

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 THE LEADERSHIP CONFERENCE
ON CIVIL AND HUMAN RIGHTS AS *AMICUS
CURIAE* IN SUPPORT OF RESPONDENTS**

MICHAEL L. FOREMAN
Counsel of Record
PENNSYLVANIA STATE
UNIVERSITY
CIVIL RIGHTS
APPELLATE CLINIC
329 Innovation Park
Suite 118
University Park, PA 16802
(814) 865-3832
mlf25@psu.edu

WADE HENDERSON
LISA M. BORNSTEIN
THE LEADERSHIP
CONFERENCE ON CIVIL
AND HUMAN RIGHTS
1629 K St., NW, 10th Flr.
Washington, DC 20006
(202) 466-3311
bornstein@civilrights.org

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. IN THE WAKE OF DR. MARTIN LUTHER KING JR.’S ASSASSINATION, CONGRESS PASSED THE FAIR HOUSING ACT TO COMBAT HOUSING DISCRIMINATION IN ALL FORMS.....	4
A. Congress Passed The FHA In An Attempt To Curtail The Rise Of The Segregated Urban Ghetto In The United States.....	5
B. As The United States Was “Moving Toward Two Societies, One Black, One White—Separate And Unequal,” Congress Attempted To Provide Housing Equality Through The FHA.	10
II. THE FHA’S COVERAGE OF DISPARATE IMPACT CLAIMS IS ESSENTIAL TO THE FABRIC OF OUR COUNTRY’S COMMITMENT TO CIVIL RIGHTS.....	18
A. This Court Should Not Disturb The Deep-Rooted Judicial And Agency Interpretations That Disparate Impact Claims Are Cognizable Under The FHA	18

TABLE OF CONTENTS – Continued

	Page
B. Recognizing Disparate Impact Claims Under The FHA Would Encourage Housing Providers And State And Local Governments To Continue To Adopt Best Practices	21
C. Equal Housing Opportunity Will Be Weakened For All Protected Classes If Disparate Impact Claims Are Not Recognized Under The FHA.....	24
CONCLUSION.....	25

APPENDIX

THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS PARTICIPATING AND INTERESTED MEMBER ORGANIZATIONS.....	App. 1
--	--------

TABLE OF AUTHORITIES

Page

CASES

<i>CBOCS West, Inc. v. Humphries</i> , 553 U.S. 442 (2008).....	19
<i>City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found.</i> , 538 U.S. 188 (2003).....	20
<i>City of Rancho Palos Verdes, Cal. v. Abrams</i> , 544 U.S. 113 (2005)	17
<i>Fitzgerald v. Barnstable Sch. Comm.</i> , 555 U.S. 246 (2009).....	17
<i>Griggs v. Duke Power Co.</i> , 401 U.S. 424 (1971).....	7, 19
<i>HUD v. Carter</i> , No. 03-90-0058-1, 1992 WL 406520 (HUD ALJ May 1, 1992)	20
<i>HUD v. Pfaff</i> , No. 10-93-0084-8, 1994 WL 592199 (HUD ALJ Oct. 27, 1994).....	20
<i>HUD v. Ross</i> , No. 01-92-0466-8, 1994 WL 326437 (HUD ALJ July 7, 1994)	20
<i>HUD v. Twinbrook Vill. Apartments</i> , No. 02-00- 0256-8, 2001 WL 1632533 (HUD ALJ Nov. 9, 2001)	20
<i>Runyon v. McCrary</i> , 427 U.S. 160 (1976)	4, 18, 19
<i>Town of Huntington v. Huntington Branch, NAACP</i> , 488 U.S. 15 (1988).....	20
STATUTES	
42 U.S.C. §§ 3604-3606 (1988)	24

TABLE OF AUTHORITIES – Continued

	Page
RULES	
Sup. Ct. R. 37.2	1
Sup. Ct. R. 37.6	1
REGULATIONS	
24 C.F.R. § 91.1(b)(2) (2013)	22
24 C.F.R. §§ 91.200-91.236 (2013)	22
24 C.F.R. §§ 91.300-91.330 (2013)	22
OTHER AUTHORITIES	
2010-2015 Mississippi Consolidated Plan for Housing and Community Development	23
2013 Action Plan for CDBG, HOME, ESG, HOPWA: Massachusetts	23
2013-2017 Dutchess County and City of Poughkeepsie [New York] Consolidated Plan	23
Brief <i>Amici Curiae</i> of the American Civil Liberties Union et al. in Support of Respon- dents	24
Brief of AARP and Mount Holly Gardens Citizens In Action, as <i>Amici Curiae</i> in Sup- port of Respondents	25
Brief of <i>Amici Curiae</i> Henry G. Cisneros et al.	20
Brief of Current and Former Members of Congress as <i>Amici Curiae</i> in Support of Re- spondents	<i>passim</i>

TABLE OF AUTHORITIES – Continued

	Page
Brief of Massachusetts et al. as <i>Amici Curiae</i> in Support of Respondents.....	22
Charles L. Nier III, <i>Perpetuation of Segregation: Toward a New Historical and Legal Interpretation of Redlining Under the Fair Housing Act</i> , 32 J. MARSHALL L. REV. 617 (1999).....	6
Dakota County [Minnesota] 5 Year Strategic Plan.....	23
Dr. Martin Luther King Jr., Speech at the Chicago Freedom Movement Rally (July 10, 1966).....	4
Dr. Martin Luther King Jr., Speech at the Great March on Detroit (June 23, 1963).....	10
EISENHOWER FOUND., EXECUTIVE SUMMARY: A FORTY YEAR UPDATE ON THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (2008)...	15, 16
Exec. Order 11365, 32 Fed. Reg. 11,111 (July 29, 1967).....	3
<i>Fair Housing Act of 1967: Hearing before the S. Subcomm. on Hous. and Urban Affairs of the S. Comm. on Banking and Currency, 90th Cong. (1967)</i>	14, 15
Geoffrey D. Korff, <i>Reviving the Forgotten American Dream</i> , 113 PENN ST. L. REV. 417 (2008).....	7

