No. 10-1032

In the
Supreme Court of the United States

STEVE MAGNER, ET AL.,
Petitioners,

v.

THOMAS J. GALLAGHER, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AARP AND MOUNT HOLLY GARDENS CITIZENS IN ACTION, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

Amici are non-profit groups committed to the wellbeing of diverse communities. They have joined in this brief to focus on the importance of eradicating laws and policies that have the effect of discriminating against older people with disabilities or on the basis of their race or national origin. *Amici* support the desire of adults to age in place. "Aging in place offers numerous benefits to older adults – including life satisfaction, health, and self esteem – all of which are key to successful aging." Nicholas Farber et al., *Aging in Place: A State Survey of Livability Policies and Practices* 1 (Nat'l Conference of State Legislatures & AARP Pub. Pol. Inst. 2011), *available at* http://assets.aarp.org/rgcenter/ppi/liv-com/aging-in-place-2011-full.pdf. In addition, *amici* have experience working with older people with disabilities and minorities who are often disproportionately affected by redevelopment activities and must rely on a disparate impact analysis to enforce their rights under the Fair Housing Act ("FHA").

AARP is a nonpartisan, nonprofit organization dedicated to addressing the needs and interests of people age fifty and older. AARP seeks through

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that no counsel for a party authored this brief in whole or in part and that none of the parties or their counsel, nor any other person or entity other than *amici*, its members or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of *amicus* briefs and have filed letters reflecting their blanket consent with the Clerk.

education, advocacy, and service to enhance the quality of life for all by promoting independence, dignity, and purpose. In promoting independence, AARP works to ensure the availability of affordable, accessible, and appropriate housing and the elimination of discrimination in housing. In addition, AARP supports the ability of older people to receive the services they need in their homes so they can age with dignity in their community. The ability of older people to remain in their communities as they age depends on their continuing ability to challenge laws and policies that discriminate because of their discriminatory effect based on disability, race and national origin.

Mount Holly Gardens Citizens in Action, Inc. ("MHGCIA"), is a voluntary membership non-profit corporation composed of residents living in the Gardens neighborhood located within Mount Holly Township, New Jersey. The Gardens neighborhood consists primarily of lower-income African-American and Hispanic homeowners and tenants, a number of whom are older people. MHGCIA's primary purpose is to advocate for the wellbeing and the betterment of the residents and neighborhood. MHGCIA is challenging in federal district court the Township's wide-scale redevelopment project seeking to take and demolish all homes in the Gardens through eminent domain, forcibly displacing all residents to make way for new, much higher-priced market rate homes intended for more affluent households. MHGCIA alleges both disparate impact and intentional housing discrimination in violation of FHA. *See Mount Holly Gardens Citizens in Action v. Township of Mount Holly*, 658 F.3d 375 (3d Cir.

2011). If MHGCIA's disparate impact claims are not cognizable under the FHA, the Township will be at liberty to tear down what was a cohesive, racially and ethnically diverse neighborhood and permanently displace hundreds of lower income minority residents.

SUMMARY OF ARGUMENT

The Fair Housing Act (FHA) prohibits policies and practices that have discriminatory effects against a protected class. The prohibition addresses facially neutral policies and practices that make housing unavailable to a protected class, regardless of intent or equal treatment. In disparate impact cases, "[e]ffect, not motivation, is the touchstone because a thoughtless housing practice can be as unfair to minority rights as a willful scheme." *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231, 233 (8th Cir. 1976).

Importantly, although people are not protected from housing discrimination based upon their age,[2] the FHA provides protection for people as they age. For example, protection against discrimination because of disability[3] helps protect the frail elderly and those with disabilities from being forced into institutions by facially neutral policies. When an older person whose housing

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[2] Age is not a protected class under the Fair Housing Act "FHA," 42 U.S.C 3604(a)-(f) and old age is not a *per se* disability. *See, e.g.*, *Caron v. City of Pawtucket*, 307 F. Supp. 2d 364, 368 (D.R.I. 2004); *Chiara v. Dizoglio*, 81 F. Supp. 2d 242, 246 (D. Mass. 2000), *aff'd*, 6 Fed. Appx. 20 (1st Cir. 2001).

[3] The Fair Housing Amendments Act ("FHAA") uses the term "handicap" instead of the term "disability." These terms have the same meaning. *See Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) (The definition of "disability" in the Americans with Disabilities Act is "drawn almost verbatim" "from the definition of 'handicap' contained in the Fair Housing Amendments Act of 1988."). Except when referring to the FHAA's statutory language, this brief uses the term "disability."

opportunities have been limited by discrimination because of race or national origin becomes disabled, their housing opportunities may be even further narrowed by discrimination because of their dual protected status.[4]

In extending the protections of the FHA to people with disabilities in 1988, Congress specifically sought to address zoning and land use policies that "have the effect of limiting the ability of such individuals to live in the residence of their choice in the community." H.R. Rep. No. 100-711 (1988), *reprinted in* U.S.C.C.A.N. 2173, 2179. Indeed, challenges to such zoning and land use policies have been brought because of their adverse disparate effects on people with disabilities and will continue to be brought especially as the population ages and housing is developed to meet their changing needs. Where some cases may be able to be resolved on an individual, reasonable accommodations basis, challenges to local policies will increasingly be made on the basis of disparate impact as the ongoing effects of the discriminatory policies are observed and in order to provide broader relief.

