

No. 13-1371

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**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.*

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

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**BRIEF OF MASSACHUSETTS, NEW YORK, ARIZONA,  
CALIFORNIA, CONNECTICUT, HAWAII, ILLINOIS,  
MINNESOTA, MISSOURI, NEW HAMPSHIRE, NEW  
MEXICO, NORTH CAROLINA, OREGON, UTAH,  
VERMONT, VIRGINIA, AND WASHINGTON AS  
AMICI CURIAE IN SUPPORT OF RESPONDENT**

ERIC T. SCHNEIDERMAN  
*Attorney General of  
the State of New York*

BARBARA D. UNDERWOOD  
*Solicitor General*

CECELIA C. CHANG  
*Special Counsel to the  
Solicitor General*

KRISTEN CLARKE  
*Chief, Civil Rights Bureau*

MATTHEW W. GRIECO  
*Assistant Solicitor General*  
120 Broadway, 25th Floor  
New York, NY 10271

MARTHA COAKLEY  
*Attorney General of  
Massachusetts*

JONATHAN B. MILLER  
GENEVIEVE C. NADEAU\*  
*Assistant Attorneys General*

One Ashburton Place  
Boston, MA 02108  
(617) 727-2200  
genevieve.nadeau@state.ma.us

*\*Counsel of Record  
for Amici Curiae*

*(additional counsel listed on inside cover)*

THOMAS C. HORNE  
Attorney General of Arizona  
1275 W. Washington Street  
Phoenix, Arizona 85007

KAMALA D. HARRIS  
Attorney General of California  
1300 I Street, Suite 125  
P.O. Box 944255  
Sacramento, California 94244

GEORGE JEPSEN  
Attorney General of  
Connecticut  
55 Elm Street  
Hartford, Connecticut 06106

RUSSELL A. SUZUKI  
Attorney General of Hawaii  
425 Queen Street  
Honolulu, Hawaii 96813

LISA MADIGAN  
Attorney General of Illinois  
100 W. Randolph Street  
12th Floor  
Chicago, Illinois 60601

LORI SWANSON  
Attorney General of Minnesota  
102 State Capitol  
75 Rev. Dr. Martin Luther  
King Jr. Blvd.  
St. Paul, Minnesota 55155

CHRIS KOSTER  
Attorney General of Missouri  
Supreme Court Building  
207 West High Street  
Jefferson City, Missouri 65101

JOSEPH A. FOSTER  
Attorney General of  
New Hampshire  
33 Capitol Street  
Concord, New Hampshire 03301

GARY K. KING  
Attorney General of New Mexico  
P. O. Drawer 1508  
Santa Fe, New Mexico 87504

ROY COOPER  
Attorney General of  
North Carolina  
Post Office Box 629  
Raleigh, North Carolina 27602

ELLEN F. ROSENBLUM  
Attorney General of Oregon  
1162 Court Street, N.E.  
Salem, Oregon 97301

SEAN D. REYES  
Attorney General of Utah  
Utah State Capitol  
350 North State Street  
Suite #230  
Salt Lake City, Utah 84114

WILLIAM H. SORRELL  
Attorney General of Vermont  
109 State Street  
Montpelier, Vermont 05609

MARK R. HERRING  
Attorney General of Virginia  
900 East Main Street  
Richmond, VA 23219

ROBERT W. FERGUSON  
Attorney General of Washington  
1125 Washington Street SE  
P.O. Box 40100  
Olympia, Washington 98504

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**INTEREST OF *AMICI CURIAE***

*Amici* States Massachusetts, New York, Arizona, California, Connecticut, Hawaii, Illinois, Minnesota, Missouri, New Hampshire, New Mexico, North Carolina, Oregon, Utah, Vermont, Virginia, and Washington, file this brief in support of Respondent The Inclusive Communities Project, Inc. as a matter of right pursuant to Sup. Ct. R. 37.4.

*Amici* States share an interest in protecting our residents and communities against housing discrimination in all of its forms, along with the substantial social and economic harm that results from such discrimination. Each of the *Amici* States is charged with combating housing discrimination through enforcement of state and federal fair housing laws, including the Fair Housing Act (FHA), 42 U.S.C. §§ 3601 *et seq.*

Based on our collective experience enforcing these laws, *Amici* States have found that the ability to pursue disparate impact claims is necessary to rooting out intentional discrimination and indispensable to achieving the broad remedial goals of the FHA.

