No. 11-1507

IN THE

# Supreme Court of the United States

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

v.

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

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

## BRIEF OF THE OPPORTUNITY AGENDA, AND THE POVERTY & RACE RESEARCH ACTION COUNCIL AS AMICI CURIAE IN SUPPORT OF RESPONDENTS


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## INTEREST OF THE AMICI CURIAE[1]

The Opportunity Agenda, a project of Tides Center, is a communications, research, and advocacy 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, or disability. The organization's recent activities have included research regarding the ill-effects of geographic isolation based on race and socioeconomic status. The subject matter of this case is therefore of keen interest to the organization. The Opportunity Agenda's parent organization, 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 Poverty & Race Research Action Council (PRRAC) is a civil rights policy organization based

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[1] Pursuant to Rule 37.6, counsel for amicus represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than amicus to its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief in the form of blanket consent letters filed with the Court.

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 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. 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.

The Asian Americans Advancing Justice – Asian Law Caucus ("Advancing Justice-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 has a long commitment

and record of advocating for the equal housing rights of low-income immigrant families through direct legal services, impact litigation, community education, and policy work.

The Asian Americans Advancing Justice – Chicago ("Advancing Justice-Chicago") is a pan-Asian, non-partisan, not-for-profit organization located in Chicago, Illinois, whose mission is to empower the Asian American community through advocacy, coalition-building, education, and research. Advancing Justice-Chicago's programs include community organizing, leadership development, and legal advocacy. Founded in 1992, Advancing Justice-Chicago is deeply concerned about the discrimination and exclusion faced by Asian Americans, including unequal access to quality, affordable housing. Advancing Justice-Chicago is committed to ensuring civil rights laws, like the Fair Housing Act, are fully implemented and vigorously enforced.

The Asian Americans Advancing Justice – Los Angeles ("Advancing Justice-LA"), 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, Advancing Justice-LA is committed to enforcing the fair housing rights of Asian Americans, Pacific Islanders, Native Hawaiians, and other communities of color and employing the disparate impact standard under the Fair Housing Act in order to ameliorate the invidious results of covert, implicit bias, which continues to stratify our communities along racial lines and results in entrenched inequity and lack of opportunity for people of color.

## SUMMARY OF ARGUMENT

While much in our country has changed since the Fair Housing Act, Pub. L. No. 90-284, Title VIII, 82 Stat. 81 (1968) (the "Fair Housing Act" or the "Act") was passed, the problems that Congress sought to address in that legislation remain significant and varied. The Act emerged from Congress's recognition of housing as a crucial determinant of societal equality and opportunity, and its knowledge that barriers to equal housing opportunity were firmly embedded in the nation's structure and psyche. Congress understood that dislodging them would demand a broadly fashioned legal remedy—one that would address patterns embedded over generations.

Accordingly, the text, history, and purpose of the Act convey Congress's intent to prohibit both intentional discrimination and practices having the unjustified or unnecessary effect of discriminating because of race, color, religion, sex, familial status or national origin. The Act's broad remedial purpose, combined with the text of the relevant provision, evinces an inclusive measure plainly intended to encompass disparate impact discrimination. The 1988 amendments to the Act were intended to strengthen the law, and reaffirmed that scope, as did the narrow exceptions to the Act's coverage that clearly assume a disparate impact cause of action. Interpreting the Fair Housing Act to include a disparate impact component is also consistent with the United States' treaty commitments, and with international consensus.

The Act's disparate impact component remains necessary to protect crucial anti-discrimination and desegregative interests that Congress targeted in passing and amending the Act. Extensive research and experience document the importance of equal housing opportunity to more equal educational achievement, access to employment, personal and environmental health, and other aspects of a fulfilling and stable life. The benefits of nondiscrimination and integration in housing also accrue to communities and the nation as a whole, including through the reduction of stereotypes and bigotry, and the promotion of broader prosperity.

The disparate impact standard is essential to realizing those benefits by addressing the myriad and evolving barriers to fair housing that continue to exist in the 21st century. Four decades of judicial rulings, agency determinations, and applied research make clear that the disparate impact and treatment standards are mutually needed to fulfill the letter and spirit of the Fair Housing Act.

## ARGUMENT

### I. PROHIBITING DISPARATE IMPACT DISCRIMINATION IS CRUCIAL TO PROTECTING FAIR HOUSING AS INTENDED BY CONGRESS

In crafting the Fair Housing Act, Congress was aware that exclusion from housing opportunities takes many, often subtle, forms. It recognized, too, that housing discrimination and residential segregation, if not stopped, would be self-perpetuating and replicated in communities across the country. Congress accordingly crafted legislation that would prohibit both intentionally discriminatory actions and policies and practices having an unjustified discriminatory impact. Congress reaffirmed this interpretation in 1988, based on two decades of experience and judicial consideration. The Department of Housing and Urban Development ("HUD"), the agency charged by Congress with enforcing the Act, has adhered to that interpretation historically in its application of the Act and in its regulation formalizing a consistent allocation of burdens of proof under the standard.

#### A. The Text, Purpose, and Structure of the Fair Housing Act Prohibit Disparate Impact Discrimination

Beginning with the declaration that "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States," 42 U.S.C. § 3601, the Fair Housing Act established an ambitious purpose and a "broad remedial intent," *Havens*

*Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982). Because Congress was aware that housing discrimination takes myriad forms and results in extensive harms, it enacted legislation broad enough to prohibit the complete range of actions, policies, and practices that unnecessarily exclude Americans from housing based on the covered human characteristics.

The provision at issue here makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer … or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a).