TABLE OF AUTHORITIES – Continued

	Page
Jean Eberhart Dubofsky, <i>Fair Housing: A Legislative History and a Perspective</i> , 8 WASHBURN L.J. 149 (1969).....	6, 10, 14
<i>Mayhem in the City: The Detroit Riots</i> , NPR (July 24, 2007).....	10
REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968).....	<i>passim</i>
Spokane County [Washington] 2013 Annual Action Plan.....	23
Stacy E. Seicshnaydre, <i>The Fair Housing Choice Myth</i> , 33 CARDOZO L. REV. 967 (2012)	16
State of Arizona Consolidated Plan 2010-2014	22
State of Rhode Island Consolidated Plan 2010-2015	23
State of Wisconsin Fair Housing Plan.....	22
SUMMARY OF REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968)	5, 13
Tony Whitehead, <i>The Formation of the U.S. Racialized Urban Ghetto</i>	<i>passim</i>
U.S. DEP'T OF HOUS. AND URBAN DEV., HISTORY OF FAIR HOUSING.....	11, 13, 14

INTEREST OF *AMICUS CURIAE*

*Amicus*¹ is The Leadership Conference on Civil and Human Rights (“The Leadership Conference”), a diverse coalition of more than 200 national organizations charged with promoting and protecting the rights of all persons in the United States.² The Leadership Conference was founded in 1950 by A. Philip Randolph, head of the Brotherhood of Sleeping Car Porters; Roy Wilkins of the NAACP; and Arnold Aronson, a leader of the National Jewish Community Relations Advisory Council. The Leadership Conference works to build an America that is as good as its ideals and has been instrumental in ensuring the passage of fair housing protections since the Fair Housing Act of 1968, including the Fair Housing Act Amendments.

Its sister organization, The Leadership Conference Education Fund, was a founding member of the National Commission on Fair Housing and Equal

¹ Pursuant to Sup. Ct. R. 37.6, *Amicus* submits that no counsel for any party participated in the authoring of this document, in whole or in part. In addition, no other person or entity, other than *Amicus*, has made any monetary contribution to the preparation and submission of this document. Pursuant to Sup. Ct. R. 37.2, letters consenting to the filing of this Brief have been filed with the Clerk of the Court.

² The appendix to this brief contains a complete list of The Leadership Conference member organizations. While The Leadership Conference is the umbrella organization for all of the listed members, several have indicated a keen interest in the issue presented and are designated in bold text.

Opportunity, a bipartisan commission created in 2008 to examine the nature and extent of illegal housing discrimination, its origins, its connection with government policy and practice, and its effect on communities across the nation.

The Leadership Conference supports the continued use of the disparate impact standard under the Fair Housing Act. The Leadership Conference believes that access to equal housing opportunity is a civil and human right, but recognizes that past and ongoing discriminatory practices in the nation's housing markets continue to produce levels of residential segregation that result in significant disparities between minority and non-minority households in access to good jobs, quality education, homeownership attainment, and asset accumulation. The disparate impact standard remains a critical way to address the continuing problem of housing discrimination in the United States.



SUMMARY OF ARGUMENT

In determining whether the Fair Housing Act (“FHA”) addresses housing practices that have a disparate impact, this Court should consider the historical and social context in which the FHA was conceptualized and passed. During the 1960s, America’s urban poor, frustrated and disenfranchised, reached their breaking point. Beginning in 1963, serious riots occurred in most of the country’s major

urban centers. The summer of 1967 saw the worst of the violence with over 150 cities reporting disturbances in minority neighborhoods.

In response, President Lyndon B. Johnson formed the National Advisory Commission on Civil Disorders in July 1967 to examine the causes of the riots. The Commission's 1968 report, known as the Kerner Report, decried the conditions in urban minority ghettos, and concluded, starkly, that the United States was "moving toward two societies, one black, one white – separate and unequal." REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS at 1 (1968) [hereinafter KERNER REPORT].³

Between 1966 and 1967, Congress considered the passage of a fair housing bill in response to this division. Shortly after the Commission issued its damning report, Dr. Martin Luther King Jr. was assassinated. Dr. King was closely associated with fair housing reform, and President Johnson invoked the tragedy of King's death to persuade Congress to pass the FHA. Congress recognized that the creation of the urban minority ghetto in the United States was the result of both intentional and unintentional

³ President Johnson reacted to violent race riots and outbursts by forming the National Advisory Commission on Civil Disorders to investigate and make recommendations in response to major civil unrest. *See* Exec. Order 11365, 32 Fed. Reg. 11,111 (July 29, 1967). The Commission's findings are informally referred to as "The Kerner Report." The Kerner Report is discussed in depth in Section I.B.

discrimination. The FHA was intended to address both evils. Disparate impact analysis is vital to achieving that goal. The FHA's enforcement depends on disparate impact analysis to prevent practices that appear fair, but are discriminatory in effect.

Since the FHA was enacted in 1968, disparate impact analysis has become "an important part of the fabric of our law." *Runyon v. McCrary*, 427 U.S. 160, 190 (1976) (Stevens, J., concurring). Every court of appeals that has considered this issue has concluded that disparate impact claims are cognizable under the FHA. Likewise, the United States Department of Housing and Urban Development ("HUD") has long interpreted the FHA as encompassing disparate impact claims. In fact, for roughly forty years, the availability of disparate impact claims has been integral to the FHA's goal of achieving equal opportunity in housing for not only African Americans, but all protected classes.



ARGUMENT

I. IN THE WAKE OF DR. MARTIN LUTHER KING JR.'S ASSASSINATION, CONGRESS PASSED THE FAIR HOUSING ACT TO COMBAT HOUSING DISCRIMINATION IN ALL FORMS.

