No. 11-1507

IN THE

Supreme Court of the United States

TOWNSHIP OF MOUNT HOLLY, *et al.*,
Petitioners,

v.

MT. HOLLY GARDENS CITIZENS IN ACTION, INC., *et al.*,
Respondents.

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

BRIEF OF *AMICI CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, *ET AL.* IN SUPPORT OF RESPONDENTS

Joseph D. Rich
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Ave., N.W.
Suite 400
Washington, DC 20005
(202) 662-8600

Megan K. Whyte de Vasquez
WASHINGTON LAWYERS' COMMITTEE
11 Dupont Circle, N.W.
Suite 400
Washington, DC 20036
(202) 319-1000

Jonathan M. Cohen
Counsel of Record
Jason S. Rubinstein
Jenna A. Hudson
Daniel I. Wolf
GILBERT LLP
1100 New York Ave., N.W.
Suite 700
Washington, DC 20005
(202) 772-2259
cohenj@gotofirm.com

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici curiae are the Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") and its following independent affiliates:

- The Washington Lawyers' Committee for Civil Rights and Urban Affairs;
- Lawyers' Committee of Civil Rights Under Law of the Boston Bar Association;
- The Chicago Lawyers' Committee for Civil Rights Under Law, Inc.;
- Colorado Lawyers' Committee;
- Mississippi Center for Justice;
- Public Counsel, Los Angeles, California;
- Public Interest Law Center of Philadelphia; and
- Lawyers' Committee for Civil Rights of the San Francisco Bay Area.

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[1] In accordance with Supreme Court Rule 37.6, *Amici curiae* note that the position they take in this brief has not been approved or financed by Petitioners, Respondents, or their counsel. Neither Petitioners, Respondents, nor their counsel had any role in authoring, nor made any monetary contribution to fund the preparation or submission of, this brief. Pursuant to Supreme Court Rule 37.3, *Amici curiae* state that all parties have consented to the filing of this brief; blanket letters of consent have been filed with the Clerk of the Court.

(Collectively, "*Amici*").

The Lawyers' Committee is a nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President Kennedy, to help defend the civil rights of racial minorities and the poor. Part of the mission of the Lawyers' Committee and its affiliates is to work with communities across the nation to combat and seek to remediate discriminatory housing practices.

For over fifty years, *Amici* have been at the forefront of many of the most significant cases involving race and national origin discrimination. The Lawyers' Committee and its affiliates have litigated numerous fair housing claims under the Fair Housing Act, Title VIII of the Civil Rights Act of 1968 ("FHA" or "Act"), many of which have raised disparate impact claims. *Amici* thus are acutely aware that residential segregation persists in the United States and that discriminatory exclusionary zoning is a frequent cause of this segregation. *Amici* also recognize the critical role the FHA plays in combatting all forms of housing discrimination.

Amici have seen firsthand that disparate impact claims under the FHA are integral to meeting the FHA's central goal of integrating our communities. *Amici* thus have a strong interest in showing that limiting the FHA to cases where intent must be proved directly would significantly weaken the Act's effectiveness.

Amici's experience in this area, particularly in cases challenging exclusionary zoning, demonstrates

that the FHA must continue to provide a remedy when local officials or housing providers take actions that prevent equal access to housing for protected groups or perpetuate residential segregation, and their legitimate interests can be served by a less discriminatory alternative. Accordingly, *Amici* have a strong interest in ensuring that this Court not reverse decades of settled law and instead hold that disparate impact claims continue to be cognizable under the FHA.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court long has recognized that one of the central goals of the FHA is to foster "truly integrated and balanced living patterns."[2] Disparate-impact liability is a critical element of the FHA's framework and is necessary to achieve this central goal. The plain language of the Act, as well as its history and purpose, demonstrate that disparate impact claims are cognizable under the FHA.

This case presents the issue of whether disparate impact claims will continue to be cognizable under the FHA in the context of a "displacement" case – a case involving a challenge to plans or regulations purportedly intended to improve housing, but that displace residents who are disproportionately minorities and replace such housing with housing available disproportionately to

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[2] *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (quoting 114 Cong. Rec. 3422 (1968)).

non-minorities. However, the FHA applies in many different contexts.