As with provisions of Title VII and the Age Discrimination in Employment Act ("ADEA") that this Court has found to prohibit disparate impact discrimination, *see generally* 42 U.S.C. § 2000e-2(a)(2) (Title VII); 29 U.S.C. § 623(a)(2) (ADEA), the phrase "otherwise make unavailable or deny" in the Fair Housing Act focuses on effects and thus encompasses disparate impact as well. *Smith v. City of Jackson*, 544 U.S. 228, 236 (2005). Indeed, the similarity of text and purpose between the Fair Housing Act (Title VIII) and Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, et seq.) underscores Congress's intent that the two laws be treated similarly, and the propriety of interpreting the Fair Housing Act to include a disparate impact cause of action. *See*, *e.g.*, *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 208-09 (1972) (interpreting the Fair Housing Act based on Title VII precedent); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 935 (2d Cir.) (recognizing a Title VIII disparate impact cause of action based on, *inter*

*alia*, "the parallel between Title VII and Title VIII"), *aff'd in part per curiam*, 488 U.S. 15 (1988).

The term "because of race" in no way limits the reach of the statute to intentional discrimination. This and other courts have found other provisions using that language to reach disparate impact discrimination. *See*, *e.g.*, *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971) (regarding Title VII, 42 U.S.C. § 2000e-2); *Smith v. City of Jackson*, 544 U.S. 228, 234-35 (2005) (regarding ADEA § 4(a)(2)). The terms "because of race" and "discrimination" each can embrace the full range of policies, practices, and decisions that unnecessarily exclude, disadvantage, or segregate Americans based on the human characteristics covered by the civil rights laws.

The Act, moreover, contains exemptions from liability that would have no purpose absent a disparate impact cause of action. *See* 42 U.S.C. §§ 3607(b)(4) (exemption for conduct against a person who has been convicted "of the illegal manufacture or distribution of a controlled substance"), 3607(b)(1) (exemption for "reasonable local, State or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling"), 3605(c) (exemption permitting appraiser "to take into consideration factors other than race, color, religion, national origin, sex, handicap or familial status"). Reading the Act to prohibit only intentional discrimination would render these exceptions superfluous, contrary to this Court's frequent admonitions. *See*, *e.g.*, *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Or.*, 515 U.S 687, 698 (1995) ("A reluctance to treat statutory terms as surplusage supports the reasonableness of

the Secretary's interpretation."); *accord Duncan v. Walker*, 533 U.S. 167, 174 (2001); *see also Smith*, 544 U.S. at 238-39 (inclusion of the "reasonable factors other than age" provision of the ADEA supports the availability of disparate impact, as it is "in cases involving disparate-impact claims that the RFOA provision plays its principal role by precluding liability").

### B. The Court Should Defer to HUD's Authoritative Interpretation of the Act

As the federal agency principally charged with interpreting and enforcing the Fair Housing Act, *see* 42 U.S.C. §§ 3614(a) (authorizing regulations), 3610 (authorizing adjudication of complaints), 3612 (same), HUD's consistent interpretation of section 804(a) to include a disparate impact claim resolves any ambiguity in its language. Most recently, through regulations effective March 2013, HUD reiterated its long-standing recognition of disparate impact liability under the Act. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013). The rule confirms unequivocally that the Act may be violated by a practice that has a discriminatory effect, "even if the practice was not motivated by a discriminatory intent." *Id.* at 11,482. In enacting this regulation, HUD recognized that it is only through the elimination of practices having an unnecessary disparate impact or that unnecessarily perpetuate or reinforce segregated housing patterns that the Act's "intended goal to advance equal housing

opportunity and achieve integration can be realized." *Id.* at 11,466.

This regulation is consistent with HUD's longstanding and continuous interpretation of the Act to include a disparate impact cause of action. *See Meyer v. Holley*, 537 U.S. 280, 287-89 (2003). HUD has consistently interpreted section 804(a) to cover disparate impact discrimination, including through formal adjudication, *see*, *e.g.*, *HUD v. Twinbrook Vill. Apartments*, Nos. 02-00-0256-8 et al., 2001 WL 1632533, at *17 (HUD ALJ Nov. 9, 2001); *HUD v. Carlson,* No. 08-91-0077-11995 WL 365009, at *14 (HUD ALJ June 12, 1995); *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); *see also HUD v. Mountain Side Mobile Estates P'ship*, Nos. 08-92-0010-1 et al., 1993 WL 307069, at *5 (HUD ALJ July 19, 1993), *aff'd in relevant part*, 56 F.3d 1243 (10th Cir. 1995), and in guidance on applying the provision to the fair-lending context, Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18,266, 18,269-70 (Apr. 15, 1994). HUD's recognition of a disparate impact cause of action in its regulations and its formal adjudications warrants deference under *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), and reinforces the thorough reasoning of its determination. *See United States v. Mead Corp.*, 533 U.S. 218, 230 (2001) (*Chevron* deference is warranted for "the fruits of notice-and-comment

rulemaking or formal adjudication"); *id.* at 230 n.12 (citing cases).

### C. The Circumstances Leading to the Passage of the Fair Housing Act, Including Amendments in 1988, Reinforce Its Aim to Address Disparate Impact Discrimination

The context and history surrounding the Fair Housing Act's passage affirm its aim to prohibit the full range of discrimination, including disparate impact. In considering the Act, Congress was made aware of the harmful results of exclusion: the injuries that arise from residential isolation and inequity. The nationwide impact of these injuries figured prominently in the *Report of the National Advisory Commission on Civil Disorders*[2] released in February of 1968. *See* Report of the National Advisory Commission on Civil Disorders 467-82 (1968) (the "Kerner Commission Report"). Because opposition to fair housing was so deeply entrenched, the Act's passage was the result of significant struggle and sacrifice, which President Lyndon Johnson characterized in his signing statement as "a long and stormy trip." Remarks Upon Signing the Civil Rights Act, 1 Pub. Papers 509, 509 (Apr. 11, 1968).

