

DEC 23 2014

**In The
Supreme Court of the United States**

TEXAS DEPARTMENT OF HOUSING
AND COMMUNITY AFFAIRS, ET AL.,

Petitioners,

v.

THE INCLUSIVE COMMUNITIES PROJECT, INC.,
Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Fifth Circuit

**BRIEF OF AMICI CURIAE THE LAWYERS'
COMMITTEE FOR CIVIL RIGHTS UNDER LAW,
THE POVERTY & RACE RESEARCH ACTION
COUNCIL, THE OPPORTUNITY AGENDA,
AND THE LEADERSHIP CONFERENCE ON CIVIL
AND HUMAN RIGHTS AND THE LEADERSHIP
CONFERENCE EDUCATION FUND, ET AL.
IN SUPPORT OF RESPONDENT THE
INCLUSIVE COMMUNITIES PROJECT, INC.**

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INTEREST OF *AMICI CURIAE*¹

This brief is submitted by the Lawyers' Committee for Civil Rights Under Law, the Poverty & Race Research Action Council, The Opportunity Agenda, and The Leadership Conference on Civil and Human Rights and The Leadership Conference Education Fund as *amici curiae*.

The Lawyers' Committee for Civil Rights Under Law² ("Lawyers' Committee") is a nonprofit civil rights organization 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. For over fifty years, the Lawyers'

¹ The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. Elizabeth Julian, President of Respondent Inclusive Communities Project, Inc., and Demetria McCain, Deputy Director for Respondent, are members of the 22-member Board of Directors of *amicus* Poverty & Race Research Action Council ("PRRAC"). The PRRAC Board played no role in authoring or funding this brief.

² The Lawyers' Committee includes the 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.

Committee has 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, many of which have raised disparate impact claims. They have seen firsthand that disparate impact claims under the Fair Housing Act are essential to meeting its central goal of integrating our communities.

The Poverty & Race Research Action Council ("PRRAC") is a civil rights policy organization based in Washington, D.C., committed to bringing the insights of social science research to the fields of civil rights and poverty law. PRRAC's housing work focuses on the government's role in creating and perpetuating patterns of racial and economic segregation, the long term consequences of segregation for low income families of color in the areas of health, education, employment, and economic mobility, and the government policies that are necessary to remedy these disparities.

The Opportunity Agenda, a project of Tides Center, is a communications, research, and cultural organization with the mission of building the national will to expand opportunity in America. Among The Opportunity Agenda's core objectives is the elimination of barriers to equal housing opportunity tied to race, gender, national origin, socioeconomic status, religion, familial status, or disability. The organization's recent activities have included developing and

promoting fair housing solutions and building public understanding of implicit and institutional racial bias. The subject matter of this case is therefore of keen interest to the organization. The Opportunity Agenda's fiscal sponsor, Tides Center, is a not-for-profit, 26 U.S.C. § 501(c)(3) California corporation that provides management and financial services as a fiscal sponsor to approximately 350 nonprofit program initiatives. Tides Center actively promotes social justice, broadly-shared economic opportunity, fundamental respect for individual rights, the vitality of communities, and a celebration of diversity.

The Leadership Conference on Civil and Human Rights ("The Leadership Conference") is a coalition of more than 200 organizations committed to the protection of civil and human rights in the United States. It is the nation's oldest, largest, and most diverse civil and human rights coalition advocating for federal legislation and policy, securing passage of every major civil rights statute since the Civil Rights Act of 1957. Its member organizations represent people of all races, ethnicities, and sexual orientations. Its sister organization, The Leadership Conference Education Fund, was a founding member of the National Commission on Fair Housing and Equal 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. Together, they support the continued use of the disparate impact standard under

the Fair Housing Act as a critical way to address the continuing problem of housing discrimination in the United States.

These four groups are joined by the additional civil rights groups listed in Appendix A.

SUMMARY OF ARGUMENT

Fair housing is a bedrock civil rights protection, crucial to our nation's core value of equal opportunity for all and to our nation's success. In the face of deeply entrenched patterns of residential segregation and exclusion, Congress enacted the Fair Housing Act ("FHA" or "Act"), Pub. L. No. 90-284, Title VIII of the Civil Rights Act of 1968, 82 Stat. 81 (1968), to effectuate "the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601; see *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (noting the purpose of the Act to foster "truly integrated and balanced living patterns") (citation omitted). The Act has helped to free many communities from discrimination and connect millions of Americans to opportunity. But, "[d]ue to a variety of factors – some influenced by government, some not – neighborhoods in our communities do not reflect the diversity of our Nation as a whole." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797, 798 (2007) (Kennedy, J., concurring in part and concurring in judgment).

Congress passed the FHA in April 1968, in the immediate aftermath of the assassination of Martin Luther King, Jr. Two years earlier, Dr. King had marched for fair housing in the hyper-segregated Chicago metropolitan area.³ As one court noted, “widespread racial segregation threatened to rip civil society asunder.”⁴

Congress recognized that comprehensive legislation would need to target both intentional discrimination and facially neutral policies with unjustified discriminatory impacts, as each was instrumental in creating and perpetuating the entrenched residential segregation the Act sought to eliminate. *See, e.g.*, 114 Cong. Rec. 2524 (1968) (statement of Sen. Brooke) (“Unless we can lift that blockade and open the traditional path once more, permanent de facto segregation will unquestionably disrupt further progress toward the open society of free men we have proclaimed as our ideal.”).⁵ The lower courts agree that “the Act’s stated purpose to end discrimination requires a discriminatory effect standard; an intent requirement would strip the statute of all impact on

³ Arnold R. Hirsch, *Making the Second Ghetto: Race & Housing in Chicago, 1940-1960*, 264-65 (1998).

⁴ *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 928 (2d Cir. 1988), *judgment aff’d in part*, 488 U.S. 15 (1988) (per curiam), *reh’g denied*, 488 U.S. 1023 (1989).

⁵ *See also id.* at 2534-35 (summary brief by the U.S. Department of Justice introduced into the record by Sen. Tydings) (asserting that the Act was appropriate legislation authorized by the Equal Protection Clause, due to the need to address the “evil effects of past unconstitutionally discriminatory government action”) (emphasis added).

de facto segregation.” See, e.g., *Huntington*, 844 F.2d at 928.

Residential segregation is central to this case and to the FHA, yet Petitioners fail to address it. We do so here.

The Act’s prohibition of unjustified disparate impact remains a powerful and necessary tool for dismantling discriminatory housing practices and barriers to equal housing opportunities on a community-wide basis. While Americans’ attitudes towards residential segregation have changed in important respects, racial isolation continues to persist, in ways that the disparate impact inquiry is necessary to address. See Part I, *infra*.

Conduct prohibited by the Act – both intentional acts and facially neutral practices – has produced and perpetuated racially segregated neighborhoods where many Americans reside, isolated from high-performing public schools, good jobs, safe streets, reliable public services, and a clean, healthy environment. Such isolation has intergenerational effects that continue to limit the opportunities available to emerging generations.⁶ Social science evidence confirms the determination of Congress that segregation is harmful and integration beneficial to educational achievement, access to employment, personal and

⁶ See Patrick Sharkey, *Stuck in Place: Urban Neighborhoods and the End of Progress toward Racial Equality* 9-10, 91-116 (2013).

environmental health, and other aspects of a fulfilling and stable life. *See* Parts II and III, *infra*.

The use of disparate impact analysis under the Act is needed to combat the harms of segregation. Experience shows that the intentional discrimination standard alone is insufficient. By 1988, when the Act was amended,⁷ nine Circuit courts of appeals had found the disparate impact standard necessary to enforce the statute. And, today, eleven Circuits – every Circuit to consider the question – have agreed. The Act’s disparate impact component remains crucial to achieving the integrated residential patterns sought by Congress. *See* Part IV, *infra*.

ARGUMENT

I. Although Attitudes About the Value of Integration Have Improved, Residential Segregation Persists.

Due in significant part to the Fair Housing Act, progress has been made in achieving the national commitment to residential integration since 1968. Significant obstacles remain, however, and segregation continues to plague too many regions and communities, with dire consequences for the nation.⁸

⁷ Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619.

⁸ *See* John R. Logan & Brian J. Stults, *The Persistence of Segregation in the Metropolis: New Findings from the 2010* (Continued on following page)

When Congress passed the Act, and again when it recommitted the nation in the 1988 Amendments to addressing “highly segregated housing patterns,”⁹ it clearly contemplated that achieving this goal would require a broad and sustained effort. The Act’s prohibition of unjustified disparate impact is critical to achieving the legislation’s goal.