Municipal redevelopment projects may be a proper exercise of eminent domain under the Constitution to rectify blight, *Berman v. Parker*, 348 U.S. 26 (1954) and for economic development, *Kelo v.*

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[4] *See, e.g.*, Nat'l Fair Hous. Alliance, *2011 Fair Housing Trends Report* 17 (2011), *available at* http://www.nationalfairhousing.org/Portals/33/Fair%20Housing%20Trends%20Report%202011.pdf (in 2010, 53% of the claims processed by HUD were for discrimination based on disability and 36% based on race).

City of New London, 545 U.S. 469 (2005). Areas affected by redevelopment are often disproportionately occupied by older people, poor people and by minorities. Without the availability of disparate impact analysis minority residents would be without recourse for a viable means of judicial review. Even though redevelopment may be a legitimate governmental purpose, the FHA requires that where the plaintiffs have met their prima facie case there be an inquiry into whether the legitimate objective could be achieved in a less discriminatory way. The defendant should bear the burden of showing that there is no less discriminatory alternative, because it is practical and not overly burdensome and only then should the burden shift back to the plaintiff to provide evidence of such an alternative.

Finally, disparate impact analysis is essential to reach the effects of discriminatory rules and policies used by providers of housing specifically designed for and marketed to older people. These providers often have rules that screen out potential applicants for reasons that are wholly unrelated to legitimate occupancy requirements. Some rules may be custom, or even be intended for the benefit of residents or staff, but nonetheless have the effect of discriminating on the basis of disability. Statistical studies have exposed adverse disparate effects in long term residential housing based on race as well as disability.

ARGUMENT

I. THE DISCRIMINATORY EFFECTS OF A WIDE RANGE OF PRACTICES LIMIT THE ABILITY OF THE RAPIDLY BURGEONING OLDER POPLULATION TO AGE IN THEIR HOMES AND COMMUNITIES BECAUSE OF THEIR RACE, NATIONAL ORIGIN OR DISABILITY

As Congress was considering the Fair Housing Amendments Act of 1988 ("FHAA"), it understood that throughout the nation there was a shortage of accessible, appropriate and integrated housing for people with disabilities. "Prohibiting discrimination against individuals with handicaps is a major step in changing the stereotypes that have served to exclude them from American life. These persons have been denied housing because of misperceptions, ignorance, and outright prejudice." H.R. Rep. No. 100-711. Congress also recognized that a growing proportion of the American populace would have housing needs that could not be met by the current housing stock or types of housing offered, and that there was great urgency to ensure that older persons, wounded veterans, and younger people with disabilities who had previously lived in institutional settings were not unnecessarily excluded from the benefits of living within their communities. "The right to be free from housing discrimination is essential to the goal of independent living" for people with disabilities. *Id.*

The FHAA protections benefit the estimated 50 million people in the United States, or one-fifth of the nation's total population, who have some type of

disability.[5] Moreover, people's housing needs frequently change as they age. The impact of disability and the importance of the FHA's disability provisions are even more pronounced for America's aging population. The number of Americans age 65 and over will double from 40 million in 2010 to 81 million by 2140. U.S. Census Bureau, *Projections of the Population by Selected Age Groups and Sex for the United States: 2010-2050* (2008), *available at* http://www.census.gov/population/www/projections/summary tables.html (last visited Jan. 26, 2012). By 2030, one-fifth of the U.S. population will be over 65. U.S. Census Bureau, *An Older and More Diverse Nation by Mid Century* (2008), http://www.census.gov/newsroom/releases/archives/population/cb08-123.html (last visited Jan. 26, 2012). The prevalence of disability increases with age.[6] For instance, people age 65 and older are three times more likely to have sensory disabilities such as blindness or hearing impairments, physical disabilities, or self-care issues such as dressing, bathing, or getting around inside a home than the general population. Yvonne J. Gist & Lisa I. Hetzel, *We the People: Aging in the U.S.* (U.S. Census Bureau 2004), *available at* http://www.census.gov/prod/2004pubs/censr-19.pdf (More than one-third (39.2 percent) of households headed by

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[5] *See* Judith Waldrop & Sharon M. Stern, *Disability Status: 2000* (2003), U.S. Census Bureau, http://www.census.gov/prod/2003pubs/c2kbr-17.pdf.

[6] *See, e.g.*, Nat'l Council on Disability, *The State of Housing in America in the 21st Century: A Disability Perspective* 27 (2010) *available at http://www.ncd.gov/publications/2010/Jan192010* (disability rates increase "from 11 percent for people 18 to 44 years of age to 52 percent for people 65 years and older.").

someone age 50 or older have at least one resident with a disability. Andrew Kochera, *State Housing Profiles* (AARP Pub. Policy Inst. 2006), *available at* http://assets.aarp.org/rgcenter/il/d18637_housing.pdf.

Congress understood that the integration of people with disabilities into mainstream society depends as much on building and developing housing that meets the needs of people with disabilities as it does on prohibiting traditional discriminatory practices such as refusing to sell or rent. "A person using a wheelchair is just as effectively excluded from the opportunity to live in a particular dwelling by the lack of access into a unit and by too narrow doorways as by a posted sign saying 'No Handicapped People Allowed.'" H.R. Rep. No. 100-711, at 25. The need for appropriate housing, however, goes well beyond wheelchair ramps and wider doorways. To insure independence and integration of people with disabilities, there must be housing in the community that is physically accessible and housing that is located or configured so that residents can receive services for a range of impairments, including mental, sensory, and cognitive.