Unlike school segregation and discrimination in public accommodations, which were largely tied to the Southern Jim Crow system, residential

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[2] The National Advisory Commission on Civil Disorders was established by President Johnson on July 29, 1967. *See* Exec. Order No. 11,365, 32 Fed. Reg. 11, 111 (Aug. 1, 1967).

segregation, racialized ghettos, and the discriminatory practices that enabled them were most prevalent in the North and West, and were greatly facilitated by government policies on the federal, state, and local level. See Kenneth B. Clark, *Dark Ghetto; Dilemmas of Social Power* 22 (1965) (describing "the Negro ghetto" as "a Northern urban invention"). Northern obstacles to fair housing, moreover, correctly were understood to include a mix of intentionally discriminatory decisions, the continuing effects of past discrimination, and neutral policies that interact with them to both perpetrate and perpetuate discrimination. *See*, *e.g.*, Kerner Commission Report, *supra*, at 467-82 (noting the role of intentional discrimination and segregation, but also unequal code enforcement, land use, lack of maintenance and investment, and other factors in constructing and perpetuating African-American ghettos); Douglas S. Massey & Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* 58 (1993) (describing the combined effects of real estate industry discrimination, individual prejudice, federally sponsored financial discrimination, disparate "urban renewal" efforts, and public housing authority policies contributing to segregation).

One well-known example of past governmental action that reaches forward across the decades is the legacy of the Home Owners' Loan Corporation, a federal program for refinancing mortgages created in the 1930s that institutionalized "redlining" practices in which neighborhood lending risk was rated according to race. These race-based credit policies were also

adopted by the Federal Housing Administration and Veterans Administration in the 1940s and 1950s—when the suburbanization of America began and the "Great Migration" of African Americans to the North was at a high point. *See* Leonard S. Rubinowitz & Ismail Alsheik, *A Missing Piece: Fair Housing and the 1964 Civil Rights Act*, 48 How. L.J. 841, 856-59 (2005). The Federal Housing Administration, which guaranteed loans made by private banks, shaped the residential housing market, reinforcing segregation and disinvestment in black communities. *See* Massey & Denton, *supra*, at 52-54. The resultant lack of loan capital "flowing into minority areas made it impossible for owners to sell their homes, leading to steep declines in property values and a pattern of disrepair, deterioration, vacancy, and abandonment." *Id*. at 55.

The extreme residential segregation that resulted has often proved self-perpetuating, with identifiable minority communities becoming the targets of concentrated poverty-level housing and exploitative practices. *See id.* at 2, 14, 54-55. Modern-day implications include "reverse redlining," in which "a string of discriminatory lending products were targeted into these historically undercapitalized and segregated communities." john a. powell & Jason Reece, *The Future of Fair Housing and Fair Credit: From Crisis to Opportunity*, 57 Clev. St. L. Rev. 209, 222 (2009). These segregated communities "remain entrenched across the nation, presenting opportunities for unscrupulous lenders to focus high cost lending on traditionally underserved populations." Nat'l Cmty. Reinvestment Coal.

(NCRC), The Opportunity Agenda & Poverty & Race Research Action Council (PRRAC), *Homeownership and Wealth Building Impeded: Continuing Lending Disparities for Minorities and Emerging Obstacles for Middle-Income and Female Borrowers of All Races* 6 (2006), *available at* http://opportunityagenda.org/files/field_file/Subprime%20Lending%20Report_0.PDF.

Both before and after the Act's passage, moreover, large-scale, high-density public and affordable housing—though often well-intentioned—exacerbated discriminatory housing patterns, as such housing generally was constructed in black neighborhoods and away from predominantly white areas with quality schools and other opportunities. *See* Massey & Denton, *supra*, at 56, 229; *see also*, *e.g.*, *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3d Cir. 1977). Today, these patterns are perpetuated by, among other decisions, exclusionary zoning practices that operate to block or limit the growth of housing likely to be accessible to minorities (such as multifamily rentals), thus freezing the status quo. *See*, *e.g.*, john a. powell, *Reflections on the Past, Looking to the Future: The Fair Housing Act at 40*, 41 Ind. L. Rev. 605, 614 (2008). In short, the interaction of past discrimination with contemporary, facially neutral policies and practices thwarts equal housing opportunity for large numbers of Americans.

The self-perpetuating nature of these patterns, even as more people of color have moved into the middle class, is well documented. *See* Massey & Denton, *supra*, at 2 (residential segregation is self-perpetuating, for in segregated

neighborhoods, "[t]he damaging social consequences that follow from increased poverty are spatially concentrated . . . creating uniquely disadvantaged environments that become progressively isolated—geographically, socially, and economically—from the rest of society."); *accord* Jason Corburn, *Toward the Healthy City: People, Places, and the Politics of Urban Planning* 77 (2009); *cf. Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 265 (1991) (Marshall, J., dissenting) (noting "the roles of the State, local officials, and the Board in creating what are now self-perpetuating patterns of residential segregation")[3]

In crafting the Fair Housing Act, Congress recognized this mix of intentional and facially neutral forces that contribute to housing discrimination. See, *e.g.*, 114 Cong. Rec. 2277 (1968) (statement of bill's sponsor, Sen. Mondale) ("In part, this inability [of African Americans to move to higher opportunity neighborhoods] stems from a refusal by suburbs and other communities to

