

No. 11-1507

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IN THE  
**Supreme Court of the United States**

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TOWNSHIP OF MOUNT HOLLY NEW JERSEY, ET AL.,  
*Petitioners,*

v.

MOUNT HOLLY GARDENS  
CITIZENS IN ACTION, INC., ET AL.,  
*Respondents.*

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

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**BRIEF OF AMICUS CURIAE EMPOWER D.C.  
IN SUPPORT OF RESPONDENTS**

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## STATEMENT OF INTEREST

*Amicus curiae* Empower D.C. is a non-profit organization in the District of Columbia representing a coalition of neighborhood citizens in Ivy City, a neighborhood in the Northeast quadrant of the District.<sup>1</sup> Ivy City's struggles mirror those of the citizens of Mt. Holly and, like Mt. Holly residents, Empower D.C. is assisting Ivy City's residents as they seek to rectify the disparate impacts that seemingly neutral policies have had on the neighborhood. As they do so, it is imperative that they are able to use disparate impact analysis to help combat the ill-effects of segregation, discrimination, and a stream of "neutral" decisions that have a disproportionate negative impact on the types of communities the Fair Housing Act seeks to protect.

Lack of fair housing options impacts nearly every aspect of an individual's well being: their employment, educational opportunities and personal health. The effects of housing discrimination, both overt and covert and both conscious and unconscious fall disproportionately upon racial and ethnic minorities. *Amicus curiae* is one such community. It respectfully submits this brief in order to urge the Court to retain disparate impact analysis under the Fair Housing Act as a vital tool to combat housing discrimination.

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<sup>1</sup> Pursuant to Supreme Court Rule 37, this brief is filed with the written consent of all parties. The parties' consent letters are on file with the Court. This brief has not been authored, either in whole or in part, by counsel for any party, and no person or entity, other than *amicus curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief.

## SUMMARY OF ARGUMENT

A home is more than shelter—it is, for those of us fortunate enough to have one, the center of the world: where we gather our families, rest our heads, nourish our bodies and mark the big and small moments of our lives.<sup>2</sup> A community of homes is more than a few city blocks—it is a unique living, breathing organism which, once broken or destroyed, can never be repaired or replaced. Housing discrimination, both overt and covert, both conscious and unconscious, has served to break and at times destroy unique communities of color by way of a pernicious cycle of isolation and segregation, malignant neglect, and uprooting of communities through forced relocation. First, communities of color are isolated from the larger city, and deprived of public resources and services. Second, as the social and physical landscape of these communities deteriorates due to that neglect, municipalities label them blighted and use them as dumping grounds for all manners of municipal pollution that no wealthy neighborhood would want nor tolerate. Third, after municipal neglect and pollution effectively push out community residents, the government swoops in to

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<sup>2</sup> Sanctity of the home is of the utmost importance in significant amounts of Supreme Court precedent. “Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home.” *Lawrence v. Texas*, 539 U.S. 558, 562 (2003); “The people’s protection against unreasonable search and seizure in their “houses” was drawn from the English common-law maxim, ‘A man’s home is his castle.’” *Minnesota v. Carter*, 525 U.S. 83, 94 (1998); *Payton v. New York*, 445 U.S. 573, 585 (1980) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)); *Oliver v. United States*, 466 U.S. 170, 178 (1984); *Silverman v. United States*, 365 U.S. 505, 511 (1961); *United States v. United States District Court*, 407 U.S. 297 (1972).



relocate any remaining residents and redevelop the community in the interest of “urban renewal.”

Cut off from the only community they’ve called home, individual residents experience a deep sense of loss that academics have aptly named “root shock.” They become unmoored from important social bonds, cultural identities, economic support, and the community itself weakens and withers away, making it even more vulnerable to the allegedly neutral political forces that scattered its members.

Mt. Holly is but one example of a community trapped in this cycle. Ivy City, a historically Black neighborhood in Northeast Washington, D.C., is another. After years of neglect, Ivy City is now being used as a virtual dumping ground for the District’s maintenance equipment and, more recently, idling inter-state busses. And, as with Mt. Holly, it is often difficult to detect in the city’s isolation of this community, its malignant neglect, and eventual forced relocation any naked expression of racism. But, it is also undeniable that racial discrimination, furthered by both public and private policies, has been deeply entrenched in 20<sup>th</sup> century community development policy.

Congress promulgated the Fair Housing Act to combat housing discrimination with a key virtue in mind, one that would become the legislation’s namesake: *fairness*. Basic fairness indicates that a municipality should not be able to tear down a community when its own policies and practices helped to create and perpetuate the so-called blight that it now seeks to remedy. The seemingly neutral policies that lead to the cycle of housing discrimination, isolation, malignant neglect, and forced relocation are

the very type that disparate impact is designed to combat.

None of this is to suggest that disparate impact analysis should prohibit municipalities from achieving legitimate redevelopment goals; but it does arm communities of color with one small tool of protection when there is a clear means to achieve that legitimate goal in a way that would be less disastrous to the very communities that the Fair Housing Act was designed to protect.

Further evidence that disparate impact analysis is critical to combating the ills brought on by housing discrimination can be found in international norms, which recognize the need for disparate impact analysis to fight housing discrimination. Disparate impact claims are cognizable under international law, which recognizes housing as a human right. And, in its periodic report to the United Nations, the United States has even conceded that disparate impact analysis is necessary both to combat housing discrimination and to meet the country's obligations pursuant to the International Convention on the Elimination of All Forms of Racial Discrimination. While not controlling, this Court should look to such international norms as persuasive authority for retaining disparate impact analysis.

## **ARGUMENT**

### **I. BASIC NOTIONS OF FAIRNESS DICTATE THAT MUNICIPALITIES SHOULD NOT BE PERMITTED TO TEAR DOWN COMMUNITIES THAT THEY HAVE ISOLATED, MALIGNANTLY NEGLECTED, AND NOW ACT TO UPROOT**

The narrow question before the Court is whether Congress intended disparate impact analysis to apply

to the Fair Housing Act (FHA). At the heart of that question is the larger issue of whether the FHA will continue to serve as an effective tool to combat the disproportionate uprooting of communities of color and the resulting “root shock” that has ripped apart a host of urban communities across the United States.

Not too long ago, municipalities used blatant racism to unfairly discriminate against communities of color. But once the FHA succeeded in eradicating the most overt forms of discrimination, these communities nonetheless continued to be victimized by seemingly neutral, but no less destructive, cycle of isolation, malignant neglect, and forced relocation.

Historically, government and private entities perpetuated housing discrimination against communities of color, resulting in their segregation and economic isolation and rendering them particularly vulnerable to the whims of detrimental government policies and practices.<sup>3</sup> As the FHA rendered the most blatant of these policies unlawful, municipalities began to subject these communities to a subtler but no less destructive cycle. Then, these communities suffer from malignant neglect coupled with the subordination of community needs to those of more politically powerful communities.<sup>4</sup> On the one hand, malignant neglect is characterized by government inaction, a lack

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<sup>3</sup> Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 VAND. L. REV. 1747, 1757 (2005).