A. Zoning and Land Use Policies That Create Barriers to Housing Solutions for Older People Often Have an Adverse Discriminatory Effect on People with Disabilities and Are Prohibited Under the FHA

1. The FHA prohibits the discriminatory effects on people with disabilities of zoning laws that create barriers to group housing or housing with services

Aging population trends portend an ever increasing need for housing available to and usable by older people with disabilities. Unfortunately, many people will find it impossible to age in place because their home will not match their changing needs, or their community lacks the home based services, supports, and features necessary to support aging in place.[7] As the population ages, many communities are exploring approaches to address the housing needs of older people.[8]

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[7] One study showed that 14% of elderly individuals had a "housing-related disability," and 23% had an unmet need for modifications to their homes, unrelated to their income level. Sandra Neuman, *The Living Conditions of Elderly Americans*, 43 The Gerontologist 99, 99, 102 (2003).

[8] Nearly 90% of those over age 65 want to stay in their residence for as long as possible, and 80% believe their current residence is where they will always live. Nicholas Farber et al., *Aging in Place: A State Survey of Livability Policies and Practices* 1 (Nat'l Conference of State Legislatures & AARP Pub. Policy Inst., 2011), *available at* http://assets.aarp.org /rgcenter/ppi/liv-com/aging-in-place-2011-full.pdf.

An array of senior and multi-generational housing, including housing with a range of supports from housekeeping help through personal care, in individual homelike settings, shared apartments, group homes, assisted living, and campus type settings has been developed to enable people to age in residential settings in their communities rather than in institutional, more isolated settings. *See* Emily Salomon, *Housing Policy Solutions to Support Aging in Place* (AARP Pub. Policy Inst. 2010), *available at* http://assets.aarp.org/rg center/ppi/liv-com/fs172-aging-in-place.pdf; Rebecca Cohen, *Connecting Existing Homes with Social Services* (AARP Pub. Policy Inst. 2010), *available at* http://assets.aarp.org/rgcenter/ppi/liv-com/fs171-homes-services.pdf. These solutions often require rethinking the zoning and land use plans that were developed with little attention to or understanding of the housing needs of people with disabilities. Although often developed without intent to discriminate, and in furtherance of legitimate goals to shape development, such laws and plans may nevertheless have the effect of making an adequate range of housing unavailable to people with disabilities. The ultimate purpose of the FHA is to create "truly integrated and balanced living patterns." *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (quoting 114 Cong. Rec. 3422). When Congress expanded coverage to include people with disabilities, it built on longstanding precedent of this Court holding that neutral rules with disparate effect could violate the law prohibiting denial of participation in programs receiving federal funding.[9] *See Alexander v. Choate*, 469 U.S. 287, 294

[9] Congress also modeled the FHAA definition of "handicap" on

n.11 (1985); H.R. Rep. No. 100-711, at 18 ("The Fair Housing Amendments Act, *like Section 504 of the Rehabilitation Act of 1973*, as amended, is a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream," (emphasis added)).

That Congress addressed land use regulations and policies that have a discriminatory impact on people with disabilities is manifestly clear:

> [T]he prohibition against discrimination against those with handicaps appl[ies] to zoning decisions and practices. The Act is intended to prohibit the application of special requirements through land-use regulations, restrictive covenants, and conditional or special use permits that *have the effect of* limiting the ability of such individuals to live in the residence of their choice in the community.

H.R. Rep. No. 100-711, at 24 (emphasis added). Congress recognized that although state and local governments have the authority to regulate land use, "that authority has sometimes been used to restrict the ability of [the disabled] to live in communities." *Id.*

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the Section 504 definition, as well as the requirement to make reasonable accommodations, 42 U.S.C. 3604(f)(3), a violation of which does not require intent. *See* H.R. Rep. No. 100-711 (citing *Southeastern Cmty. College v. Davis*, 442 U.S. 397 (1979) and 45 C.F.R. § 84.12).

Unfortunately, as Congress predicted, restrictive zoning and land use laws have erected barriers that have the effect of limiting the ability of older people who acquire disabilities to live independently and with dignity in integrated settings in their communities. Many such policies have the effect of discriminating because of disability whether or not people with disabilities are *treated* differently in the zoning and land use process. Older people with disabilities will not be able to combat the discriminatory effects of zoning and land use decisions without the disparate impact tool Congress provided under the FHAA to ensure the housing opportunities would be available to them.

Potomac Group Home Corporation, for example, created a supportive setting for up to eight older individuals to live together in a house in a residential neighborhood. During the day, two staff members would join the residents and assist them with everyday needs such as eating, grooming and bathing; at night, one staff member would be present in the home. *See Potomac Group Home Corp. v. Montgomery County, MD*, 823 F. Supp 1285, 1289 (1993). Under the County's zoning law, group homes for up to eight residents were permitted in residential neighborhoods as a matter of right. *Id.* The County's licensing scheme, however, required group homes to notify every neighbor and local civic association of the specific type of "exceptional person" who would live there. Under the rules, neighbors and other groups were given the opportunity to provide regular input to program review boards comprised of government and community members. *Id.* at 1289-90.

The group seeking to operate the homes challenged the notice and other provisions of the licensing scheme alleging discrimination against people with disabilities. The court held that plaintiffs had made a strong showing of discriminatory effect by demonstrating that the notification and hearing process applied only to housing to be exclusively occupied by people who were disabled; no other type of residential housing in the county was held up to such public scrutiny. The court dismissed the defendant's purported justifications as offensive, rather than justified. *See id*. at 1296-97.[10]

Some communities have explicitly barred certain types of senior housing or housing for older people. However, not every such denial or policy

