No. 10-1032

IN THE

Supreme Court of the United States

STEVE MAGNER, et al.,
Petitioners,
v.
THOMAS GALLAGHER, et al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF THE OPPORTUNITY AGENDA, POVERTY & RACE RESEARCH ACTION COUNCIL, PUBLIC ADVOCATES INC., PROFESSOR MICHELLE ADAMS, THE EQUAL JUSTICE SOCIETY, AND THE KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

Alan Jenkins
Counsel of Record
Megan Haberle
Annie Wang
Juhu Thukral
The Opportunity Agenda
568 Broadway Ste. 302
New York, NY 10012
(212) 334-5977
ajenkins@opportunityagenda.org

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Acts

Other Authorities

INTEREST OF THE AMICI CURIAE[1]

The Opportunity Agenda, a project of Tides Center, is a communications, research, and advocacy organization with the mission of building the national will to expand opportunity in America. Among The Opportunity Agenda's core objectives is the elimination of barriers to equal housing opportunity tied to race, gender, national origin, socioeconomic status, or disability. The organization's recent activities have included research regarding the ill-effects of geographic isolation based on race and socioeconomic status. The subject matter of this case is therefore of keen interest to the organization. The Opportunity Agenda's parent organization, Tides Center, is a not-for-profit, 26 U.S.C. § 501(c)(3) California corporation that provides management and financial services as a fiscal sponsor to approximately 350 nonprofit program initiatives. Tides Center actively promotes social justice, broadly shared economic opportunity, fundamental respect for individual rights, the vitality of communities and a celebration of diversity.

The Poverty & Race Research Action Council (PRRAC) is a civil rights policy organization based in Washington, D.C., committed to bringing the insights of social science research to the fields of civil rights

---

[1] Pursuant to Rule 37.6, counsel for amicus represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than amicus to its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief in the form of blanket consent letters filed with the Court.

and poverty law. PRRAC's housing work focuses on the government's role in creating and perpetuating patterns of racial and economic segregation, the long term consequences of segregation for low income families of color in the areas of health, education, employment, and economic mobility, and the government policies that are necessary to remedy these disparities.

Public Advocates Inc. is a nonprofit law firm and advocacy organization that challenges the systemic causes of poverty and racial discrimination by strengthening community voices in public policy and achieving tangible legal victories advancing education, housing and transit equity. Since 1971, Public Advocates has spurred change in California through collaboration with grassroots groups representing low-income communities, people of color and immigrants in combination with strategic policy reform, media advocacy, and litigation. In particular, Public Advocates strives to unearth and challenge discriminatory practices in housing and land use.

Professor Michelle Adams is Professor of Law at the Benjamin N. Cardozo School of Law, Yeshiva University, and co-director of the Floersheimer Center for Constitutional Democracy, the goal of which is to better understand, and to assist in improving, the functioning of constitutional democracies, both at home and abroad. Professor Adams' research focuses on race and sex discrimination, and on housing law.

The Equal Justice Society (EJS) is a national legal organization that promotes equality and an end to all manifestations of invidious discrimination and second-class citizenship. Using a three-pronged

strategy of law and public policy advocacy, building effective progressive alliances, and strategic public communications, EJS's principal objective is to combat discrimination and inequality in America. Because an intentional discrimination standard does not address manifestations of contemporary discrimination — including implicit bias and structural racism — that have a disproportionate adverse effect on people of color in housing, EJS is committed to preserving a disparate impact standard in anti-discrimination law.

The Kirwan Institute for the Study of Race and Ethnicity, established in 2003, is an interdisciplinary research center at The Ohio State University which works through engaged research to deepen understanding of the causes and consequences of racial and ethnic disparities. Kirwan's work emphasizes the importance of structures, and how the arrangement of structures can distribute benefits and burdens unevenly across races and ethnicities even in the absence of intentional animus. Using the latest learning from social psychology and neuroscience, Kirwan also works to deepen understanding of the role implicit bias plays in the creation of disparities. Disparate impact claims are necessary to address these potent forms of unintentional discrimination.

SUMMARY OF ARGUMENT

While much in our country has changed since the Fair Housing Act was passed, the problems that Congress sought to address in that legislation remain significant and varied. The Act emerged from Congress's recognition of housing as a crucial determinant of societal equality and opportunity, and its knowledge that racial and other prejudices ran deep within the private and public spheres. Barriers to equal housing opportunity were firmly embedded in the nation's structure and psyche, and Congress understood that dislodging them would demand a broadly fashioned legal remedy—one that would address patterns embedded over generations.

Accordingly, the text, history, and purpose of the Act convey Congress's intent to prohibit both intentional discrimination and practices having the unjustified or unnecessary effect of discriminating because of race, color, religion, sex, familial status, disability, or national origin. The Act's broad remedial purpose, combined with the text of the relevant provision, evinces an inclusive measure plainly intended to encompass disparate impact discrimination. The 1988 amendments to the Act were intended to strengthen the law, and reaffirmed that scope, as did the narrow exceptions to the Act's coverage that clearly assume a disparate impact cause of action. Interpreting the Fair Housing Act to include a disparate impact component is also consistent with the United States' treaty commitments, and with international consensus.

The Act's disparate impact component remains necessary to protect crucial anti-discrimination interests that Congress targeted in passing and

amending the Act. Extensive research and experience document the importance of equal housing opportunity to more equal educational achievement, access to employment, personal and environmental health, and other aspects of a fulfilling and stable life. The benefits of nondiscrimination and integration also accrue to the community and nation as a whole, including through the reduction of stereotypes and bigotry, and the promotion of broader prosperity.

The disparate impact standard is necessary, moreover, to address the myriad and evolving barriers to fair housing that continue to exist in the 21st century. Four decades of judicial rulings, agency determinations, and applied research make clear that the disparate impact and treatment standards are mutually needed to fulfill the letter and spirit of the Fair Housing Act. Properly applied, the standard protects the autonomy and expertise of public and private housing decision-makers while preventing unnecessary discrimination and exclusion.

ARGUMENT

I. PROHIBITING DISPARATE IMPACT DISCRIMINATION IS CRUCIAL TO PROTECTING FAIR HOUSING AS INTENDED BY CONGRESS

Since its initial passage, the Fair Housing Act, Pub. L. No. 90-284, Title VIII, 82 Stat. 81 (1968), has helped to propel our nation forward from one in which discrimination and segregation pervaded public and private institutions, communities, and decision-making, to one in which explicit racially exclusionary policies are rare, and intentional discrimination in housing is no longer the norm.[2] In