<sup>4</sup> KEVIN PHILLIPS, THE POLITICS OF RICH AND POOR 59-66 (1990); Peter Dreier, *Capitalists vs. the Media: An Analysis of an Ideological Mobilization Among Business Leaders*, 4 MEDIA CULTURE & SOC'Y 111, 111-32 (1982); Herbert Gans, *Deconstructing the Underclass*, 56 J. AM. PLAN. ASS'N 271, 271-77 (1990).

of regulation, and often a lack of investment towards improving the interests of certain minority communities, eventually leading to previously functioning cities, or segments of cities, falling into a state of despair and decrepitude.<sup>5</sup> Communities in this stage often experience deindustrialization, depopulation, and high local unemployment rates.<sup>6</sup>

As this neglect devastates these communities they become dumping grounds for the government or, often times, for surrounding communities.<sup>7</sup> This stage is one in which the government enacts “neutral” policies that have the effect of turning the community, that was previously in a state of decrepitude, into a government enacted cesspool.<sup>8</sup> Communities in this phase are often burdened with the task of housing junkyards, heavy industry, or government vehicles.<sup>9</sup>

This is the stage in which Ivy City exists, and it is just one of many examples of communities on the path through the progression of government imposed, seemingly neutral policies, that result in disparate

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<sup>5</sup> See, e.g., ROGER MONTGOMERY & DANIEL MANDELKER, HOUSING IN AMERICA: PROBLEMS & PERSPECTIVES 162 (2d ed. 1979).

<sup>6</sup> Paul Stanton Kibel, *The Urban Nexus: Open Space, Brownfields, and Justice*, 25 B.C. ENVTL. AFF. L. REV. 589, 590 (1998).

<sup>7</sup> DANIEL FUSFELD & TIMOTHY BATES, THE POLITICAL ECONOMY OF THE URBAN GHETTO (1984); ROLF GOETZE, UNDERSTANDING NEIGHBORHOOD CHANGE 11-26 (1979).

<sup>8</sup> See Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1070-71 (1996).

<sup>9</sup> See Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 754 (1993).

impact.<sup>10</sup> Many of these small neighborhoods throughout the country, just like Ivy City, will potentially face the wrath of politically powerful private institutions that possess the financial backing to gain government support in their conquest of<sup>11</sup> these private properties. Unfortunately, because it is involved in a pernicious cycle that subsists as a malignant condition, this stage often forces the city, or segments of the city, into the final stage on this urban renewal trajectory—in a state of disrepair that ultimately makes “blight” removal necessary. Without the tool of disparate impact analysis, Ivy City’s fate may be much the same as other communities forced through the cycle.

In this final stage, municipalities force out minority families and businesses.<sup>12</sup> As a result of the disproportionate effect of these municipal policies, communities of color are destroyed to the point of experiencing “root shock”—“a traumatic stress

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<sup>10</sup> See Janet Thompson Jackson, *What is Property? Property is Theft: The Lack of Social Justice in U.S. Eminent Domain Law*, 84 ST. JOHN’S L. REV. 63, 103 (2010); see Richard Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 495, 520-21 (2003).

<sup>11</sup> See Phillips, *supra* note 4, at 271.

<sup>12</sup> MINDY THOMPSON FULLILOVE, *ROOT SHOCK: HOW TEARING UP NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT* 6, 7 (2004) (citing Bernard J. Frieden & Lynne B. Sagalyn, *Downtown, Inc.: How America Rebuilds Cities*, THE M.I.T. PRESS, 1989, at 35); GEORGE GRIER & EUNICE GRIER, *URBAN DISPLACEMENT: A RECONNAISSANCE* 8 (1978); see also MINDY THOMPSON FULLILOVE, *Eminent Domain and African Americans: What is the Price of the Commons?* INSTITUTE FOR JUSTICE (2007).

reaction to the destruction of all or part of one's emotional ecosystem."<sup>13</sup>

**A. Government and Private Entities Perpetrate Housing Discrimination Against Communities of Color, Resulting in Their Segregation and Economic Isolation**

1. *Historically, Racial Segregation and Discrimination was Entrenched in Federal, State and Local Government Policies, and Perpetrated by Private Entities*

The racial segregation of communities of color due to local and federal policies has been deeply rooted in 20<sup>th</sup> century community development policies, disguised as “urban renewal.”<sup>14</sup>

Between the 1940s and 1950s, over one million African Americans migrated to northern states in search of employment opportunities.<sup>15</sup> By the end of the decade, over 9,000,000 of these American migrants lived in urban centers, and it is with this historical perspective that the Court must understand the effect of the implementation of community redevelopment policies—policies that served a dual purpose.<sup>16</sup> On the one hand, the federal government and state municipalities selected properties to redevelop that had profit potential, irrespective of the condition of the

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<sup>13</sup> FULLILOVE, *id.*

<sup>14</sup> See FULLILOVE, *supra* note 12, at 16.

<sup>15</sup> Jackson, *supra* note 10, at 101.

<sup>16</sup> *Id.* (citing Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1, 31-32 (2003)).

properties; on the other hand, the purpose of many redevelopment policies was the relocation of people of color.<sup>17</sup> These community redevelopment programs displaced poor and minority neighborhoods, forcing a disproportionate number of African Americans into concentrated minority communities.<sup>18</sup> For example, while the federal government's homeownership assistance programs promoted "the creation of homogeneous white suburbs," the federal public housing program for low-income families with children "facilitated the development of segregated and deficient black inner city neighborhoods."<sup>19</sup> This ultimately perpetuated segregation by forcing reduced access to building homes in stable communities and diminishing access to affordable housing for minorities.<sup>20</sup> Much like the experience of residents in Ivy City, this was the beginning of what would become the dumping ground of municipalities, which leads to its subsequent "Negro clearance."<sup>21</sup>

This systematic targeting of communities of color for dislocation was caused by affirmative policies of the federal government,<sup>22</sup> that promoted segregation in housing and land use.<sup>23</sup> One such example is evidenced in the Federal Housing Administration's Underwriting Manual, in use from 1934 to 1947,

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<sup>17</sup> *Id.*

<sup>18</sup> Edward Imperatore, *Discriminatory Condemnations and the Fair Housing Act*, 96 GEO. L.J. 1027, 1029 (2008).

<sup>19</sup> Dubin, *supra* note 9, at 751.

<sup>20</sup> Imperatore, *supra* note 18, at 1029.

<sup>21</sup> Jackson, *supra* note 10, at 101.

<sup>22</sup> See generally FULLILOVE, *supra* note 12; Imperatore, *supra* note 18 at 1047.