In July 1966, Dr. Martin Luther King Jr. urged that "now is the time to end the long and desolate night of slumism." Dr. Martin Luther King Jr.,

Speech at the Chicago Freedom Movement Rally (July 10, 1966). Less than two years later, he was shot dead on a motel balcony in Memphis. His assassination in April 1968 was a blunt example of the unrest that wracked American cities between 1966 and 1968, as the country's urban ghettos were torn apart in anger and frustration. It was in this context, a week after Dr. King's assassination, that Congress passed the FHA. Reacting to this regrettable trend of increasing segregation, Congress intended the FHA to reverse the deleterious effect that decades of discriminatory policies, intentional and unintentional, had wrought on minority neighborhoods. Any analysis of whether disparate impact is available under the FHA must begin with and be informed by this history.

A. Congress Passed The FHA In An Attempt To Curtail The Rise Of The Segregated Urban Ghetto In The United States.

Between 1910 and 1966, millions of African Americans fled the South for cities in the North and West. SUMMARY OF REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS at 10 (1968) [hereinafter KERNER SUMMARY]. The number of African Americans living in metropolitan areas rose more than fivefold, and the number outside the South rose elevenfold. *Id.* The migration was driven largely by the pursuit of better economic opportunities. During the 1950s, "following World War II and the labor shortages it brought[,] . . . manufacturing jobs were a

major employer of working urban blacks.” Tony Whitehead, *The Formation of the U.S. Racialized Urban Ghetto* at 8 (The Cult. Sys. Analysis Grp., Univ. of Maryland, Working Paper, 2000).

At the same time, however, African Americans’ mass migration caused an expansion of “racialized urban ghettos.” *Id.* The creation of urban ghettos “was a process that began as early as the 1930s, and was stimulated by federal policies that favored whites to the detriment of blacks.” *Id.* at 5.

By 1934, the Federal Housing Administration “developed confidential city surveys and appraiser’s manuals with overtly racist categories . . . [that] channeled almost all of the loan money toward whites and away from communities of color.” *Id.* (internal quotation marks omitted). The Administration’s Underwriting Manual stated that “[i]f a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same social and racial classes.” Charles L. Nier III, *Perpetuation of Segregation: Toward a New Historical and Legal Interpretation of Redlining Under the Fair Housing Act*, 32 J. MARSHALL L. REV. 617, 626 (1999) (internal quotation marks omitted). Appraisers were even warned of the dangers from infiltration of “inharmounious racial or nationality groups.” *Id.* (internal quotation marks omitted). This was due to the fear from existing homeowners “that the appearance of one black family means property values plummet, to be followed by a mass immigration of blacks.” Jean Eberhart Dubofsky, *Fair Housing: A Legislative*

History and a Perspective, 8 WASHBURN L.J. 149, 154 (1969). If disparate impact does not reach the effects of these past discriminatory practices, the result will be to “freeze’ the status quo of prior discriminatory . . . practices.” *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).

In addition, during the 1940s, the Federal Housing Administration underwrote millions of mortgages to prevent mass foreclosures that accrued during the Great Depression. Whitehead, *supra*, at 6. This practice “favored whites to the exclusion of blacks and other non-white minorities, based on the agency’s conclusion that blacks uniformly depressed the value of homes in communities.” Geoffrey D. Korff, *Reviving the Forgotten American Dream*, 113 PENN ST. L. REV. 417, 438 (2008). Specifically, white buyers accounted for 90% of the insurance provided by the Federal Housing Administration. *Id.* Practically speaking, the government encouraged white families to migrate to the suburbs, while black families were left in “decaying inner cities.” *Id.*

Money and other incentives from the Federal Housing Administration and the Veterans Administration also “encouraged urban white ethnic groups, already concerned with the increasing number of non-whites moving into their neighborhoods, to join other whites in the suburbs.” Whitehead, *supra*, at 6. For instance, these agencies “provided mortgage interest tax exemptions,” and “veterans were provided mortgages, and construction companies in the suburbs were stimulated through quick, cheap, production of

massive amounts of tract housing, while federal and state tax monies routinely funded the construction of water supplies and sewage facilities for racially exclusive suburban communities.” *Id.* (internal quotation marks omitted). In fact, the Federal Housing Administration and the Veterans Administration “financed more than \$120 billion worth of new housing between 1934 and 1962,” yet “less than 2% of this real estate was available to non-white families.” *Id.* (internal quotation marks omitted).

The federal government’s own rental and leasing practices also encouraged segregation in urban communities. The General Services Administration, for example, “routinely channeled the government’s own rental and leasing business to realtors who engaged in racial discrimination.” *Id.* (internal quotation marks omitted). Each of these policies had a disparate impact on blacks and other non-white ethnic groups by racially and economically segregating neighborhoods. Congress enacted the FHA to “prohibit *all* forms of discrimination in housing – including actions having the effect of disproportionately denying housing based on a protected characteristic.” Brief of Current and Former Members of Congress as *Amici Curiae* in Support of Respondents at 1 [hereinafter Congressional Brief]. Considering this context, disparate impact analysis is a critical aspect of the FHA.

Urban renewal projects in major metropolitan areas attempted to reduce blight, but were often unsuccessful and disparately impacted minorities. In

Jersey City, New Jersey, for instance, projects “intended to clear slums and replace them with low-cost housing, in fact, resulted in a reduction of 2,000 housing units.” KERNER REPORT at 39. In one area designated for urban renewal six years earlier, no work had been done, and it remained as blighted in 1967 as it had been in 1961. *Id.* “Ramshackle houses deteriorated, no repairs were made, yet people continued to inhabit them.” *Id.*

National transportation policies also encouraged white flight from urban areas and reinforced ghettoization. For example, “federal transportation and highway policies were developed to fund highway systems between the suburbs and the cities to accommodate those whites who had moved to the suburbs, but continued to work in the cities.” Whitehead, *supra*, at 6. Many highways were built through the centers of cities, “creating boundaries between some business districts and the sections where most non-whites lived.” *Id.* Highway systems created literal and figurative barriers “between the poor and minority neighborhoods and the central business districts.” *Id.*

Transportation was a key factor restricting African Americans to urban ghettos because, as “jobs moved to the suburbs, black people were prevented from following; eighty percent of the nonwhite population of metropolitan areas in 1967 lived in central cities. These persons, the least able to afford the high cost of transportation from the city to the suburbs, sustained the highest rate of unemployment.”