Today, most Americans would prefer to live in racially integrated communities. According to one Pew study, for example, “[s]ome 65% of Americans say they would rather live in a community composed of a mix of racial and ethnic groups, while 20% say they would rather live in a community made up mainly of people who are the same race as they are. Blacks say they prefer racially and ethnically mixed communities to mainly black communities by a lopsided 83%-to-9% margin.”¹⁰

Yet significant obstacles and persistent patterns continue to stand in the way of open and inclusive housing. Levels of segregation of African Americans remain high, the segregation levels of Latinos and

Census 4 (Mar. 24, 2011), available at <http://www.s4.brown.edu/us2010/Data/Report/report2.pdf>.

⁹ See 134 Cong. Rec. 15658 (1988) (statement of Rep. Rodino).

¹⁰ Pew Social & Demographic Trends Survey, *Americans Say They Like Diverse Communities; Election, Census Trends Suggest Otherwise* (Dec. 2, 2008), available at <http://www.pewsocialtrends.org/2008/12/02/americans-say-they-like-diverse-communities-election-census-trends-suggest-otherwise/>.

Asian Americans have not improved since 1980, and, by some measures, racial isolation has increased.¹¹ Racially isolated areas of concentrated poverty, in particular, remain prevalent, harmful, and in need of the searching inquiry that the disparate impact standard facilitates.

Approximately half of all high-poverty census tracts are dominated by a single racial or ethnic group.¹² African Americans and Latinos represent 12.3% and 15.8% of the population respectively, yet they make up much smaller percentages of the residents in low-poverty census tracts.¹³ This segregation affects all Americans, as it isolates people from opportunity that would enable their economic mobility and limits greater economic participation.¹⁴ African Americans are more racially isolated than any other racial group, with 75% of African

¹¹ Logan & Stults, *supra*, at 2, 15, 19.

¹² Paul A. Jargowsky, Century Found. & Rutgers Ctr. for Urban Research & Educ., *Concentration of Poverty in the New Millennium: Changes in Prevalence, Composition, and Location of High-Poverty Neighborhoods* 5 (Dec. 17, 2013), available at http://tcf.org/assets/downloads/Concentration_of_Poverty_in_the_New_Millennium.pdf.

¹³ John R. Logan, Project US2010, *Separate and Unequal: The Neighborhood Gap for Blacks, Hispanics and Asians in Metropolitan America* 4, 6 (July 2011), available at <http://www.s4.brown.edu/us2010/Data/Report/report0727.pdf> (African Americans constitute 7.2% and Latinos constitute 10.7% of census tracts with a poverty rate of less than 13.8%).

¹⁴ Jargowsky, *supra*, at 4-5.

Americans nationwide residing in only 16% of Census block groups.¹⁵

Residential segregation persists in this country even when people of color have the socioeconomic resources to live in higher opportunity neighborhoods. Data reveals that “[w]ith only one exception (the most affluent Asians), minorities *at every income level* live in poorer neighborhoods than do whites with comparable incomes.”¹⁶ In other words, patterns of persistent segregation and exclusion prevent Americans from living in communities that they can afford, that would connect them to greater opportunity, and that are consistent with their preference for integration and diversity.

II. Residential Segregation Leads to Intergenerational Social Harms.

An extensive body of research confirms the validity of Congress’s concerns about racial isolation and unequal housing opportunity, as well as the continuing relevance of the Act. The effects of living in segregated neighborhoods with highly concentrated poverty are overwhelmingly adverse: restricting

¹⁵ See Craig Gurian, *Mapping and analysis of new data documents still-segregated America*, *Remapping Debate* (Jan. 18, 2011), available at <http://www.remappingdebate.org/map-data-tool/mapping-and-analysis-new-data-documents-still-segregated-america>.

¹⁶ Logan, *supra*, at 1 (emphasis added).

access to education, employment, and public services, and negatively impacting health. The effects on children are particularly acute and resonate across generations. Conversely, removing barriers to residential integration delivers broadly-felt social benefits.¹⁷

A. Residential Segregation Impairs Educational Integration and Its Benefits.

Equal housing opportunity is closely linked with educational diversity and achievement in ways the FHA was intended to address. *See, e.g.*, 114 Cong. Rec. 2276 (1968) (statement of Sen. Mondale) (noting earlier testimony that “open housing is absolutely essential to the realistic achievement of such accepted goals and desegregated schools and equal opportunity,” and that “the soundest way to attack

¹⁷ Although this case focuses specifically on racial segregation, this Court has held that segregation and isolation also severely injure people with disabilities. *See Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 600-01 (1999) (finding in an Americans with Disabilities Act case that the unjustified isolation of persons with disabilities perpetuates disempowering stereotypes and reduces access to opportunity). Social science evidence confirms the harms that persons with disabilities experience because of segregative policies and the benefits that result from meaningful community integration. *See Leyla Gulcur et al., Housing, Hospitalization, and Cost Outcomes for Homeless Individuals with Psychiatric Disabilities Participating in Continuum of Care and Housing First Programmes*, 13 J. Cmty. Applied Soc. Psychol. 171, 181-83 (2003) (finding housing that promoted integration for persons with psychiatric disabilities resulted in lower incidences of homelessness and hospitalization than a segregated model).

segregated education is to attack the segregated neighborhood”); 134 Cong. Rec. 19711 (1988) (statement of Sen. Kennedy) (“Residential segregation is the primary obstacle to meaningful school integration.”).

“Public schools typically reflect their neighborhood demographics because most students are assigned to schools based on their residence.”¹⁸ Consequently, segregated neighborhoods often drive segregated educational settings.¹⁹ This Court long ago recognized the close interaction between school and residential segregation. In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), for example, the Court noted that choices regarding the location of schools “have been used as a potent weapon for creating or maintaining a state-segregated school system.” 402 U.S. at 21. The Court described school district practices including “the

¹⁸ Roslyn Arlin Mickelson, *Exploring the School-Housing Nexus: A Synthesis of Social Science Evidence*, in *Finding Common Ground: Coordinating Housing and Education Policy to Promote Integration* 5 & n.1 (Philip Tegeler, ed., Poverty & Race Research Action Council & National Coalition on School Diversity, Oct. 2011), available at <http://www.prrac.org/pdf/HousingEducationReport-October2011.pdf> (citing Simon Burgess & Adam Briggs, *School Assignment, School Choice, and Mobility*, 29 Econ. Educ. Rev. 639 (2010); Deenesh Sohoni & Salvador Saporito, *Mapping School Segregation: Using GIS to Explore Racial Segregation Between Schools and Their Corresponding Attendance Areas*, 115 Am. J. Educ. 569 (2009)).

¹⁹ See *id.* at 5.

classic pattern” of building schools specifically where African-American or white students live, closing schools which appeared likely to become racially mixed through changes in neighborhood residential patterns, and building new schools farthest from African-American population centers, which “may well promote segregated residential patterns which, when combined with ‘neighborhood zoning,’ further lock the school system into the mold of separation of the races.” *Id.*; see *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 201 (1973); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 455 n.4 (1979); *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1233-35 (2d Cir. 1987) (discussing the relationship between school segregation and housing segregation), *cert. denied*, 486 U.S. 1055 (1988).

Indeed, in Texas, the state from which this case arises, courts have found that housing segregation in some metropolitan areas was so profound and extensive that no practicable remedy existed for ongoing school segregation. See, e.g., *Ross v. Houston Indep. Sch. Dist.*, 699 F.2d 218, 224, 228 (5th Cir. 1983); *Flax v. Potts*, 725 F. Supp. 322, 330 (N.D. Tex. 1989), *aff’d*, 915 F.2d 155 (5th Cir. 1990).

Social science research confirms that “[s]chool segregation is tethered to residential segregation because of the prevalence of neighborhood schools in

the public school system. This linkage is especially strong at the lower grades.²⁰

Courts have long recognized both the benefits of educational diversity as a vital interest to American society at large and the severe harm of racially and ethnically isolated schools. *See Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (“Segregation of white and colored children in public schools has a detrimental effect upon the colored children.”) (citation omitted); *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring in part and concurring in judgment) (“A compelling interest exists in avoiding racial isolation.”).²¹

²⁰ Paul M. Ong & Jordan Rickles, *The Continued Nexus Between School and Residential Segregation*, 6 Afr.-Am. L. & Pol’y Rep. 178, 179 (2004); *id.* at 191 (“To confront school segregation, it is equally important to confront its underlying cause – residential segregation.”).