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[10] *See also The Stewart B. McKinney Foundation, Inc. v. Town of Fairfield*, 790 F. Supp. 1197, 1217 (D. Conn. 1992) (Foundation purchased a two-family house for use by up to seven HIV+ residents and successfully challenged requirement for special use permit on basis that ordinance's definition of "family" had disparate impact on people with disabilities.); *Dr. Gertrude A. Barber Ctr., Inc. v. Peters Twp.*, 273 F. Supp. 2d 643, 655 (W.D. Pa. 2003) (Non-disabled people had opportunity to enter into a variety of living arrangements under the challenged ordinance, but residents with disabilities were limited in their choices); *Sharpvisions, Inc. v. Borough of Plum*, 475 F. Supp. 2d 514, 525-26 (W.D. Pa. 2007) **(**"Plaintiff has shown that while non-disabled persons would be able to enjoy a variety of living arrangements in Plum Borough, a single disabled person could not. Defendants' policies have created restrictions on the establishment of homes for individuals with disabilities in single-family neighborhoods and the burdens placed on those persons with disabilities (having to apply for conditional use permits, attend meetings and hire attorneys) and those policies undoubtedly have a disparate impact on individuals with disabilities.").

results in a successful disparate impact claim. For instance, because age is not a protected class under the FHA, a law directed at older people or senior housing, would be considered a "neutral" rule under disparate impact analysis and only if it were shown to have an adverse disparate effect on disability (or another protected class) would it violate the FHA. General statistical linkages showing that disability increases with age are insufficient to sustain a prima facie case of discrimination under the FHA. In one case, a developer of an age restricted retirement community challenged denial of its application in which it had represented that entry to its community would be restricted to healthy, active, independent seniors[11] and that its small skilled nursing component would be limited to temporary acute care. *Budnick v. Town of Carefree*, 518 F.3d 1109, 1112 (9th Cir. 2008). When the application was denied and the developer brought suit, the court held that the denial of its application could not be challenged as discrimination based on a general link of increased disability with age. *Id*. at 1115; *see also Gamble v. City of Escondido*, 104 F.3d 300, 307 n.2 (9th 1996) (plaintiffs, who sought to obtain a permit to build housing for "fifteen elderly disabled adults" failed in their attempt to demonstrate a disparate impact on "group housing," because there was no evidence of a significant correlation between being disabled and living in group housing.); *Chiara v. Dizoglio*, 81 F. Supp. 2d 242, 244–47 (D. Mass. 2000), *aff'd*, 6 Fed.Appx. 20 (1st Cir. 2001) (in applying the FHA to proposed assisted-living facility

[11] Such an entry restriction might itself violate the FHA. See discussion of independent living standards, *infra* at pp. 25-30.

for seniors, the court stated that the "mere fact that a person is elderly does not constitute a handicap.").

Although not every denial of housing for older people is discriminatory, some surely are. In *Sunrise Development, Inc. v. Town of Huntington*, 62 F. Supp. 2d 762 (E.D.N.Y. 1999) the court found that the local law imposed a greater burden on elderly people with disabilities to obtain approval for the construction of housing suited to their needs in residential neighborhoods. The challenged law created a category called "Congregate Care, Life Care and Assisted Living Facilities" and included in it all "residential developments providing dwelling units for persons at least sixty-five (65) years old" that must include an "association with a fully licensed nursing home facility which provides skilled care to residents requiring such services on a priority basis." *Id.* at 776 (quoting the challenged town law). Under the law, these types of congregate facilities were required to apply for zoning changes to locate in residential neighborhoods. Similar type dwellings that were not congregate care facilities could apply for a special use permit, a much easier process. The court held that it appeared likely that the law would have a disparate impact on people with disabilities. *Id.* at 776-777.

In *Groome Res., Ltd. v. Parish of Jefferson*, 234 F.3d 192 (5th Cir. 2000), a for-profit developer sought to operate a group home for five individuals suffering from Alzheimer's disease.[12] The Parish

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[12] The need to develop housing options, including supportive housing for people with Alzheimer's disease, is increasingly critical. In 2011, 5.4 million Americans had been diagnosed

zoning ordinance limited the area to single family residences, and defined a family as:

> one or more persons related by blood or marriage living together and occupying a single housekeeping unit with single culinary facilities or a group of not more than four persons living together by mutual agreement and occupying a single housekeeping unit with single culinary facilities on a non-profit cost-sharing basis.

Id. at 196. The developer applied for reasonable accommodation pursuant to the process provided for in the ordinance, but sued under the FHA when the Parish failed to decide. *Id.* at 196-97. The court ruled that the developer was entitled to the reasonable accommodation; and the Fifth Circuit affirmed, holding, *inter alia*, that Congress intended the Act to reach violations resulting from the effect of defendants' actions, not only its intent. *Id.* at 202.

Although *Groome* was brought as a reasonable accommodation case, similar cases may be brought under a disparate impact theory. A reasonable accommodation case is appropriate when an

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with Alzheimer's disease, 5.2 million aged 65 and over and 200,000 with younger-onset Alzheimer's. By 2050, as many as 16 million Americans will have the disease. Most people survive an average of four to eight years after an Alzheimer's diagnosis, but some live as long as twenty years with the disease. Alzheimer's Association, *2011 Alzheimer's Disease Facts and Figures*, 7 Alzheimer's & Dementia 2 (2011), *available at* http://www.alz.org/documentscustom/2011_Facts_Figures_Fact_Sheet.pdf.

individual with a disability seeks a change in a rule or policy that is needed for that individual to have equal access to or use of the housing, *see* 42 U.S.C. § 3604(f)(3)(B), but otherwise has no quarrel with the rule or policy. In contrast, disparate impact analysis examines the challenged policy, almost by definition, in a broader context. However, the boundary between the two types of claims may be fluid. For instance, if an encountered rule is new, its adverse impacts may not be known, but an individual reasonable accommodation may be fashioned. As the court in *Groome* noted, "The legislative record demonstrates a concern about group homes being discriminated against through zoning mechanisms: '[The FHAA] is intended to prohibit special restrictive covenants or other terms or conditions . . . which have the effect of excluding, for example, congregate living arrangements for persons with handicaps.'" *Groome* at 214 (quoting H.R. Rep. No. 100-711).