One of the most important means for achieving the core purposes of the FHA – promoting residential integration and eliminating segregation – is challenging what is commonly referred to as exclusionary zoning. Specifically, these cases challenge zoning and land use decisions that often are facially neutral but that create or perpetuate segregation (either by accident or by design) by restricting housing opportunities available to minorities. Frequently, exclusionary zoning cases challenge regulations that block the opportunity of protected classes to move to residential areas from which they historically were absent.

Given the persistence of residential racial segregation, the ability to enforce fair housing rights in exclusionary zoning cases through a disparate impact theory has been a crucial tool for accomplishing Congress's goal for fair and integrated housing. In particular, the broader lens of exclusionary zoning cases brings focus to three points that show why violations of the FHA may be proved through disparate impact analysis regardless of demonstrable intent.

First, exclusionary zoning cases illustrate why actions having an unjustified disparate impact offend Congress's intent in enacting the FHA. These cases show that zoning ordinances that have a disparate impact can freeze segregated housing patterns that themselves resulted from past intentionally discriminatory laws or practices, thus

perpetuating historical discriminatory intent. By viewing housing discrimination and segregation in its historical context, Congress recognized in the language of the FHA that making housing unavailable in a racially disproportionate manner or perpetuating residential segregation requires a remedy, without requiring a plaintiff to prove discriminatory intent.

Second, exclusionary zoning cases demonstrate that unjustified disparate impact, regardless of whether intent can be proven, "make[s]" housing "unavailable . . . because of race" or another protected status.[3] Cases in multiple U.S. Courts of Appeals have presented facts that illustrate how some zoning ordinances can, and often do, make housing unavailable due to race even where discriminatory intent cannot readily be shown. In many cases, that intent is hidden under the guise of facial neutrality, and in others the discrimination results merely from thoughtless action that is equally as harmful as intentional discrimination. As the Eighth Circuit explained,

> Effect, and not motivation, is the touchstone, in part because clever men may easily conceal their motivations, but more importantly, because . . . 'whatever our law was once, . . . we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public

[3] 42 U.S.C. § 3604(a) (2012).

> interest as the perversity of a willful scheme.[4]

Third, in exclusionary zoning cases, courts and the Department of Housing and Urban Development ("HUD") have applied a multi-prong test to determine when unjustified disparate impact or perpetuation of residential segregation triggers a remedy under the FHA. A plaintiff cannot obtain a remedy under the FHA simply by demonstrating that there is a disparate impact on a protected class or that an action perpetuates segregation. After a plaintiff makes a *prima facie* case by showing that an action has a disparate impact on a protected group *or* by showing that an action perpetuates residential segregation, the burden shifts to the defendant to establish that the regulation is necessary to further a substantial, legitimate governmental interest. If the defendant meets that burden, the plaintiff can prevail only if it demonstrates that a less discriminatory alternative would serve that interest.

Under this burden-shifting approach, it is not easy for plaintiffs to establish liability. Thus, confirming that disparate impact claims are cognizable under the FHA would not result in a disruption of legitimate, well-established land use regulation or other commerce. To the contrary, overturning decades of disparate impact housing jurisprudence and removing a substantial protection that Congress intended when it passed the FHA

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[4] *United States v. City of Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974) (citations omitted).

would be significantly more disruptive to land use regulation than confirming that all eleven Circuits to consider the issue and HUD were correct in holding that disparate impact claims are cognizable under the FHA.

Amici therefore join Respondents in respectfully requesting that this Court affirm the Third Circuit's holding.

ARGUMENT

I. HISTORY SHOWS THAT EVEN FACIALLY NEUTRAL ACTIONS OFTEN PERPETUATE DISCRIMINATORY INTENT.

Exclusionary zoning cases demonstrate that, contrary to Petitioners' contentions, discriminatory zoning ordinances have the effect of perpetuating segregation fueled by this country's long and shameful history of intentional racial discrimination in housing. Furthermore, these cases show that by viewing housing discrimination and segregation in their historical context, Congress recognized in the language of the FHA, specifically Section 804(a), that making housing unavailable requires a remedy, whether there is discriminatory intent or a perpetuation of the status quo of segregated living patterns through even well-intentioned governmental action.[5]

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[5] 42 U.S.C. § 3604(a) (making it unlawful to "make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin").