²¹ *See also Grutter v. Bollinger*, 539 U.S. 306, 308, 330 (2003) (noting that the benefits of diversity are substantial, promote “cross-racial understanding,” help break down racial stereotypes, and “enable[] [students] to better understand persons of different races”) (citation omitted); *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (“We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.”); *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637, 641 (1950) (noting that segregation “impair[s] and inhibit[s] [a student’s] ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession”).

School segregation significantly limits educational opportunities and outcomes for minority students.²² Segregation in education impairs students' ability to learn, and integration can be a powerful force for improved learning.²³ High levels of segregation often result in resource disparities that lead to detrimental outcomes, including larger class sizes, lower funding, fewer resources, more inexperienced teachers, insufficient facilities, lower per-pupil spending, and reduced access to services like counseling.²⁴ Racially segregated schools account for the

²² Gary Orfield et al., The Civil Rights Project, *E Pluribus . . . Separation: Deepening Double Segregation for More Students* 6-10 (Sept. 2012, rev. Oct. 18, 2012), available at [http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus . . . separation-deepening-double-segregation-for-more-students/orfield_epluribus_revised_omplete_2012.pdf](http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students/orfield_epluribus_revised_omplete_2012.pdf); Dennis J. Condrón, *Social Class, School and Non-School Environments, and Black/White Inequalities in Children's Learning*, 74 Am. Soc. Rev. 683, 699 (2009).

²³ Douglas Harris, Ctr. for Am. Progress, *Lost Learning, Forgotten Promises: A National Analysis of School Racial Segregation, Student Achievement, and "Controlled Choice" Plans* (Nov. 11, 2006), available at <http://cdn.americanprogress.org/wp-content/uploads/issues/2006/11/pdf/lostlearning.pdf>; Mark Berends & Roberto Peñaloza, *Increasing Racial Isolation and Test Score Gaps in Mathematics: A 30-year Perspective*, 112 Tchrs. C. Rec. 978 (2010).

²⁴ See Marguerite L. Spencer et al., Kirwan Inst. for the Study of Race & Ethnicity, *The Benefits of Racial and Economic Integration in Our Education System: Why This Matters for Our Democracy* 9 (Feb. 2009), available at <http://www.racial-equitytools.org/resourcefiles/spencer.pdf>; Brief for 553 Social Scientists as *Amici Curiae* Supporting Respondents, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701

majority of the nation's high schools with significantly elevated dropout rates, while integrated school environments are associated with lower dropout rates.²⁵

Conversely, compelling evidence demonstrates that attending integrated schools is associated with a host of positive educational and life course outcomes.²⁶ Low-income, minority students perform better academically in diverse school settings, with improvements resulting from significant peer effects and the reduction of resource disparities. In addition, research has found that students of all racial backgrounds tend to perform better academically

(2007) (Nos. 05-908, 05-915), 2006 WL 2927079, at *33a-34a; Roslyn Arlin Mickelson, *When Are Racial Disparities in Education the Result of Racial Discrimination? A Social Science Perspective*, 105 *Tchrs. C. Rec.* 1052, 1061-62 (2003); see also U.S. Dep't of Justice & U.S. Dep't of Educ., *Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools* 1-2 (Nov. 2011), available at <http://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.pdf>; Orfield et al., *E Pluribus . . . Separation*, *supra*.

²⁵ See Robert Balfanz & Nettie Legters, *Locating the Dropout Crisis: Which High Schools Produce the Nation's Dropouts? Where Are They Located? Who Attends Them?* in *Dropouts in America: Confronting the Graduation Rate Crisis* 57 (Gary Orfield, ed., 2004), available at <http://files.eric.ed.gov/fulltext/ED484525.pdf>; Jonathan Guryan, *Desegregation and Black Dropout Rates*, 94 *Am. Econ. Rev.* 919, 931-32 (2004).

²⁶ Rucker C. Johnson, *Long-Run Impacts of School Desegregation & School Quality on Adult Attainments*, National Bureau of Economic Research Working Paper 16664, 2-3 (Jan. 2011, rev. May 2014), available at <http://www.nber.org/papers/w16664>.

(measured by grades, test scores, and high school and college graduation rates) in racially integrated schools, compared to those who attend schools that are racially and socioeconomically isolated.²⁷ Racially

²⁷ Susan Eaton, *How the Racial and Socioeconomic Composition of Schools and Classrooms Contributes to Literacy, Behavioral Climate, Instructional Organization and High School Graduation Rates*, National Coalition on School Diversity Research Brief No. 2, 1 & n.1 (Oct. 2010, rev. Mar. 2011), available at <http://school-diversity.org/pdf/DiversityResearchBriefNo2.pdf> (detailing the “profound” negative effect of attending a high-poverty or highly segregated African-American school on a student’s verbal achievement) (citing Geoffrey Borman & Maritza Dowling, *Schools and Inequality: A Multilevel Analysis of Coleman’s Equality of Educational Opportunity Data*, 112 *Tchrs. C. Rec.* 1201 (2010)); Gary Orfield & Chunmei Lee, The Civil Rights Project, *Why Segregation Matters: Poverty and Educational Equality* 15 (Jan. 2005), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/why-segregation-matters-poverty-and-educational-inequality/orfield-why-segregation-matters-2005.pdf>; Shelly Brown-Jeffy, *The Race Gap in High School Reading Achievement: Why School Racial Composition Still Matters*, 13 *Race, Gender & Class* 268 (2006) (“Results indicate that the Black-White gap in reading achievement in schools with less than 10% Black, Hispanic, and/or Native American students enrolled is substantial, especially in comparison to schools with 25-54% Black, Hispanic, and/or Native American students (where the Black-White gap is relatively small and all students have higher average reading achievement). Racial integration is beneficial for Black student achievement, especially in the racially diverse suburban school with a mix of Black, Hispanic, Native American, White and Asian students that most approximates the racial mix of the United States.”). For a comprehensive survey of recent research, see National Coalition on School Diversity, *Research Briefs*, available at <http://school-diversity.org/coalition-research-briefs>.

and socioeconomically integrated schools also have higher rates of graduation than high-poverty, segregated schools.²⁸

Addressing the educational impacts of segregation would benefit not only individuals, but our society as a whole:

If the United States were able to close the educational achievement gaps between native-born white children and black and Hispanic children, the U.S. economy would be 5.8 percent – or nearly \$2.3 trillion – larger in 2050. The cumulative increase in GDP from 2014 to 2050 would amount to \$20.4 trillion, or an average of \$551 billion per year. Thus, even very large public investments that close achievement gaps would pay for themselves in the form of economic growth by 2050.²⁹

²⁸ See Christopher B. Swanson, Urban Inst. Policy Ctr., *Who Graduates? Who Doesn't?: A Statistical Portrait of Public High School Graduation, Class of 2001* 35 (2004), available at http://www.urban.org/UploadedPDF/410934_WhoGraduates.pdf (noting that “there is a strong and very detrimental linkage between graduation rates and the environmental conditions that go along with factors like poverty and segregation”); Brief for 553 Social Scientists, *supra*, at App. 39 (“An examination of over 13,000 public high schools across the country in 2004 showed that schools with a higher concentration of blacks and Latinos tend to have lower ‘promoting power,’ which indicates the percentage of students who stay in school and are promoted each year from grades 9 to 12.”) (citation omitted).

²⁹ Robert G. Lynch & Patrick Oakford, Ctr. for Am. Progress, *The Economic Benefits of Closing Educational Achievement* (Continued on following page)

The degree of integration in educational settings also affects the neighborhoods students are likely to seek to live in as adults. Social science research demonstrates that “[t]he experience of attending segregated schools has intergenerational consequences for adults’ choices of same or different race neighbors. Students who attended more racially isolated elementary, middle, and high schools are more likely as adults to prefer same race neighbors compared to adults who have attended integrated schools,” and vice versa.³⁰

In other words, not only does open, inclusive housing improve educational diversity and achievement, but those improved educational opportunities, in turn, foster a more integrated and successful society. The Fair Housing Act’s protection against

Gaps: Promoting Growth and Strengthening the Nation by Improving the Educational Outcomes of Children of Color 2 (Nov. 2014), available at <https://cdn.americanprogress.org/wp-content/uploads/2014/11/WinningEconomyReport2.pdf> (footnote omitted).