2. The FHA is intended to prohibit discrimination on the basis of race and national origin through redevelopment that has the adverse effect of removing people from their homes and neighborhoods

Redevelopment plans can be similarly neutral on their face but discriminatory in effect.[13] As this Court has held, municipal redevelopment projects may be a proper exercise of eminent domain under the Constitution to rectify blight, *Berman*, 348 U.S. 26 (1954), and for economic development, *Kelo,* 545 U.S. 469 (2005). However, in the past local governments have misused such power to target lower-income minority communities for removal. Historically, "[b]light was a facially neutral term infused with racial and ethnic prejudice." Wendell Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 Yale L. & Pol'y Rev. 1, 6 (2003). Thus, "[u]rban

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[13] A dwelling can be made otherwise unavailable by, among other things, action that limits the availability of affordable housing. *See, e.g.*, *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 928-29, 938 (2d Cir. 1988); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1059, 1062-64 (4th Cir. 1982); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 130 (3d Cir. 1977). *See also*, *Rivera v. Incorporated Village of Farmingdale*, 571 F. Supp. 2d 359, 369 (E.D.N.Y. 2008) (challenge to redevelopment project eliminating housing occupied by lower income Latino workers and replacing it with higher priced units unaffordable to such residents actionable under FHA because even if the municipality "had the best of intentions, the result of the plan disproportionately injured the Latino population in need of low income housing").

renewal projects have long been associated with the displacement of blacks." *Kelo*, 545 U.S. at 522 (Thomas J., dissenting). "In cities across the country, urban renewal came to be known as 'Negro removal.'" Pritchett at 47. Such "poor communities" are "disproportionately" harmed by redevelopment because they "are also the least politically powerful." *Id.*, *Kelo* 545 U.S. at 521 (Thomas, J., dissenting). *See also* Dana Berliner, Public Power, Private Gain: A Five Year, State by State Report Examining the Abuse of Eminent Domain 102, 185 (Inst. for Just. 2003).

In a case still in litigation, residents in the predominately African-American and Hispanic Gardens neighborhood in Mount Holly Township, New Jersey, many of whom are older homeowners, are challenging the Township's redevelopment project that calls for the destruction of their community and the forcible displacement through eminent domain of all of the residents. *See Mount Holly Gardens Citizens in Action v. Twp. of Mount Holly*, 658 F.3d 375 (3d Cir. 2011). While the Township's finding of blight was upheld in state court, the Township's subsequent implementation of its redevelopment plan was nevertheless subject to challenge in federal court under the FHA. The residents have claimed that the plan created extreme adverse disproportionate discriminatory effects[14] by requiring the demolition of every home within the neighborhood to be replaced with homes

[14] African-Americans in the Township would be eight times more likely to be affected by the project than Whites, and Hispanics would be 11 times more likely to be affected. *Mount Holly Gardens Citizens in Action*, 658 F.3d at 382.

that 90% of the current homeowners would be unable to afford. *Id.* at 379. Furthermore, under the proposed plan, the amount residents would be paid for their homes would be insufficient for them to purchase a similar home nearby. *Id.* at 380. As a result, older homeowners, who had paid off their mortgages and were living on fixed incomes, would not be able to make ends meet. Almost none of the renters would be able to afford the few rental units that would be built. *Id.*

The Third Circuit, relying on well-established precedent,[15] held that the Gardens residents could proceed under a disparate impact theory for a violation of the FHA without needing to show a discriminatory motive.[16] In doing so, the court rejected the Township's argument "[t]hat a disparate impact approach would result in the unintended consequence of halting the redevelopment of minority neighborhoods." *Id.* at 384. The Third Circuit saliently observed that while "[t]he Township may be correct that a disparate impact analysis will often allow plaintiffs to make out a prima facie case when a segregated neighborhood is redeveloped in circumstances where there is a shortage of alternative affordable housing," "this is a feature of the FHA's programming, not a bug." *Id.* at 384-85. The court explained that the "FHA is a broadly remedial statute designed to prevent and remedy invidious discrimination on the basis of race . . . that

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[15] *See, e.g.*, *Resident Advisory Bd.*, 564 F.2d 126.

[16] The Third Circuit affirmed the dismissal of the plaintiffs' intentional discrimination claims brought under the FHA and other constitutional and statutory grounds. *Mount Holly Gardens*, 658 F.3d at 387.

facilitates its anti-discrimination agenda by encouraging a searching inquiry into the motives behind a contested policy to ensure that is not improper." *Id.* at 385 (internal citations omitted). The court concluded:

> In reality, the District Court's decision was based on a valid and practical concern, which appears to drive its reasoning throughout the opinion. It feared that finding a disparate impact here would render the Township powerless to rehabilitate its blighted neighborhoods. This underlying rationale distorts the focus and analysis of disparate impact cases under the FHA. . . . Once the Residents established a *prima facie* case of disparate impact, the District Court's inquiry must continue to determine whether a person is being deprived of his lawful rights because of his race. It must ask whether that Township's legitimate objectives could have been achieved in a less discriminatory way.

Id. at 385. The Third Circuit's analysis of the FHA thus provides Gardens residents a viable means of obtaining judicial review of the Township's actions and protecting their rights. If this Court were to adopt the position urged by Petitioner, the residents would be left without recourse under federal law and would be subject to the harms anticipated by Justice Thomas' dissent in the *Kelo* decision.