---

[2] Although the claim was dismissed in this case, intentional housing discrimination is still quite common in the United States. In 2003, for example, an Urban Institute report submitted to the U.S. Department of Housing and Urban Development concluded that "significant discrimination against African American and Hispanic homeseekers still persists in both rental and sales markets of large metropolitan areas nationwide." Margery Austin Turner et al., Urban Inst., *Discrimination in Metropolitan Housing Markets: Phase 2 – Asians and Pacific Islanders* ii (2003), *available at* http://www.huduser.org/portal/publications/pdf/phase2_final.pdf. Phase 1 of the report found that in rental tests, for example, whites were favored over blacks 21.6% of the time and over Hispanics 25.7% of the time. Margery Austin Turner et al., Urban Inst., *Discrimination in Metropolitan Housing Markets: National Results from Phase I HDS 2000*, at iii-iv (2002), *available at* http://www.huduser.org/portal/Publications/pdf/Phase1_Report.pdf. Asian Americans and Native Americans faced significant levels of discrimination, as well. *See* Margery Austin Turner et al., Urban Inst., *Discrimination in Metropolitan Housing Markets Phase 3 – Native Americans* (2003), *available at* http://www.huduser.org/portal/Publications/pdf/hds_phase3_final. pdf. Other audits have found significantly higher rates of *(cont'd)*

crafting the Act, however, Congress was aware that discrimination and exclusion in housing, as in employment, take many, often subtle, forms. It recognized, too, that discriminatory housing and residential segregation, if not interrupted, would be self-perpetuating and replicated in many communities across the country. Congress accordingly crafted legislation that would prohibit both intentional discriminatory actions and policies and practices having an unjustified discriminatory impact. It reaffirmed that determination in 1988, based on two decades of experience and judicial interpretation. The Department of Housing and Urban Development ("HUD"), the agency charged by Congress with enforcing the Act, has consistently adopted and applied that interpretation. And the interpretation comports with U.S. treaty obligations and international consensus.

A. The Text, Purpose, and Structure of the Fair Housing Act Prohibit Disparate Impact Discrimination

---

(cont'd from previous page)
discrimination. *See, e.g.,* Daniel Bustamante, Exec. Dir., Greater Houston Fair Hous. Ctr., Remarks Before the National Commission on Fair Housing and Equal Opportunity 2 (July 31, 2008), *available at* http://www.prrac.org/projects/fair_housing_commission/houston/bustamante.pdf; *The Future of Fair Housing: Report of the National Commission on Fair Housing and Equal Opportunity* (2008), *available at* http://www.prrac.org/projects/fair_housing_commission /The_Future_of_Fair_Housing.pdf.

Beginning with the declaration that "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States," 42 U.S.C. § 3601, the Fair Housing Act established an ambitious purpose and a "broad remedial intent," *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982). Because Congress was aware that housing discrimination took myriad forms and resulted in extensive harms, it fully intended to prohibit the complete range of actions, policies, and practices that exclude Americans from housing based on the covered human characteristics.

Petitioners' contention that the term "because of race" connotes only intentional discrimination, Br. for the Pet'rs at 20-36, demonstrably fails, as this and other courts have found other provisions using that language to prohibit disparate impact discrimination. *See*, *e.g.*, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (regarding Title VII, 42 U.S.C. § 2000e-2); *Smith v. City of Jackson*, 544 U.S. 228 (2005) (regarding ADEA § 4(a)(2)). Both the terms "because of race" and "discrimination" can embrace the full range of policies, practices, and decisions that act to exclude, disadvantage, or segregate Americans based on the human characteristics covered by the civil rights laws. The similarity of text and purpose between the Fair Housing Act (Title VIII) and Title VII, moreover, indicates that the former provision's language should encompass disparate impact here. *See*, *e.g.*, *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 208-09 (1972) (interpreting the Fair Housing Act based on Title VII precedent); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 935 (2d Cir.) (citing numerous cases and other authorities

noting "the parallel between Title VII and Title VIII"), *aff'd in part per curiam*, 488 U.S. 15 (1988).

Here, the operative language "focuses on the effects of the action"—that is, on whether housing is "unavailable" to homeseekers of a particular group along a protected classification—"rather than the motivation for the action," *Smith*, 544 U.S. at 236 (emphasis omitted), and prohibits a wide range of exclusionary practices, to the full extent of "constitutional limitations." *See* 42 U.S.C. § 3602(f). As with provisions of Title VII and the Age Discrimination in Employment Act ("ADEA") that this Court has found to prohibit disparate impact discrimination, *see generally* 42 U.S.C. § 2000e-2(a)(2) (Title VII), 29 U.S.C. § 623(a)(2) (ADEA), the phrase "otherwise make unavailable or deny" here focuses on effects and thus encompasses disparate impact as well. While not every civil rights provision that includes the word "otherwise" prohibits disparate impact discrimination, *see* 29 U.S.C. § 623(a)(1), the full phrase "otherwise make unavailable or deny," in the textual and structural context of the Fair Housing Act, connotes disparate impact, as well as disparate treatment, prohibitions. *See*, *e.g.*, *Reno v. Koray*, 515 U.S. 50, 56 (1995) ("[I]t is a 'fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.'" (quoting *Deal v. United States*, 508 U.S. 129, 132 (1993))).

As the Brief for the United States explains, moreover, the Act contains exemptions from liability that would have no functional purpose absent a disparate impact cause of action. Br. for the U.S. at 15-16; *see also* 42 U.S.C. §§ 3607(b)(4), 3607(b)(1),

3605(c). Reading the Act to prohibit only intentional discrimination would render these exceptions superfluous, contrary to this Court's frequent admonitions. *See*, *e.g.*, *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Or.*, 515 U.S 687, 698 (1995) ("A reluctance to treat statutory terms as surplusage supports the reasonableness of the Secretary's interpretation."); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (same); *see also Smith*, 544 U.S. at 238-39 (inclusion of the "reasonable factors other than age" provision of the ADEA supports the availability of disparate impact, as it is "in cases involving disparate-impact claims that the RFOA provision plays its principal role by precluding liability").

B. The Court Should Defer to HUD's Authoritative Interpretation of the Act

As the federal agency principally charged with interpreting and enforcing the Fair Housing Act, see 42 U.S.C. §§ 3614a (authorizing regulations), 3610 (authorizing adjudication of complaints), 3612 (same), HUD's long-standing interpretation of section 804(a) should resolve any ambiguity in its language. *See Meyer v. Holley*, 537 U.S. 280, 287-89 (2003). HUD has consistently interpreted the provision to cover disparate impact discrimination, including through formal adjudication. *See*, *e.g.*, *HUD v. Twinbrook Vill. Apartments*, Nos. 02-00-0256-8 et al., 2001 WL 1632533, at *17 (HUD ALJ Nov. 9, 2001); *HUD v. Pfaff*, No. 10-93-0084-8, 1994 WL 592199, at *7-9 (HUD ALJ Oct. 27, 1994), *rev'd on other grounds*, 88 F.3d 739 (9th Cir. 1996); *HUD v. Ross*, No. 01-92-0466-8, 1994 WL 326437, at *5, *7 (HUD ALJ July 7,

1994); *HUD v. Carter*, No. 03-90-0058-1, 1992 WL 406520, at *5 (HUD ALJ May 1, 1992); *see also HUD v. Mountain Side Mobile Estates P'ship*, Nos. 08-92-0010-1 et al., 1993 WL 307069, at *5 (HUD ALJ July 19, 1993), *aff'd in relevant part*, 56 F.3d 1243 (10th Cir. 1995), and in guidance on applying the provision to the fair-lending context, Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18,266, 18,269-70 (Apr. 15, 1994). HUD's recognition of a disparate impact cause of action in its formal adjudications warrants deference under *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), and reinforces the thorough reasoning of its determination. See *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001) (*Chevron* deference is warranted for "the fruits of notice-and-comment rulemaking or formal adjudication"); *id* at 230 n.12 (citing cases).