<sup>23</sup> See Dubin, *supra* note 9, at 751-55.

which explicitly deprived communities of color of equal access to housing.<sup>24</sup> The Manual counseled against “the infiltration of inharmonious racial and national groups,” “a lower class of inhabitants,” and “the presence of incompatible racial elements” in new housing.<sup>25</sup> Furthermore, after the implementation of the federal urban renewal program under the Federal Housing Act of 1949 (“1949 Act”),<sup>26</sup> Congress virtually guaranteed that all new housing would continue to be constructed on a discriminatory basis when it rejected anti-discrimination amendments to the 1949 Act.<sup>27</sup> However, even with the end of the federal housing program and the implementation of neutral community development policies, federal urban renewal programs under the 1949 Act uprooted “approximately 177,000 families, 66,000 individuals, and over 39,000 [b]usinesses; a disproportionate amount—46% of families and 39% of individuals—were non-white.”<sup>28</sup>

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<sup>24</sup> *Id.* (citing Robert W. Collin & Robin A. Morris, *Racial Inequality In American Cities: An Interdisciplinary Critique*, 11 NAT'L BLACK L.J. 177, 182 (1989)).

<sup>25</sup> *Id.*

<sup>26</sup> Jackson, *supra* note 10, at 101; *see also* James A. Kushner, *An Unfinished Agenda: The Federal Fair Housing Enforcement Effort*, 6 YALE L. & POL'Y REV. 348, 348 (1988).

<sup>27</sup> Dubin, *supra* note 9, at 751-55 (citing Elizabeth K. Julian & Michael M. Daniel, *Separate and Unequal—The Root and Branch of Public Housing Segregation*, 23 CLEARINGHOUSE REV. 666, 668-69 (1989)).

<sup>28</sup> U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, A-26, *Relocation: Unequal Treatment of People and Businesses Displaced by Government* 25 (1965), available at <http://digital.library.unt.edu/ark:/67531/metadc1407/m1/38/?q=relocated> (last visited Oct. 22, 2013).



By the summer of 1967, urban renewal destroyed 400,000 housing units, and only built 10,760 low-income units to replace them.<sup>29</sup> In just under three decades, one million people were displaced and an astounding two-thirds of them were African Americans.<sup>30</sup> This rendered African Americans—only 12% of the United States population—five times more likely to be displaced than what their population would indicate.<sup>31</sup> Further, despite the implementation of the FHA, which has the goal of Americans from housing discrimination, the reality was this: of the three to four million Americans that were displaced from their homes by forced urban renewal, the majority of those whose property was taken were non-White.<sup>32</sup> This segregation and destruction of communities of color was not simply by happenstance.

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<sup>29</sup> FULLILOVE, *supra* note 12, at 7.

<sup>30</sup> FULLILOVE, *supra* note 12, at 2; *see also* ALEXANDER GARVIN, *THE AMERICAN CITY: WHAT WORKS, WHAT DOESN'T*, THE MCGRAW-HILL COMPANIES 122 (1995); Mary Bishop, *Street by Street, Block by Block: How Urban Renewal Uprooted Black Roanoke*, ROANOKE TIMES, Jan. 29, 1995.

<sup>31</sup> FULLILOVE, *supra* note 12, at 2.

<sup>32</sup> Jim Bailey, *Ethnic and Racial Minorities, the Indigent, the Elderly, and Eminent Domain: Assessing the Virginia Model of Reform*, 19 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 73, 89-90 (2012).

2. *Government and Private Entities  
Continue to Perpetrate Housing  
Discrimination Against Already  
Vulnerable Communities of Color*

Housing discrimination on account of race persists today despite important progress towards equality.<sup>33</sup> Governmental policies and private actions that officially encouraged and sustained housing discrimination and residential segregation until the 1960s<sup>34</sup> continue to have profound disparate adverse impacts on communities of color. While no longer valid,<sup>35</sup> the lack of legal enforceability of racial housing covenants “has not completely stifled their adverse impact on minority homeseekers.”<sup>36</sup> Similarly, while no longer in effect, the government-sponsored racially discriminatory policies described above, had impacts that will last for generations.<sup>37</sup>

The case of home mortgage lending is representative. While studies show that minorities face less housing discrimination today than in previous decades, minority homeseekers continue to struggle for equal access to affordable housing.<sup>38</sup> For instance,

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<sup>33</sup> See generally Margery Austin Turner, *Limits on Housing and Neighborhood Choice: Discrimination and Segregation in U.S. Housing Markets*, 41 IND. L. REV. 797 (2008).

<sup>34</sup> See *supra*, Part I.A.

<sup>35</sup> *Shelley v. Kraemer*, 334 U.S. 1 (1948).

<sup>36</sup> Margalynne Armstrong, *Desegregation Through Private Litigation: Using Equitable Remedies to Achieve the Purposes of the Fair Housing Act*, 64 TEMP. L. REV. 909, 920 (1991).

<sup>37</sup> See Nancy A. Denton, *The Role of Residential Segregation in Promoting and Maintaining Inequality in Wealth and Property*, 34 IND. L. REV. 1199, 1205 (2001).

<sup>38</sup> See generally Turner, *supra* note 33.

in one 2008 study, African Americans and Latinos were shown to be “twice as likely as whites to have subprime mortgages, even among borrowers with comparable incomes,” and “more likely than whites to be turned down for mortgages.”<sup>39</sup> Data shows that minorities, and African Americans and Latinos in particular, are “more likely to be steered toward, and issued, subprime loans” than whites with comparable credit scores, income and other such factors.<sup>40</sup>

One HUD report disclosed that “even when African American borrowers resided in *high-income* African American neighborhoods, they were twice as likely to receive subprime loans as residents in *low-income* White neighborhoods.”<sup>41</sup> In another, “high-income Blacks have been denied mortgage loans more frequently than low-income whites, rendering the former more vulnerable to unscrupulous lenders.”<sup>42</sup>

Using paired testers, the National Fair Housing Alliance showed that real estate agents in Chicago, Atlanta and Detroit were more likely to show African Americans and Latinos homes in “majority-minority communities while showing whites homes in predominantly white communities, even though both white and minority testers could afford comparable prices and asked about neighborhoods near their work.”<sup>43</sup> In addition, agents made disparaging

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<sup>39</sup> Mario L. Barnes et. al., *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 987 (2010).

<sup>40</sup> Creola Johnson, *The Magic of Group Identity: How Predatory Lenders Use Minorities to Target Communities of Color*, 17 GEO. J. ON POVERTY L. & POL’Y 165, 179-80 (2010).

<sup>41</sup> Johnson, *supra* note 40, at 179-80.

<sup>42</sup> Barnes et. al., *supra* note 39, at 987.

<sup>43</sup> Turner, *supra* note 33, at 797.

comments to white homebuyers about minorities and minority communities.<sup>44</sup>

There are a myriad of explanations proffered for racial disparities in housing opportunity and continued residential segregation, including self-selection and economic status. However, such explanations cannot account for the current levels of residential segregation or for the disparities between housing opportunities for minorities and Whites. Further-more, these explanations do not change the fact that malignant redevelopment policies, like those used in Mt. Holly and in Ivy City, compound the segregation of minorities.<sup>45</sup>

**B. Municipalities Ensure the Physical and Social Deterioration of Communities of Color Through Malignant Neglect and the Subordination of Minority Community Needs to those of More Politically Powerful Communities**

Forty-five years after the FHA was enacted in 1968, its promise to provide basic fairness in housing remains in some ways unfulfilled. If overt racism established segregation, now these discriminatory housing patterns are kept in place by seemingly neutral governmental decisions and private actions.