3. This court should adopt a burden shifting standard that requires the defendant to show that there is no less discriminatory alternative

The Third Circuit in *Mount Holly Gardens* further applied the proper burden-shifting test for proving a disparate impact claim that should be adopted by this Court. After finding that residents had presented proof sufficient for establishing a prima facie case and noting that the parties agreed that the redevelopment plan furthered a legitimate government interest, the court then properly focused on the next step in the disparate impact analysis, whether there is no less discriminatory alternative, and required the defendants to make this showing. Only then did the burden shift back to the plaintiffs—where it ultimately remains—to provide evidence of such an alternative. *Id*. at 386-87.

Placing the burden on the defendant is practical and not overly burdensome, as demonstrated by the fact that many courts have long assigned defendants that burden.[17] The defendant is generally in the best position to know what obstacles exist to conducting business in an alternative, as well as what would be the administrative, political,

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[17] *See e.g. Huntington Branch, NAACP*, 844 F.2d at 939 (a defendant must show that there are no less discriminatory alternatives available); *Langlois v. Abington Hous. Auth.*, 1998 U.S. Dist. LEXIS 22871 (D. Mass. Dec. 30, 1998), *aff'd in part*, 207 F.3d 43, 50 (1st Cir. 2000); *Inclusive Communities Project, Inc. v. Texas Dep't of Hous. & Cmty. Affairs*, 749 F. Supp. 2d 486, 503 (N.D. Tex. 2010) (same); *Dews v. Town of Sunnyvale*, 109 F. Supp. 2d 526, 565 (N.D. Tex. 2000) (same).

managerial, personnel, logistical, and budgetary problems to implementing any other courses of action or policies.[18] The defendant knows (or can find out) the reason the challenged policy was chosen, what alternatives were considered and rejected, and what alternatives might still be waiting in the wings. Only where the defendant can produce evidence that there is no less discriminatory alternative should the plaintiff be required to prove that other less discriminatory alternatives exist.

The Third Circuit analogized this burden shifting to the reasonable accommodations process:

> The test for whether there is no [less discriminatory] alternative is "similar to the test of whether the defendant has demonstrated that the requested accommodation is 'unreasonable' for the purposes of rebutting a claim under § 3604(f)(3)(B)." *Lapid-Laurel*, 284 F.3d at 468. Section 3604(f)(3)(B) of the FHA requires that reasonable housing accommodations be made for individuals with disabilities. In other words, the defendant must show that the alternatives impose an undue hardship under the circumstances of this specific case. *See US Airways,*

[18] For instance, a long term care facility is best positioned to first address complex issues of overlapping federal and state regulations, insurance reimbursements, health care overlays, staffing issues, and a myriad of other specialized knowledge it would need after disparate impact and legitimate justification were determined.

> *Inc. v. Barnett*, 535 U.S. 391, 401-02 (2002) (discussing the term "unreasonable accommodation" under the Americans with Disabilities Act).

Id. at 387. This distribution of burdens can achieve the earliest and most efficient results, narrowing the potential alternatives explored to overcoming the obstacles to less discriminatory alternatives identified by defendants.

B. Admission, Occupancy and Residency Rules in Housing for Older People Can Have an Adverse Discriminatory Effect on People with Disabilities or Other Protected Classes in Violation the FHA

Common barriers that older people face obtaining and remaining in housing are often created by neutral policies that have a discriminatory effect on people with disabilities. Discriminatory effects may result from decisions based upon "thoughtlessness" as well as intent.

For example, prior to 1990, rules that had the effect of disproportionately discriminating against disabled applicants for federally subsidized housing were common. The U.S. Department of Housing and Urban Development (HUD) required this result in its national inventory of public and assisted housing. *Cf. Cason v. Rochester Hous. Auth.*, 748 F. Supp. 1002, 1009 (W.D.N.Y. 1990) (referencing 1987 HUD instructions to use an independent living criteria to screen applicants). The Rochester Housing

Authority ("RHA") implemented HUD's policy by screening all applicants for its "elderly" housing buildings by conducting in-home evaluations of their mood and mental status, having social workers make nursing and daily living activity assessments, and inquiring into an applicant's personal hygiene habits, prior hospitalizations, and medications. *Id.* at 1005.

Shortly after the passage of the FHAA, applicants to RHA elderly housing who had been subjected to these intrusive screening procedures and then rejected because they were allegedly not able to "live independently" sued claiming disability discrimination. *Id*. The court, in the first challenge to a rental policy under the FHAA, applied a disparate impact analysis. The court noted that discrimination against people with disabilities existed as much because of "thoughtlessness" as intentional discrimination and that "[p]ublic agencies must be especially vigilant to protect the disabled from all forms of discrimination -- intentional as well as benign discrimination caused by the public's perception of what is 'best' for the disabled." *Id*. at 1003. The court held that plaintiffs had presented sufficient statistical evidence that those who were rejected under the "independent living" policy were, although in absolute numbers a small group, all people with disabilities and concluded that those in the protected class were affected with significantly greater impact than those not in the protected class who were never denied admission under the challenged policy. *Id*. at 1007.

Congress subsequently set in motion implementation of the outcome achieved in the

Cason decision on a national scale by creating a Task Force to advise HUD on standards for fully integrating people with disabilities into public and assisted housing. H.R. Rep. No, 102-760 at 139-140 (1992) ("The Committee encourages the Task Force to review . . . the procedures developed in connection with *Cason v. Rochester Hous. Auth.*").

Cason has been applied in the context of traditional rental housing[19] including rental housing specifically funded and set aside for people with disabilities.[20] Recently assisted living and retirement community residents have begun to challenge similar independent living policies.