HUD's interpretation of section 804(a), moreover, reflects its experience with the many types of practices that, irrespective of their intent, actively discriminate in practice on the bases covered by the Act. The 1995 HUD enforcement handbook, for example, explains that a local residence preference, although not intended to discriminate, may disproportionately exclude groups along lines prohibited by the Act, *see* U.S. Dep't of Hous. & Urban Dev., No 8024.01, *Title VIII Complaint Intake, Investigation and Conciliations Handbook* 2-28 (1995), *available at* http://www.hud.gov/offices/adm/hudclips/handbooks/fheh/80241/80241c2FHEH.pdf, as may "facially neutral policies of refusing to permit low income housing within the city limits of a white community where such decisions would disproportionately

exclude African-Americans, Asians, Latinos or other groups protected against discrimination," *id.*

C. The Context and History of the Act's Passage, Including Amendments in 1988, Reinforce Its Aim to Address Disparate Impact Discrimination

The context and history surrounding the Fair Housing Act's passage affirm its aim to prohibit the full range of discrimination, including disparate impact. The contemporary examinations of housing discrimination relied upon by Congress focused on that discrimination's harmful results: the injuries that arise from residential isolation and inequity. The nationwide impact of such injuries figured prominently in the *Report of the National Advisory Commission on Civil Disorders*, established by Executive Order 11365 in 1967, and released in February of 1968. Report of the National Advisory Commission on Civil Disorders 467-82 (1968) [hereinafter Kerner Commission Report]. Because opposition to fair housing was so deeply entrenched, the Act's birth was the result of significant struggle and sacrifice, what President Lyndon Johnson called in his signing statement "a long and stormy trip." Remarks Upon Signing the Civil Rights Act, 1 Pub. Papers 509 (Apr. 11, 1968).

Unlike school segregation and discrimination in public accommodations, which were largely tied to the Southern Jim Crow system, residential segregation, racialized ghettos, and the discriminatory practices that enabled them were most prevalent in the North and West, and were greatly facilitated by government policies on the

federal, state, and local level. See Kenneth B. Clark, *Dark Ghetto* 22-25 (1965) (describing "the Negro ghetto" as "a Northern urban invention"). Northern obstacles to fair housing, moreover, were correctly understood to include intentionally discriminatory decisions, the continuing effects of past discrimination, and neutral policies that interact with them to both perpetrate and perpetuate discrimination. *See*, *e.g.*, Kerner Commission Report, *supra*, at 467-82 (noting the role of intentional discrimination and segregation, but also unequal code enforcement, land use, lack of maintenance and investment, and other factors in constructing and perpetuating African-American ghettos); Douglas S. Massey & Nancy A. Denton, *American Apartheid* 58 (1993) (describing the combined effects of real estate industry discrimination, individual prejudice, federally sponsored financial discrimination, disparate "urban renewal" efforts, and public housing authority policies contributing to segregation).

One well-known example of past governmental action that reaches forward across the decades is the Home Owners' Loan Corporation, a federal program for refinancing mortgages passed in the 1930s, which institutionalized "redlining" practices in which neighborhood lending risk was rated according to race. These race-based credit policies were adopted in turn by the Federal Housing Administration and Veterans Administration in the 1940s and 50s—when the suburbanization of America began, and the "Great Migration" of African Americans to the North was at a high point. *See* Leonard S. Rubinowitz & Ismail Alsheik, *A Missing Piece: Fair Housing and the 1964 Civil Rights Act*, 48 How. L.J. 841, 873-84 (2005). The Federal Housing Administration

program, which guaranteed loans made by private banks, shaped the residential housing market, reinforcing segregation and disinvestment in black communities. Massey & Denton, *supra*, at 52-54. The lack of loan capital "flowing into minority neighborhoods made it impossible for owners to sell their homes, leading to steep declines in property values and a pattern of disrepair, deterioration, vacancy, and abandonment." *Id*. at 55. Modern-day implications include the "reverse redlining" era of the 1980s and beyond, in which "a string of discriminatory lending products were targeted into these historically undercapitalized and segregated communities." john a. powell & Jason Reece, *The Future of Fair Housing and Fair Credit: From Crisis to Opportunity*, 57 Clev. St. L. Rev. 209, 222 (2009); *see also* Nat'l Cmty. Reinvestment Coal., The Opportunity Agenda & Poverty & Race Research Action Council, *Homeownership and Wealth Building Impeded: Continuing Lending Disparities for Minorities and Emerging Obstacles for Middle-Income and Female Borrowers of All Races* (2006), *available at* http://opportunityagenda.org/files/field_file/Subprime%20Lending%20Report_0.PDF.

Both before and after the Act's passage, moreover, large-scale, high-density public and affordable housing—though often well-intentioned—exacerbated discriminatory housing patterns, as they were generally constructed in black neighborhoods and away from white areas near quality schools and other opportunities. *See* Massey & Denton, *supra*, at 56, 229; *see also*, *e.g.*, *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3d Cir. 1977). In more recent times, these patterns have also been perpetuated by

exclusionary zoning practices, which operate to block or limit the growth of housing likely to be accessible to minorities (such as multifamily rentals), thus freezing the status quo. *See*, *e.g.*, john a. powell, *Reflections on the Past, Looking to the Future: The Fair Housing Act at 40*, 41 Ind. L. Rev. 605, 614 (2008). In short, the interaction of past discrimination with facially neutral policies and practices thwarts equal housing opportunity for large numbers of Americans.

The self-perpetuating nature of these patterns, even as more people of color have moved into the middle class, is well documented. *See* Massey & Denton, *supra*, at 2 ("Residential segregation is self-perpetuating, for in segregated neighborhoods, the damaging social consequences that follow from increased poverty are spacially concentrated . . . creating uniquely disadvantaged environments that become progressively isolated—geographically, socially, and economically—from the rest of society."); Jason Corburn, *Toward the Healthy City: People, Places, and the Politics of Urban Planning* 77 (2009) (same); *cf. Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 265 (1991) (Marshall, J., dissenting) (noting "the roles of the State, local officials, and the Board in creating what are now self-perpetuating patterns of residential segregation"); *see also* Camille L. Zubrinsky & Lawrence Bobo, *Prismatic Metropolis: Race and Residential Segregation in the City of the Angels*, 25 Soc. Sci. Res. 335, 339 (1996); David J. Harris & Nancy McArdle, Harvard Civil Rights Project, *More Than Money: The Spatial Mismatch Between Where Homeowners of Color in Metro Boston Can Afford to Live and Where They Actually Reside* (2004), *available at*

http://civilrightsproject.ucla.edu/research/metro-and-regional-inequalities/metro-boston-equity-initiative-1/more-than-money-the-spatial-mismatch-between-where-homeowners-of-color-in-metro-boston-can-afford-to-live-and-where-they-actually-reside/harris-spatial-mismatch-boston-one-2004.pdf.