The history of housing segregation in the United States is well documented.[6] Housing segregation is not a naturally occurring phenomenon, but rather has resulted in this country from a long history of intentional conduct on the part of both private and public actors. Private discriminatory actions fostering segregation have included violence, collective anti-black action, racially restrictive covenants, discriminatory real estate practices, mortgage and insurance redlining, and white flight.[7]

Furthermore, governmental actors have played a large role in creating and perpetuating our nation's residential segregation. Federal, state, and local governments across the country have enacted laws and adopted policies that were expressly designed to create and maintain segregated living patterns. For example, cities as different as Boston, Dallas, and Baltimore developed separate public housing for white families and black families and dismantled those dual systems only when forced to do so by court order.[8]

Perhaps most importantly in shaping lasting living patterns, governmental actors deployed their

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[6] *See, e.g.*, Douglas S. Massey & Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* (1993).

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

[8] *See generally NAACP v. Sec'y of Hous. & Urban Dev.*, 817 F.2d 149, 151 (1st Cir. 1987); *Thompson v. U.S. Dep't of Hous. & Urban Dev.*, 348 F. Supp. 2d 398, 405-07 (D. Md. 2005); *Walker v. City of Dallas*, 734 F. Supp. 1289, 1293-309 (N.D. Tex. 1989).

land use powers in ways that created and maintained lasting residential segregation. Discriminatory ordinances contributed significantly to segregated housing throughout much of this nation's history.

For example, Louisville, Kentucky applied an ordinance prohibiting minorities from moving into any majority-white block.[9] Similarly, Oklahoma City adopted an ordinance known as the "Segregation Ordinance," which prevented minorities from moving into majority-white blocks.[10] Winston-Salem, North Carolina had a discriminatory ordinance that provided that no blacks could reside in certain districts.[11] Birmingham, Alabama used an ordinance to prohibit minorities from moving into certain neighborhoods.[12] Each of these ordinances, and many others across the country, were direct government actions expressly intended to create and to maintain residential segregation.

After facially discriminatory ordinances became less common in certain parts of the country, facially neutral zoning ordinances often worked to freeze segregated housing patterns. In August of 1967, a witness at a hearing on fair housing

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[9] *Buchanan v. Warley*, 245 U.S. 60, 70-71 (1917).

[10] *Allen v. Oklahoma City*, 52 P.2d 1054, 1054 (Okla. 1935).

[11] *Clinard v. City of Winston-Salem*, 6 S.E.2d 867, 868 (N.C. 1940).

[12] *Monk v. City of Birmingham*, 87 F. Supp. 538, 539 (N.D. Ala. 1949).

legislation before the House Subcommittee on Housing and Urban Affairs testified,

> [w]e can go across this country and find almost every city zoned racially. The zoning is in the minds of the banks and the lending institutions, the builders, the real estate brokers. It is written down in very few places. But it is at work in the principles of the real estate boards.[13]

Another witness catalogued race-neutral policies that had the effect of enforcing segregation as effectively or more effectively than individual prejudice: "Zoning ordinances, minimum size requirements, water and sewer permits, building codes, restriction standards, and other legal and administrative devices . . . function[ ] as a racial exclusion in our time."[14]

The result of these intentional public and private actions was deeply entrenched residential segregation by the 1960s. In 1968, the National Advisory Commission on Civil Disorders issued a report concluding that the "Nation [was] moving toward two societies, one black, one white – separate and unequal."[15] In *Huntington Branch, NAACP v.*

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[13] *Fair Housing Act of 1967: Hearing before the S. Subcomm. On Housing and Urban Affairs of the S. Comm. On Banking and Currency*, 90th Cong. 174 (1967) (statement of Algernon Black of the American Civil Liberties Union).

[14] *Id.* at 217 (statement of Edward Rutledge of the National Committee Against Discrimination in Housing).

[15] Otto Kerner et al., *Report of the Nat'l Advisory Comm'n on Civil Disorders* 1 (1968).

Town of Huntington, the Second Circuit recognized that in the late 1960s, "widespread racial segregation threatened to rip civil society asunder."[16] Indeed, residential segregation and the dire conditions in segregated inner-cities were primary causes of major riots in American cities from Los Angeles to Chicago in the turbulent summers from 1965 to 1967.[17]

It was precisely Congress's recognition of the need to bring about real change in our nation's segregated living patterns that led it to adopt the FHA's broad remedial provisions. The FHA strove "to provide, within constitutional limitations, for fair housing throughout the United States."[18] The Act thus would undo the effects of past State and Federal unconstitutional discriminatory actions, and replace segregated communities with "truly integrated and balanced living patterns."[19] To do so, as Senator Mondale noted during the Act's debate, the FHA would address not only overt racial discrimination but also ill-intentioned old habits that became frozen rules perpetuating segregation, even where those rules lacked overt discriminatory intent.[20]

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[16] 844 F.2d 926, 928 (2d Cir. 1988), *aff'd in part sub nom. Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15 (1988).