Dubofsky, *supra*, at 153 (citing Hearings on S. 1358, S. 2114, and S. 2280 *Before a Subcommittee of the Senate Committee on Banking and Currency*, 90th Cong., 1st Sess. (1967)). All of these practices, if isolated from challenge, would institutionalize the effects of both intentional and unintentional discrimination. The FHA should not be interpreted in such a restrictive manner.

B. As The United States Was “Moving Toward Two Societies, One Black, One White—Separate And Unequal,” Congress Attempted To Provide Housing Equality Through The FHA.

In the summer of 1967, cities across the country erupted in bloody violence. Over 150 cities reported disturbances in minority neighborhoods, ranging from minor to widespread property destruction and looting. KERNER REPORT at 15. During a two-week period in July, large-scale rioting erupted in Newark and Detroit and spread to neighboring communities, representing the worst of the rioting. *Id.* For example, in Detroit, 7,200 individuals were incarcerated, 43 were killed, and 1,300 homes and businesses were destroyed in the course of the riots. *Mayhem in the City: The Detroit Riots*, NPR (July 24, 2007), available at <http://n.pr/15Mspgx>. Dr. King understood the perils of segregation and four years earlier had urged residents of Detroit “to work with determination to get rid of any segregation and discrimination” in their community. Dr. Martin Luther King Jr., Speech at the

Great March on Detroit (June 23, 1963). Housing integration was an essential component of this task, and any resolution had to reach beyond intentional discrimination.

While the 1967 riots are widely regarded as the most intense, “serious disorders, involving both whites and Negroes, broke out in Birmingham, Savannah, Cambridge, Md., Chicago, and Philadelphia” (as well as many other cities) starting as early as 1963. KERNER REPORT at 19. The outbreak of rioting was a violent, desperate reaction to the segregation that had been plaguing the black community. Against this backdrop, between 1966 and 1967, “Congress regularly considered the fair housing bill, but failed to garner a strong enough majority for its passage.” U.S. DEPT OF HOUS. AND URBAN DEV., HISTORY OF FAIR HOUSING, *available at* <http://1.usa.gov/fgHYrG> [hereinafter HISTORY OF FAIR HOUSING].

President Lyndon Johnson formed the National Advisory Commission on Civil Disorders (“Commission”) in July 1967 to explore the riots that erupted in American cities during that decade and to provide recommendations. The Commission’s 1968 report, informally known as the Kerner Report, detailed the riots and their root causes, and “press[ed] for a national resolution” to the problem of racial unrest. KERNER REPORT at 1. The Report intended to answer three basic questions: (1) what happened, (2) why did it happen, and (3) what could be done to prevent it from happening again? *Id.*

Among the causes of the violence, the Commission focused on the conditions African Americans faced in neglected and segregated urban neighborhoods, including “pervasive discrimination and segregation in employment, education and housing, which have resulted in the continuing exclusion of great numbers of Negroes from the benefits of economic progress.” KERNER SUMMARY at 9. The Commission wrote that “[b]lack in-migration and white exodus . . . produced . . . massive and growing concentrations of impoverished Negroes in our major cities, creating a growing crisis of deteriorating facilities and services and unmet human needs.” *Id.* Specifically, “segregation and poverty converge on the young” in “black ghettos” to “destroy opportunity and enforce failure.” *Id.*

The Commission recognized the insidious effect of federal housing policies on American cities, writing that “after more than three decades of fragmented and grossly under-funded Federal housing programs, decent housing remain[ed] a chronic problem for the disadvantaged urban household.” KERNER REPORT at 257. For these Americans, “condemned by segregation and poverty to live in the decaying slums of our central cities, the goal of a decent home and suitable environment [was] . . . far distant.” *Id.* The Commission’s criticism was directed broadly at society: “[w]hat white Americans have never fully understood – but what the Negro can never forget – is that white society is deeply implicated in the ghetto. White

institutions created it, white institutions maintain it, and white society condones it.” KERNER SUMMARY at 1.

To address the dire neglect of urban African-American communities, the Commission recommended sweeping changes to federal housing policies. “Federal housing programs must be given a new thrust aimed at overcoming the prevailing patterns of racial segregation. If this is not done, those programs will continue to concentrate the most impoverished and dependent segments of the population into the central-city ghettos. . . .” KERNER REPORT at 13. Given the entrenched history, any law intended to try to overcome these “prevailing patterns of racial segregation” would have to include an analysis of the disparate impact of these policies.

Shortly after the Kerner Report’s publication in 1968, Dr. Martin Luther King Jr. was assassinated. In response, a new wave of rioting broke out in more than 100 cities. President Johnson “utilized this national tragedy to urge for the FHA’s speedy Congressional approval.” HISTORY OF FAIR HOUSING, *supra*. Dr. King’s assassination set in motion an expedited effort in Congress to pass the Fair Housing Act:

Martin Luther King’s assassination on the evening of April 4th accomplished one thing; it dislodged the Civil Rights Bill of 1968 from the Rules Committee. On April 8th, shaken by the disorders in Washington, the Committee concluded its hearings. . . . [On] April 10th, with National Guard troops called up

to meet riot conditions in Washington still in the basement of the Capitol, the House debated fair housing. Debate was limited to one hour. . . . On April 11th, President Johnson signed at the White House H.R. 2516, and the Civil Rights Act of 1968 became law.

Dubofsky, *supra*, at 160. Since 1966, Dr. King's name had been closely associated with fair housing legislation, and President Johnson viewed the Act as a fitting memorial to Dr. King. HISTORY OF FAIR HOUSING, *supra*.