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[3] *See also* Camille L. Zubrinsky & Lawrence Bobo, *Prismatic Metropolis: Race and Residential Segregation in the City of the Angels*, 25 Soc. Sci. Res. 335, 339 (1996); *see generally* David J. Harris & Nancy McArdle, Metro Boston Equity Initiative, Harvard Civil Rights Project, *More Than Money: The Spatial Mismatch Between Where Homeowners of Color in Metro Boston Can Afford to Live and Where They Actually Reside* (2004), *available at* http://civilrightsproject.ucla.edu/research/metro-and-regional-inequalities/metro-boston-equity-initiative-1/more-than-money-the-spatial-mismatch-between-where-homeowners-of-color-in-metro-boston-can-afford-to-live-and-where-they-actually-reside/harris-spatial-mismatch-boston-one-2004.pdf.

accept low-income housing," as well as from "the racially discriminatory practices not only of property owners themselves but also of real estate brokers," and "the policies and practices of agencies of government at all levels." (quoting U.S. Comm'n on Civil Rights, *A Time to Listen . . . A Time to Act: Voices From the Ghettos of The Nation's Cities* 60 (1967))); *id.* at 2278 (statement of Sen. Mondale) ("The record of the U.S. Government in that period [the immediate post World War II era] is one, at best, of covert collaborator in policies which established the present outrageous and heartbreaking racial living patterns . . . ."); *id.* at 2526-27 (statement of Sen. Brooke) (detailing the role of the federal and state governments, as well as private discrimination, in creating, institutionalizing, and perpetuating contemporary housing discrimination and segregation).

Congress realized that, accordingly, reversing such long-standing, deeply-embedded patterns would require legislation that disrupted both intentional and unintentional patterns and practices. [4] *See*, *e.g.*, 114 Cong. Rec. 2524 (statement of Sen. Brooke) ("Unless we can lift that

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[4] In this respect, Title VIII and Title VII similarly were intended to address deeply embedded, self-perpetuating harms. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971) ("The objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." (citation omitted)).

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." (emphasis added)); *id*. at 2534-36 (summary brief by the U.S. Department of Justice introduced 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 insidious past state and federal government conduct (emphasis added)).

When Congress amended the Act in 1988, it made clear in myriad ways that the goal of "fair housing through the United States" was far from being achieved and that practices with an unintentional but discriminatory effect were among the chief remaining challenges. In 1988, finding that "highly segregated housing patterns still exist across the Nation," 134 Cong. Rec. H4604 (daily ed. June 22, 1988) (statement of Rep. Rodino), Congress expanded and strengthened the Act. The 1988 amendments added new provisions barring discrimination based on familial status and disability, creating statutory exemptions that presume the availability of disparate impact causes of action (*see supra* pp. 9-10), and enhancing HUD's authority to interpret and implement the Act. *See* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619. At the same time, Congress specifically rejected an amendment that would have required proof of intentional discrimination in disparate impact challenges to zoning decisions. *See* H.R. Rep. No. 100-711, at 89 (dissenting view of Rep. Swindall).

Additionally, Congress made clear its intent that protection from unnecessary discriminatory effects be extended to the newly covered class of individuals with disabilities, including through the reasonable accommodations provision. As Senator Harkin noted, for example, "[d]iscrimination in housing on the basis of handicap takes many forms. One form of discrimination . . . results from thoughtlessness and indifference. Policies or acts that have the effect of causing discrimination can be just as devastating as other forms of discrimination. For example, a person using a wheelchair is just as effectively excluded from the opportunity to live in a particular dwelling by a policy that provides 'no wheeled vehicles may be used on carpets' or by the design and construction of a dwelling that results in a lack of access into a unit because the door ways are too narrow." 134 Cong. Rec. S10,463 (daily ed. Aug. 1, 1988) (statement of Sen. Harkin). The Amendments' authors further clarified that the amendment's new "antidiscrimination provisions [applicable] to purchasers of mortgage loans in the secondary mortgage market . . . [would] not preclude those purchasing mortgage loans from taking into consideration factors *justified by business necessity*." 134 Cong. Rec. S10,549 (daily ed. Aug. 2, 1988) (statement of Sen. Sasser) (regarding current 42 U.S.C. § 3605) (emphasis added).

In enacting these amendments, Congress was aware that the Act, including section 804(a), had uniformly been interpreted by all of the courts of appeals that had then considered the issue to encompass disparate impact claims. *See*, *e.g.*, *Fair Housing Amendments Act of 1987: Hearings on S.*

*558 Before the Subcomm. on the Constitution of the Sen. Comm. on the Judiciary*, 100th Cong. (1987) (statement of Prof. Robert Schwemm, Univ. of Ky. Law Sch.) (noting that the decisions of nine of the twelve Federal Courts of Appeals "reflect the strong consensus, now approaching unanimity, that [T]itle VIII should be construed to prohibit discriminatory effects"); *see also* H.R. Rep. No. 100-711, at 21 (House Judiciary Committee report citing two circuit court decisions holding that adults-only housing may state a claim of racial discrimination under Title VIII); *id.* at 90 (discussing Second Circuit's decision recognizing disparate impact claims without a finding of discriminatory intent by the district court). Congress thus acknowledged the judiciary's recognition of disparate impact and, far from altering that interpretation, implicitly ratified it in its discussion and amendment of the Act.