[17] *See, e.g.*, 114 Cong. Rec. 2281 (1968) (statement of Sen. Edward Brooke).

[18] 42 U.S.C. § 3601 (2012).

[19] 114 Cong. Rec. 3422 (statement of Sen. Walter Mondale).

[20] 114 Cong. Rec. 2277, 3421.

Congress intended that the FHA have a dual purpose – not just to eliminate discrimination, but also to eliminate segregation and promote integration. Adopted against a background of severely segregated communities, this pro-integration mandate demonstrates Congress's intent that the FHA provide a remedy when segregated communities have enacted laws or adopted policies that preserve the status quo, because preserving the status quo "freezes" historical intentional segregation, whether or not the laws are intentionally discriminatory. The FHA is a robust statute that was enacted to produce integrated communities, not to enable the preservation of the status quo of our nation's residential segregation.

In *Griggs v. Duke Power Co.*, in the Title VII employment context,[21] the Court held that "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[22] As in the employment context, the FHA was enacted to change the status quo in residentially segregated areas and to promote integration.

Petitioners speciously argue that Congress did not intend to include a disparate impact theory of liability in the FHA despite doing so in employment statutes because "barriers erected by past discrimination do not have the same persistent legacy in housing transactions as in employment

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[21] 42 U.S.C. § 2000e (2012).

[22] 401 U.S. 424, 430 (1971).

decisions."[23] This argument fails to appreciate (1) the extensive historical record of intentional housing discrimination, documented in the FHA's legislative history and in numerous studies, that was the root cause of residential segregation, and (2) Congress's statement that a primary purpose of the FHA is to eliminate segregation and promote integration.

Indeed, the similarity between Title VII and the FHA has long been an important theme in court decisions addressing exclusionary zoning cases. The *Huntington Branch* court noted that courts and commentators have consistently found that the two statutes require similar proof to establish a violation. *Huntington Branch*'s holding that the FHA violations may be proved by a discriminatory effect analysis was largely informed by the fact that Title VII and Title VIII (the FHA) "are part of a coordinated scheme of federal civil rights laws enacted to end discrimination" and "both . . . must be construed expansively" in furtherance of that goal.[24]

Exclusionary zoning cases bring into sharp focus how land use and zoning decisions perpetuate segregation that resulted from historical intentional discrimination. For example, in cases such as *United States v. City of Black Jack* and *Huntington Branch*, the jurisdictions in question – greater St. Louis and Long Island, respectively – were

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[23] Pet'rs' Br. 28.

[24] *Huntington Branch*, 844 F.2d at 935. *See also Trafficante*, 409 U.S. at 211-12, (Fair Housing Act); *Griggs*, 401 U.S. at 429-36 (Title VII).

locales plagued by entrenched segregation.[25] In each case, it was shown that proposed multi-family housing would enable some minorities to have the opportunity to live in those jurisdictions, but that a subsequent zoning ordinance prevented the construction of this affordable multi-family housing in portions of the jurisdiction that were historically unpopulated by minority residents. The FHA must continue to provide a genuine opportunity to challenge ordinances that have an unjustified disparate impact or perpetuate segregation, whether or not the plaintiff is able to prove directly that there is a current discriminatory intent. Without the availability of disparate impact liability in cases such as these, savvy government actors will be able to enact with impunity facially neutral policies that create or perpetuate segregation and make housing unavailable on the basis of race or other protected characteristics.

Facially neutral zoning ordinances that have an unjustified disparate impact are just as harmful as intentionally discriminatory ordinances because they freeze, perpetuate, and expand housing segregation that was created through intentional discrimination. Both types of discrimination make housing unavailable in a racially disproportionate manner, and Congress intended that the FHA would provide a remedy for both.

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[25] 508 F.2d 1179, 1183 (8th Cir. 1974); 844 F.2d at 929.