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<sup>44</sup> Turner, *supra* note 33, at 797.

<sup>45</sup> Imperatore, *supra* note 18, at 1045-46; *see also* David A. Dana, *Exclusionary Eminent Domain*, 17 SUP. CT. ECON. REV. 7, 8 (2009).

Ivy City is just one of many examples of communities being decimated by such seemingly neutral policies and practices.<sup>46</sup>

1. *Community Stories: Ivy City, A Neighborhood Profile*

Ivy City was once a small, nameless section of town just outside the boundaries of Washington, D.C.<sup>47</sup> In 1835, after the Baltimore and Ohio (B&O) Railroad received approval to build a Washington Branch passenger train between Washington and Baltimore, the railroad developed a tract of land adjacent to the roadhouse.<sup>48</sup> This adjacent area of land became Ivy City.<sup>49</sup> Ivy City eventually became a part of the

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<sup>46</sup> Ivy City is being used as a current example to demonstrate the fate that can befall so many other segments of cities and cities themselves if disparate impact is not recognized as a cognizable claim under the Fair Housing Act. *See also* Metro Housing Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1289-90 (7th Cir. 1977) (finding that a zoning ordinance that barred construction of multi-family housing, effectively barring African American families from moving to the neighborhood was a violation of the Fair Housing Act under disparate impact analysis); Wallace v. Chicago Housing Authority, 298 F. Supp. 2d 710 (N.D. Ill. 2003) (holding that the CHA's failure to provide adequate relocation assistance and effective social services to families displaced by public housing demolition was sufficient evidence for the plaintiff's to establish a claim for disparate impact); Kennedy v. City of Zanesville, 505 F. Supp. 2d 456 (S.D. Ohio 2007).

<sup>47</sup> JAMES D. DILTS, *THE GREAT ROAD: THE BUILDING OF THE BALTIMORE AND OHIO, THE NATION'S FIRST RAILROAD, 1828-1853* 158 (1996).

<sup>48</sup> KIRK REYNOLDS & DAVID OROSZI, *BALTIMORE & OHIO RAILROAD 16* (Mike Schaffer ed., 2000).

<sup>49</sup> Darryl Fears, *Ivy City Tired of being a D.C. "Dumping Ground," Takes on Gray Over Bus Depot*, WASH. POST, August 12,

District of Columbia after the Organic Act of 1871,<sup>50</sup> and quickly developed a strong African American presence because railroads were one of the few industries to consistently employ African Americans.<sup>51</sup> In 1911, the segregated city authorized the construction of the first “colored” school, Alexander Crummell School, which served as a symbol of pride in the neighborhood.<sup>52</sup>

As B&O’s railroad thrived, Ivy City mirrored its success. However, when rail travel declined following World War II, the success of this small neighborhood began to slow drastically.<sup>53</sup> In the decades that followed, Ivy City suffered from economic downturn and poor city management that placed an especially large burden on minority neighborhoods in Washington.<sup>54</sup> The local government did little to improve economic stability of Ivy City. This government inaction led the streets of Ivy City to become home to numerous decrepit and abandoned buildings as a result of former residents fleeing from the ruins of the community.<sup>55</sup>

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2012, *available at* [http://articles.washingtonpost.com/2012-08-12/national/35492485\\_1\\_bus-depot-boltbus-suit-claims](http://articles.washingtonpost.com/2012-08-12/national/35492485_1_bus-depot-boltbus-suit-claims).

<sup>50</sup> DILTS, *supra* note 47, at 157.

<sup>51</sup> ERIC ARNESEN, BROTHERHOODS OF COLOR: BLACK RAILROAD WORKERS AND THE STRUGGLE FOR EQUALITY 14 (2001).

<sup>52</sup> *Id.*

<sup>53</sup> REYNOLDS & OROSZI, *supra* note 48, at 84.

<sup>54</sup> Paul Schwartzman, *Renewal takes Root in D.C.’s Blighted Ivy City: Real Estate Investors Betting on Neighborhood*, WASH. POST, July 10, 2005, *available at* <http://www.washingtonpost.com/wpdyn/content/article/2005/07/09/AR2005070900711.html>.

<sup>55</sup> Jason Cherkis, *Ghost Town: The Swansons Have Lived in Ivy City for 26 Years. They Have Watched Half Their Neighborhood*

As one of the smallest and poorest communities in the District of Columbia, with an unemployment rate of 50 percent,<sup>56</sup> Ivy City has become easy prey for municipal pollution and other undesirable uses. The community has become a parking lot for numerous government vehicles, snowplows, and idle buses.<sup>57</sup> As a result, air quality has become dangerously poor causing many residents to develop asthma and other respiratory ailments.<sup>58</sup> As one resident complained, Ivy City is now a “dumping ground.”<sup>59</sup> Another bluntly warned, “we can’t just let you come in and kill us.”<sup>60</sup>

Yet, even with all the “neutral” policies that Ivy City has been forced to endure; the government wants the small section of town to take on yet another burden. Union Station is being redeveloped and the city needs a place to house interstate buses during the redevelopment. The city could have chosen to house

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*Disappear. And Now They May Disappear, Too*, WASH. CITY PAPER, June 2, 2000, available at <http://www.washingtoncitypaper.com/articles/19731/ghost-town>.

<sup>56</sup> Peter Tatian, *State of Washington, D.C.’s Neighborhoods*, THE URBAN INSTITUTE, 19 (2008).

<sup>57</sup> Eric Tucker, *D.C. Council Chair Resigns After Bank Fraud Charge*, ASSOCIATED PRESS, June 6, 2012, available at <http://bigstory.ap.org/article/dc-council-chair-resigns-after-bank-fraud-charge>.

<sup>58</sup> Tom Sherwood, *Ivy City Residents Fight Bus Depot at Crummell School Site*, NBC WASHINGTON, Nov. 26, 2012, <http://www.nbcwashington.com/blogs/first-read-dmv/Ivy-City-Residents-Fight-Bus-Depot-at-Crummell-School-Site-180938721.html>.

<sup>59</sup> See Fears, *supra* note 49.

<sup>60</sup> Eric Falquero, *The Fight for Ivy City*, STREET SENSE Sept. 16, 2013, available at <http://www.streetsense.org/2013/09/the-fight-for-ivy-city>.

the buses anywhere, yet it chose to place the buses in the now-closed Crummell School in the center of Ivy City.<sup>61</sup> The District had promised to turn the unused school space into a community center and job training facility, yet it chose to turn the center of this once-thriving community into a storage space for idling busses.

The FHA requires municipalities to make decisions in a “fair” manner and disparate impact analysis is needed to ensure such fairness. Unless the Court is able to see the struggle of these communities, sympathize with them, and realize that unless disparate impact is included as a cognizable claim under the Fair Housing Act many communities, just like the once thriving Ivy City, will be destroyed. Although the government may not have intended to substantially burden minority communities with its “neutral” policies, it is evident that these communities have experienced disparate impact, which, if left unchecked will leave these communities irreparably broken.