In crafting the Fair Housing Act, Congress recognized this mix of intentional and facially neutral forces that contribute to housing discrimination. See, *e.g.*, 114 Cong. Rec. 2277 (1968) (statement of bill's sponsor, Sen. Mondale) ("In part, this inability [of African Americans to move to higher opportunity neighborhoods] stems from a refusal of suburbs and other communities to accept low-income housing," as well as from "the racially discriminatory practices not only of property owners but also of real estate brokers," and "the policies and practices of agencies of government at all levels." (quoting U.S. Comm'n on Civil Rights, *A Time to Listen . . . A Time to Act: Voices From the Ghettos of The Nation's Cities* 60 (1967))); *id.* at 2278 (statement of Sen. Mondale) ("The record of the U.S. Government in that period is one, at best, of covert collaborator in policies which established the present outrageous and heartbreaking racial living patterns . . . ."); *id.* at 2526-27 (statement of Sen. Brooke) (detailing the role of the federal and state governments, as well as private discrimination, in creating, institutionalizing, and perpetuating housing discrimination and segregation). It saw that, accordingly, reversing such long-standing, deeply-embedded patterns would require legislation that disrupted both intentional

and non-intentional patterns and practices.[3] *See*, *e.g.*, 114 Cong. Rec. 2524 (statement of Sen. Brooke) ("Unless we can lift that blockade and open the traditional path once more, permanent *de facto* segregation will unquestionably disrupt further progress toward the open society of free men we have proclaimed as our ideal."); *id.* at 2534-36 (summary brief by the U.S. Department of Justice introduced by Sen. Tydings) (asserting that the Act was appropriate legislation authorized by the Equal Protection Clause, due to the need to address the "evil effects" of extensive past state and federal government conduct).

In 1988, finding that "highly segregated housing patterns still exist across the Nation," 134 Cong. Rec. H4604 (daily ed. June 22, 1988) (statement of Rep. Rodino), Congress strengthened the Act. The 1988 amendments added new provisions barring discrimination based on familial status and disability, creating statutory exemptions that presume the availability of disparate impact causes of action (*see supra* pp. 9-10), and enhancing HUD's authority to interpret and implement the Act. *See* Fair Housing Amendments Act of 1988, Pub. L.

---

[3] In this respect, Title VIII and Title VII similarly were intended to address deeply embedded, self-perpetuating harms. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971) ("The objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.").

No. 100-430, 102 Stat. 1619. At the same time, Congress specifically rejected an amendment that would have required proof of intentional discrimination in disparate impact challenges to zoning decisions. *See* H.R. Rep. No. 100-711, at 89 (dissenting view of Rep. Swindall).

Additionally, Congress made clear its intent that protection from discriminatory effects be extended to the newly-protected class of individuals with disabilities, including through the reasonable accommodations provision. As Senator Harkin noted, for example, "[d]iscrimination in housing on the basis of handicap takes many forms. One form of discrimination . . . results from thoughtlessness and indifference. Policies or acts that have the effect of causing discrimination can be just as devastating as other forms of discrimination. For example, a person using a wheelchair is just as effectively excluded from the opportunity to live in a particular dwelling by a policy that provides 'no wheeled vehicles may be used on carpets' or by the design and construction of a dwelling that results in a lack of access into a unit because the door ways are too narrow." 134 Cong. Rec. S10,463 (daily ed. Aug. 1, 1988) (statement of Sen. Harkin). Congress further clarified that the amendment's new "antidiscrimination provisions [applicable] to purchasers of mortgage loans in the secondary mortgage market . . . [would] not preclude those purchasing mortgage loans from taking into consideration factors *justified by business necessity*." 134 Cong. Rec. S10,549 (daily ed. Aug. 2, 1988) (statement of Sen. Sasser) (regarding current 42 U.S.C. § 3605) (emphasis added).

In enacting these amendments, Congress was aware that the Act, including section 804(a), had

uniformly been interpreted by all of the courts of appeals that had then considered the issue to encompass disparate impact claims. *See*, *e.g.*, *Fair Housing Amendments Act of 1987: Hearings on S. 558 Before the Subcomm. on the Constitution of the Sen. Comm. on the Judiciary*, 100th Cong. (1987) (statement of Robert Schwemm) (noting that the decisions of nine courts of appeals "reflect the strong consensus, now approaching uniformity, that [T]itle VIII be construed to prohibit discriminatory effects"); *see also* H.R. Rep. No. 100-711, at 21 (House Judiciary Committee report citing two circuit court decisions holding that adults-only housing may state a claim of racial discrimination under Title VIII); H.R. Rep. No. 100-711, at 90 (discussing Second Circuit's decision recognizing disparate impact claims without a finding of discriminatory intent by the district court). Congress thus acknowledged the lower courts' recognition of disparate impact and, far from altering that interpretation, implicitly ratified it in its discussion and amendment of the Act.

D. Interpreting the Fair Housing Act to Prohibit Disparate Impact Discrimination Is Consonant with U.S. Treaty Commitments and International Consensus

Interpreting the Fair Housing Act to prohibit unnecessary or unjustified disparate impact is also consistent with the United States' international treaty agreements, and with international consensus. While the task of interpreting domestic law is the purview of the U.S. courts, this Court has recognized the value of international authority as "instructive for its interpretation" of federal law. *Roper v.*

Simmons, 543 U.S. 551, 575 (2005); *see also Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (describing as instructive the international understanding of, and limits to, proactive government actions as embodied in the International Convention on the Elimination of All Forms of Racial Discrimination); *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (Kennedy, J.).

The International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), a treaty which the United States has signed and ratified,[4] is instructive in resolving the case at bar. As of January 7, 2012, 175 nations had become parties to CERD, representing a broad inter-governmental consensus regarding "measures for speedily eliminating racial discrimination in all its forms and manifestations." CERD, pmbl. Consistent with the Courts of Appeals' uniform interpretation of section 804(a), CERD requires that governments eliminate behavior that is unnecessarily discriminatory in effect. *Id.* art. 1(1) ("[R]acial discrimination" is "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the *purpose* or *effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." (emphasis added)).

---

[4] CERD, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (originally signed Sept. 28, 1966, entered into force Jan. 4, 1969 and ratified by Congress Oct. 21, 1994); *see also* 140 Cong. Rec. S7634 (daily ed. June 24, 1994).

Similarly, in its General Recommendation No. 14 of 17 March 1993 on the definition of discrimination, the Committee on the Elimination of Racial Discrimination, the body responsible for administering the treaty, noted, *inter alia*, that "[i]n seeking to determine whether an action has an effect contrary to the Convention, [the Committee] will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin." Rep. of the Comm. on the Elimination of Racial Discrimination, 42d Sess., Mar. 1-19, 1993, ¶ 2, U.N. Doc. A/48/18; GAOR, 48th Sess., Supp. No. 18 (1993). The Senate Executive Report on CERD, issued when the Senate deliberated ratification, noted that certain federal and civil rights statutes already addressed these obligations, including the observation that "lower courts have uniformly held that disparate impact claims may be brought under the Fair Housing Act, even in the absence of discriminatory intent." S. Exec. Rep. No. 103-29, at 28-29 (1994).

II. THE FAIR HOUSING ACT'S DISPARATE IMPACT COMPONENT PROTECTS CRUCIAL ANTI-DISCRIMINATION INTERESTS IN THE 21ST CENTURY

As a substantial body of evidence documents, housing discrimination is still a living force, and its eradication is in the nation's vital interest. Its myriad and often subtle expressions require that the Fair Housing Act remain endowed with its full reach, including over disparate impact claims.