II. EXCLUSIONARY ZONING CASES REINFORCE THAT THE FHA ENCOMPASSES DISPARATE IMPACT LIABILITY

Exclusionary zoning cases reveal two additional reasons that, even absent proven discriminatory intent, zoning ordinances and land use decisions can violate the FHA by "mak[ing]" housing unavailable "because of" race or other protected status. First, in many instances, neutral zoning ordinances are used as a guise or subterfuge for discriminatory actions that are difficult, if not impossible, to prove, and the disparate impact analysis is a means of determining whether a challenged action is truly non-discriminatory. Second, there has been a long history of jurisdictions across the country enacting facially neutral ordinances that have the effect of perpetuating segregation and precluding minorities from enjoying equal housing opportunity in those communities without adequate justification or without considering less discriminatory means of achieving their goals. Even where there is no animus underlying an ordinance that perpetuates segregation, "the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme."[26]

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[26] *Black Jack*, 508 F.2d at 1185; *see also Huntington Branch*, 844 F.2d at 935 (stating that "[o]ften, such [facially neutral] rules bear no relation to discrimination upon passage, but develop into powerful discriminatory mechanisms when applied").

First, facially neutral land use regulations can disguise discriminatory intent, making it impossible to prove in court. For example, local officials often take actions that increase housing segregation or otherwise have a disparate racial impact. Local officials virtually never state that they are acting with a discriminatory motive or in a manner intended to exclude minorities.[27] Courts consistently have recognized this hidden discrimination as a basis for recognizing disparate impact claims. As the Seventh Circuit put it:

> A strict focus on intent permits racial discrimination to go unpunished in the absence of evidence of overt bigotry. As overtly bigoted behavior has become more unfashionable, evidence of intent has become harder to find. But this does not mean that racial discrimination has disappeared. We cannot agree that Congress in enacting the Fair Housing Act intended to permit municipalities to systematically deprive minorities of

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[27] *See, e.g.*, Arnold R. Hirsch, *Making the Second Ghetto: Race and Housing in Chicago 1940-1960*, 240-45 (1998) (describing the selection of public housing sites in Chicago in the 1950s and early 1960s, when earlier efforts by the Chicago Housing Authority to create integrated housing across the city were abandoned in favor of a compromise that gave informal veto powers to city council aldermen and resulted in ninety-nine percent of new public-housing units being located in all-black neighborhoods on Chicago's south side).

> housing opportunities simply because those municipalities act discreetly.[28]

Consistent with this logic, courts in numerous exclusionary zoning cases have held that only through the application of a disparate impact analysis can such invidious but well-concealed intent be combatted. In *Black Jack*, for example, the Eighth Circuit declined to make a finding of discriminatory intent.[29] Instead, the court found the regulation violated the FHA due to its disparate impact, noting that "clever men may easily conceal their motivations."[30] Without the availability of the disparate impact theory, *Black Jack* and similar cases likely would have resulted in a finding of no violation of the FHA and the denial of housing opportunities to minorities. Perpetuation of segregation in greater St. Louis would have continued unchecked. Indeed, one of the most consistent reasons that Courts of Appeals first recognized disparate impact claims in the FHA was to provide a safeguard against covert intentional discrimination.[31]

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[28] *Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977).

[29] 508 F.2d at 1185 n.3.

[30] *Id.*

[31] *See also Smith v. Town of Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982) ("Municipal officials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority."); *Huntington Branch*, 844 F.2d at 935 (stating that "clever men may easily conceal their motivations," and this is an "especially persuasive" reason

Thus, exclusionary zoning cases plainly belie the rationale behind Petitioners' flawed argument that identifying intentional discrimination is uniquely difficult in the employment context and that disparate impact liability is therefore not necessary under the FHA because intentional discrimination in housing is "easier to identify and prosecute."[32]

A recent 2012 HUD report based on a nationwide empirical study reinforces this point. This report noted that most forms of housing discrimination found today "are very difficult for victims to detect," so much so that HUD believes a heavy reliance on individual reporting of discrimination is not a very effective means for enforcing the FHA.[33] The report further found that while the blatant "door-slamming" discrimination of the past has declined, "other, less easily detectable forms of discrimination persist, limiting the information and options offered to minority homeseekers."[34] Based on this most recent nationwide empirical study, "minorities still face significant barriers to housing search, even when they are well-qualified as renters or homebuyers."[35]

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for a disparate impact standard "where a facially neutral rule is being challenged" (internal quotations omitted)).

[32] *See* Pet'rs' Br. 28.

[33] U.S. Dep't of Hous. and Urban Dev., *Housing Discrimination Against Racial and Ethnic Minorities 2012*, at xxiii (2013) ("HUD Report").