**C. The Wholesale Disproportionate Effect of Local and Federal Municipal Policies Displaces and Destroys Communities of Color to the Point of Experiencing “Root Shock.”**

In the final stage of the urban renewal trajectory, families and businesses are forced out of their homes after their living centers are destroyed, triggering “root shock,” the culminating point of a pernicious cycle of targeting communities of color for dislocation. These communities were once home for those who lived there—something more than “just a symbol of

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<sup>61</sup> See Fears, *supra* note 49.



social status,”<sup>62</sup> but instead, “a splendid invention” that “keeps the warmth in and the rain out, the predators at bay, and the loved ones close.”<sup>63</sup> Forcing out families and businesses as a result of urban renewal destroys that splendid place Ivy City is deathly close to the end of this pernicious cycle.

Sadly, as the final stage of urban renewal tears across communities, bulldozers level to the ground once vibrant neighborhoods, homes are left abandoned and dilapidated, and cultural centers and churches no longer embody community vibrancy because there is no one left to give it life.

For the victims of so called “neutral” urban renewal, the displacement of families undermines trust, increases anxiety about letting loved ones out of one’s sight, destabilizes relationships, destroys social, emotional and financial resources, and increases the risk for every kind of stress-related disease, from depression to heart attack.<sup>64</sup> “The developers tell us not to be sentimental about where we live,” yet families are continuously stripped of an equal opportunity to build their homes or strengthen their family structure when faced with such rapid and unbearable destabilization of displacement.<sup>65</sup>

Root shock results because communities are weaker, shaken from their foundation, and unable to rebuild the once thriving core of family and community. More

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<sup>62</sup> FULLILOVE, *supra* note 12, at 3.

<sup>63</sup> *Id.*

<sup>64</sup> FULLILOVE, *supra* note 12, at 6.

<sup>65</sup> Michael Hudson, *Root Shock: How Tearing Up City Neighborhoods Hurts American and What We Can Do About It*, CITY LIMITS, available at [http://www.citylimits.org/news/article\\_print.cfm?article\\_id=3116](http://www.citylimits.org/news/article_print.cfm?article_id=3116) (last visited Oct. 22, 2013).

importantly, because urban renewal efforts and municipal policies over the decades were mostly implemented in Black neighborhoods, this impact—the eventual uprooting of families and business and ultimately the “root shock” that it produces—is magnified in these communities of color.

*Amicus curiae* do not claim that the municipalities cannot or should not fight blight. On the contrary, fighting the “blight”—the progressive physical and social destruction of communities of color caused by malignant neglect and subordination—and enhancing communities is essential. However, the Court should recognize that municipalities should only be able to use tools to rid of blight that do not destroy the very communities that the FHA sought to protect.

Neither the causes nor the effects of the “root shock” described above can be ameliorated without disparate impact analysis. Without disparate impact analysis, Ivy City and other over-burdened or displaced communities of color will continue to experience the harmful and compounding effects of these discriminatory policies.

## **II. VULNERABLE COMMUNITIES OF COLOR WILL LOSE THEIR ABILITY TO PROTECT THEMSELVES IN A MEANINGFUL WAY IF FHA CLAIMS ARE NO LONGER COGNIZABLE UNDER A DISPARATE IMPACT ANALYSIS**

Since its enactment, the purpose<sup>66</sup> of the FHA has been to stop housing discrimination and segregation.<sup>67</sup>

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<sup>66</sup> *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972).

<sup>67</sup> See 42 USC § 3601 (1968); see also *Trafficante*, 409 U.S. at 211. The Fair Housing Act makes it unlawful to “refuse to sell or rent ... or otherwise make unavailable or deny, a dwelling to any

This purpose, however, cannot be fulfilled without consideration of the disparate impact that policies and actions have on minority communities. Given that the FHA largely depends upon citizen action<sup>68</sup> to combat housing discrimination, this Court's mandate of "a generous construction"<sup>69</sup> of the statute is essential to empowering individuals and affected communities to address a range of discriminatory practices.

Because the FHA depends upon citizen action to combat housing discrimination, this Court's mandate of "a generous construction" of the FHA has been essential to allowing individuals and affected communities to directly address a range of discriminatory practices.<sup>70</sup> Vulnerable communities need the tool of disparate impact analysis to challenge otherwise insurmountable evidentiary obstacles to challenging governmental and private actions that may be neutral in appearance, but that undermine the FHA's purpose by unfairly and unnecessarily burdening the very communities that the FHA aims to protect. Eliminating disparate impact analysis under the FHA would effectively undermine vulnerable communities' ability to realize the statute's self-help function, thereby further entrenching segregation in housing, education and employment.<sup>71</sup>

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person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. 3604(a) (1968).

<sup>68</sup> See Armstrong, *supra* note 36, at 920-21 (discussing remedy structure for FHA claims).

<sup>69</sup> *Trafficante*, 409 U.S. at 212.

<sup>70</sup> *Id.*

<sup>71</sup> See, e.g., Stanley P. Stocker-Edwards, *Black Housing 1860-1980: The Development, Perpetuation, and Attempts to Eradicate*

**A. Disparate Impact Analysis is Needed to Ferret Abuses Under the FHA Because Most Contemporary Housing Discrimination is Either Hidden or Subconscious**

Although disparate treatment analysis has been an effective tool for combating some forms of housing discrimination, this tool's narrow focus on overtly intentional discrimination is insufficient to achieve the goals of the FHA. An intent-based approach is inadequate because what is in the mind of a particular decision-maker is not relevant to whether an action that undermines the goals of the FHA has occurred. Disparate impact analysis remedies this deficiency. Unlike an intent-based approach, disparate impact analysis reflects the basic reality—now well documented by social scientists—that “many people who act in biased ways are genuinely unaware of their biases.”<sup>72</sup>

An overwhelming body of social science evidence shows that people are not colorblind.<sup>73</sup> Indeed, awareness of race and ethnicity is a basic function of human cognitive processes, which rely on social

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*the Dual Housing Market in America*, 5 HARV. BLACKLETTER J. 50, 51 (1988).

<sup>72</sup> Primus, *supra* note 11 at 532-33.

<sup>73</sup> See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Primus, *supra* note 11, at 532-33; Destiny Peery, Note & Comment, *The Colorblind Ideal in A Race-Conscious Reality: The Case for A New Legal Ideal for Race Relations*, 6 NW. J. L. & SOC. POL'Y 473, 481 (2011).

categorization “when dealing with the complex, social world in which we all live.”<sup>74</sup> Moreover,

[R]equiring proof of conscious or intentional motivation as a prerequisite to [] recognition that a decision is race-dependent ignores much of what we understand about how the human mind works. It also disregards both the irrationality of racism and the profound effect that the history of American race relations has had on the individual and collective unconscious.

Lawrence III, *supra* note 73, at 323.