In passing the FHA, Congress recognized that segregated housing was often the result of unplanned, institutionalized racism:

The ghetto pattern is not just out of one man not liking or rejecting another, the prejudice of man to man. The pattern comes from the policies of the industry reinforced by government. We 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. It is in the patterns and practices of the industry. This is a pattern which goes beyond individual prejudices.

Fair Housing Act of 1967: Hearing before the S. Subcomm. on Hous. 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). This pattern of segregation “goes beyond individual prejudices.” *Id.*; Congressional Brief at 8. Recognizing the complexities of individual and institutional racism, Congress envisioned a comprehensive bill that would successfully combat both racial animus and “frozen rules” and “[o]ld habits,” like the “refusal by suburbs and other communities to accept low-income housing” – a facially neutral practice with discriminatory effects. Congressional Brief at 10 (internal citations omitted). It would be counterintuitive to surmise that Congress ignored this context and failed to include discriminatory effects in its protections.

Forty years have passed since the FHA’s enactment, and its objectives have yet to be completely achieved.⁴ In 2008, the Eisenhower Foundation (“Foundation”), the private, non-profit continuation of the Commission, revisited America’s progress on racial segregation and urban blight and concluded that America has, “for the most part, failed to meet the Kerner Commission’s goals of less poverty, inequality, racial injustice[,] and crime.” EISENHOWER FOUND., EXECUTIVE SUMMARY: A FORTY YEAR UPDATE ON THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS at 2 (2008). The Foundation explained that there is “continu[ing] evidence . . . that many real

⁴ In 1988, Congress amended the FHA, increasing its scope to include additional protected classes and expanding HUD’s enforcement capabilities, further demonstrating that the FHA’s purpose has not yet been fulfilled. *See infra* Sections II.A, II.C.

estate agents steer minorities to less desirable locations, compared to Whites; and that lenders treat minorities differently from Whites in terms of percentage of mortgage applications accepted.” *Id.*

The Foundation also found that “Hispanic residential segregation increased in many major metropolitan areas from 1980 to 2000,” and that “[o]verall levels of residential segregation remain high for African Americans and Latinos.” *Id.* In addition, the “national absolute median rates of racial segregation remain high, and blacks remain the most isolated of any racial group.” *Id.* Worse still, there has been an actual “reversal in the level of segregation in schools that bodes poorly for neighborhood segregation: [a]fter steady decline from the 1950s through the 1980s, black segregation in schools has increased to levels not seen in thirty years.” Stacy E. Seicshnaydre, *The Fair Housing Choice Myth*, 33 CARDOZO L. REV. 967, 974 (2012) (internal quotation marks omitted).

This Court should consider this important historical context in deciding whether disparate impact analysis is available under the FHA. As discussed, the condition of America’s inner cities is both a product of overt intentional discrimination and of practices and policies that, if unassailable, would “freeze” institutional racism into the core of our nation. Petitioners recognize that discrimination manifests itself in “the most subtle” ways. Petitioners’ Opening Brief at 27. However, Petitioners’ attempt to confine subtle discrimination to the employment context is a fallacy.

The same subtle, subjective, and facially neutral discriminatory policies that arise in the employment context also present themselves in every aspect of life, including housing. Because racial bias is often subtle and not always intentional, Congress knew disparate impact analysis was necessary to provide protections to counter the effects of racial bias in housing. Congressional Brief at 8.

Dr. King’s dream of equality was in the hearts and minds of those who enacted the FHA. *Id.* at 2. Those involved in writing and passing the FHA intended to “prohibit acts or practices that have an unjustified discriminatory *effect* on a person’s ability to acquire housing – not just those proven to be motivated by discriminatory *intent*.” *Id.* at 1. While the text itself should be read to incorporate disparate impact analysis, as the Court has recognized, its “conclusions regarding congressional intent can be confirmed by a statute’s context.” *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 253 (2009). “[C]ontext, not just literal text, will often lead a court to Congress’ intent in respect to a particular statute.” *City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 127 (2005).

Given the history behind the FHA’s enactment and the continuation of segregated housing patterns in the United States, it is difficult to imagine a statute for which context matters more. Disparate impact analysis is essential to remedy the continued discriminatory effect on the ability of protected classes to acquire fair housing. This Court should not divorce

this history from its consideration of whether the FHA was intended to address only overt intentional forms of housing discrimination.

II. THE FHA'S COVERAGE OF DISPARATE IMPACT CLAIMS IS ESSENTIAL TO THE FABRIC OF OUR COUNTRY'S COMMITMENT TO CIVIL RIGHTS.

The interpretation that the FHA encompasses disparate impact claims has been memorialized in numerous court and administrative decisions. It now constitutes “an important part of the fabric of our law.” *Runyon*, 427 U.S. at 190 (Stevens, J., concurring). Applying Petitioners’ narrow construction of the FHA would be wholly inconsistent with long-standing precedent and with Congress’ intent to ensure equal rights in housing for all in the wake of Dr. King’s assassination. To remain true to the historical underpinnings of the FHA and the circuit court precedents interpreting this foundational statute, this Court should confirm that the FHA includes protection against housing practices that have a disparate impact on protected classes.

A. This Court Should Not Disturb The Deep-Rooted Judicial And Agency Interpretations That Disparate Impact Claims Are Cognizable Under The FHA.

Since its passage, the FHA has been interpreted to encompass claims of disparate impact. While the

test for how disparate impact is proven under the FHA varies, there is little doubt that its disparate impact coverage constitutes “an important part of the fabric of our law.” *Runyon*, 427 U.S. at 190 (Stevens, J., concurring). For decades, every court of appeals that has considered the issue has concluded that the FHA authorizes suits based on disparate impact claims. See Brief for the Mt. Holly Gardens Respondents at 4, 16-17. The Court has recognized that a “broad consensus” in the courts of appeals regarding a question of statutory interpretation should not be disturbed. See *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 451 (2008). The courts of appeals that have addressed the issue unanimously endorse disparate impact claims, yet Petitioners insist that such claims are not cognizable under the FHA. Applying Petitioners’ narrow interpretation of the FHA would unravel the fabric of one of our country’s important civil rights laws, whose enforcement often depends on disparate impact analysis to prevent “practices that are fair in form, but discriminatory in operation,” even when there is no evidence of “overt discrimination.” *Griggs*, 401 U.S. at 431.