[34] *Id.* at 68.

[35] *Id.* at xxiii.

Second, jurisdictions across the country have enacted facially neutral ordinances that have the effect of perpetuating segregation and precluding minorities from enjoying equal housing opportunity in those communities. Sometimes those ordinances have been adopted with discriminatory intent, but even when they have not, they violate the FHA if they result in an unjustified disparate impact. When enacted by one of our country's highly segregated communities, exclusionary zoning ordinances violate the FHA if they result in an unjustified disparate impact, regardless of whether there is any provable animus underlying their enactment.

For example, in *Huntington Branch*, plaintiffs challenged a zoning ordinance that limited multi-family housing to Huntington's designated "urban renewal area."[36] A developer seeking to build low-income multi-family housing outside the urban renewal area was blocked by the zoning ordinance. The record in *Huntington Branch* demonstrates that the town's minority residents were confined to a segregated part of the town, and there was a severe shortage of available low-income housing in Huntington. Thus, even though the zoning ordinance was facially neutral as to race, it limited housing options in a way that inevitably limited housing far more for Huntington's minority residents. Based on these facts, the Second Circuit found the ordinance made housing unavailable because of race and violated the FHA, even though it made no finding of discriminatory intent.

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[36] 844 F.2d at 928.

Similarly, *Black Jack* involved a challenge to a zoning regulation that prohibited the construction of any multi-family housing within the City of Black Jack's borders.[37] Developers' plans to build low-income multi-family units in Black Jack were barred by the zoning regulation. The court reviewed evidence showing that minorities in the areas surrounding Black Jack were disproportionally in need of low-income housing and that the exclusionary zoning regulation severely curtailed low-income housing in Black Jack. In light of this evidence, the Eighth Circuit recognized that the disproportionate effect on racial minorities meant that the ordinance rendered housing unavailable because of race and violated Section 804(a) of the FHA, despite making no finding of discriminatory intent concerning the local government's actions.

In these cases, and others, courts have found that facially neutral zoning ordinances enacted by historically segregated jurisdictions have violated the FHA when they inevitably restricted available housing for racial minorities.[38] Indeed, as these cases illustrate, exclusionary zoning with an unjustified disparate impact is as contrary as

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[37] 508 F.2d at 1183.

[38] *See also Arlington Heights*, 558 F.2d at 1294 (finding refusal to rezone a property to accommodate low-income housing by an almost entirely white town with a sizeable minority population in surrounding metropolitan area could violate FHA); *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish*, 641 F. Supp. 2d 563, 568 (E.D. La. 2009) (finding FHA violation where zoning regulations blocked all multi-family housing in town where minority residents were disproportionately poor and in need of affordable housing).

intentional discrimination to the FHA's purpose of eliminating segregation and promoting integration. Confining minority communities to highly segregated neighborhoods is harmful due to both the "adverse impact on a particular minority group" and the "harm to the community generally by the perpetuation of segregation."[39] These harms run directly counter to one of the central goals of the FHA – fostering "truly integrated and balanced living patterns."[40] As exclusionary zoning cases demonstrate, facially neutral decisions can make housing unavailable because of race on a large scale, regardless of whether those decisions are due to discriminatory intent or thoughtlessness.

III. AFFIRMING SETTLED CASE LAW HOLDING THAT DISPARATE IMPACT CLAIMS ARE COGNIZABLE WILL NOT DISRUPT HOUSING LAW.

Finally, contrary to Petitioners' claim that affirming the Third Circuit's decision will be disruptive to housing-related decision-making by municipalities,[41] recognition of disparate impact claims under the FHA has been the law in virtually every Circuit for nearly four decades. All eleven Circuits to consider the issue have held that disparate impact claims are cognizable under the FHA and have done so in a wide variety of circumstances.[42] This Court has even affirmed one

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[39] *Huntington Branch*, 844 F.2d at 937.

[40] *Trafficante*, 409 U.S. at 211 (quoting 114 Cong. Rec. 3422).

[41] *See* Pet'rs' Br. 44-45.

[42] Resp'ts' Br. 27-28.

such ruling, albeit without addressing directly whether disparate impact claims are cognizable under the FHA.[43]

As discussed above, the first cases to apply disparate impact analysis to the FHA were exclusionary zoning cases.[44] Since then, disparate impact has continued to be an important tool in challenging exclusionary zoning and land use actions in cases brought by private parties[45] as well as by the Department of Justice.[46]

Thus, contrary to Petitioners' argument, a decision from this Court holding that disparate impact claims are not cognizable under the FHA would upend settled case law and absolve from

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[43] *Town of Huntington*, 448 U.S. 15.