This Court recognized the role that subconscious discrimination plays in the realm of employment.<sup>75</sup> In *Watson v. Fort Worth Bank & Trust*, for example, a plurality of the Court noted that “even if one assumed that [intentional] discrimination can be adequately policed through disparate *treatment* analysis, the problem of subconscious stereotypes and prejudices would remain” in the absence of a disparate *impact* analysis.<sup>76</sup>

Without disparate impact analysis, the myriad effects of housing discrimination are too readily dismissed as an individual’s unfortunate reality for which no one but she is responsible.<sup>77</sup> There is good reason to believe that “to accept a narrative of post-

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<sup>74</sup> Peery, *supra* note 73, at 481; *see also* Lawrence III, *supra* note 73, at 323.

<sup>75</sup> *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988).

<sup>76</sup> *See* Primus, *supra* note 11, at 532-33 (emphasis added).

<sup>77</sup> Kenneth L. Karst, *Equal Citizenship at Ground Level: The Consequences of Nonstate Action*, 54 DUKE L.J. 1591, 1606-07 (2005).

racialism is to succumb to a form of ‘racial amnesia’— a desire to forget that those marked by race neither asked for the designation nor can they escape its present day meanings and effects.”<sup>78</sup> Left to its own devices, color-blindness will serve only to entrench an intolerable status quo of racial inequality.<sup>79</sup> “[A]ntidiscrimination laws that make deliberate intent a necessary element for imposing liability will systematically fail to reach the problem because there may be no conscious discriminatory intent to discover.”<sup>80</sup>

The threat of accountability for both intentional and subconscious discrimination under a disparate impact analysis assures a powerful deterrent that would be lost if this Court limits the manner in which lower courts have employed disparate impact analysis.<sup>81</sup> “Housing providers have strong incentives to provide equal treatment to all their customers, regardless of race or ethnicity, when fair housing organizations bring suits against discriminatory real estate and rental agents based on systematic paired testing and when courts impose substantial penalties in high-profile cases.”<sup>82</sup>

Finally, even where neither intentional nor subconscious discrimination exist, the historical

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<sup>78</sup> Barnes et. al., *supra* note 39, at 979.

<sup>79</sup> Barnes et. al., *supra* note 39, at 998; *see also* James J. Hartnett, *Affordable Housing, Exclusionary Zoning, and American Apartheid: Using Title VIII to Foster Statewide Racial Integration*, 68 N.Y.U. L. REV. 89, 98 (1993).

<sup>80</sup> Primus, *supra* note 11, at 532-33.

<sup>81</sup> *See* Turner, *supra* note 33, at 806.

<sup>82</sup> *Id.*

legacy of government-mandated segregation and discrimination<sup>83</sup> may still serve to undermine equal and fair housing opportunities for vulnerable communities of color.<sup>84</sup> Not only does disparate impact analysis allow for identification of hidden intentional and unintentional discrimination, such an approach recognizes the invidious role of historical *government-supported* discrimination in disparately undermining communities of color in the present.<sup>85</sup> By requiring a heightened barrier to prosecution of housing discrimination cases, both intentional and facially neutral discriminatory practices should be expected to continue. Consequently, racial segregation of communities in the housing, education, and employment contexts will persist, frustrating the core purpose of the FHA.<sup>86</sup> For these reasons, it is essential that FHA claims be cognizable under a disparate impact analysis.

**B. Disparate Impact Analysis for Housing Discrimination is Needed to Fight Discrimination and Segregation in Education and Employment**

Housing discrimination and segregation does not just affect where individuals reside—it also determines education and employment opportunities

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<sup>83</sup> See *supra*, Part I.

<sup>84</sup> Primus, *supra* note 11, at 533-34.

<sup>85</sup> See, e.g., Primus, *supra* note 11, at 533-34 (discussing the historical legacy of past discrimination in shaping current and future employment opportunities).

<sup>86</sup> See Eric W.M. Bain, Note, *Another Missed Opportunity to Fix Discrimination in Discrimination Law*, 38 WM. MITCHELL L. REV. 1434, 1463 (2012).

for entire segments of our society.<sup>87</sup> Emphasizing the *intent* of isolated individual acts, rather than the cumulative *effects* of government and private decisions on historically disadvantaged communities of color, obscures the complex connection between housing discrimination and segregation and many other societal ills.<sup>88</sup>

There is a long-established link between housing segregation in the public education system.<sup>89</sup> For the majority of people in the United States, the racial makeup of their residential neighborhood is the most important determinant of the caliber of schools they will attend.<sup>90</sup> Very often, housing discrimination causes minority neighborhoods to be isolated, and diminishes the quality of education available to minority communities. In turn, perceptions of school quality influence residential choices and reinforce segregated housing patterns.<sup>91</sup> The process is cyclical and continuous. Living in one community rather than another can mean the difference between attending a

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<sup>87</sup> See Denton, *supra* note 37, at 1205 (“Residential segregation limits individual accumulation of human capital via education and the job market.”).

<sup>88</sup> See Karst, *supra* note 77.

<sup>89</sup> Nancy A. Denton, *The Persistence of Segregation: Links Between Residential Segregation and School Segregation*, 80 Minn. L. Rev. 795 (1996).

<sup>90</sup> *Parents Involved in Cmty. Schs. v. Seattle School District. Dist. No. 1*, 551 U.S. 701 (2007).

<sup>91</sup> Sarah Max, *School, What Is It Good For?*, CNN.COM (August 27, 2004), available at [http:// money.cnn.com/2004/08/27/real\\_estate/buying\\_selling/schools/](http://money.cnn.com/2004/08/27/real_estate/buying_selling/schools/).



high-achieving school with resources and attending a low-achieving school deprived of resources.<sup>92</sup>

Since *Brown*, it has been well established that separate is not equal, and racially isolated schools are harmful for minorities.<sup>93</sup> Volumes of social science evidence show the detrimental effects that segregated schools have on minority communities. Research has proven segregated schools have limited educational resources, overcrowded classes, weak curricula, and fewer qualified teachers.<sup>94</sup> Without disparate impact analysis under the FHA, facially neutral municipal policies will continually displace minority communities from flourishing “redeveloped” neighborhoods and perpetuate education segregation.

Similar to the effect of housing discrimination on education, disparate impact analysis is also needed under the FHA to combat employment segregation. The correlation between housing discrimination, housing segregation, and employment segregation has long been established. Beginning in the late 1960s, scholars have argued that the concentration of minorities in segregated neighborhoods limits their access to employment because a growing number of jobs are dispersed to predominantly white locations.<sup>95</sup> Additionally, studies indicate that the

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<sup>92</sup> Erika K. Wilson, *Leveling Localism and Racial Inequality in Education Through the No Child Left Behind Act Public Choice Provision*, 44 U. MICH. J.L. REFORM 625 (2011).

<sup>93</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>94</sup> Rebecca M. Abel, *Drawing the Lines: Pushing Past Arlington Heights and Parents Involved in School Attendance Zone Cases*, 2012 B.Y.U. Educ. & L.J. 369 (2012).