## II. THE FAIR HOUSING ACT'S DISPARATE IMPACT COMPONENT PROTECTS CRUCIAL ANTI-DISCRIMINATION INTERESTS IN THE 21ST CENTURY

As a substantial body of evidence documents, housing discrimination is still a living force, and its eradication is in the nation's vital interest. Its myriad and often subtle expressions require that the Fair Housing Act remain endowed with its full reach, including over actions that result in an unjustified disparate impact.

### A. Contemporary Housing Decisions Often Perpetuate Discriminatory

**Harms that the Act Was Intended to Address.**

As the Court recognized in *Trafficante v. Metro. Life Ins. Co.,* 409 U.S. 205 (1972), the presence or absence of equal housing opportunity profoundly affects, for many Americans, "'the very quality of their daily lives.'" *Id.* at 211 (quoting *Shannon v. HUD*, 436 F.2d 809, 818 (3d Cir. 1970)); *see also Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 111 (1979) (recognizing the "harms flowing from the realities of a racially segregated community," such as school segregation and reduced property values); 114 Cong. Rec. 2529 (statement of Sen. Mondale) (statement of Sen. Tydings) ("Racial discrimination in housing ties almost all nonwhites to an environment which is not conducive to good health, educational advancement, cultural development, or to improvement in general standards of living."). For the goals and vision of the Act to be realized it must cover the full spectrum of discriminatory policies.

When Congress amended the Fair Housing Act in 1988, it continued to recognize fair housing as a crucial access point to equal opportunity more broadly. As co-sponsor Senator Arlen Spector stated, citing the social science findings of Dr. Douglas Massey: "due to residential segregation, middle class blacks are not free to live where they choose or where their income allows. They are forced to live in a disadvantaged environment, subject to higher crime rates, less healthy surroundings and inferior school systems." 134 Cong. Rec. S10,460 (daily ed. Aug. 1, 1988) (statement of Sen. Specter) (citing statement of Douglas S. Massey Before the Banking, Finance,

and Urban Affairs Subcomm. on Housing and Community Development). Similarly, co-sponsor Senator Edward Kennedy noted that "[r]esidential segregation is the primary obstacle to meaningful school integration. ." *Id.* at S10,454; *see also* 114 Cong. Rec. 2277 (statement of Sen. Mondale) ("To many slum residents, just as to other Americans, moving to a better neighborhood may mean more than obtaining better housing. For one thing, it may give their children the opportunity to grow up in a healthier atmosphere." (quoting U.S. Comm'n on Civil Rights, *supra*, at 60)).

These statements make clear that concerns over the negative social impacts of discrimination and segregation were intrinsic to the Fair Housing Act at the time of its passage and amendment. A large body of social science research and practical experience continues to reaffirm the extraordinary societal value of equal housing opportunity, which is protected, at least in part, by the Fair Housing Act's disparate impact standard. Now, as in 1968 and 1988, the place where we live is a crucial determinant of our access to opportunity and social capital, including education, employment, environmental quality, and physical health. Discrimination in housing, both intentional and unintentional, continues to impede equal access to these vital aspects of opportunity in this nation.

Despite the progress that has been made over the last several decades to increase racial and ethnic integration in housing, "highly segregated housing patterns still exist across the Nation." 134 Cong. Rec. H4604 (daily ed. June 22, 1988) (Statement of Rep. Rodino). Among these patterns, low-income Americans of color are still much more

likely than low-income white Americans to be relegated to neighborhoods of extreme and concentrated poverty.[5] That is, *controlling for income*, people of color disproportionately suffer the harmful effects resulting from the confluence of racial and socioeconomic isolation, and remain burdened by the lack of social resources and opportunities that accompany that condition. Recent data reveal 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*."[6]. As one study analyzing national Census data noted, "[a]mong the poor, only one quarter of whites live in poverty areas, compared to half of Asians and two-thirds of blacks and Latinos . . . . Almost half of poor whites and over half of poor non-Latino whites live in the suburbs, compared to just 24% of poor Asians, 15% of poor Latinos, and 10% of poor blacks."[7]

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[5] See The Opportunity Agenda, *The State of Opportunity in America* 118-19 (2006), *available at* http://opportunityagenda.org/static/report/STATE%20OF%20OPPORTUNITY%20REPORT.PDF; *see also* John R. Logan, *Separate and Unequal: The Neighborhood Gap for Blacks, Hispanics and Asians in Metropolitan America* (2011), *available at* www.s4.brown.edu/us2010/Data/Report/report0727.pdf.

[6] Logan, *supra*, at 1 (emphasis added).

[7] Nancy McArdle, Civil Rights Project, Harvard Univ., *Beyond Poverty: Race and Concentrated-Poverty Neighborhoods in Metro Boston* 7 (2003) (citation omitted), available at http://civilrightsproject.ucla.edu/research/metro-and-regional-inequalities/metro-boston-equity-initiative-1/beyond-poverty-race-and-concentrated-poverty-

*(cont'd)*

The effects on individuals of living in neighborhoods of high poverty concentration are overwhelmingly adverse, restricting access to education, employment, and public services, and negatively impacting health. *See*, *e.g.*, David R. Williams & Chiquita Collins, *Racial Residential Segregation: A Fundamental Cause of Racial Disparities in Health*, Pub. Health Rep., vol. 116, Sept.-Oct. 2001, at 404. Conversely, access to low-poverty, "high opportunity" neighborhoods has the potential to improve the life chances of inhabitants, and particularly young people, through several distinct mechanisms. These include stronger institutional resources, such as higher quality schools, youth programs, and health services; more positive peer-group influences; reduced violence; and more effective parenting due to reduced stress and greater employment. *See* Xavier De Souza Briggs et al., *Moving to Opportunity: The Story of an American Experiment to Fight Ghetto Poverty* 93 (2010); *cf. Report of the Bipartisan Millenial Housing Commission* 10 (2002) ("Decent, affordable, and accessible housing fosters self-sufficiency, brings stability to families and new vitality to distressed communities, and supports overall economic growth."); Jens Ludwig et al., *Neighborhoods, Obesity, and Diabetes — A Randomized Social Experiment*, 365 New Eng. J. Med. 1509, 1509 (2011) ("The opportunity to move from a neighborhood with a high level of poverty to one with a lower level of poverty was associated

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neighborhoods-in-metro-boston/mcardle-beyond-poverty-boston-2003.pdf.

with modest but potentially important reductions in the prevalence of extreme obesity and diabetes.").