[44] In addition to *Black Jack*, *Arlington Heights*, *Town of Huntington* and *Smith* discussed above, these cases include *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3d Cir. 1977); *United States v. City of Parma*, 661 F.2d 562 (6th Cir. 1981); and *Keith v. Volpe*, 858 F.2d 467 (9th Cir. 1988).

[45] *See, e.g.*, *Inclusive Communities Project, Inc. v. Texas Dep't of Hous. and Cmty. Affairs*, 860 F. Supp. 2d 312 (N.D. Tex. 2012); *MHANY Mgmt. v. Cnty. of Nassau*, 843 F. Supp. 2d 287 (E.D.N.Y. 2012); *St. Bernard Parish,* 641 F. Supp. 2d at 568; *Brisben Cos. v. Village of Brown Deer*, No. 99-C-1063, 2003 WL 23845078 (E.D. Wisc. Sept. 30, 2003); *Dews v. Town of Sunnyvale*, 109 F. Supp. 2d 526 (N.D. Tex. 2000).

[46] *See, e.g.*, *United States v. Sussex County*, Civil Action No. 1:12-cv-01591-UNA (D. Del. 2012); *United States v. City of Joliet*, Civil Action No. 1:11-cv-05305 (N.D. Ill. 2011); *United States v. City of New Berlin*, Civil Action No. 2:11-cv-00608 (E.D. Wisc. 2011); *United States v. City of Fairview Heights*, Civil Action No. 3:00-cv-00331-MJR (S.D. Ill. 2000). Summaries of these cases may be found at www.justice.gov/crt/about/hce/caselist.php.

liability actors that have known for decades that they could be liable under the FHA for an action that had an unjustified disparate impact.

Furthermore, Petitioners' *Amici* are wrong when they suggest that disparate impact claims are simple to prove and thus risk creating limitless liability.[47] Courts and HUD have long set a very high threshold for disparate impact claims and have required far more than a showing of disparate impact alone to establish a claim. Indeed, recognizing this Court's warning that disparate impact not be applied so broadly as to implicate constitutional concerns,[48] the Courts of Appeals and HUD have "refuse[d] to conclude that every action which produces discriminatory effects is illegal."[49] As the Seventh Circuit noted, "[s]uch a per se rule would go beyond the intent of Congress and would lead courts into untenable results in specific cases."[50]

Since the first application of a disparate impact analysis to an FHA claim, courts have applied a rigorous, multi-step analysis that has

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[47] *See Amicus Curiae* Br. for the International Municipal Lawyers Association in Supp. of Pet'rs at 8-9; Br. of *Amicus Curiae* of the Project on Fair Representation in Supp. of Pet'rs at 18-19.

[48] *See Washington v. Davis*, 426 U.S. 229, 248 (1976) (expressing concern that "[a] rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of . . . statutes . . . .").

[49] *Arlington Heights*, 558 F.2d at 1290.

[50] *Id.*

resulted in relatively few disparate impact cases triggering FHA relief. Historically, the analysis applied to a disparate impact claim differed slightly among the U.S. Courts of Appeals, but a majority of the circuits applied a multi-prong test that required the plaintiff to first make a *prima facie* showing of disparate impact. The burden then shifted to the defendant to establish that the challenged regulation furthered a legitimate, bona fide governmental interest. Once the defendant made this demonstration, the burden shifted back to the plaintiff to show that a less discriminatory alternative would serve that purpose.

On February 15, 2013, HUD issued a final disparate impact rule that has clarified any differences by setting forth a multi-prong test to apply across the country.[51] Under the rule, a plaintiff may make a *prima facie* showing of disparate impact in one of two ways – by demonstrating that a facially neutral policy or practice results in a discriminatory effect or disparate impact on people protected by the FHA, or by demonstrating that the policy or practice harms people protected by the FHA by perpetuating or exacerbating residential segregation.[52] If the plaintiff makes its *prima facie* showing the burden shifts to the defendant to prove that the challenged practice is "necessary to achieve one or more substantial, legitimate, nondiscriminatory interests."[53] If the defendant is successful in

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[51] *See* 24 C.F.R. § 100.500 (2013).