A. Full and Equal Access to Fair Housing Opportunities Yields Tremendous Societal Benefits that the Act Was Designed to Protect

In *Trafficante v. Metropolitan Life Insurance Co.*, this Court noted that, in addition to advancing individuals' freedom of choice, the Act was intended to ensure the benefits of integration for "the whole community" and to foster "truly integrated and balanced living patterns." 409 U.S. 205, 211 (1972) (quoting 114 Cong. Rec. 2706 (statement of Sen. Javits), 3422 (statement of Sen. Mondale)). This principle was reinforced in *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979), in which the Court recognized white plaintiffs' standing under the Act on the basis that the "transformation of their neighborhood from an integrated to a predominantly Negro community is depriving them of the social and professional benefits of living in an integrated society." *Id.* at 111 (internal quotation marks omitted); *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 376 (1982) (recognizing the "benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices" (citation omitted)); *Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85, 95 (1977) (noting that, through the Act, Congress made "a strong national commitment to promote integrated housing").

Congress was also profoundly concerned by the ways in which unequal housing opportunity, in turn, denies other important opportunities. As the Court noted in *Trafficante*, the presence or absence of equal housing opportunity profoundly affects, for many

Americans, "the very quality of their daily lives." 409 U.S. at 211 (quoting *Shannon v. HUD*, 436 F.2d 809, 818 (3d Cir. 1970)); *see also Gladstone, Realtors*, 441 U.S. at 111, recognizing the "harms flowing from the realities of a racially segregated community," such as school segregation and reduced property values; *see also* 114 Cong. Rec. 2529 (statement of Sen. Tydings) ("Racial discrimination in housing ties almost all nonwhites to an environment which is not conducive to good health, educational advancement, cultural development, or to improvement in general standards of living.").

When Congress amended the Fair Housing Act in 1988, it continued to recognize fair housing as a crucial access point to equal opportunity more broadly. As co-sponsor Senator Arlen Spector stated, citing the social science findings of Dr. Douglas Massey: "due to residential segregation, middle class blacks are not free to live where they choose or where their income allows. They are forced to live in a disadvantaged environment, subject to higher crime rates, less healthy surroundings and inferior school systems." 134 Cong. Rec. S10,460 (daily ed. Aug. 1, 1988) (statement of Sen. Specter) (citing statement of Douglas S. Massey Before the Banking, Finance, and Urban Affairs Subcomm. on Housing and Community Development). Similarly, co-sponsor Senator Edward Kennedy noted that "[r]esidential segregation is the primary obstacle to meaningful school integration. And as businesses move away from the urban core, housing discrimination prevents its victims from following jobs to the suburbs, impeding efforts to reduce minority unemployment." *Id*. at S10,454; *see also* 114 Cong. Rec. 2277 ("To many slum residents, just as to other Americans,

moving to a better neighborhood may mean more than obtaining better housing. For one thing, it may give their children the opportunity to grow up in a healthier atmosphere." (quoting U.S. Comm'n on Civil Rights, *supra*, at 60)).

Such statements make clear that concerns over racial isolation and its related social impacts were intrinsic to the Fair Housing Act at the time of its passage and amendment. A large body of social science research and practical experience, moreover, reaffirms the profound value of equal housing opportunity protected by the Fair Housing Act's disparate impact component. Now, as in 1968 and 1988, our neighborhoods are the primary environments in which we access key structures of opportunity and social capital, including education, employment, environmental quality, and physical health. In the context of enduring racialized residential trends, housing discrimination, intentional and otherwise, continues to frustrate equal access to these vital aspects of opportunity.

While racial and ethnic residential segregation have diminished modestly over the last several decades, low-income Americans of color are much more likely than low-income white Americans to be relegated to neighborhoods of extreme and concentrated poverty. [5] That is, *controlling for*

---

[5] See The Opportunity Agenda, *The State of Opportunity in America* 118-19 (2006), *available at* http://opportunityagenda.org/static/report/STATE%20OF%20OPPORTUNITY%20REPORT.PDF; *see also* John R. Logan, *Separate and Unequal: The Neighborhood Gap for Blacks, Hispanics and Asians in Metropolitan America* (2011), *available at* http://www.s4.brown.edu/us2010/Data/Report/report0727.pdf.

income, people of color disproportionately suffer the confluence of racial and socioeconomic isolation, and the lack of social resources and opportunities that accompany that condition. Recent data reveals that "[w]ith only one exception (the most affluent Asians), minorities at every income level live in poorer neighborhoods than do whites with *comparable incomes*." Logan, *supra*, at 1 (emphasis added). As one study analyzing national Census data noted, "[a]mong the poor, only one quarter of whites live in poverty areas, compared to half of Asians and two-thirds of blacks and Latinos . . . . Almost half of poor whites and over half of poor non-Latino whites live in the suburbs, compared to just 24% of poor Asians, 15% of poor Latinos, and 10% of poor blacks." Nancy McArdle, Harvard Civil Rights Project, *Beyond Poverty: Race and Concentrated-Poverty Neighborhoods in Metro Boston* 7 (2003), *available at* http://civilrightsproject.ucla.edu/research/metro-and-regional-inequalities/metro-boston-equity-initiative-1/beyond-poverty-race-and-concentrated-poverty-neighborhoods-in-metro-boston/mcardle-beyond-poverty-boston-2003.pdf.

The effects on individuals of living in neighborhoods of high poverty concentration are overwhelmingly adverse, restricting access to education, employment, and public services, and negatively impacting health. *See*, *e.g.*, David R. Williams & Chiquita Collins, *Racial Residential Segregation: A Fundamental Cause of Racial Disparities in Health*, Pub. Health Rep., vol. 116, Sept.-Oct. 2001, at 404. Conversely, moving to low-poverty, "high opportunity" neighborhoods has been shown to improve the life chances of inhabitants, and particularly young people, through several distinct

mechanisms, including: stronger institutional resources, such as higher quality schools, youth programs, and health services; more positive peer-group influences; reduced violence; and more effective parenting due to reduced stress and greater employment. *See* Xavier De Souza Briggs et al., *Moving to Opportunity: The Story of an American Experiment to Fight Ghetto Poverty* 93 (2010); *cf. Report of the Bipartisan Millenial Housing Commission* 10 (2002) ("Decent, affordable, and accessible housing fosters self-sufficiency, brings stability to families and new vitality to distressed communities, and supports economic growth.").

Neighborhoods are a primary determinant of school assignment, linking equal housing opportunity to educational opportunity and achievement. *See*, *e.g.*, Gary Orfield & Chunmei Lee, Harvard Civil Rights Project, *Why Segregation Matters: Poverty and Educational Inequality* (2005), *available at* http://bsdweb.bsdvt.org/district/EquityExcellence/Research/Why_Segreg_Matters.pdf; *see also United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1233-35 (2d Cir. 1987) (discussing the relationship between school segregation and housing segregation). Research by The Century Foundation, for example, found that, on average, low-income students attending middle-class schools perform higher than middle-class students attending low-income schools.[6] Additionally, research has found that students of all racial backgrounds tend to perform better

---

[6] Richard D. Kahlenberg, Century Found., *Can Separate Be Equal? The Overlooked Flaw in No Child Left Behind* (2004), *available at* http://tcf.org/publications/2004/4/pb468.

academically (as measured by grades, test scores, and high school and college graduation rates) in racially integrated schools, compared to those who attend schools that are racially and socioeconomically isolated.[7] Susan Eaton, Nat'l Coal. on Sch. Diversity, *How the Racial and Socioeconomic Composition of Schools and Classrooms Contributes to Literacy, Behavioral Climate, Instructional Organization and High School Graduation Rates* 1 (2010), available at http://school-diversity.org/pdf/DiversityResearchBriefNo2.pdf (detailing the "profound" negative effects of attending high poverty and racially concentrated schools (citing James Benson & Geoffrey Borman, *Family, Neighborhood, and School Settings Across Seasons: When Do Socioeconomic Context and Racial Composition Matter for the Reading Achievement Growth of Young Children?*, 112 Teachers Coll. Rec. 1338 (2010))); *see also* Orfield & Lee, *supra*, at 15.