**SUMMARY OF ARGUMENT**

Congress affirmed the broad purposes of the FHA when it marked the law's 40th anniversary in 2008, noting, "the intent of Congress in passing the Fair Housing Act was broad and inclusive, to advance equal opportunity in housing and achieve racial integration for the benefit of all people in the United States." 154 Cong. Rec. H2280 (2008). Recognition of disparate impact claims under the FHA is not only consistent with the text and structure of the statute; it is

necessary to achieve its broad remedial goals. These broad purposes of eradicating discrimination and segregation in housing are consistent with other civil rights legislation of the era and should be interpreted accordingly.

*Amici* States leave to the United States and others the analysis of the text and legislative history of the FHA, showing that the statute imposes liability for practices with an unjustified disparate impact. Instead, we focus here on *Amici* States' use of disparate impact liability to address intentionally discriminatory and other bias-motivated conduct and to combat the harms caused by persistent residential segregation. We show that rejection of the disparate impact model would leave an evidentiary gap that no other doctrine or regulatory tool addresses. The protections of the FHA would be substantially under-inclusive—even where intentional discrimination occurs—not because invidious motive is absent, but because injured parties would be stripped of any adequate method for remedying practices that are motivated by discrimination whenever direct proof of intent is unavailable or inconclusive.

Without disparate impact claims, States and others will be left with fewer critical tools to combat the kinds of systemic discrimination that the FHA was intended to address. The result is of significant concern to States. Housing patterns across the nation remain largely segregated by race. Combined with concentrated poverty, such persistent segregation has significant social and economic consequences for our residents, and exacts substantial costs on state and local governments.

Finally, *Amici* States' experience contradicts the suggestion that disparate impact liability unnecessarily interferes with local land-use decisions and exposes governmental actors to constitutional liability. For decades, we have seen that, instead, these claims weed out discriminatory conduct without unduly burdening decision-makers and ultimately further important state interests.

## ARGUMENT

### I. DISPARATE IMPACT CLAIMS ARE NECESSARY TO ROOTING OUT AND COMBATING HIDDEN FORMS OF INTENTIONAL DISCRIMINATION

For over three decades, courts have uniformly upheld disparate impact liability as necessary to fulfilling the goals of the FHA. Although disparate impact claims focus on different forms of proof than disparate treatment, “the core injury targeted . . . remains the same: intentional discrimination.” *In re Employment Discrimination Litig. Against State of Ala.*, 198 F.3d 1305, 1322 (11th Cir. 1999). The disparate impact model originated as a judicial response to the practical challenges of detecting and proving bias in cases of covert discrimination, and it continues to serve this essential function today. Under the FHA and in a broad array of analogous contexts, courts have developed surrogate tests to unearth concealed discrimination based on the *effect* of the challenged action and *weight* of the justification for imposing unequal burdens on protected groups. FHA disparate impact claims rely on the same evidentiary inferences and serve the same vital interests.



As courts have widely recognized, if FHA protection always required direct proof of discriminatory motive—without an alternative mode of establishing intent—many acts of intentional discrimination would not be redressed. While disparate impact is rightly also understood as a separate type of claim (see Part II.A, *infra*), its roots lie in identifying and eradicating purposeful discrimination. Disparate impact claims under the FHA can be upheld on this ground alone, as “a doctrinal surrogate for eliminating unprovable acts of intentional discrimination hidden innocuously behind facially-neutral policies or practices.” *EEOC v. Joe’s Stone Crab, Inc.*, 220 F.3d 1263, 1274 (11th Cir. 2000).

**A. Direct Proof of Discriminatory Motive Is Rarely Available in FHA Cases, Even When Such Motive Is Present**

Courts developed the disparate impact model under the FHA (looking to Title VII claims by analogy)<sup>1</sup> not because intent is irrelevant, but because proving intent can be so difficult. As our society has become less

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<sup>1</sup> Petitioners and their *amici* suggest that Congress did not intend to authorize disparate impact claims under the FHA because Congress specifically amended Title VII in 1991 to codify a disparate impact standard for employment discrimination claims, while no similar amendment was made to the FHA. But no amendment to the FHA was necessary. Congress added a specific disparate impact provision to Title VII to respond to this Court’s decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). Congress believed that *Wards Cove* made it too difficult for plaintiffs to prove disparate impact claims under Title VII and accordingly revised the statute to preserve broad disparate impact protection. Congress had no similar reason to amend the FHA.

accepting of overtly discriminatory behavior, direct proof has become less frequently available in discrimination cases. The absence of direct proof, however, does not mean that intentional discrimination is lacking, but that deliberate discrimination may be hidden behind facially neutral policies and practices.