[52] *See id.* § 100.500(a), (c)(1).

[53] *Id.* § 100.500(b)(1), (c)(2).

establishing such a justification, the plaintiff can prevail only if it proves that "substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect."[54] In light of *Chevron* deference,[55] any difference among the circuits should be resolved and all circuits should now be applying the burden-shifting test set forth in the HUD rule.

The burden-shifting approach requires a complex analysis and results in a high bar for establishing a violation of the FHA. As such, it has safeguarded land use laws and housing regulations that are designed to protect legitimate governmental interests and whose purpose could not be achieved in a less discriminatory manner throughout the life of the FHA. This is demonstrated by the fact that defendants have prevailed at the Courts of Appeals level in a majority of exclusionary zoning cases making disparate impact claims.[56]

Where municipalities have legitimate reasons for using their zoning powers to promote particular land uses, courts have safeguarded this traditional local power by applying the burden-shifting framework to ensure that only actions with an

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[54] *Id.* § 100.500(c)(3).

[55] *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984).

[56] *See* Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims under the Fair Housing Act*, 63 Am. U. L. Rev. (forthcoming Dec. 2013) (manuscript at 38-46, figures 1, 4-6) (on file with authors).

unjustified disparate impact violate the FHA.[57] *Amici* do not dispute that courts may approve practices that have a disparate racial impact where those practices are necessary to serve substantial, legitimate, non-discriminatory interests and no less discriminatory alternatives exist to serve those interests. It is when practices resulting in a disparate impact on minorities do not serve important interests or may be achieved through less discriminatory alternatives that the deprivation has the same effect as intentional discrimination. As the court said in *Huntington Branch*, "[t]hough a town's interests in zoning requirements are substantial, they cannot, consistently with Title VIII, automatically outweigh significant disparate effects."[58]

Although establishing an unjustified disparate impact is difficult for a plaintiff, disparate impact claims – especially in the context of exclusionary zoning – remain crucial to efforts to combat residential segregation and to protect minority households from thoughtless actions that have the effect of disproportionately denying them the opportunity to obtain the benefits of living in high opportunity, integrated areas. Thus, the FHA's language and the Circuits' careful approach to that language over decades of jurisprudence strikes an effective balance between the need to protect

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[57] *See, e.g., Village of Belle Terre v. Boraas*, 416 U.S. 1, 7-10 (1974).

[58] *Huntington Branch*, 844 F.2d at 937. (citing *Belle Terre*, 416 U.S. 7; *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)).

legitimate governmental interests in housing decision-making and the need to protect against covert discriminatory intent and discriminatory thoughtlessness. This Court should endorse decades of jurisprudence and hold that disparate impact claims continue to be cognizable under the FHA.

IV. CONCLUSION

The FHA was enacted with the dual purposes of eliminating discrimination and segregation and promoting integration in an effort "to provide, within constitutional limitations, for fair housing throughout the United States."[59] This legislation was intended to be broad in scope and was, and continues to be, necessary to correct decades of intentional private and governmental discriminatory housing practices that resulted in the creation of segregated living patterns across the country.

The primary goal of Congress in crafting the FHA was to dismantle entrenched residential segregation. Exclusionary zoning cases are especially pertinent to this goal. Whether due to covert discrimination or equally harmful thoughtlessness, municipalities across the country have enacted exclusionary zoning ordinances that have perpetuated the segregated status quo and have made housing unavailable to people because of their race. For decades, the FHA has provided a remedy for these violations without requiring a plaintiff to prove that the ordinance was passed with direct discriminatory intent. When viewed through

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[59] 42 U.S.C. § 3601.

the lens of exclusionary zoning cases, it becomes evident that disparate impact claims are cognizable under the FHA.

Amici therefore respectfully join Respondents in requesting this Court uphold the Third Circuit's decision.

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Respectfully submitted,

Joseph D. Rich
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Ave., NW
Suite 400
Washington, DC 20005
(202) 662-8600

Megan K. Whyte de Vasquez
WASHINGTON LAWYERS' COMMITTEE
11 Dupont Circle, NW
Suite 400
Washington, DC 20036
(202) 319-1000

Jonathan M. Cohen
Counsel of Record
Jason S. Rubinstein
Jenna A. Hudson
Daniel I. Wolf
GILBERT LLP
1100 New York Ave., NW
Suite 700
Washington, DC 20005
(202) 772-2259
cohenj@gotofirm.com