Equality of housing opportunity also helps to determine health outcomes. This is because neighborhood quality determines both exposure to health risks and access to health care resources. Research demonstrates that, controlling for income and other relevant variables, communities of color bear a disproportionate share of the nation's environmental and health hazards.[8] The racially

---

[7] Roslyn Arlin Mickelson, Nat'l Coal. on Sch. Diversity, *Exploring the School-Housing Nexus: A Synthesis of Social Science Evidence* (2011), *available at* http://school-diversity.org/pdf/DiversityResearchBriefNo7.pdf.

[8] *See*, *e.g.*, U.S. Comm'n on Civil Rights, *Not in My Backyard: Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice* 13 et seq. (2003), *available at*

(cont'd)

identifiable character of communities has been found to be correlated with land use and facility siting; transport of hazardous and radioactive materials; public access to environmental services, planning, and decision-making; health assessments and community impacts; air quality and health risks; childhood lead poisoning; childhood asthma; pesticide poisoning; and occupational accidents and illnesses.[9] Studies have also shown that residential segregation is related to elevated risks of adult mortality, infant mortality, and tuberculosis, and that even adjusting for income, education, occupational status, and behavioral risk factors, people residing in disadvantaged neighborhoods had a relatively high risk of heart disease.[10] Unequal neighborhood conditions—such as crime rates, park space, safe pedestrian routes, and grocery stores—also impact physical and mental health and the ability to engage in healthy behaviors.[11] Additionally, access to health care facilities and medicine are unequal across

---

(cont'd from previous page)
http://www.usccr.gov/pubs/envjust/ej0104.pdf; Manuel Pastor et al.,Ctr. for Justice, Tolerance & Cmty., *Still Toxic After All These Years: Air Quality and Environmental Justice in the Bay Area* (2007), *available at* http://cjtc.ucsc.edu/docs/bay_final.pdf; Joint Ctr. for Political & Econ. Studies, *Breathing Easier: Community-based Strategies to Prevent Asthma* 2 (2004), *available at* http://jointcenter.org/hpi/sites/all/files/JointCenter-Asthma.pdf.

[9] Robert D. Bullard & Glenn S. Johnson, *Just Transportation, in Just Transportation: Dismantling Race and Class Barriers to Mobility* 10 (Robert D. Bullard & Glenn S. Johnson eds., 1997).

[10] *See* Williams & Collins, *supra*, at 409.

[11] *See*, *e.g.*, *id.*

neighborhoods.[12] For example, research shows that health care facilities are more likely to close in poor and minority communities than in other areas.[13] Racially isolated minority communities are also more likely to be stranded without adequate municipal services, which often bypass segregated communities.[14] *See*, *e.g.*, *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690 (9th Cir. 2009); *Kennedy v. City of Zanesville*, 505 F. Supp. 2d 456 (S.D. Ohio 2007); *Lopez v. City of Dallas*, No. 3:03-CV-2223-M, 2004 WL 2026804 (N.D. Tex. Sept. 9, 2004). Removing unequal and unnecessary barriers to high opportunity neighborhoods thus promotes better and more equitable health opportunities, as intended by Congress.

Housing opportunity is also crucial to expanding access to skill-appropriate jobs. Racial and ethnic differences in income derive partially from a spacial mismatch between job sites and minority residences, largely due to the relocation of high-paying, low-skilled jobs away from the cities and older suburbs[15]—a particular concern of the Act's

---

[12] *Id.* at 411.

[13] *Id.*

[14] Nat'l Research Council, *Governance and Opportunity in Metropolitan America* 31 (Alan Altshuler et al. eds., 1999) (citing Nancy Burns, *The Formation of American Local Governments* (1994)).

[15] See Michael A. Stoll, Brookings Inst., *Job Sprawl and the Spatial Mismatch Between Blacks and Jobs* (2005), *available at* http://www.brookings.edu/~/media/Files/rc/reports/2005/02metropolitanpolicy_stoll/20050214_jobsprawl.pdf.

drafters. *See, e.g.,* 114 Cong. Rec. 2276 (statement of Sen. Mondale) ("Unless [African Americans] are going to be able to move in the suburban communities through the elimination of housing discrimination and the provision of low and moderate-cost housing, they are going to be deprived of many jobs because they will be unable to live in the central city and work in the suburbs."). Where blacks, Latinos, and Asian Americans are most segregated from whites residentially, they also experience the greatest mismatches between their residences and available jobs.[16] The very fact of racial isolation also limits the job and other opportunities available to minorities by constricting their social networks.[17]

These findings about the benefits of equal access to high-opportunity neighborhoods are reflected in the first-hand observations of those who have made the transition from low-opportunity neighborhoods. For example, in one recent pilot housing mobility program, tracking the experiences of over 500 families who moved from low-opportunity, racially concentrated areas to low-poverty, racially diverse neighborhoods, participants reported significant, positive changes in numerous aspects of their lives. Eighty-nine percent of parents reported that their children appeared to be learning "better or much better" in their new schools, while 80 percent of participants said they felt safer, more peaceful,

---

[16] Lisa Robinson & Andrew Grant-Thomas, Harvard Civil Rights Project, *Race, Place, and Home: A Civil Rights and Metropolitan Opportunity Agenda* 25 (2004).

[17] *See* Massey & Denton, *supra*, at 109, 161-62.

and less stressed, 60 percent of participants said they felt more motivated, and nearly 40 percent said they felt healthier.[18]

Finally, as this Court has noted, equal housing opportunity and residential integration provide important societal benefits of inter-group understanding and dismantling of negative stereotypes through richer social interactions and opportunities to learn from each other. *See Grutter v. Bollinger*, 539 U.S. 306, 330-34 (2003). Numerous studies demonstrate that meaningful contact between members of different races significantly reduces prejudice among racial groups. Recently, a carefully researched and frequently cited review of over 500 studies found that this phenomenon, known as "contact theory," is overwhelmingly supported by the data, and that inter-group contact typically reduces prejudice even towards groups not included in the study. Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. Personality & Soc. Psychol. 751 (2006). By facilitating exposure to other cultures and contact among individuals, racial integration can dispel harmful stereotypes and help to dismantle the discriminatory cycles that perpetuate racial distrust.[19]

---

[18] Lora Engdahl, Poverty & Race Research Action Council, *New Homes, New Neighborhoods, New Schools: A Progress Report on the Baltimore Housing Mobility Program* 3 (2009), *available at* http://www.prrac.org/pdf/BaltimoreMobilityReport.pdf.