³⁰ Mickelson, *Exploring the School-Housing Nexus*, *supra*, at 6-7; see also Roslyn Arlin Mickelson & Mokubung Nkomo, *Integrated Schooling, Life Course Outcomes, and Social Cohesion in Multiethnic Democratic Societies*, 36 *Rev. of Res. in Educ.* 197, 218-19 (Mar. 2012), available at http://www.school-diversity.org/pdf/Mickelson_Nkomo_%20RRE_2012.pdf; Jomills Henry Braddock II & Amaryllis Del Carmen Gonzalez, *Social Isolation and Social Cohesion: The Effects of K-12 Neighborhood and School Segregation on Intergroup Orientations*, 112 *Tehrs. C. Rec.* 1631 (2010).

unjustified disparate impact plays a vital role in this cycle.

B. Residential Segregation Impedes Access to Economic Mobility and Resources.

The connection between housing opportunity and economic opportunity was of particular concern to the Act's drafters. *See, e.g.*, 114 Cong. Rec. 2276 (1968) (statement of Sen. Mondale) ("Unless [African Americans] are going to be able to move in the suburban communities through the elimination of housing discrimination and the provision of low- and moderate-cost housing, they are going to be deprived of many jobs because they will be unable to live in the central city and work in the suburbs. ").

Today, segregation continues to impede access to employment and other resources, such that poverty remains entrenched and mobility out of reach to many people of color. "Segregation isolates disadvantaged groups from access to public and private resources, from sources of human and cultural capital, and from the social networks that govern access to jobs, business connections, and political influence."³¹

Housing opportunity is crucial to expanding access to jobs. In metropolitan areas characterized by

³¹ Elizabeth Anderson, *The Imperative of Integration* 2 (2010).

higher job sprawl, residential segregation is an independent factor that contributes to African Americans' physical isolation from jobs.³² The geographic mismatch between job sites and segregated neighborhoods often results in racial and ethnic differences in income due to the relocation of high-paying, low-skilled jobs away from the cities and older suburbs.³³ Where African Americans are most segregated from whites residentially, they also are likely to experience the greatest mismatch between their residences and available jobs.³⁴ Racial isolation constricts the social networks of minorities, limiting employment opportunities.³⁵

C. Residential Segregation Is Associated With Adverse Health and Environmental Effects for People of Color.

Social science research also confirms Congress's concern that residential segregation has subjected people of color to "less healthy surroundings," 134 Cong. Rec. 19715, 19716-17 (1988) (statement of Sen.

³² Michael A. Stoll, Brookings Inst. Metro. Policy Program, *Job Sprawl and the Spatial Mismatch between Blacks and Jobs* 7 (Feb. 2005), available at http://www.brookings.edu/~media/Files/rc/reports/2005/02metropolitanpolicy_stoll/20050214_jobsprawl.pdf.

³³ See generally *id.*

³⁴ *Id.* at 8.

³⁵ Douglas S. Massey & Nancy A. Denton, *American Apartheid* 109, 161-62, 166 (1993).

Specter) (quoting exhibit read into the record regarding a study of African Americans), while freedom from housing barriers “may give children the opportunity to grow up in a healthier atmosphere,” 114 Cong. Rec. 2277 (1968) (statement of Sen. Mondale) (quoting Commission on Civil Rights Report for 1967 regarding African Americans in segregated communities).

Racially or ethnically isolated communities are much more likely to experience environmental hazards and associated adverse health impacts than are integrated communities, making race a stronger corollary to environmental vulnerability than income.³⁶ The groundbreaking research finding, reached just prior to the 1988 amendments to the Act, “that race was consistently a more prominent factor in the location of commercial hazardous waste facilities than any other factor examined”³⁷ has been

³⁶ See, e.g., Helen H. Kang, *Pursuing Environmental Justice: Obstacles and Opportunities – Lessons from the Field*, 31 Wash. U. J.L. & Pol’y 121, 126-27 (2009); U.S. Env’tl. Prot. Agency, *Environmental Equity: Reducing Risk for All Communities* 15 (1992), available at <http://infohouse.p2ric.org/ref/32/31476.pdf>.

³⁷ United Church of Christ, Comm’n for Racial Justice, *Toxic Wastes and Race in the United States: A National Report of the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites* 15 (1987), available at <http://www.ucc.org/about-us/archives/pdfs/toxwrace87.pdf>; see also U.S. Gen. Accounting Ofc., *Siting Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities* (1983), available at <http://archive.gao.gov/d48t13/121648.pdf>.

repeatedly analyzed and confirmed since that time.³⁸ Hazardous materials disposal sites, municipal waste facilities, power plants, and other sources of pollution are all disproportionately located in racially and ethnically identifiable communities of color,³⁹ in a way that neither housing preferences nor wealth gaps adequately explain.⁴⁰ Residents of segregated

³⁸ See generally Robert D. Bullard et al., *Toxic Wastes and Race at Twenty: 1987-2007*, 38-47 (2007), available at http://www.ucc.org/justice/advocacy_resources/pdfs/environmental-justice/toxic-wastes-and-race-at-twenty-1987-2007.pdf (summarizing confirmatory effect of more recent studies); U.S. Comm'n on Civil Rights, *Not in My Backyard: Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice* 16-19 (2003), available at <http://www.usccr.gov/pubs/envjust/ej0104.pdf> (same); Luke W. Cole & Sheila R. Foster, *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement* 167-83 (2001) (annotated bibliography of studies); see also Rachel D. Godsil, *Environmental Justice and the Integration Ideal*, 49 N.Y.L. Sch. L. Rev. 1109, 1115 (2005) (noting that inequitable distribution of environmental risks "has been confirmed by scores of studies," to the point that "few now dispute" it).

³⁹ See Daniel R. Faber & Eric J. Krieg, *Unequal Exposure to Ecological Hazards 2005: Environmental Justice in the Commonwealth of Massachusetts* vi (Oct. 12, 2005), available at <http://www.northeastern.edu/nejrc/wp-content/uploads/Final-Unequal-Exposure-Report-2005-10-12-05.pdf>; Robert D. Bullard, *Dumping in Dixie: Race, Class, and Environmental Quality* 98, n.12-17 (3d ed. 2000).

⁴⁰ See also Vicki Been & Francis Gupta, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 Ecology L.Q. 1, 34 (1997) (rejecting Been's prior hypothesis that "market dynamics" increase minority residency rates in neighborhoods *after* siting of hazardous waste facilities); Paul Mohai & Robin Saha, *Racial*

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communities are significantly more likely to experience high-volume releases of toxic chemicals,⁴¹ to breathe high concentrations of harmful air pollutants,⁴²

Inequality in the Distribution of Hazardous Waste: A National-Level Reassessment, 54 Soc. Probs. 343, 361 (2007), available at http://scholarworks.umt.edu/cgi/viewcontent.cgi?article=1001&context=environstudies_pubs (“[R]acial disparities in the distribution of the nation’s [hazardous waste facilities] persist despite controlling for the economic and sociopolitical make-up of the tracts. . .”).

⁴¹ See, e.g., Godsil, *supra*, at 1118; Seema Arora & Timothy N. Cason, *Do Community Characteristics Influence Environmental Outcomes? Evidence from the Toxics Release Inventory*, 1 J. App. Econ. 413, 415-16 (1998).

⁴² For criteria-pollutant exposures, see, e.g., Lara P. Clark et al., *National Patterns in Environmental Injustice and Inequality: Outdoor NO₂ Air Pollution in the United States*, 9 PLOS ONE e94431, 2 (2014), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3988057/pdf/pone.0094431.pdf> (observing that “reducing NO₂ concentrations to levels experienced by whites . . . for all nonwhites” would prevent 7,000 deaths from ischemic heart disease each year); Marie Lynn Miranda et al., *Making the Environmental Justice Grade: The Relative Burden of Air Pollution Exposure in the United States*, 8 Int’l J. Env’tl. Res. Pub. Health 1755, 1768-69 (2011), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3137995/pdf/ijerph-08-01755.pdf>. For hazardous-pollutant exposures, see, e.g., Jeremy L. Mennis & Lisa Jordan, *The Distribution of Environmental Equity: Exploring Spatial Nonstationarity in Multivariate Models of Air Toxic Releases*, 95 Annals Soc’y Am. Geog’rs 249 (2005); Russ Lopez, *Segregation and Black/White Differences in Exposure to Air Toxics in 1990*, 110 Env’tl. Health Persp. 289 (2002); see also Jayajit Chakraborty & Paul A. Zandbergen, *Children at Risk: Measuring Racial/Ethnic Disparities in Potential Exposure to Air*
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and to live in chronically substandard, lead-painted housing.⁴³ Minority communities are also less likely to benefit from reliable municipal services, *see, e.g., Committee Concerning Community Improvement v. City of Modesto*, 583 F.3d 690 (9th Cir. 2009); *Kennedy v. City of Zanesville*, 505 F. Supp. 2d 456 (S.D. Ohio 2007),⁴⁴ or to enjoy access to grocery stores,⁴⁵ private-practice healthcare facilities,⁴⁶ and green spaces, such as parks and sports fields.⁴⁷

Pollution at School and Home, 61 J. Epidem. Cmty. Health 1074, 1074 (2007).