Courts adopted the disparate impact model under the FHA with this practical reality in mind. They recognized that public and private actors could readily evade FHA requirements if the test for liability focused solely on intent, because defendants could easily camouflage their true reasons for taking biased actions. *See, e.g., Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 935 (2d Cir. 1988) (“Practical concerns . . . militate against inclusion of intent in disparate impact analysis” because defendants can readily mask true motives and use neutral rules as “powerful discriminatory mechanisms”); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1064-65 (4th Cir. 1982) (actors “seldom, if ever, announce . . . their desire to discriminate against a racial minority”); *Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977) (“A strict focus on intent permits racial discrimination to go unpunished in the absence of evidence of overt bigotry.”); *United States v. City of Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974) (“Effect, and not motivation, is the touchstone [of housing discrimination], in part because clever men may easily conceal their motivations”).

Testifying before Congress nearly 35 years ago, the Secretary of HUD explained how critical disparate impact claims are to civil rights enforcement:

“Discriminators seldom are . . . foolish” enough to “take overt action indicating [biased] intent.” 126 Cong. Rec. 31,167 (1980). The Secretary focused on zoning and land-use discrimination, pointing out that “[a] zoning board or city council pressured by racially biased resistance to construction of an integrated housing project” will rarely “take action which is openly responsive to racial opposition,” instead citing neutral factors such as “traffic problems . . . or overcrowding in the schools” to bar the project. *Id.* Without some form of disparate impact analysis, it would be difficult, if not impossible, to remedy precisely these types of disguised intentional discrimination.

**B. The Disparate Impact Model Uses Objective Proof of Effects and a Burden-Shifting Framework to Unearth Discriminatory Intent**

Because direct proof of subjective intent is likely to be unavailable or misleading, courts often look to the objective effects of a defendant’s actions on protected groups. Statistical evidence of disparate burden or harm has long been viewed as “a telltale sign of purposeful discrimination” and highly probative of actual discriminatory motive. *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977); see also *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (evidence of disparate impact provides “an important starting point” in searching out “invidious discriminatory purpose”); *Washington v. Davis*, 426 U.S. 229, 242-44 (1976) (“disproportionate impact” is relevant to discerning discriminatory purpose).

Reliance on objective proof of effects also recognizes the real-world constraints faced by FHA plaintiffs. In many cases, statistical evidence of disparate impact is the “only available avenue of proof . . . to uncover clandestine and covert discrimination.” *Int’l Bhd. of Teamsters*, 431 U.S. at 340 n.20. And unlike subjective motive, the objective consequences of actions cannot be hidden by defendants through silence or false explanations. *See, e.g., Adams v. Fla. Power Corp.*, 255 F.3d 1322, 1327 (11th Cir. 2001) (Barkett, J., concurring) (disparate impact analysis exploits the difference between subjective evidence of state of mind and objective proof of results; “although discriminatory intent [can] be hidden . . . its effects” cannot be).

Once an inference of discriminatory motive is raised by proof of disparate effects on a protected class, the disparate impact model relies on a burden-shifting mechanism for a searching inquiry into the defendant’s motivation. The defendant has the burden of establishing that the challenged practice is necessary to achieve a substantial non-discriminatory interest. If the defendant succeeds, the plaintiff can prevail only by proving that the defendant’s legitimate interests could be served by a viable alternative means with less discriminatory effect. *See Implementation of the Fair Housing Act’s Discriminatory Effects Standard*, 78 Fed. Reg. 11,466, 11,482 (Feb. 15, 2013) (codified at 24 C.F.R. § 100.500(c)). The sequenced steps of the disparate impact test do not require direct proof or findings about a defendant’s subjective intent. But that does not mean that intent is irrelevant. The defendant is prompted to explain the reason for disparate burden or harm, and the plaintiff may demonstrate that the

defendant's reason fails to justify the discriminatory effects.

Proof that a defendant can accomplish proffered aims through other means with less harmful impact—the showing a plaintiff must make under the HUD regulations to establish a disparate impact claim—strongly indicates that the practice was a “pretext’ for discrimination.” *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (quotations in original); *Wards Cove Packing Co.*, 490 U.S. at 660-61 (a defendant's failure to adopt alternative practices with less racially disparate impact “belie[s] a claim that . . . incumbent practices are being employed for nondiscriminatory reasons”).