<sup>95</sup> Turner, *supra* note 33, at 809.

ratio of jobs to population is higher in primarily white neighborhoods than in minority neighborhoods.<sup>96</sup>

The geography of employment intersects with the geography of residence, and housing discrimination places minorities at a disadvantage in discovering and accessing available employment.<sup>97</sup> An illustration of this can be found in Ivy City in the District of Columbia. Although Ivy City is one of the smallest communities in the District of Columbia, it is one of the most densely populated minority communities in the area, and has one of the highest rates of unemployment in the area. With a staggering 50 percent unemployment rate, Ivy City is one of the poorest minority communities within the District of Columbia and is isolated from employment opportunity and economic growth.<sup>98</sup>

As discussed above, residential segregation is closely linked to education segregation, which directly correlates to employment opportunity.<sup>99</sup> The quality of primary and secondary education a person receives impacts their ability to obtain higher education, and thus impacts their employment opportunities. Research indicates—other factors held constant—that high levels of housing segregation have been shown to increase high school drop-out rates among blacks, reduce employment among blacks, and widen the gap between black and white wages.<sup>100</sup> As a result of

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<sup>96</sup> Justin P. Steil, *Innovative Responses to Foreclosures: Paths to Neighborhood Stability and Housing Opportunity*, 1 COLUM. J. RACE & L. 63, 117 (2011).

<sup>97</sup> See Steil, *supra* note 96, at 85.

<sup>98</sup> See Tatian, *supra* note 56.

<sup>99</sup> See Turner, *supra* note 39, at 811.

<sup>100</sup> *Id.*

housing segregation, minority communities are distanced from “redeveloped” areas containing employment growth and opportunity. Without disparate impact analysis, we will see increased segregation and fewer opportunities for minorities not just in housing, but in education, employment and a myriad of other areas.

**C. Disparate Impact Analysis Empowers Vulnerable Communities to Prevent the Eradication of their Political Power, Cultural Identity and Financial and Economic Stability**

Municipal redevelopment policies have overburdened and eradicated many individuals, families and communities of color, and the conditions of Ivy City residents are typical of this problem. Preventing municipalities from destroying neighborhoods such as Ivy City is a key part of preventing the abolition of the political power, cultural identity, and financial stability in these communities of color.

The loss of a community’s political presence due to federal, state and local policies eradicates minorities’ ability to strengthen their neighborhoods or protect themselves against unfair redevelopment policies. Research published by Dr. Mindy Fullilove in her publications, *Eminent Domain and African Americans* and *Root Shock*, depict the impact of targeted municipal policies disguised as community redevelopment.<sup>101</sup> The research rightly concluded that it has been extremely difficult for African Americans to rejuvenate the political centers of their communities

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<sup>101</sup> FULLILOVE, *supra* note 12, at 5-6.

once its power is lost.<sup>102</sup> For instance, the decentralization of communities directly impacts the political power of its residents. In an interview of community members impacted by “blight” removal, one resident noted that, “...we are not only politically weak, we are not a political entity” at all.<sup>103</sup> The slow eradication of a community, much like what is being experienced by Ivy City residents (and what has been experienced by Mt. Holly residents), wholly and unwaveringly removes any political power that they once had.

This Court recognized in *Trafficante* that “[t]he person on the landlord’s blacklist is not the only victim of discriminatory housing practices; it is, as Senator Javits said in supporting the bill, ‘the whole community.’”<sup>104</sup> Just as the consequences of discrimination are grave for group identity, so too, are the potential benefits of equal opportunity in housing:

The implications for group status hierarchies are huge. The African American policeman on the streets of Birmingham and the woman electrician on a construction site carry messages for all who see them, and each message proclaims not just an individual’s status but also a group’s entitlement to inclusion in the ranks of equal citizens.

Karst, *supra* note 77, at 1598-99.

Today, the Court should not only understand the extreme difficulty in forcing communities of color to rebuild outside of their homes, but also grab hold to

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<sup>102</sup> *Id.*

<sup>103</sup> FULLILOVE, *supra* note 12, at 6-7.

<sup>104</sup> *Trafficante*, 409 U.S. at 211.

the notion that “displacement is the problem the twenty first century must solve.”<sup>105</sup>

Disparate impact analysis will enable the Court to remedy and reduce the fragmentation and disrepair of communities of color and prevent communities like Ivy City from this pernicious cycle. Unfortunately, Ivy City is at the precipice of destruction, and it may not be long before Ivy City experiences the same fate as communities like Mt. Holly Gardens, New Jersey. Without disparate impact analysis, the problem of allowing municipalities to continue to break apart communities of color to the point of being irreparable and irreplaceable will not end.

**III. SHELTER IS THE MOST FUNDAMENTAL COMPONENT OF HUMAN SECURITY AS DEMONSTRATED BY INTERNATIONAL NORMS THAT RECOGNIZE DISPARATE IMPACT ANALYSIS IN HOUSING DISCRIMINATION**

Housing is a fundamental component of human security—how one works, eats, parents, and has access to education is all affected by where one lives. The United Nations Office of the High Commissioner for Human Rights has long recognized housing not only as a human right, but a fundamental component of security impacting nearly every other part of the human experience.

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<sup>105</sup> FULLILOVE [ROOT SHOCK], *supra* note 12, at 5.

**A. Disparate Impact Analysis Cognizable through the Fair Housing Act is Consistent with the United States' Obligations Under International Law.<sup>106</sup>**

The United States has signed and ratified The International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”).<sup>107</sup> CERD proscribes a broad definition of discrimination, which prohibits laws or policies that are intentionally discriminatory or have a disparate impact.<sup>108</sup> Under CERD, racial 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.”<sup>109</sup> The definition’s “purpose or effect” language bars seemingly race-neutral state actions that create statistically significant racial

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<sup>106</sup> Audrey Daniel, *The Intent Doctrine and CERD: How the United States Fails to Meet Its International Obligations in Racial Discrimination Jurisprudence*, 4 DEPAUL J. FOR SOC. JUST. 263, 268 (2011).

<sup>107</sup> International Convention on the Elimination of all Forms of Racial Discrimination, *Signatories, Accessions, Succession & Ratification Status*, U.N.T.S., available at [http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg\\_no=IV-2&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-2&chapter=4&lang=en).

<sup>108</sup> International Convention on the Elimination of All Forms of Racial Discrimination art. I, Jan. 4, 1969, 660 U.N.T.S. 195.

<sup>109</sup> *Id.* (emphasis added)

disparities, even when they lack racial animus.<sup>110</sup> As a member of the United Nations and a world leader in economics, foreign policy and social justice, the United States has an obligation to follow the definition of discrimination provided in CERD—and to retain disparate impact as an available avenue to combat housing discrimination.

Pursuant to its agreement as a member of CERD, the United States has an obligation to fulfill certain requirements, which includes a duty to “take effective measures to review governmental national and local policies and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.”<sup>111</sup> Further, Under Article 5(e)(iii) of CERD, the United States, as a signatory to the convention, must “undertake to eliminate racial discrimination in all its forms and to guarantee the right of everyone without distinction as to race, colour, national or ethnic origin to equality before the law, notably in the enjoyment of...the right to housing.”<sup>112</sup>

As it relates to housing, the Department of Housing and Urban Development (“HUD”), the administrative agency appointed by congress to enforce the FHA, has promulgated a regulation recognizing disparate impact. HUD specified that the “Fair Housing Act

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<sup>110</sup> Corinne A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. TOL. L. REV. 545, 586 (2005).