⁴³ See Godsil, *supra*, at 1120; U.S. Env'tl. Prot. Agency, *supra*, at 11; Bullard, *Dumping in Dixie*, *supra*, at 98-99.

⁴⁴ See also, *e.g., Lopez v. City of Dallas*, No. 3:03-CV-2223-M, 2004 WL 2026804 (N.D. Tex. Sept. 9, 2004); *Miller v. City of Dallas*, No. 3:98-CV-2995-D, 2002 WL 230834 (N.D. Tex. Feb. 14, 2002).

⁴⁵ See, *e.g.,* Kimberly Morland et al., *Neighborhood Characteristics Associated with the Location of Food Stores and Food Service Places*, 22 Am. J. Prev. Med. 23 (2002).

⁴⁶ See, *e.g.,* David Barton Smith, *Health Care Divided: Race and Healing a Nation* 283 (1999).

⁴⁷ See Ming Wen et al., *Spatial Disparities in the Distribution of Parks and Green Spaces in the USA*, 45 Annals Behav. Med. 18 (2013); Dustin T. Duncan et al., *The Geography of Recreational Open Space: Influence of Neighborhood Racial Composition and Neighborhood Poverty*, 90 J. Urb. Health 618 (2012).

Grave public health impacts – including asthma,⁴⁸ cancer,⁴⁹ diabetes,⁵⁰ and infant mortality,⁵¹ as well as psychosocial phenomena like violent crime and post-traumatic stress disorder⁵² – are now widely viewed as environmentally mediated consequences of residential segregation.⁵³

⁴⁸ See, e.g., Joint Ctr. for Political & Econ. Studies, *Breathing Easier: Community-Based Strategies to Prevent Asthma 2* (2004), available at <http://policylink.info/pdfs/JointCenter-Asthma.pdf>; Evalyn N. Grant et al., *The Relation of Socioeconomic Factors and Racial/Ethnic Differences in US Asthma Mortality*, 90 Am. J. Pub. Health 1923, 1925 (2000).

⁴⁹ See, e.g., U.S. Dep't of Health & Human Servs., *Healthy People 2010: Understanding and Improving Health* 12 (2d ed. Nov. 2000), available at <http://www.healthypeople.gov/2010/document/pdf/uih/2010uih.pdf?visit=1>.

⁵⁰ See *id.*

⁵¹ See *id.* (noting that African-American infant mortality rate is double that of whites); see also Rachel Morello-Frosch & Russ Lopez, *The Riskscape and the Color Line: Examining the Role of Segregation in Environmental Health Disparities*, 102 *Envtl. Res.* 181, 190-91 (2006).

⁵² See, e.g., Magdalena Cerdá et al., *Addressing Population Health and Health Inequalities: The Role of Fundamental Causes*, 104 Am. J. Pub. Health S609, S610 (2014), available at <http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2014.302055>; Kang, *supra*, at 128 (noting that “[c]ommunities that are burdened with pollution and have less access to environmental benefits also suffer from crime, violence, [and] chronic stress”).

⁵³ See, e.g., David R. Williams & Chiquita Collins, *Racial Residential Segregation: A Fundamental Cause of Racial Disparities in Health*, 116 *Pub. Health Reps.* 404, 409 (2001), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1497358/pdf/12042604.pdf>; Inst. of Med., *Comm. on Env'tl. Justice*,

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III. Residential Integration Provides Widespread Social Benefits.

In enacting the FHA, Congress recognized that ensuring residential integration would have many social benefits. 114 Cong. Rec. 2985 (1968) (statement of Sen. Proxmire) (“The benefits of an open housing policy are numerous.”). Social science has confirmed those myriad benefits.

A. Benefits of Interracial Contact.

In addition to the benefits detailed above, equal housing opportunity and residential integration provide opportunities for sustained, meaningful interracial contact that promote, as the Court has noted, inter-group understanding and dismantling negative stereotypes. *See Grutter*, 539 U.S. at 330 (noting that diversity “helps to break down racial stereotypes”) (citation omitted); note 17, *supra*, and accompanying text.

Toward Environmental Justice: Research, Education, and Health Policy Needs 36 (1999); Masayoshi Oka & David W.S. Wong, *Capturing the Two Dimensions of Residential Segregation at the Neighborhood Level for Health Research*, 2 *Frontiers Pub. Health* 1, 12 (2014), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4142636/pdf/fpubh-02-00118.pdf>; Gilbert C. Gee & Devon C. Payne-Sturges, *Environmental Health Disparities: A Framework Integrating Psychosocial and Environmental Concepts*, 112 *Envtl. Health Persp.* 1645, 1646-47 (2004), available at <http://infohouse.p2ric.org/ref/52/51434.pdf>.

Meaningful contact between members of different races significantly reduces prejudice among racial groups. A frequently cited review of more than 500 studies found that this phenomenon, known as “contact theory,” is overwhelmingly supported by the data, and that inter-group contact typically reduces prejudice even toward groups not included in the study.⁵⁴ By facilitating exposure to other cultures and contact among diverse individuals, racial integration can dispel harmful stereotypes and dismantle the discriminatory cycles that perpetuate racial distrust.⁵⁵

B. Access to Integrated Neighborhoods Benefits Families Moving From Segregated Neighborhoods.

The life chances of families moving from racially segregated neighborhoods to low-poverty, “high opportunity,” more integrated neighborhoods improve by increasing access to stronger institutional resources, such as higher quality schools, among other

⁵⁴ Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 *J. Personality & Soc. Psychol.* 751 (2006), available at <http://blogs.law.columbia.edu/genderandsexualitylawblog/files/2012/04/A-Meta-Analytic-Test-of-Intergroup-Contact-Theory.pdf>; Mickelson & Nkomo, *supra*, at 210-11, 218, 222-23.

⁵⁵ Pettigrew & Tropp, *supra*; Genevieve Siegel-Hawley, *How Non-Minority Students Also Benefit from Racially Diverse Schools*, National Coalition on School Diversity Research Brief No. 8, 2-3 (Oct. 2012), available at <http://www.school-diversity.org/pdf/DiversityResearchBriefNo8.pdf>.

positive outcomes.⁵⁶ For example, HUD's "Moving to Opportunity" ("MTO") demonstration, begun in the 1990s and in which more than 97% of the participants were people of color, has shown health and mental health gains for low-income women and girls who used housing vouchers to move from high-poverty neighborhoods to low-poverty, more integrated neighborhoods, even for moves of relatively short duration.⁵⁷ Follow-up research has found that MTO families who lived for longer periods in neighborhoods with lower poverty achieved better outcomes in work and school, as well as in health.⁵⁸ A recent study

⁵⁶ See John Goering, *Expanding Housing Choice and Integrating Neighborhoods: The MTO Experiment*, in *The Geography of Opportunity: Race and Housing Choice in Metropolitan America* 127, 142-43 (Xavier de Souza Briggs, ed., 2005); Margery Austin Turner & Dolores Acevedo-Garcia, *The Benefits of Housing Mobility: A Review of the Research Evidence*, in *Keeping the Promise: Preserving and Enhancing Housing Mobility in the Section 8 Housing Choice Voucher Program: Conference Report of the Third National Conference on Housing Mobility* 9-23 (Philip Tegeler et al., eds., Poverty & Race Research Action Council, Dec. 2005), available at <http://www.prrac.org/pdf/KeepingPromise.pdf>.

⁵⁷ Lisa Sanbonmatsu et al., U.S. Dep't of Hous. & Urban Dev., Ofc. of Policy Dev. & Res., *Moving to Opportunity for Fair Housing Demonstration Program: Final Impacts Evaluation* 8, 255-56 (Nov. 2011), available at www.huduser.org/publications/pdf/MTOFHD_fullreport_v2.pdf.