When a certain statutory interpretation is “well embedded in the law[,]” and a departure from that interpretation “would necessarily unsettle many Court precedents[,]” fidelity to that rule is especially warranted. *CBOCS West, Inc.*, 553 U.S. at 451-52. Although the Court has not explicitly answered the question of whether disparate impact claims are cognizable under the FHA (although it has taken two

disparate impact cases under the FHA⁵), the adoption of Petitioners' restrictive approach would surely have an "unsettl[ing]" effect on precedents throughout the country due to the circuits' undivided authorization of such claims.

Further emphasizing the hardship that would result from the adoption of Petitioners' approach, HUD, the agency charged with interpreting and enforcing the Fair Housing Act, has long taken and enforced the position that the FHA encompasses claims of disparate impact.⁶ See Brief for the Mt. Holly Gardens Respondents at 40-43; Brief of *Amici Curiae* Henry G. Cisneros et al. [Presidential appointees and career employees of HUD] at 2-3, *Magner v. Gallagher*, No. 10-1032 (U.S. Jan. 30, 2012).⁷ In 1988, Congress amended the FHA to expand its statutory

⁵ *City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15 (1988).

⁶ HUD has taken this position in every formal adjudication to address the issue. See, e.g., *HUD v. Twinbrook Vill. Apartments*, No. 02-00-0256-8, 2001 WL 1632533, at *17 (HUD ALJ Nov. 9, 2001); *HUD v. Pfaff*, No. 10-93-0084-8, 1994 WL 592199, at 7-9 (HUD ALJ Oct. 27, 1994), *rev'd on other grounds*, 88 F.3d 739 (9th Cir. 1996); *HUD v. Ross*, No. 01-92-0466-8, 1994 WL 326437, at *5, *7 (HUD ALJ July 7, 1994); *HUD v. Carter*, No. 03-90-0058-1, 1992 WL 406520, at *5 (HUD ALJ May 1, 1992).

⁷ This issue was previously before this Court in *Magner v. Gallagher*. *Amici* has cited to several of the briefs filed in that case. It is expected that some of the *Magner amici* will file comparable briefs here, but those briefs were unavailable at the time of this filing.

protections and HUD's enforcement capabilities. This Court should consider the substantial hardship that would result from the abandonment of a deeply entrenched understanding of the FHA embraced by the courts of appeals and HUD. To ignore this extensive history would undermine vital protections of a law that is central to Congress' commitment to civil rights protections.

B. Recognizing Disparate Impact Claims Under The FHA Would Encourage Housing Providers And State And Local Governments To Continue To Adopt Best Practices.

A number of Petitioners' *amici* argue that disparate impact liability under the FHA is inappropriate due to its alleged impracticability and unintended consequences. This argument ignores the unbroken line of FHA precedent recognizing disparate impact claims. For roughly forty years, housing providers have conducted business with the knowledge that the courts of appeals and HUD recognize such claims under the FHA. For these *amici* to now claim that they cannot comply with a part of the FHA that has been incorporated into the fabric of our law for decades is disingenuous. This Court's recognition of disparate impact claims under the FHA would effectively ratify the decades-long state of the law – not upend the housing community as Petitioners' *amici* claim.

Additionally, state and local governments play a key role in the administration of the FHA, and are

thus required to comply with and enforce the Act's mandates. See Brief of Massachusetts et al. as *Amici Curiae* in Support of Respondents at 6, *Magner v. Gallagher*, No. 10-1032 (U.S. Jan. 30, 2012) (noting that "there are 102 local and state agencies that receive funding from HUD to review and investigate housing discrimination complaints"). These state and local governments have long accepted HUD funding contingent upon their compliance with the FHA, including disparate impact analysis. Any jurisdiction that wishes to receive federal housing grants must act in accordance with the FHA by preparing a Consolidated Plan detailing the jurisdiction's housing needs assessment, housing market analysis, and housing objectives, *inter alia*. See 24 C.F.R. § 91.1(b)(2) (2013); *id.* §§ 91.200-91.236; *id.* §§ 91.300-91.330. A number of these state and local Consolidated Plans acknowledge that housing policies that disparately impact protected classes constitute a violation of the FHA.

For example, Wisconsin's Consolidated Plan provides an extensive definition of disparate impact and identifies several practices that can have a disparate impact on minorities, such as "lead poisoning," "a lack of affordable housing," "zoning and impact fees[.]" See State of Wisconsin Fair Housing Plan at 4-5, 32, 48-49, 93, 100, *available at* <http://1.usa.gov/1bjfJhu>.⁸ Similarly, the Consolidated Plan for

⁸ For further examples of state Consolidated Plans, see State of Arizona Consolidated Plan 2010-2014 at 58, *available at* (Continued on following page)

Dutchess County, New York, identifies common housing problems (inadequate plumbing, multiple people per room, etc.) and analyzes the disparate impact of these problems on various racial groups. *See* 2013-2017 Dutchess County and City of Poughkeepsie [New York] Consolidated Plan at 42-46, *available at* <http://bit.ly/1aeN6BD>.⁹ As demonstrated by these Plans, many state and local governments acknowledge that the FHA includes disparate impact

<http://bit.ly/17MpMcz> (stating that “[t]he lack of affordable housing throughout the state has a disparate negative impact on Fair Housing Act protected classes”); 2013 Action Plan for CDBG, HOME, ESG, HOPWA: Massachusetts at 136, 139, *available at* <http://1.usa.gov/1c0UXEb> (recognizing “the potential disparate impact that local zoning policies or practices may have on families with children and other protected classes[,]” and noting that “[t]he foreclosure crisis disparately impacted communities of color”); 2010-2015 Mississippi Consolidated Plan for Housing and Community Development at 117, *available at* <http://bit.ly/16wd6LL> (stating that “[c]urrent elements of housing disaster recovery activities by units of local government may leave local jurisdictions open to criticism of . . . disparate impact on protected minorities”); State of Rhode Island Consolidated Plan 2010-2015 at App. A, *available at* <http://1.usa.gov/19BbqP8> (defining disparate impact, providing examples, and noting that “[m]ost federal appeals courts . . . hold that racially neutral policies with discriminatory effects violate fair housing laws”).

