided the Saintils' release as against public policy based on its "historical overview of mortgage lending in the United States." Special App'x at 177-78. But there is no legal basis for invalidating the Saintils' waiver.

The majority points to the federal policy of ending housing discrimination and a bar on waiving claims under the Truth in Lending Act, a statute not at issue here. *See ante* at 64-65. But none of the district court, Plaintiffs, or the panel majority identifies a single case in which federal fair-housing policy trumped the longstanding policy of respecting settlements. *See, e.g., ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 997 (2d Cir. 1983) (collecting cases). The district court thus erred by disregarding the Saintils' knowing and voluntary release of their federal claims. It then presented those waived claims to the second jury, which in turn awarded only nominal damages. However small, that award was based on yet another error of law.

* * *

In conclusion, the claims underlying this suit were time-barred when the Saint-Jean Plaintiffs filed in 2011 and when the other

Plaintiffs joined in 2014. The majority excuses this untimeliness by turning equitable tolling into a fairness-based discovery rule in discrimination cases. In doing so, the majority defies Supreme Court and Second Circuit precedent and raises troubling questions about the reach of its holding to Title VII and ADEA cases. On top of that, the majority affirms a jury instruction for disparate-impact liability that lacked any comparative component. Finally, the majority takes the unprecedented step of voiding a contractual release provision on federal housing policy grounds. All three of these conclusions are wrong. I respectfully dissent.