⁵⁸ Margery Austin Turner et al., Urban Inst., *Benefits of Living in High-Opportunity Neighborhoods: Insights from the Moving to Opportunity Demonstration* 1, 3 (Sept. 2012), available at <http://www.urban.org/UploadedPDF/412648-Benefits-of-Living-in-High-Opportunity-Neighborhoods.pdf>.

tracking outcomes for low-income families, most of whom were people of color, who moved to subsidized housing in a low-poverty, overwhelmingly white neighborhood found similar powerful impacts, including less exposure to social disorder and violence, fewer negative life events, improved mental health, higher levels of employment and earnings, lower levels of receiving public benefits, and greater access to high-quality schools.⁵⁹ These research findings are reflected in the first-hand observations of those who have made the transition from low- to high-opportunity, racially diverse neighborhoods.⁶⁰

⁵⁹ See Douglas S. Massey et al., *Climbing Mount Laurel: The Struggle for Affordable Housing and Social Mobility in an American Suburb* 125-26, 133-34, 145, 148 (2013); see also Anna Maria Santiago et al., U.S. Dep't of Hous. & Urban Dev., Ofc. of Policy Dev. & Res., *Opportunity Neighborhoods for Latino and African American Children* 191-97 (Mar. 2014), available at http://www.huduser.org/portal/Publications/pdf/Opportunity_Neighborhoods.pdf (finding long-term exposure to higher-quality "neighborhood environments" associated with strong positive outcomes for low-income African-American and Latino children and youth in Denver on a wide range of social indicators).

⁶⁰ For example, a pilot housing mobility program in Baltimore, Maryland tracked the experiences of more than 1,500 families who moved from low-opportunity, racially concentrated areas to low-poverty, racially diverse neighborhoods. Participants reported significant, positive changes in numerous aspects of their lives. Eighty-nine percent of survey respondents reported that their children "appear to be learning better or much better" in their new schools, while nearly 80 percent of respondents said they "feel safer, more peaceful, and less stressed," 60 percent of respondents said they "feel more motivated," and nearly 40 percent said they "feel healthier." Lora Engdahl,

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It is difficult to overstate the value of residential integration and its potential benefits for Americans for generations to come. As this Court has recognized, residential integration has significant benefits. See note 61, *infra*, and accompanying text.

IV. Fair Housing Jurisprudence Demonstrates the Necessary Role That Disparate Impact Claims Play in Challenging Actions and Policies That Create or Perpetuate Segregation.

Shortly after the passage of the Act, this Court recognized that racial integration with its important societal benefits is a foundational purpose of the Act. In *Trafficante*, as noted above, the Court held that Congress intended to ensure the benefits of integration for “the whole community” and to foster “truly integrated and balanced living patterns.” 409 U.S. at 211 (quoting 114 Cong. Rec. 2706 (1968) (statement of Sen. Javits), 3422 (1968) (statement of Sen. Mondale)).⁶¹

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

⁶¹ See also *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 111 (1979) (discussing the benefits of that accrue from integrated communities); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 376 (1982) (noting “palpable injury” of being denied the benefits of “living in integrated communities free from discriminatory housing practices”); *Linmark Assocs., Inc. v. Twp.*

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Beginning shortly after the Act's passage, Circuit courts have unanimously held that violations of the Fair Housing Act can be established through a disparate impact standard of proof. These courts recognized that prohibiting unjustified facially neutral policies with significant racially discriminatory effects was necessary to achieve the Act's purpose of fostering residential integration. Under the disparate impact standard, courts assess discriminatory effect and whether an action perpetuates segregation, whether the discrimination is justified, and whether less discriminatory alternatives exist for the challenged practice. The inquiry into motive under the intentional discrimination standard is insufficient to accomplish the broad purposes of the Act. *See Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights* ("Arlington Heights II"), 558 F.2d 1283, 1289-90 (7th Cir. 1977) (finding disparate impact standard appropriate "[i]n light of the declaration of congressional intent provided" in the statute), *cert. denied*, 434 U.S. 1025 (1978).

Many of the first cases to apply the disparate impact standard under the FHA were exclusionary zoning cases for which the disparate impact standard

of Willingboro, 431 U.S. 85, 94-95 (1977) (noting that "[t]his Court has expressly recognized that substantial benefits flow to whites and blacks from interracial association and that Congress has made a strong national commitment to promote integrated housing") (citing *Trafficante*, 409 U.S. 205).

is an indispensable tool for assessing land use actions of governmental entities that perpetuate residential segregation. These cases have been prosecuted by private parties,⁶² as well as by the Department of Justice.⁶³

In 1974, the Eighth Circuit applied the disparate impact standard in a challenge brought by the United States to an almost-exclusively white town's restrictive zoning policies. *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975), *reh'g denied*, 423 U.S. 884 (1975). Finding that the zoning code would foreclose housing opportunities within the town to 85% of the region's African-American population and thus exacerbate preexisting, pervasive regional segregation, the Eighth Circuit held that, regardless of whether there is evidence of discriminatory purpose, a facially neutral zoning law "must be curbed where the clear result

⁶² See, e.g., *MHANY Mgmt. v. Cnty. of Nassau*, 985 F. Supp. 2d 390 (E.D.N.Y. 2013); *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish*, 641 F. Supp. 2d 563, 566-68 (E.D. La. 2009); *Brisben Cos. v. Vill. of Brown Deer*, No. 99-C-1063, 2003 WL 23845078 (E.D. Wis. Sept. 30, 2003); *Dews v. Town of Sunnyvale*, 109 F. Supp. 2d 526 (N.D. Tex. 2000).

⁶³ See, e.g., *United States v. Sussex Cnty.*, No. 1:12-cv-01591-UNA (D. Del. 2012); *United States v. City of Joliet*, No. 1:11-cv-05305 (N.D. Ill. 2011); *United States v. City of New Berlin*, No. 2:11-cv-00608 (E.D. Wis. 2011); *United States v. City of Fairview Heights*, No. 3:00-cv-00331-MJR (S.D. Ill. 2000). Summaries of and filings from these cases may be found at www.justice.gov/crt/about/hce/caselist.php.

is the segregation of low-income Blacks from all White neighborhoods.”⁶⁴ 508 F.2d at 1184 (internal quotation marks and citation omitted). The court explained that “[e]ffect, and not motivation, is the touchstone” for finding a violation “in part because clever men may easily conceal their motivations, but more importantly, because the arbitrary quality of thoughtlessness can be as disastrous and unfair as the perversity of a willful scheme.” 508 F.2d at 1185 (internal quotation marks and citation omitted).

Other Circuits soon concurred. In 1977, the Seventh Circuit applied the disparate impact standard to a local rezoning decision that had an unjustified racially discriminatory effect and perpetuated residential segregation. *Arlington Heights II*, 558 F.2d at 1289-90. That court held the disparate impact standard appropriate “[i]n light of the declaration of congressional intent provided” in the statute.⁶⁵

⁶⁴ The Eighth Circuit previously noted in *Williams v. Matthews Co.*, 499 F.2d 819 (8th Cir. 1974), cert. denied, 419 U.S. 1021 (1974), 419 U.S. 1027 (1974), that “courts will . . . proscribe practices which actually or predictably result in racial discrimination, irrespective of defendant’s motivation.” 499 F.2d at 926.

⁶⁵ See 42 U.S.C. § 3601 (“It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”).

Conduct that has the necessary and foreseeable consequence of perpetuating segregation can be as deleterious as purposefully discriminatory conduct in frustrating the national commitment “to replace the ghettos by truly integrated and balanced living patterns.”

Id. at 1289-90 (quoting *Trafficante*, 409 U.S. at 211) (internal quotation marks and citation omitted). Echoing the Eighth Circuit’s decision in *Black Jack*, the court noted that “[a] strict focus on intent permits racial discrimination to go unpunished in the absence of evidence of overt bigotry.” *Id.* at 1290.