⁹ For further examples of local Consolidated Plans, *see* Dakota County [Minnesota] 5 Year Strategic Plan at 32, *available at* <http://bit.ly/17hs4pv> (stating that “[s]ome zoning and land use regulations by units of local government may be construed to have a disparate impact”); Spokane County [Washington] 2013 Annual Action Plan (Application to HUD) at 18, *available at* <http://bit.ly/18Q5Wkj> (identifying a training event for County Planning Department staff “to keep them up to date on fair housing issues, disparate impacts of decisions, etc.”).

claims and take steps to remedy practices that disparately impact minorities in their jurisdictions.

Petitioners' *amici*, including industry associations and housing providers, insist that allowing disparate impact liability under the FHA presents unique problems in the housing context. Yet these organizations, as well as state and local governments, have long practiced preventative maintenance – or at least should have, given the universal acceptance of disparate impact claims under the FHA. Petitioners' *amici*'s assertions that allowing such claims has proven unworkable for the housing community ignore this reality.

C. Equal Housing Opportunity Will Be Weakened For All Protected Classes If Disparate Impact Claims Are Not Recognized Under The FHA.

Although the facts of this case concern disparate impact based on race, the FHA protects individuals based on color, religion, sex, handicap, familial status, and national origin as well. 42 U.S.C. §§ 3604-3606 (1988). When Congress amended the FHA in 1988, it did so knowing that disparate impact analysis would apply. Brief for Mt. Holly Gardens Respondents at 5-6.

Disparate impact analysis is vital to the protection of each of these classes of individuals. For example, it has been used to protect women who are victims of domestic violence. *See* Brief *Amici Curiae* of the American Civil Liberties Union et al. in

Support of Respondents, *Magner v. Gallagher*, No. 10-1032, 22-34 (U.S. Jan. 27, 2012) (explaining that abused women have used disparate impact claims after they have been evicted pursuant to zero-tolerance policies following domestic abuse). It has also been important in protecting those with disabilities. See Brief of AARP and Mount Holly Gardens Citizens In Action, as *Amici Curiae* in Support of Respondents, *Magner v. Gallagher*, No. 10-1032 (U.S. Jan. 30, 2012).

As a result, this case is about more than race. While Congress initially targeted intentional and unintentional racial discrimination in housing, the 1988 Amendments were intended to eliminate both intentional and unintentional housing discrimination for all protected classes. This vital protection will be weakened if disparate impact analysis is stripped from the FHA. Because disparate impact has been recognized as part of the protection afforded by the FHA by every circuit that has considered the issue and by HUD, this Court should not disrupt the reliance that individuals place on disparate impact claims.



CONCLUSION

Congress passed the FHA in response to a national crisis and tragedy in an attempt to remedy the harmful effects of intentional and unintentional housing discrimination. Since that time, every court

of appeals to address the issue, as well as HUD, have consistently interpreted the FHA to recognize disparate impact claims. Disparate impact analysis under the FHA has become a part of the fabric of our society.

For the foregoing reasons, the Court should affirm the judgment of the Third Circuit that disparate impact claims are cognizable under the Fair Housing Act.

Respectfully submitted on October 28, 2013.

MICHAEL L. FOREMAN

Counsel of Record

PENNSYLVANIA STATE UNIVERSITY

CIVIL RIGHTS APPELLATE CLINIC

329 Innovation Park

Suite 118

University Park, PA 16802

(814) 865-3832

mlf25@psu.edu

WADE HENDERSON

LISA M. BORNSTEIN

THE LEADERSHIP CONFERENCE

ON CIVIL AND HUMAN RIGHTS

1629 K St., NW, 10th Flr.

Washington, DC 20006

(202) 466-3311

bornstein@civilrights.org

APPENDIX

**THE LEADERSHIP CONFERENCE ON CIVIL
AND HUMAN RIGHTS PARTICIPATING AND
INTERESTED MEMBER ORGANIZATIONS**

A. Philip Randolph Institute
AARP
Advancement Project
African Methodist Episcopal Church
Alaska Federation of Natives
Alliance for Retired Americans
Alpha Kappa Alpha Sorority, Inc.
Alpha Phi Alpha Fraternity, Inc.
American-Arab Anti-Discrimination Committee
American Association for Affirmative Action
American Association of College for
Teacher Education
American Association of People with Disabilities
AAUW
American Baptist Churches, U.S.A. –
National Ministries
American Civil Liberties Union
American Council of the Blind
American Ethical Union
American Federation of Government Employees
American Federation of Labor-Congress
of Industrial Organizations
**American Federation of State, County &
Municipal Employees, AFL-CIO**
American Federation of Teachers, AFL-CIO
American Friends Service Committee
American Islamic Congress (AIC)
American Jewish Committee
American Nurses Association
American Society for Public Administration

App. 2

American Speech-Language-Hearing Association
Americans for Democratic Action
Amnesty International USA
Anti-Defamation League
Appleseed
Asian American Justice Center
Asian Pacific American Labor Alliance
Association for Education and Rehabilitation of the
Blind and Visually Impaired
B'nai B'rith International
Brennan Center for Justice at New York University
School of Law
Building & Construction Trades Department,
AFL-CIO
Center for Community Change
Center for Responsible Lending
Center for Women Policy Studies
Children's Defense Fund
Church of the Brethren-World Ministries Commission
Church Women United
Coalition of Black Trade Unionists
Coalition on Human Needs
Common Cause
Communications Workers of America
Community Action Partnership
Community Transportation Association of America
Compassion & Choices
DC Vote
Delta Sigma Theta Sorority
DEMOS: A Network for Ideas & Action
Disability Rights Education and Defense Fund
Disability Rights Legal Center
Division of Homeland Ministries-Christian Church
(Disciples of Christ)
Epilepsy Foundation of America