[19] *See* Roslyn Arlin Mickelson, Nat'l Coal. on Sch. Diversity, *Exploring the School-Housing Nexus: A Synthesis of Social Science Evidence* (2011), *available at* http://school-diversity.org/pdf/DiversityResearchBriefNo7.pdf (regarding

(cont'd)

The research described above confirms the validity of Congress's concerns about residential isolation and unequal housing opportunity, and makes clear that those concerns remain highly relevant today. It highlights, moreover, the personal, community, and national value that removing unequal and unnecessary barriers to high opportunity neighborhoods confers. As we explain below, the Fair Housing Act's disparate impact component is crucial to fulfilling Congress's intent in that regard.

B. Disparate Impact Protections Are Necessary to Address the Harms Contemplated by the Fair Housing Act

Opinion research shows that Americans of color overwhelmingly prefer to live in racially and ethnically mixed communities. A 2008 survey by the Pew Research Center, for example, found that 83% of African Americans expressed a preference for living in a racially mixed neighborhood, as did 69% of Latinos, and 60% of whites.[20] Opinion research has also found that "[o]nly a trivial percentage of blacks, Hispanics, and Asians express objection to living in a largely white neighborhood. The figure is below 10%

(cont'd from previous page)
benefits of multiethnic "social cohesion" and connection between residential and educational integration).

[20] Pew Research Ctr., *Americans Say They Like Diverse Communities* (2008), *available at* http://pewsocialtrends.org/2008/12/02/americans-say-they-like-diverse-communities-election-census-trends-suggest-otherwise/.

for each of the minority groups."[21] But despite the preference of most Americans of color, and indeed most Americans generally, for equal access to diverse communities, that goal is too often thwarted by a mix of intentional and practical discrimination. The Fair Housing Act, properly construed, can address such discrimination.

Whereas official racial exclusion is now rare in the housing context, discrimination in the 21st century continues, and is frequently covert or implicit.[22] *See*, *e.g.*, Jerry Kang, *Trojan Horses of Race*, 118 Harv. L. Rev. 1489 (2005) (documenting the role of subconscious or implicit bias in decision-making); *see also* Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test*, 85 J. Personality & Soc. Psychol. 197 (2003); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161, 1188 (1995); David L. Hamilton & Terrence L. Rose, *Illusory Correlation and the Maintenance of Stereotypic Beliefs*, 39 J. Personality & Soc. Psychol. 832 (1980). Subconscious or implicit bias may influence the adoption of facially neutral policies in ways that are difficult to detect, and of which the decision-makers are, by definition, not aware. *See* George Wilson & Amie L. Nielsen, *"Color Coding" and Support for Social Policy Spending: Assessing the Parameters Among Whites*,

---

[21] Lawrence Bobo, Attitudes on Residential Integration: Perceived Status Differences, Mere In-Group Preference, or Racial Prejudice?, 74 Soc. Forces 3, 883 (1996).

634 Annals Am. Acad. Pol. & Soc. Sci. 174, 176 (2011) (describing how "invidious stereotypes regarding the cultural and motivational personal characteristics of African Americans (e.g., laziness or lack of work ethic), are linked to ostensibly nonracial specific statuses and conditions," and noting that stereotypes of African Americans are connected to reduced support for certain social policies (citing Martin Gilens, *"Race Coding" and White Opposition to Welfare*, 90 Am. Pol. Sci. Rev. 593 (1996))).

Furthermore, modern day discrimination is often structural in nature: inequities in education, finance, housing and other systems are layered upon a shared national past – that includes legally mandated segregation – to form a web of interrelated barriers that perpetuate inequality. *See* john a. powell, *Structural Racism: Building Upon the Insights of John Calmore*, 86 N.C. L. Rev. 791 (2008). In the housing context, current spatial arrangements and financial inequalities are the legacy of (among other factors) enforced segregation, redlining, and unequal property rights. See, *e.g.*, Massey & Denton, *supra*, at 58 (noting the broad, continuing effects of racially restrictive covenants). As discussed above, these policies and practices have created deeply embedded, self-perpetuating harms.

In a wide range of circumstances relevant here, moreover, facially neutral policies and practices erect unequal and unnecessary barriers to housing opportunity, arbitrarily or despite the existence of effective, less discriminatory alternatives. In *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir.), *aff'd in part per curiam*, 488 U.S. 15 (1988), for example, a primarily white suburb was challenged under the Fair Housing Act for its

adherence to a zoning ordinance that confined multifamily housing to a narrow urban renewal area. Although the town was only 3.35% black, the urban renewal district was 52% minority; the court further found that the town had a shortage of affordable rental housing, and that a disproportionate number of minorities were in need of such housing. *Id.* at 928-29. As the court in *Huntington* also found that the plaintiffs had not "prove[n] that the Town was motivated by segregative intent when it confined subsidized housing to the urban renewal area," *id.* at 933, these harms would have gone unaddressed had a showing of intent been required. Yet, they reflect precisely the type of injury that the Act was intended to address. *See*, *e.g.*, 114 Cong. Rec. 2281 (statement of Sen. Brooke) (describing how the housing official of the time "commonly inveighs against the evils of ghetto life even as he pushes buttons that ratifies their triumph—even as he ok's public housing sites in the heart of Negro slums, releases planning and urban renewal funds to cities dead-set against integration, and approves the financing of suburban subdivisions from which Negroes will be barred").

In *Resident Advisory Board v. Rizzo*, 564 F.2d 126 (3d Cir. 1977), where defendants failed to develop land they had cleared for urban renewal, disparate impact analysis was again necessary to address barriers to housing opportunity. The Third Circuit found that the renewal policies had virtually eliminated black residents from an area that was previously 43% black: "[t]he evidence produced by the plaintiffs, which revealed that the urban renewal activities of the defendants had the result of removing black families from the Whitman [development] site, leaving Whitman as an all-white

community, was sufficient to establish a prima facie case of discriminatory effect. Nor can there be any doubt that the impact of the governmental defendants' termination of the project was felt primarily by blacks, who make up a substantial proportion of those who would be eligible to reside there." *Id*. at 149. Further, in *Dews v. Town of Sunnyvale*, 109 F. Supp. 2d 526 (N.D. Tex. 2000), *Keith v. Volpe*, 858 F.2d 467 (9th Cir. 1988), and *Charleston Housing Authority v. United States Department of Agriculture*, 419 F.3d 729 (8th Cir. 2005), courts upheld disparate impact claims where defendants' actions rendered low-income housing unavailable while the stated reasons for these decisions lacked a legitimate justification.

As with affordable housing construction, residency preferences can constitute facially neutral policies that raise barriers to equal housing opportunity while lacking roots in a justifiable purpose. In *United States v. Housing Authority of Chickasaw*, 504 F. Supp. 716 (S.D. Ala. 1980), for example, a housing authority within a county with a 32% African-American population had never housed a black resident; this was attributable to the housing authority's town residency requirement. As the court found that this "requirement was not adopted by the defendant with the intent to discriminate on the basis of race," a disparate impact analysis was necessary to address this unjustified and avoidable harm under the Act. *Id*. at 729, 730; *see also Comer v. Cisneros*, 37 F.3d 775 (2d Cir. 1994); *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33 (D. Mass. 2002).