<sup>111</sup> International Convention on the Elimination of All Forms of Racial Discrimination art. II(1)(c), Jan. 4, 1969, 660 U.N.T.S. 195.

<sup>112</sup> International Convention on the Elimination of All Forms of Racial Discrimination art. 5(e)(iii), Jan. 4, 1969, 660 U.N.T.S. 195 (emphasis added).

may be violated by a practice that has a discriminatory effect...regardless of whether the practice was adopted for discriminatory purpose.”<sup>113</sup> The use of disparate impact under the FHA allows the United States to comply with its CERD treaty obligations with respect to housing.

The U.N. has made recommendations to the United States in pursuing the elimination of housing discrimination. In her report to the United Nations, Special Rapporteur Raquel Rolnik indicated that significant challenges continue to remain in eliminating discrimination in the United States housing market. Despite Rolnik’s characterization of the United States Fair Housing Act as “strong,” she made clear that “there have been significant problems in [the Fair Housing Act’s] enforcement, and further strengthening is required.”<sup>114</sup> She reiterated that CERD continues to express “deep concern” that discrimination tends to be disproportionately concentrated where there is a high minority presence,<sup>115</sup> and the resultant housing discrimination has a direct impact upon the accessibility of quality education for children in those communities. *Id.*

Rolnik also noted that while “there is a long-standing commitment to provide adequate housing

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<sup>113</sup> 42 U.S.C. § 3601 (1968).

<sup>114</sup> U.N. GAHRC, 13th Sess., *Report of the Special Rapporteur on Adequate Housing in the United States as a Component of the right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context* [hereinafter Report of the Special Rapporteur on Adequate Housing in the United States] at 16, U.N. Doc. A/HRC/13/20/Add.4 (Dec. 24, 2012).

<sup>115</sup> U.N. GAHRC, 13th Sess., *Report of the Special Rapporteur on Adequate Housing in the United States* at 15, U.N. Doc. A/HRC/13/20/Add.4 (Dec. 24, 2012).



within their means for all Americans”<sup>116</sup> at times, “[g]overnment policy has...resulted in tearing apart this important sense of community, removing a source of stability for subsidized housing residents, and engendering a sense of mistrust of Government regard for their interests.”<sup>117</sup> Ultimately, Rolnik recommended that the United States follow the housing-related recommendations of the Committee on the Elimination of Racial Discrimination<sup>118</sup> and “strongly” recommended the United States to ratify the International Covenant on Economic, Social and Cultural Rights.<sup>119</sup> This covenant and the Committee’s observations both strongly incorporate disparate impact analysis as a tool for combating the

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<sup>116</sup> U.N. GAHRC, 13th Sess., *Report of the Special Rapporteur on Adequate Housing in the United States* at 20, U.N. Doc. A/HRC/13/20/Add.4 (Dec. 24, 2012); see also *From Despair to Hope: Two HUD Secretaries on Urban Revitalization and Opportunity*, BROOKINGS INSTITUTION, Metropolitan Policy Program Discussion, National Press Club, Washington D.C. (Jul. 14, 2009), available at <http://www.brookings.edu/events/2009/07/14-urban-development>. At the discussion, HUD Secretary Shawn Donovan admitted that, “in many cases neighbourhoods of concentrated poverty were the result of government policy.”

<sup>117</sup> U.N. GAHRC, 13th Sess., *Report of the Special Rapporteur on Adequate Housing in the United States* at 20, U.N. Doc. A/HRC/13/20/Add.4 (Dec. 24, 2012).

<sup>118</sup> Specifically, its concluding observations in paragraphs 16, 17 and 18. U.N. GAHRC, 13th Sess., *Report of the Special Rapporteur on Adequate Housing in the United States* at 22, U.N. Doc. A/HRC/13/20/Add.4 (Dec. 24, 2012).

<sup>119</sup> International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, 660 U.N.T.S. 195.

types of discrimination that Ms. Rolnik noted has been so difficult to eradicate in the United States.<sup>120</sup>

In response to such recommendations, the United States acknowledged in its periodic report to the Committee on the Elimination of Racial Discrimination<sup>121</sup> that disparate impact analysis played an important role in combating several forms of racial discrimination.<sup>122</sup> Indeed the United States proffered the FHA as an example of a law that addresses discrimination in the form of disparate impact,<sup>123</sup> stating that the United States uses disparate impact analysis as a key tool to combat housing discrimination:

[W]hen facts support the use of disparate impact analysis, the United States is committed to using these valuable tools to address indirect discrimination. Laws that address disparate impact discrimination include...The Fair Housing Act (Title VIII of the Civil Rights Act of 1968)...<sup>124</sup>

This acknowledgement demonstrates the legitimacy of disparate impact analysis and the United States'

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<sup>120</sup> See generally, U.N. GAHRC, 13th Sess., *Report of the Special Rapporteur on Adequate Housing in the United States*, U.N. Doc. A/HRC/13/20/Add.4 (Dec. 24, 2012).

<sup>121</sup> The body responsible for monitoring compliance with CERD.

<sup>122</sup> *Periodic Report of the United States of America to the United Nations Committee on the Elimination of Racial Discrimination Concerning the International Convention on the Elimination of all Forms of Racial Discrimination*, at 7 (Jul. 12, 2013), available at [http://www.state.gov/documents/organization/210817.pdf?z\\_ad8eb2b0f40c11e0be500800200c9a66=1380305338](http://www.state.gov/documents/organization/210817.pdf?z_ad8eb2b0f40c11e0be500800200c9a66=1380305338).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

obligation to retain it as a tool to combat housing discrimination.

The fact is there has been “wide acceptance of disparate impact analysis in the international marketplace of legal ideas.”<sup>125</sup> The United Nation general assembly recognizes that “housing is not simply about bricks and mortar, nor is it simply a financial asset. Housing includes a sense of community, trust and bonds built between neighbours over time; the schools which educate the children; and the businesses which support the local economy and provide needed goods and services.”<sup>126</sup> For these reasons, it is imperative that the United States follow international norms by retaining disparate impact analysis to combat housing discrimination.

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<sup>125</sup> Rosemary C. Hunter & Elaine W. Shoben, *Disparate Impact Discrimination: American Oddity or Internationally Accepted Concept?*, 19 BERKELEY J. EMP. & LAB. L. 108 (1998).

<sup>126</sup> U.N. GAHRC, 13th Sess., *Report of the Special Rapporteur on Adequate Housing in the United States* at 20, U.N. Doc. A/HRC/13/20/Add.4 (Dec. 24, 2012).

**CONCLUSION**

For the foregoing reasons, *amicus curiae* urge this Court to retain disparate impact analysis as a cognizable claim under the Fair Housing Act.

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## **APPENDIX**

**APPENDIX**

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