In terms of education, in most communities, the location of a person's residence is a primary determinant (if not the sole determinant) of school assignment, which means that equal housing opportunity is critical to educational opportunity and achievement.[8] Research has shown that, on average, low-income students attending middle-class schools perform higher than middle-class students attending low-income schools.[9] Additionally, students of all racial backgrounds tend to perform better academically (as 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.[10]

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[8] *See*, *e.g.*, Gary Orfield & Chungmei Lee, Civil Rights Project, Harvard Univ., *Why Segregation Matters: Poverty and Educational Inequality* (2005), *available at* http://bsdweb.bsdvt.org/district/EquityExcellence/Research/Why_Segreg_Matters.pdf; *see also 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).

[9] Richard D. Kahlenberg, Century Found., *Can Separate Be Equal? The Overlooked Flaw at the Center of No Child Left Behind* (2004), *available at* http://tcf.org/assets/downloads/tcf-kahlenberg_separaterc.pdf.

[10] Roslyn Arlin Mickelson, Nat'l Coal. on Sch. Diversity, *Exploring the School-Housing Nexus: A Synthesis of Social Science Evidence* (2011), *available at* http://school-diversity.org/pdf/DiversityResearchBriefNo7.pdf; *see also* Susan Eaton, Nat'l Coal. on Sch. Diversity, *How the Racial and Socioeconomic Composition of Schools and Classrooms*

*(cont'd)*

Equality of housing opportunity also helps to improve health outcomes. This is because neighborhood characteristics determine both exposure to health risks and access to health care resources. Research demonstrates that, controlling for income and other relevant variables, concentrated communities of color bear a disproportionate share of the nation's environmental and health hazards.[11] The racially

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*Contributes to Literacy, Behavioral Climate, Instructional Organization and High School Graduation Rates* 1 (2010), available at http://school-diversity.org/pdf/DiversityResearchBriefNo2.pdf (detailing the "profound" negative effects of attending high poverty and racially concentrated schools (citing Geoffrey Borman &Maritza Dowling, *Schools and Inequality: A Multilevel Analysis of Coleman's Equality of Educational Opportunity Data*, 112 Teachers Coll. Rec. 1201 (2010))); Orfield & Lee, *supra*, at 15; s*ee generally,* Heather Schwartz, *Housing Policy Is School Policy: Economically Integrative Housing Promotes Academic Success in Montgomery County, Maryland*, (Century Foundation, 2010) (finding that Montgomery County's "inclusionary zoning program" benefitted low-income students by exposing them to low-poverty settings and schooling).

[11] *See*, *e.g.*, Manuel Pastor et al., Ctr. for Justice, Tolerance & Cmty., *Still Toxic After All These Years: Air Quality and Environmental Justice in the Bay Area* (2007), *available at* http://cjtc.ucsc.edu/docs/bay_final.pdf; Joint Ctr. for Political & Econ. Studies, *Breathing Easier: Community-based Strategies to Prevent Asthma* 2 (2004), *available at* http://jointcenter.org/hpi/sites/all/files/JointCenter-Asthma.pdf; U.S. Comm'n on Civil Rights, *Not in My Backyard: Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice* 13 et seq. (2003), *available at* www.usccr.gov/pubs/envjust/ej0104.pdf.

identifiable character of communities has been found to be correlated with land use and facility siting; transport of hazardous and radioactive materials; public access to environmental services, planning, and decision-making; health assessments and community impacts; air quality and health risks; childhood lead poisoning; childhood asthma; pesticide poisoning; and occupational accidents and illnesses.[12] Residential segregation is related to elevated risks of adult mortality, infant mortality, and tuberculosis.[13] Adjusting for income, education, occupational status, and behavioral risk factors, moreover, people residing in segregated neighborhoods have a relatively high risk of heart disease.[14]

Unequal neighborhood conditions—such as crime rates, park space, safe pedestrian routes, and grocery stores—impact physical and mental health and the ability to engage in healthy behaviors.[15] Additionally, access to health care facilities and medicine are unequal across racially isolated and inclusive neighborhoods.[16] For example, health care facilities are more likely to close in poor and

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[12] *Just Transportation, in Just Transportation: Dismantling Race and Class Barriers to Mobility* 10 (Robert D. Bullard & Glenn S. Johnson eds., 1997).

[13] *See* Williams & Collins, *supra*, at 409.

[14] *Id*.

[15] *See*, *e.g.*, *id*. at 410.

[16] *Id*. at 411.

minority communities than in other areas.[17] Racially isolated minority communities are also more likely to be stranded without adequate municipal services, which often bypass segregated communities.[18] *See*, *e.g.*, *Comm. Concerning Cmty. 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); *Lopez v. City of Dallas*, No. 3:03-CV-2223-M, 2004 WL 2026804 (N.D. Tex. Sept. 9, 2004). Removing unequal and unnecessary barriers to high opportunity neighborhoods thus promotes better and more equitable health opportunities, as intended by Congress.[19]

Equal housing opportunity is also crucial to expanding access to skill-appropriate jobs. Racial and ethnic differences in income derive partially from a spatial mismatch between job sites and

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[17] *Id.*

[18] Nat'l Research Council, *Governance and Opportunity in Metropolitan America* 31 (Alan Altshuler et al. eds., 1999) (citing Nancy Burns, *The Formation of American Local Governments; Private Values in Public Institutions* (1994)).