Numerous other lower court cases illustrate that disparate impact protections remain necessary

to fulfill the goals of the Fair Housing Act in a variety of contexts. For example, disparate impact claims have been necessary to address discrimination in the form of unjustified refusal to rent to welfare recipients, *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246 (9th Cir. 1997) and *HUD v. Ross*, No. 01-92-0466-8, 1994 WL 326437, at *5, *7 (HUD ALJ July 7, 1994); homeowners insurance redlining, *Nat'l Fair Hous. Alliance, Inc. v. Prudential Ins. Co. of Am.*, 208 F. Supp. 2d 46 (D.D.C. 2002); exclusionary mortgage lending policies, *Nat'l Cmty. Reinvestment Coal. v. Accredited Home Lenders Holding Co.*, 573 F. Supp. 2d 70 (D.D.C. 2008); and zoning restrictions on supportive living facilities, *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179 (E.D.N.Y. 1993).

Notably, though it is not at issue in this case, the Act's prohibition against actions that have a *segregative* effect on communities—like its prohibition on disparate impact discrimination—has also been crucial in preventing the harms the Act was intended to address, and in protecting access to high-opportunity neighborhoods. *See*, *e.g.*, *Huntington Branch*, 844 F.2d at 937 (explaining that under the Fair Housing Act, the "discriminatory effect of a rule arises in two contexts: adverse impact on a particular minority group and harm to the community generally by the perpetuation of segregation").

III. THE DISPARATE IMPACT STANDARD PROTECTS THE NEEDS OF PUBLIC AND PRIVATE HOUSING DECISION-MAKERS WHILE PREVENTING UNNECESSARY DISCRIMINATION

Proper enforcement of housing codes is an important municipal function, and part of ensuring

the full benefits of housing. Yet, as with restrictive covenants, zoning ordinances, and other neutral property-related mechanisms, it cannot be employed to discriminate. At the same time, liability remains circumscribed by plaintiffs' burden at the *prima facie* stage, as well as by the remaining factors in the analysis. *See*, *e.g.*, *Catanzaro v. Weiden*, 188 F.3d 56, 65 (2d Cir. 1999) (Fair Housing Act claim based on demolition of structurally unsound building failed because plaintiffs did not prove discriminatory impact); *Budnick v. Town of Carefree*, 518 F.3d 1109, 1119 (9th Cir. 2008) (failure to produce statistics showing discriminatory impact); *Oti Kaga, Inc. v. S.D. Hous. Dev. Auth.*, 342 F.3d 871, 883 (8th Cir. 2003) (conduct with discriminatory impact was found justifiable on the ground that it was necessary to governmental entity's "exercise of its funding responsibilities"); *Peoria Area Landlord Ass'n v. City of Peoria*, 168 F. Supp. 2d 917, 923 (C.D. Ill. 2001) (granting summary judgment on Fair Housing Act claim alleging disparate impact of housing safety code, because of plaintiffs' failure to provide "non-speculative evidence demonstrating the number of individuals who have been denied housing or inconvenienced in their search for subsidized housing as a result of the challenged policy" as well as due to the city's legitimate interest in public safety).

Properly applied, the disparate impact standard thus protects the autonomy and expertise of public and private housing decision-makers while preventing unnecessary discrimination and exclusion.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Eight Circuit should be affirmed.

Respectfully submitted,

Alan Jenkins
Counsel of Record
Megan Haberle
Annie Wang
Juhu Thukral
The Opportunity Agenda
568 Broadway Ste. 302
New York, NY 10012
(212) 334-5977
ajenkins@opportunityagenda.org

January 27, 2012

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that on this 30th day of January, 2012, I have caused three copies of the Brief Of The Opportunity Agenda, Poverty & Race Research Action Council, Public Advocates Inc., Professor Michelle Adams, The Equal Justice Society, And The Kirwan Institute For The Study Of Race And Ethnicity As *Amici Curiae* In Support Of Respondents to be served via Federal Express on counsel listed below, pursuant to Rule 29.3 of the Rules of this Court:

Louise Toscano Seeba
750 City Hall 15 W. Kellogg Boulevard
St. Paul, MN 55102
Counsel of Record for Petitioners

Thomas C. Goldstein
Goldstein & Russell, P.C.
5225 Wisconsin Avenue, N.W., Suite 404
Washington, DC 20015
Counsel of Record for Respondents

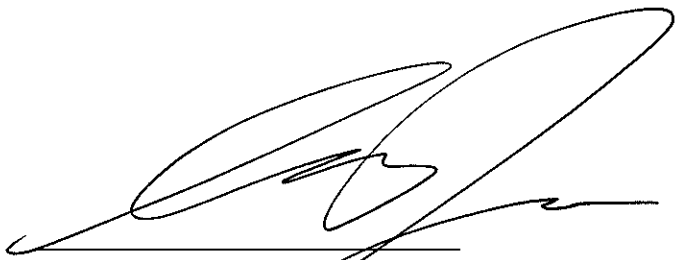
John R. Shoemaker
Shoemaker & Shoemaker, P.L.L.C.
7900 International Drive
International Plaza, Suite 200
Minneapolis, MN 55425
Counsel of Record for Respondents

Matthew A. Engel
The Engel Firm P.L.L.C.
333 Washington Avenue North, #300
Minneapolis, MN 55401
Counsel of Record for Respondents

Sonia Miller-Van Oort
Sapientia Law Group
12 South Sixth Street, Suite 1242
Minneapolis, MN 55402
Counsel of Record for Respondents

Bee Vue
21301 Furman Street, NE
Wyoming, MN 55092
Counsel of Record for Respondents

All parties required to be served have been served.

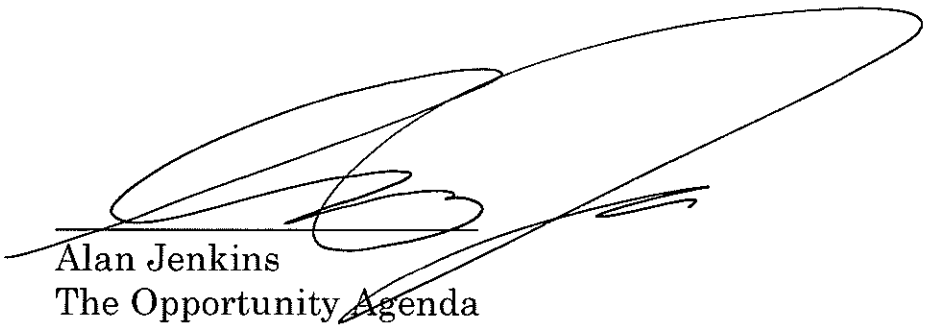


Alan Jenkins
The Opportunity Agenda
568 Broadway Ste. 302
New York, NY 10012
Counsel of Record for Amici Curiae

CERTIFICATE OF COMPLIANCE WITH WORD LIMITATIONS

As required by Supreme Court Rule 33.1(h), I certify that the Brief Of The Opportunity Agenda, Poverty & Race Research Action Council, Public Advocates Inc., Professor Michelle Adams, The Equal Justice Society, And The Kirwan Institute For The Study Of Race And Ethnicity As *Amici Curiae* In Support Of Respondents contains 8,949 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing in true and correct.



Alan Jenkins
The Opportunity Agenda
568 Broadway Ste. 302
New York, NY 10012
Counsel of Record for Amici Curiae