Episcopal Church-Public Affairs Office
Equal Justice Society
Evangelical Lutheran Church in America
FairVote: The Center for Voting and Democracy
Families USA
Federally Employed Women
Feminist Majority
Friends Committee on National Legislation
Gay, Lesbian and Straight Education
Network (GLSEN)
General Board of Church & Society of the United
Methodist Church
Global Rights: Partners for Justice
GMP International Union
Hip Hop Caucus
Human Rights Campaign
Human Rights First
Immigration Equality
Improved Benevolent & Protective Order of Elks of
the World
International Association of Machinists and
Aerospace Workers
International Association of Official Human
Rights Agencies
International Brotherhood of Teamsters
International Union, United Automobile, Aerospace
and Agricultural Implement Workers
of America (UAW)
Iota Phi Lambda Sorority, Inc.
Japanese American Citizens League
Jewish Council for Public Affairs
Jewish Labor Committee
Jewish Women International
Judge David L. Bazelon Center for Mental
Health Law

Kappa Alpha Psi Fraternity
Labor Council for Latin American Advancement
Laborers' International Union of North America
Lambda Legal

LatinoJustice PRLDEF

Lawyers' Committee for Civil Rights Under Law
League of United Latin American Citizens
League of Women Voters of the United States
Legal Aid Society – Employment Law Center
Legal Momentum
Mashantucket Pequot Tribal Nation
Matthew Shepard Foundation
Mexican American Legal Defense and
Educational Fund

Na'Amat USA

NAACP

NAACP Legal Defense and Educational Fund, Inc.
NALEO Educational Fund
National Alliance of Postal & Federal Employees
National Association for Equal Opportunity in
Higher Education
National Association of Colored Women's Clubs, Inc.
National Association of Community Health Centers
National Association of Consumer Advocates (NACA)
National Association of Human Rights Workers
National Association of Negro Business &
Professional Women's Clubs, Inc.
National Association of Neighborhoods
National Association of Social Workers
9 to 5 National Association of Working Women
National Bar Association
National Black Caucus of State Legislators
National Black Justice Coalition
National CAPACD – National Coalition For Asian
Pacific American Community Development

App. 5

National Center for Lesbian Rights
National Center for Transgender Equality
National Center on Time & Learning
National Coalition for the Homeless
National Coalition on Black Civic Participation
National Coalition to Abolish the Death Penalty
National Committee on Pay Equity
National Committee to Preserve Social Security
& Medicare
National Community Reinvestment Coalition
National Conference of Black Mayors, Inc.
National Congress for Puerto Rican Rights
National Congress of American Indians
National Consumer Law Center
National Council of Churches of Christ in the U.S.
National Council of Jewish Women
National Council of La Raza
National Council of Negro Women
National Council on Independent Living
National Disability Rights Network
National Education Association
National Employment Lawyers Association
National Fair Housing Alliance
National Farmers Union
National Federation of Filipino
American Associations
National Gay & Lesbian Task Force
National Health Law Program
National Hispanic Media Coalition
National Immigration Forum
National Immigration Law Center
National Korean American Service and Education
Consortium, Inc. (NAKASEC)
National Latina Institute for Reproductive Health
National Lawyers Guild

App. 6

National Legal Aid & Defender Association
National Low Income Housing Coalition
National Organization for Women
National Partnership for Women & Families
National Senior Citizens Law Center
National Sorority of Phi Delta Kappa, Inc.
National Urban League
National Women's Law Center
National Women's Political Caucus
Native American Rights Fund
Newspaper Guild
OCA
Office of Communications of the United Church of
Christ, Inc.
Omega Psi Phi Fraternity, Inc.
Open Society Policy Center
ORT America
Outserve-SLDN
Paralyzed Veterans of America
Parents, Families, Friends of Lesbians and Gays
People for the American Way
Phi Beta Sigma Fraternity, Inc.
Planned Parenthood Federation of America, Inc.
PolicyLink
Poverty & Race Research Action Council (PRRAC)
Presbyterian Church (USA)
Pride at Work
Prison Policy Initiative
Progressive National Baptist Convention
Project Vote
Public Advocates
Religious Action Center of Reform Judaism
Retail Wholesale & Department Store Union,
AFL-CIO
SAALT (South Asian Americans Leading Together)

App. 7

Secular Coalition for America
Service Employees International Union
Sierra Club
Sigma Gamma Rho Sorority, Inc.
Sikh American Legal Defense and Education Fund
Sikh Coalition
Southeast Asia Resource Action Center (SEARAC)
Southern Christian Leadership Conference
Southern Poverty Law Center
Teach For America
The Arc
The Association of Junior Leagues International, Inc.
The Association of University Centers on Disabilities
The National Conference for Community and Justice
The National PTA
TransAfrica Forum
Union for Reform Judaism
Unitarian Universalist Association
UNITE HERE!
United Brotherhood of Carpenters and Joiners
of America
United Church of Christ-Justice and
Witness Ministries
United Farm Workers of America (UFW)
United Food and Commercial Workers
International Union
United Mine Workers of America
United States International Council on Disabilities
United States Students Association
United Steelworkers of America
United Synagogue of Conservative Judaism
Workers Defense League
Workmen's Circle
YMCA of the USA, National Board

YWCA USA
Zeta Phi Beta Sorority, Inc.

The following are not members of The Leadership Conference, but have also expressed a keen interest in the issue presented:

National Action Network

The City Project

**The Sargent Shriver National Center
on Poverty Law**

**UCLA Blum Center on Poverty and Health
in Latin America**