The Second Circuit similarly adopted disparate impact liability under the Act in examining another local zoning decision because “[o]ften [facially race-neutral] rules bear no relation to discrimination upon passage, but develop into powerful discriminatory mechanisms when applied.” *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 935 (2d Cir. 1988), *judgment aff’d in part*, 488 U.S. 15 (1988) (per curiam), *reh’g denied*, 488 U.S. 1023 (1989). In *Huntington*, the plaintiffs challenged an ordinance restricting multifamily housing to Huntington’s designated “urban renewal area,” which was a segregated, predominantly minority area of the town. *Id.* at 928. The record demonstrated that the town’s minority residents were confined to this segregated part of the town and that there was a severe shortage of available low-income housing in Huntington. Thus, even though the multi-family housing restriction was

facially neutral, it unjustifiably limited housing opportunities for minority residents by perpetuating residential segregation. The court concluded that “the Act’s stated purpose to end discrimination requires a discriminatory effect standard; an intent requirement would strip the statute of all impact on de facto segregation.” *Id.*

These principles have been applied by the lower courts to myriad other unjustified, facially neutral practices that perpetuate or exacerbate residential segregation. *See, e.g., Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49 (1st Cir. 2000) (residency preferences for the allocation of housing assistance vouchers); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 146 (3d Cir. 1977) (termination of public housing project), *cert. denied*, 435 U.S. 908 (1978); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065-66 (4th Cir. 1982) (withdrawal of public housing authority from plan to construct public housing); *United States v. City of Parma*, 661 F.2d 562, 566 (6th Cir. 1981) (use of restrictive land covenants and public housing authority site and tenant selection practices), *cert. denied*, 456 U.S. 926 (1982); *Keith v. Volpe*, 858 F.2d 467 (9th Cir. 1988) (failure to construct non-discriminatory replacement housing for residents displaced by freeway construction), *cert. denied sub nom.*, *City of Hawthorne v. Wright*, 493 U.S. 913

(1989); *Jackson v. Okaloosa Cnty.*, 21 F.3d 1531, 1543 (11th Cir. 1994) (siting of public housing).⁶⁶

CONCLUSION

A decision from this Court upholding use of the disparate impact standard to enforce the Fair Housing Act will maintain long-settled expectations. On the other hand, eliminating FHA disparate impact claims would upend decades of settled case law. It

⁶⁶ Against the overwhelming weight of this precedent, *amici* American Bankers' Association et al. assert that there is no private cause of action to pursue a disparate impact claim under the Fair Housing Act. See Brief for the American Bankers' Ass'n et al. as *Amici Curiae* Supporting Petitioners, *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.* 13-28 (No. 13-1371) (Nov. 24, 2014). This argument is primarily based on *Alexander v. Sandoval*, 532 U.S. 275 (2001), in which this Court considered whether there existed a private right of action to enforce a DOJ regulation. By the time this Court decided *Sandoval*, it was well-settled that Section 601 of Title VI prohibited disparate treatment but not disparate impact. See *id.* at 281 (citing *Alexander v. Choate*, 469 U.S. 287 (1985)). The only question before the Court, therefore, was whether private plaintiffs could sue to enforce the agency disparate impact regulation, promulgated pursuant to Section 602 of Title VI. *Id.* at 281-93. Here, by contrast, this Court has yet to answer the threshold question of whether the Fair Housing Act encompasses the disparate impact standard. If the Court agrees with Respondent that it does, that holding will necessarily mean that private plaintiffs can sue for disparate impact, based on the explicit rights-conferring language in 42 U.S.C. § 3613. This case does not involve a *Sandoval* effort to enforce an agency regulation.

would absolve from liability actors who have known for decades that they are liable under the Act for actions with significant, unjustified disparate impact.

The Fair Housing Act, moreover, embodies the nation's "moral and ethical obligation to fulfill its historic commitment to creating an integrated society." *Parents Involved*, 551 U.S. at 798 (Kennedy, J., concurring in part and concurring in judgment). The Act's goal of achieving integrated living patterns would be significantly impaired if its scope were limited to an inquiry into intentionally discriminatory conduct. Without the availability of disparate impact analysis, governments and other actors would be able to pursue cleverly concealed, intentionally discriminatory acts and policies, as well as facially neutral policies no matter how harsh the impact, how unjustified the action and how readily available the non-discriminatory alternatives. The adverse consequences of such a ruling would be felt for generations.

For the above-stated reasons, *amici* respectfully request that the Court affirm the judgment below.

Respectfully submitted,

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APPENDIX

List of Amici Curiae

American-Arab Anti-Discrimination Committee ("ADC")

The American-Arab Anti-Discrimination Committee ("ADC") is the country's largest Arab American nonprofit grassroots civil rights organization. ADC has protected the Arab-American community for over thirty years against defamation, discrimination, racism, and stereotyping. ADC is dedicated to eradicating all forms of unlawful discrimination and defending the rights of all.

American Association for Access, Equity and Diversity ("AAAED")

Founded by equal opportunity professionals as the American Association for Affirmative Action ("AAAA"), the American Association for Access, Equity and Diversity ("AAAED") has four decades of leadership in promoting training, understanding, and advocacy of affirmative action and other equal opportunity laws to enhance the diversity tenets of access, inclusion, and equality.

American Association of People with Disabilities ("AAPD")

The American Association of People with Disabilities ("AAPD") is the nation's largest disability rights organization. AAPD strives for an America where all

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people can live in the most integrated setting possible, regardless of disability status or other defining characteristics including race and ethnicity.

American Jewish Committee (“AJC”)

The American Jewish Committee (“AJC”), a national organization with 22 regional offices, was founded in 1906 to protect the civil and religious rights of Jews. It is AJC’s guiding principle that the security and constitutional rights of any group can best be protected by helping to preserve the security and constitutional rights of all, including through the championing of fair housing opportunities. AJC joins this brief based on the keen awareness that prohibition of intentional discrimination, without regard to policies with unjustified discriminatory impacts, is by itself not sufficient to erase, within the foreseeable future, the accumulated burdens of a history of entrenched racial segregation. In joining this brief, AJC takes no position on, nor does the case at bar present an occasion to address, the standard for rebuttal of a fair housing claim based on disparate impact.

Anti-Defamation League (“ADL”)

The Anti-Defamation League (“ADL”) was founded in 1913 to combat anti-Semitism and other forms of discrimination, to advance goodwill and mutual understanding among Americans of all creeds and race, and to secure justice and fair treatment to all.

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Today, ADL is one of the world's leading civil and human rights organizations combating anti-Semitism and all types of prejudice, discriminatory treatment, and hate. As part of its commitment to protecting the civil rights of all persons, ADL has supported the passage of federal and state antidiscrimination laws, including mobilizing support for the Fair Housing Act of 1968. Recognizing the importance of being able to effectively enforce these laws, ADL has also filed *amicus* briefs in cases such as this one, which raise important legal issues regarding how such laws are interpreted.

Asian Americans Advancing Justice (“Advancing Justice | AAJC”)

Asian Americans Advancing Justice | AAJC (“Advancing Justice | AAJC”), founded in 1991, is a national non-profit, non-partisan organization in Washington, DC, working to advance the civil and human rights of Asian Americans and build and promote a fair and equitable society for all. Unequal access to quality, affordable housing is a key barrier to long-term economic stability and self-sufficiency for a disproportionately high percentage of Asian Americans and Pacific Islanders. Advancing Justice | AAJC has a long history of engagement in disparate impact litigation and is committed to ensuring that civil rights laws, like the Fair Housing Act, are fully implemented and vigorously enforced.

Asian Americans Advancing Justice – Asian Law Caucus (“ALC”)

Asian Americans Advancing Justice – Asian Law Caucus (“ALC”) was founded in 1972 with a mission to promote, advance, and represent the legal and civil rights of Asian and Pacific Islanders, with a particular focus on low-income members of those communities. Advancing Justice – ALC is part of a national affiliation of Asian American civil rights groups, with offices in Los Angeles, Chicago, Atlanta and Washington, DC. Advancing Justice – ALC has a long history of advocating for the housing rights of low-income immigrants through direct legal services, impact litigation, community education, and policy work, including in the fair housing arena.

Asian Americans Advancing Justice – Los Angeles (“APALC”)

Asian Americans Advancing Justice – Los Angeles (“APALC”) is the nation’s largest public interest law firm devoted to the Asian American, Pacific Islander, and Native Hawaiian communities. As part of its mission to advance civil rights, APALC is committed to enforcing the fair housing rights of its clients and employing the disparate impact standard under the Fair Housing Act in order to prove discrimination, which often is covert or the result of implicit bias, because it produces the same invidious results as overt discrimination.

Bend the Arc: A Jewish Partnership for Justice
("Bend the Arc")

Bend the Arc: A Jewish Partnership for Justice ("Bend the Arc") is the nation's leading progressive Jewish voice empowering Jewish Americans to be advocates for the nation's most vulnerable. Bend the Arc mobilizes Jewish Americans beyond religious and institutional boundaries to create justice and opportunity for all, through bold leadership development, innovative civic engagement, and robust progressive advocacy.