[19] *See*, *e.g.*, 134 Cong. Rec. S10,460 (daily ed. Aug. 1, 1988) ("due to residential segregation," middle class African Americans "are forced to live in a disadvantaged environment, subject to higher crime rates, less healthy surroundings and inferior school systems.") (statement of Sen. Specter); 114 Cong. Rec. 2277 ("To many slum residents, just as to other Americans, moving to a better neighborhood may mean more than obtaining better housing. For one thing, it may give their children the opportunity to grow up in a healthier atmosphere.") (statement of Sen. Mondale, quoting U.S. Comm'n on Civil Rights, *supra*, at 60).

minority residences, largely due to the relocation of high-paying, low-skilled jobs away from the cities and older suburbs[20]. This problem was of particular concern to the Act's drafters. *See, e.g.,* 114 Cong. Rec. 2276 (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."). Where blacks, Latinos, and Asian Americans are most segregated from whites residentially, they also experience the greatest mismatches between their residences and available jobs.[21] The very fact of racial isolation also limits the job and other opportunities available to minorities by constricting their social networks.[22] Moreover, these harms accrue to society as a whole, not just to minorities, as this Court recognized when it held that both African American and white residents of an apartment complex had standing under the Act to challenge the racial steering practices of their landlord because all races may be

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[20] *See* Michael A. Stoll, Brookings Inst., *Job Sprawl and the Spatial Mismatch Between Blacks and Jobs* (2005), *available at* www.brookings.edu/~/media/Files/rc/reports/2005/02metropolitanpolicy_stoll/20050214_jobsprawl.pdf.

[21] Lisa Robinson & Andrew Grant-Thomas, Civil Rights Project, Harvard Univ., *Race, Place, and Home: A Civil Rights and Metropolitan Opportunity Agenda* 25 (2004).

[22] *See* Massey & Denton, *supra*, at 109, 161-62.

harmed when they are deprived of the "social benefits of living in an integrated community" and "the 'benefits from interracial associations.'" *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 210 (1972); *accord Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 111-12 (1979); *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 376 (1982) (allegations "that the racial steering practices of petitioners have deprived them of 'the right to the important social, professional, business and economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices'" (citation omitted) are sufficient to support standing under Act).

Over four decades of fair housing jurisprudence makes clear that the disparate impact standard is both necessary and appropriate to address these discriminatory harms. As the Court of Appeals aptly stated in *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977):

> 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.'" … Moreover, a requirement that the plaintiff prove discriminatory intent before relief can be granted under the statute is often a burden that is impossible to satisfy. "[I]ntent, motive and purpose are elusive subjective concepts," … and attempts to discern the intent of an entity such as a municipality are

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

*Id.* at 1289-90 (alteration in original) (citations omitted). *See also United States v. City of Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974) ("we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme" (citation omitted)); *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49 (1st Cir. 2000) ("[T]he consensus among the circuits that have discussed this issue in the housing context is that the Fair Housing Act prohibits actions that have an unjustified disparate racial impact, and we find their reasoning persuasive." (footnote omitted)); *Jackson v. Okaloosa Cnty.*, 21 F.3d 1531, 1543 (11th Cir. 1994) ("a showing of a significant discriminatory effect suffices to demonstrate a violation of the Fair Housing Act"); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934 (2d Cir.), *aff'd in part per curiam*, 488 U.S. 15 (1988) ("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"); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 147 (3d Cir. 1977) (noting that "the stated

congressional purpose demands a generous construction of Title VIII" and that "[t]he Supreme Court has noted the need to construe both Title VII and Title VIII broadly so as to end discrimination"); *see also Gladstone Realtors*, 441 U.S. at 107, 111 (1979) (the Court has repeatedly noted that "'[t]here can be no question about the importance' to a community of 'promoting stable, racially integrated housing.'" (alteration in original)) (quoting *Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85, 94 (1977)).

This need for the disparate standard remains clear today. In communities around the country, existing discriminatory housing patterns continue the legacy of past segregation and housing discrimination. These patterns are perpetuated through the confluence of multiple factors such as municipal zoning, land-use, lending, and housing-siting practices and decisions. *See Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 711-14 (9th Cir. 2009) (reinstating claims under the Act that defendants' comprehensive tax and development plan allegedly had the effect of failing to provide key municipal services to predominantly Latino neighborhoods); *Dews v. Town of Sunnyvale*, 109 F.Supp. 2d 526, 571-72 (N.D. Tex. 2000) (intentional segregation by home builders association in 1940s-50s was compounded by purportedly "facially neutral" comprehensive zoning plans in 1970s-90s that had discriminatory effect in violation of Act).

The continuing importance of addressing unjustified barriers to fair housing is reflected in the first-hand observations of those who have made the transition from low-opportunity neighborhoods.