Use of pretext as a proxy for discriminatory intent is not unique to the disparate impact analysis. This Court has recognized that evidence that a defendant's explanation for challenged action is “unworthy of credence” is “probative of intentional discrimination” and can therefore establish intentional disparate treatment. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 146-47 (2000). Under Title VII, for example, pretext is enough to prevail on a disparate treatment claim. Utilizing the *McDonnell Douglas* framework, an employee can prevail with direct evidence that an employer was motivated by discriminatory intent. But an employee can likewise prevail by “showing that the employer's proffered explanation” for an adverse action was pretextual. See *Tex. Dep't of Cmty Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

In function, disparate impact analysis rests on the same inferences and addresses the same concerns as

the *McDonnell Douglas* burden-shifting analysis. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring) (recognizing that the purpose of the *McDonnell Douglas* test “is to compensate for the fact that direct evidence of intentional discrimination is hard to come by”). Both tests allow a plaintiff to state a prima facie case when an inference of discrimination is raised, requiring the defendant to then articulate its reasons for the challenged action. Both tests also allow the plaintiff to prevail, even without direct proof of discriminatory motive, through circumstantial proof that the defendant’s explanation is pretextual. A showing of pretext—like a showing of unjustified disparate impact—relies on a circumstantial chain of inference, but one strongly indicative of actual discriminatory motive.

### **C. Effects-Based Tests Have Been Used in Many Contexts to Guard Against Covert Discrimination**

Use of effects-based tests as a surrogate for discerning covert discrimination is also well established in other areas of the law where history and circumstance suggest that an intent-only standard will be substantially under-protective. This Court, for example, has “repeatedly approved the use of statistical proof . . . to establish a prima facie case of racial discrimination in jury selection cases.” *Int’l Bhd. of Teamsters*, 431 U.S. at 339. If a plaintiff demonstrates that a jury-selection procedure “result[s] in substantial under-representation of his race or of the identifiable group to which he belongs,” the burden then shifts to

the State to “rebut” the inference of discrimination. *Castenda v. Partida*, 430 U.S. 482, 494-95 (1977).

Similarly, in interpreting the anti-discrimination provisions of the National Labor Relations Act, this Court has affirmed that discriminatory intent to discourage union membership can be inferred from the significant “adverse effect” of an employer’s actions alone, “even if an employer comes forward with a nondiscriminatory explanation for its actions.” *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 701-02 (1983). Effects-based proof is also the touchstone for establishing violations of § 2 of the Voting Rights Act. “In 1982, Congress amended § 2 . . . to make clear that certain practices and procedures that *result* in the denial or abridgement of the right to vote are forbidden” without requiring separate proof of intent. *Chisom v. Roemer*, 501 U.S. 380, 383-84 (1991) (emphasis in original).<sup>2</sup>

In each of these cases, the target (or substantial target) of the test was intentional discrimination, yet an effects-based test was deemed an appropriate vehicle for unearthing discriminatory motive. Moreover, the reasons supporting an effects-based test in these areas of law also support an effects-based disparate impact standard under the FHA. Not only is it “often difficult to identify the true motive” of

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<sup>2</sup> Congress passed the 1982 amendments to overrule *City of Mobile v. Bolden*, 446 U.S. 55 (1980), in which a plurality of this Court held that § 2 of the VRA required intentional discrimination. See *Chisom*, 501 U.S. at 393 (the “impetus” for the 1982 amendments was *City of Mobile*). As with Title VII, Congress acted only after judicial decisions threatened to cut off plaintiffs’ ability to rely on proof of effects to demonstrate discrimination.

defendants in FHA cases, *Metro. Edison Co.*, 460 U.S. at 701, but the historical and social realities of housing discrimination—like similar discrimination in jury selection and voting—strongly suggest that defendants “can readily offer” a neutral explanation for conduct “which in fact purposefully discriminates.” S. Rep. No. 97-917, at 37 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 215 (explaining why intent-only standard was inadequate under VRA). An intent-based standard is inherently subject to manipulation because defendants may attempt to immunize themselves by deliberately “planting a false trail” of facially neutral reasons for excluding or otherwise harming minorities. *Id.*

Petitioners here treat disparate impact as a fundamentally different type of claim in which intent is irrelevant. But disparate impact analysis in both its historical development and present-day use is akin to the effects-based, burden-shifting tests that courts and Congress have found necessary to remedy concealed instances of *purposeful* discrimination, harm that indisputably lies at the core of the FHA. As this Court has explained, in such situations, “[t]he reason for treating circumstantial and direct evidence alike is both clear and deep rooted.” *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003). There is no automatic preference for direct evidence, especially in the circumstances confronted by many FHA plaintiffs where direct evidence is unavailable or otherwise subject to manipulation. *See id.* (“Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive.” (quotation marks omitted)).