In *United States v. Savannah Pines*, No. 4:01CV3303 (Consent Order) (D. Neb. 2003), *available at* http://www.justice.gov/crt/about/hce/documents/savannahsettle.php, the United States Department of Justice sued a retirement community that placed restrictions in leases requiring that all residents "live independently" without caretakers, required residents with mobility impairments to purchase liability insurance for motorized wheelchairs and scooters, banned motorized wheelchairs and scooters from common areas including the dining hall, and mandated that residents with motorized wheelchairs or scooters live on the first floor. After the apartment style

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[19] *Neiderhauser v. Independence Square Housing,* 4 Fair Hous.–Fair Lending (Aspen Law & Bus.) 16,305, 16,305.2–.6 (N.D. Cal. Aug. 27, 1998).

[20] *Laflamme v. New Horizons, Inc.*, 605 F. Supp. 2d. 378, 391-92 (D. Conn. 2009).

retirement community's motion to dismiss was denied, Savannah Pines and the Department of Justice reached a settlement. *See also Hyatt v. Northern California Presbyterian Homes and Services, Inc.*, No. 2008-cv-03265 (Consent Order) (N.D. Cal. April 26, 2010) (resident of assisted living facility challenged policy preventing use of walkers in dining room and specifically preventing residents who relied on walkers from using buffet dining room; case was settled.)

Residents in Continuing Care Retirement Communities ("CCRCs")[21] have challenged similar restrictions. In particular, they have challenged CCRC rules that place limits on the number of hours per day a resident can hire a personal assistant, where the consequence for violating the rule is to be required to move from homelike, independent living apartment to an institutional, assisted living setting.[22] In one case, a resident acquired ALS (Lou Gehrig's disease) and relied upon personal aides to continue her active social life, resulting in her CCRC

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[21] CCRCs provide housing with different levels of support, such as independent living, assisted living, and skilled nursing, in one community, often in a campus setting. In 2003, there were approximately 2,150 "CCRCs" with 613,625 beds nationwide. Lauren R. Sturm, *Fair Housing Issues In Continuing Care Retirement Communities: Can Residents Be Transferred Without Their Consent?* 6 N.Y. City L. Rev. 119, 123 (2003) (citing Evelyn Howard, HDR Affordable Seniors Housing Handbook § 2:10 (West Group 2003)).

[22] For a general discussion of transfer requirements used by CCRCs see Lauren R. Sturm, *Fair Housing Issues in Continuing Care Retirement Communities: Can Residents be Transferred without Their Consent?*, 6 N.Y. City L. Rev. 119 (2003).

demanding her transfer to an assisted living unit. She filed suit alleging disability discrimination under the FHA, and her case was settled with changes made to the mandatory transfer policy. *Bell v. Bishop Gadsden*, No. 05-1953 (Consent Order) (D.S.C. July 8, 2005); D. Trey Jordan, *Continuing Care Retirement Communities Versus the Fair Housing Act: Independent Living and Involuntary Transfer*, 9 Marq. Elder's Advisor 205, 221 (2005). In another case, a resident who similarly hired a personal assistant was required by her CCRC to move from a spacious two bedroom apartment filled with her personal possessions, where she often hosted guests, to assisted living that consisted of a shared room with a curtain divider, hospital bed, and a dresser. *Herriot v. Channing House*, No. 2006-cv-06323 (Consent Order) (N.D. Cal. Oct. 10, 2006); *see also* Melissa Morris and Kim Pederson, *Reasonable Accommodations in Assisted Living: Crafting Effective Requests to Promote Housing Choice*, 44 Clearinghouse Rev. 518, 522 (2011).[23]

In Texas, a senior apartment complex wanted to remake its image as an "active seniors" or "independent living" community; to do so it evicted as many as twenty-five residents on the basis of "wellness examinations" conducted by untrained staff members. Michael Allen, *We Are Where We Live: Seniors, Housing Choice, and the Fair Housing*

[23] See also *United States v. Resurrection Ret. Cmty., Inc.*, No. 02-cv-7453 (Consent Order) (N.D. Ill. Oct. 17, 2002) (consent decree with large retirement development resulted in $220,000 in monetary relief and an injunction barring it from, *inter alia*, imposing an "ability to live independently" requirement on its residents.)

Act (American Bar Association 2004), *available at* http://www.americanbar.org/publications/human_rights_magazine_home/ irr_hr_spring04_seniors.html (citing *Casaregola v. Coop. Ret. Servs. of Am., Inc.*, SA-04-CA-0114-OG (D. Tex. Feb. 4, 2004)). Although each of these cases was settled, it is only a matter of time before such policies that disproportionately adversely affect older residents with disabilities are resolved by the courts.[24]

Disability status within the older population varies according to race, with minorities having a higher incidence of disability.[25] At the same time, housing options that support successful aging are disproportionately unavailable in racially concentrated neighborhoods and to minorities who seek out housing where services are provided.

African American and Hispanic residents, many of whom live in racially or ethnically concentrated neighborhoods, tend to live in older

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[24] See, e.g. D. Trey Jordan, *Continuing Care Retirement Communities Versus the Fair Housing Act: Independent Living and Involuntary Transfer*, 9 Marq. Elder's Advisor 205, 227 (2005).