For example, in one recent pilot housing mobility program, tracking the experiences of over 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 parents reported that their children appeared to be learning "better or much better" in their new schools, while 80 percent of participants said they felt safer, more peaceful, and less stressed, 60 percent of participants said they felt more motivated, and nearly 40 percent said they felt healthier.[23]

### B. Full and Equal Access to Fair Housing Opportunities Yields Tremendous Societal Benefits that the Act Was Designed to Protect

This Court has recognized that racial integration is a foundational purpose of the Fair Housing Act, and yields tremendous societal benefits that the Act was designed to protect. For example, in *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972), this Court noted that, in addition to advancing individuals' freedom of choice, the Act was intended to ensure the benefits of integration for "the whole community" and to foster "truly integrated and balanced living patterns." *Id.* at 211

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[23] Lora Engdahl, Poverty & Race Research Action Council, *New Homes, New Neighborhoods, New Schools: A Progress Report on the Baltimore Housing Mobility Program*, at 3 (2009), *available at* www.prrac.org/pdf/BaltimoreMobilityReport.pdf.

(quoting 114 Cong. Rec. 2706 (statement of Sen. Javits), 3422 (statement of Sen. Mondale)). This principle was reinforced in *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91 (1979), in which the Court recognized white plaintiffs' standing under the Act on the basis that the "transformation of their neighborhood from an integrated to a predominantly Negro community is depriving them of the social and professional benefits of living in an integrated society." *Id.* at 111 (internal quotation marks omitted); *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 376 (1982) (recognizing the "benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices" (citation omitted)); *Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85, 95 (1977) (noting that, through the Act, Congress "made a strong national commitment to promote integrated housing").

In addition, this Court has noted, equal access to public institutions and educational integration provide important societal benefits of inter-group understanding and dismantling of negative stereotypes through richer social interactions and opportunities to learn from each other. *See Grutter v. Bollinger*, 539 U.S. 306, 330-34 (2003) ("Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized."). *Id.* at 332. Numerous studies demonstrate that meaningful contact between members of different races significantly reduces prejudice among racial groups. Recently, a carefully researched and frequently cited review of over 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 towards groups not included in the study. *See* Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. Personality & Soc. Psychol. 751 (2006). By facilitating exposure to other cultures and contact among individuals, racial integration can dispel harmful stereotypes and help to dismantle the discriminatory cycles that perpetuate racial distrust.[24] As Justice Kennedy has explained in the context of assessing a school integration plan:

> This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children. A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population.

*Parents Involved in Cmty. Sch. v. Seattle Sch. Distr. No. 1*, 551 U.S. 701, 797-98 (2007) (Kennedy, J., concurring).

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[24] *See* Roslyn Arlin Mickelson, Nat'l Coal. on Sch. Diversity, *Exploring the School-Housing Nexus: A Synthesis of Social Science Evidence* (2011), *available at* http://school-diversity.org/pdf/DiversityResearchBriefNo7.pdf (regarding benefits of multiethnic "social cohesion" and connection between residential and educational integration).

The foregoing confirms the validity of Congress's concerns about residential isolation and unequal housing opportunity, and makes clear that those concerns remain highly relevant today. It highlights, moreover, the personal, community, and national value that removing unequal and unnecessary barriers to high opportunity neighborhoods confers. Where identifiable barriers to equal housing opportunity and integration are unnecessary or unjustified, the text, history and purpose of the Fair Housing Act make clear that those barriers should fall, irrespective of the subjective intent that animates them.

## III. INTERPRETING THE FAIR HOUSING ACT TO PROHIBIT DISPARATE IMPACT DISCRIMINATION IS CONSONANT WITH U.S. TREATY COMMITMENTS AND INTERNATIONAL CONSENSUS

Interpreting the Fair Housing Act to prohibit unjustified disparate impact is also consistent with the United States' international treaty agreements, and with international consensus. While the task of interpreting domestic law is the purview of the U.S. courts, this Court has recognized the value of international authority as "instructive for its interpretation" of federal law. *Roper v. Simmons*, 543 U.S. 551, 575 (2005); *see also Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (describing as instructive the international understanding of, and limits to, proactive government actions as embodied in the International Convention on the Elimination of All Forms of Racial Discrimination); *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (Kennedy, J.).

The International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), a treaty which the United States has signed and ratified,[25] is instructive in resolving the case at bar. As of April 10, 2013, 176 nations had become parties to CERD, representing a broad inter-governmental consensus regarding "measures for speedily eliminating racial discrimination in all its forms and manifestations." CERD, pmbl. Consistent with the interpretation of HUD and the Courts of Appeals' uniform construction of section 804(a), CERD requires that governments eliminate behavior that is unnecessarily discriminatory in effect. *Id.* art. 1(1) ("[R]acial discrimination" is "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the *purpose* or *effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." (emphasis added)).

Similarly, in its General Recommendation No. 14 of 17 March 1993 on the definition of discrimination, the Committee on the Elimination of Racial Discrimination, the body responsible for administering the treaty, noted, *inter alia*, that "[i]n seeking to determine whether an action has an effect contrary to the Convention, [the Committee] will look to see whether that action has an

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[25] CERD, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (originally signed Sept. 28, 1966, entered into force Jan. 4, 1969 and ratified by Congress Oct. 21, 1994); *see also* 140 Cong. Rec. S7634 (daily ed. June 24, 1994).

unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin." Rep. of the Comm. on the Elimination of Racial Discrimination, 42d Sess., Mar. 1-17, 1993, ¶ 2, U.N. Doc. A/48/18; GAOR, 48th Sess., Supp. No. 18 (1993). The Senate Executive Report on CERD, issued when the Senate deliberated ratification, noted that certain federal and civil rights statutes already addressed these obligations, including the observation that "lower courts have uniformly held that disparate impact claims may be brought under the Fair Housing Act, even in the absence of discriminatory intent." S. Exec. Rep. No. 103-29, at 28-29 (1994).

## CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Third Circuit should be affirmed.

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