Center on Race, Poverty & the Environment
("CRPE")

The Center on Race, Poverty & the Environment ("CRPE") is a national non-profit environmental justice organization providing legal, organizing, and technical assistance to grassroots groups in low-income communities and communities of color. We are driven by the belief that all people have the right to live, work, play, and pray in a healthy environment, regardless of their race, place, or income. For over 25 years, CRPE has filed numerous administrative complaints under Title VI of the Civil Rights Act with the U.S. Environmental Protection Agency, and has litigated disparate impact claims under Title VI and the Fair Housing Act.

Charles Hamilton Houston Institute for Race and Justice at Harvard Law School (“CHHIRJ”)

The Charles Hamilton Houston Institute for Race and Justice at Harvard Law School (“CHHIRJ”) continues the unfinished work of Charles Hamilton Houston, one of the Twentieth Century’s most talented legal scholars and litigators. The CHHIRJ marshals resources to advance Houston’s dreams for a more equitable and just society. It brings together students, faculty, practitioners, civil rights and business leaders, community advocates, litigators, and policymakers to focus on, among other things, reforming criminal justice policies.

City Project

The City Project is a multicultural civil rights non-profit organization founded in 2000 whose mission is equal justice, democracy, and livability for all. Equal access to parks and recreation, public health, and environmental justice for communities of color and low income communities is a core part of its work.

Earthjustice

Earthjustice is a nonprofit environmental law organization. We are dedicated to protecting magnificent places and wildlife, advancing clean energy, combating climate change, and defending the right of all people to a healthy environment. For more than forty years, Earthjustice has achieved long-lasting protection of the environment through high-impact

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litigation. Earthjustice is committed to confronting environmental injustices facing communities of color and low-income communities across the United States in partnership with a diverse set of clients, including farmworkers, native tribes, and grassroots organizations fighting pollution in overburdened communities. We bring the expertise of a national organization to those who are most impacted – and who often are the most powerful voices for advocating solutions – while ensuring that our efforts are well-informed by local concerns.

Gay & Lesbian Advocates & Defenders (“GLAD”)

Founded in 1978, Gay & Lesbian Advocates & Defenders (“GLAD”) is New England’s leading public interest legal organization dedicated to ending discrimination based on sexual orientation, HIV status, and gender identity and expression. GLAD has litigated widely in both state and federal courts in all areas of the law in order to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals, and people living with HIV and AIDS.

Human Rights Campaign (“HRC”)

Human Rights Campaign (“HRC”), the largest national lesbian, gay, bisexual, and transgender political organization, envisions an America where lesbian, gay, bisexual, and transgender people are ensured of their basic equal rights, and can be open, honest, and safe at home, at work, and in the community.

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Institute for Science and Human Values, Inc.

The Institute for Science and Human Values, Inc. is an international nonprofit organization committed to social justice, planetary ethics, and developing shared values for the human family. This includes support for the democratic way of life, tolerance, and fairness, with a belief that humankind has a responsibility for the well-being of society, guaranteeing various rights including those of women, racial, ethnic, and sexual minorities.

Judge David L. Bazelon Center for Mental Health Law

The Judge David L. Bazelon Center for Mental Health Law is a national non-profit advocacy organization that provides legal assistance to individuals with mental disabilities. The Center was founded in 1972 as the Mental Health Law Project. Through litigation, policy advocacy, training, and education, the Center promotes the rights of individuals with mental disabilities to participate equally in all aspects of society, including community living, housing, health care, employment, education, and other areas. The Center has devoted much of its resources to enforcement of the Americans with Disabilities Act, the Fair Housing Act, and other laws in order to ensure that individuals with disabilities have opportunities to live in their own homes with supports.

LatinoJustice PRLDEF

LatinoJustice PRLDEF, which was founded in 1972 as the Puerto Rican Legal Defense and Education Fund, champions an equitable society. Using the power of the law together with advocacy and education, LatinoJustice seeks to protect opportunities for all Latinos to succeed in school and work, fulfill their dreams, and sustain their families and communities. During its 42-year history, LatinoJustice has advocated for and defended the constitutional rights and the equal protection of all Latinos under the law, and has litigated numerous cases challenging multiple forms of discrimination. In recent years, LatinoJustice has successfully challenged discriminatory housing practices targeting the right of Latino tenants to secure and maintain affordable housing.

National Action Network (“NAN”)

National Action Network (“NAN”) is one of the leading civil rights organizations in the nation, with chapters throughout the U.S. Founded in 1991 by Reverend Al Sharpton, NAN works within the spirit and tradition of Dr. Martin Luther King, Jr., to promote a modern civil rights agenda that includes the fight to extinguish poverty, inequality, and racial injustice. That effort is incomplete without working to end unnecessary obstacles to fair housing, and to ensure freedom from discrimination for all. So long as one group is denied equal treatment under the law,

the nation falls short of guaranteeing the right of all persons to life, liberty, and the pursuit of happiness.

National Center for Lesbian Rights (“NCLR”)

Founded in 1977, the National Center for Lesbian Rights (“NCLR”) is one of the nation’s leading legal advocacy groups for lesbian, gay, bisexual, and transgender people. NCLR has participated in many cases and advocacy efforts targeting unlawful housing discrimination. Because the Fair Housing Act prohibits discrimination based on gender identity and gender nonconformity, NCLR has a strong interest in ensuring that all methods of litigating against unlawful housing discrimination remain available under the Fair Housing Act, including cases based on the well-established disparate impact theory.

National Center for Transgender Equality

The National Center for Transgender Equality is a national organization founded in 2003, which works to advance opportunity and well-being for transgender people and their loved ones through policy advocacy and public education.

National Council of La Raza (“NCLR”)

The National Council of La Raza (“NCLR”) – the largest national Hispanic civil rights and advocacy organization in the United States – works to improve opportunities for Hispanic Americans. Through its

network of nearly 300 affiliated community-based organizations, NCLR reaches millions of Hispanics each year in 41 states, Puerto Rico, and the District of Columbia.

National Low Income Housing Coalition
("NLIHC")

The National Low Income Housing Coalition ("NLIHC") is dedicated solely to achieving socially just public policy that assures people with the lowest incomes in the United States have affordable and decent homes. NLIHC is a membership organization whose members include state and local housing coalitions, residents of public and assisted housing, nonprofit housing providers, homeless service providers, fair housing organizations, researchers, public housing agencies, private developers and property owners, local and state government agencies, faith-based organizations, and concerned citizens. Our work is focused on policies, programs, and practices that are in the best interests of people who receive and those who are in need of federal housing assistance, especially extremely low income people.

National Workrights Institute

The National Workrights Institute is a not-for-profit research and advocacy organization dedicated to increasing protection for human rights in the workplace.

Natural Resources Defense Council, Inc. (“NRDC”)

Natural Resources Defense Council, Inc. (“NRDC”) is a national, not-for-profit membership organization committed to the preservation, protection, and defense of the environment, public health, and natural resources. For over thirty-five years, NRDC has engaged in scientific analysis, public education, advocacy, and litigation on a wide range of environmental and health issues. NRDC has long been active in efforts to reduce the threats to human health and the environment from toxic chemicals and pollution, as well as addressing the statistical fact that pollution disproportionately burdens communities of color. To this end, NRDC has filed lawsuits and administrative complaints under Title VIII of the Civil Rights Act of 1968, Title VI of the Civil Rights Act of 1964, and the Fair Housing Act Amendments on behalf of environmental justice communities. NRDC maintains offices in New York, NY; Washington, DC; Chicago, IL; San Francisco and Santa Monica, CA; and Beijing, China. NRDC has more than 1.4 million members and online activists nationwide.

Sargent Shriver National Center on Poverty Law (“Shriver Center”)

The Sargent Shriver National Center on Poverty Law (“Shriver Center”) is a national non-profit and advocates on behalf of low-income families and individuals, representing them in a wide range of policy and legal matters including housing, employment, public

benefits, community and criminal justice, education, health care, and the manner in which these issues impact individuals' and groups' civil rights. The Shriver Center is committed to ensuring that the Fair Housing Act's intent and purpose are preserved and the rights of individuals with respect to housing are protected.

Women's League for Conservative Judaism
("WLCJ")

Women's League for Conservative Judaism ("WLCJ") is the largest synagogue based women's organization in the world. As an active arm of the Conservative/Masorti movement, we provide service to hundreds of affiliated women's groups in synagogues across North America and to thousands of women worldwide. We support efforts to alleviate discrimination.