[25] *See* Judith Waldrop, *Disability Status: 2000*, at 5 (52.8% of blacks and 48.5% of Hispanics in the 65-and-over age group report having a disability, whereas the comparable figure for whites is 40.6%); Jack McNeil, Americans with Disabilities: 1997 2-3, (U.S. Dep't of Commerce 2001), http://www.census.gov/ prod/2001pubs/p70-73.pdf (in this age group, "non-Hispanic Whites had a considerably lower rate of severe disability than individuals in the other categories: 35.3 percent compared with 49.2 percent for Asians and Pacific Islanders, 47.0 percent for Hispanics, and 51.8 percent for Blacks").

housing stock, built well before accessibility guidelines provided a minimal level of accessible features necessary to permit them to age in place.[26] Minority neighborhoods also lack the supportive services and transportation options to support successful aging in place and typically have limited alternative accessible housing options available, including assisted living or nursing facilities. Even where such options exist, they tend to be segregated and provide lower quality care.[27]

In one study, a HUD funded fair housing testing organization[28] conducted site visits at twenty locations representing 1,300 beds in two counties in northern California. Fair Housing of Marin, *Racial Discrimination in Long Term Care Facilities for the Elderly* (2003), *available at* http://www.fairhousingmarin.com/services/RCFReport.pdf (last visited Jan. 26, 2012). The report observed that during the entire study "all the residents the

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[26] MetLife, *Aging In Place 2.0: Rethinking Solutions to the Home Care Challenge* 18-19 (Sept. 2010), *available at* http://www.metlife.com/mmi/research/aging-in-place.html#insights (last visited Jan. 26, 2012).

[27] David Barton Smith, et al., *Racial Disparities in Access to Long-Term Care: The Illusive Pursuit of Equity*, 33 J. Health Pol. Pol'y & L. 801 (2008); Mary L. Fennell, et al., *Elderly Hispanics More Likely to Reside In Poor Quality Nursing Homes*, 29 Heath Affairs 65 (2010); David Barton Smith, et al., *Separate and Unequal: Racial Segregation and Disparities in Quality Across U.S. Nursing Homes*, 26 Health Affairs 1448 (2007).

[28] 42 U.S.C. § 3616a (authorizing Fair Housing Initiatives Program through which HUD provides training, funding and oversight for fair housing activities including studies.)

tester[s] reported seeing were Caucasian, and that the only people of color they sighted were staff – mostly maintenance workers, nursing assistants, kitchen help, and the like." *Id*. at 8-9. No overt discrimination was found,[29] but the study was able to expose disparate treatment through the use of trained, paired testers and careful analysis. *Id*. at 10.

Most victims, however, do not have the resources to conduct paired testing with such rigor. An African-American applicant denied housing in one of the facilities studied might bring a disparate impact case and as part of the prima facie case demonstrate that black applicants were turned down at a significantly disproportionately higher rate than white applicants.[30] The results of the study could also serve as evidence of adverse disparate effect based on race in a properly brought case along with other elements of a disparate impact prima facie case.[31] In addition, the disparate treatment of a few

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[29] No discriminatory statements were made, no minority testers turned away, and minority testers could not tell they were being treated differently than white testers. Fair Housing of Marin, *Racial Discrimination in Long Term Care Facilities for the Elderly* (2003), *available at* http://www.fairhousing marin.com/services/RCFReport.pdf (last visited Jan. 26, 2012)

[30] No claim is being made that the study proves that this is true, only that it indicates that it might be true in some instances.

[31] The Marin study is not the only such study of residential care, although it is in the vanguard. The John Marshall Law School Fair Housing Legal Support Group conducted a yearlong project to identify significant issues that seniors face in housing marketed to them; fully 25% of respondents in the study suffered some form of housing discrimination. The John

individuals may not explain broad, significant adverse statistical effects on a protected class. Thus, while correcting the attitude of an individual marketing division employee is of course important, only the analysis of a provider's actual practices and the evidence based results will change the market by ending discrimination at all stages of the life cycle whether through thoughtlessness or intent.

Nursing homes are also covered dwellings under the FHA. *Hovson, Inc. v. Brick, N.J.*, 89 F.3d 1096, 1102 (3d Cir. 1996). In 2000, African Americans were concentrated in a small percentage of nursing homes. David Barton Smith, et al., *Separate And Unequal: Racial Segregation And Disparities In Quality Across U.S. Nursing Homes*, 26 Health Affairs 1448, 1451-52 (2007) (in for-profit facilities, more than 50 percent of black residents are concentrated in less than 10 percent of facilities, contrasted with non-profit facilities, where more than 70 percent of black residents are concentrated in less than 10 percent of facilities). Not only are African Americans not in the same nursing homes as whites, they are in worse nursing homes. African Americans are much more likely than whites to be located in nursing homes that have serious deficiencies, lower staffing ratios, and greater financial vulnerability. *Id.* at 1456. As a result,

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Marshall Fair Hous. Legal Support Ctr., *Senior Housing Reseach Project* 74 (2007), *available at* http://www.jmls.edu/fairhousingcenter/commentary/Final-Report-Draft-11-6-2007%20_2_.pdf (last visited Jan. 26, 2012). Almost two-thirds of those surveyed believed that a housing provider could mandate an "independent living" requirement. *Id.* at 74-75.

black nursing home residents face an increased risk of "actual harm or immediate jeopardy." *Id.* at 1452.

Unlike a person who lives in a community with more robust options and resources, people in protected classes who live in segregated communities may be forced as they age to make the Hobson's choice of foregoing suitable housing and services or breaking the social ties necessary to maintain mental and physical health in order to access such supports and services in either a residential or institutional setting.[32]

[32] Mia Oberlink, *Opportunities for Creating Livable Communities* (AARP Pub. Policy Inst. 2008).

CONCLUSION

The Fair Housing Act remains a crucial tool to eliminate intentional discrimination in housing. But if the law is to fulfill its stated purposes, it must recognize claims based on discriminatory effects.

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