Petitioners' *amici* point out that intentional discrimination can be established by inference. But disparate impact claims target forms of purposeful discrimination that cannot be remedied on an inference-only model. In many cases, statistical data about disparate effects is the only available proof prior to discovery, and the ability to plead a disparate impact claim is necessary to unearth evidence of purposeful discrimination. In a recent FHA action brought by the City of Baltimore, for example, the initial complaint relied on statistical evidence in alleging that a bank had targeted borrowers for subprime mortgages because of their race. Information later discovered revealed that the bank's loan officers referred to African-Americans as "mud people" and "niggers" who "don't pay their loans," resulting in a settlement and relief for injured borrowers. *See Amended Complaint, Mayor & City Council of Baltimore v. Wells Fargo, N.A.*, No. 08 Civ. 62, ECF Nos. 176 & 222 (D. Md. Oct. 21, 2010 & Aug. 7, 2012).

Disparate impact claims also serve a purpose beyond the pleading stage. In *Amici States'* experience, even with strong circumstantial proof of bias, judges and juries are reluctant to find intentional discrimination. *See, e.g., Joe's Stone Crab, Inc.*, 220 F.3d at 1283 (noting deep inconsistency in district court's refusal to infer intentional discrimination from underlying proof).<sup>3</sup> As a result, limiting FHA plaintiffs

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<sup>3</sup> *See also* Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. Rev. 36, 83 (1977) (pointing out that judges are reluctant to find intentional discrimination notwithstanding strong circumstantial proof of bias). Similar concerns led Congress to reject an intent-

to proving subjective motive by inference alone will result in substantial under-enforcement—regardless of whether intentional discrimination exists—because of the difficulty in getting fact-finders to infer discrimination without smoking-gun proof of illicit motive.

Finally, many FHA suits, particularly government enforcement actions, settle before trial on disparate impact grounds. But the nature of the settlements does not suggest that intentional discrimination is absent. To the contrary, defendants may well settle to avoid discovery that will unearth proof of intentional discrimination. In addition, defendants will often agree to voluntary reforms if they can avoid being labeled an intentional discriminator. Enforcement authorities and other FHA plaintiffs have little incentive to pursue intentional discrimination claims—even if proof of deliberate bias is present—if adequate relief can be obtained on a disparate impact theory.<sup>4</sup>

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only test under § 2 of the Voting Rights Act because, even with strong proof of purposeful discrimination, courts remained unwilling to draw reasonable inferences of discrimination. See Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies after Flores*, 39 Wm. & Mary L. Rev. 725, 735 (1998).

<sup>4</sup> See, e.g., Alfred W. Blumrosen, *Modern Law: The Law Transmission System and Equal Employment Opportunity* 73 (1993) (discussing EEOC's enforcement strategy of pursuing disparate impact claims because employers were more willing to negotiate and settle if they could avoid the moral blame of an intentional discrimination finding).

This Court granted certiorari on a single, threshold question: whether disparate impact claims are cognizable under the FHA. Neither the scope of HUD's new disparate impact regulations, nor the appropriate contours of disparate impact analysis in FHA cases, is at issue. Petitioners nonetheless seek to bar disparate impact claims wholesale. There is no justification for that sweeping result. While the outer reaches of disparate impact theory as a proxy for rooting out intentional discrimination might be debated, disparate impact remains a time-tested "evidentiary tool" that can be "used to identify genuine, intentional discrimination." *Ricci v. DeStefano*, 557 U.S. 557, 595 (2009) (Scalia, J., concurring). That purpose alone warrants retention of disparate impact claims under even Petitioners' narrow reading of the FHA.

## **II. PERSISTENT RESIDENTIAL SEGREGATION POSES SIGNIFICANT CHALLENGES FOR STATE AND LOCAL GOVERNMENTS**

Residential segregation persists across the country, and along with it, unequal educational opportunities, employment prospects, neighborhood amenities and infrastructure, and health care, among other disparities. This inequality is reinforced and perpetuated by discrimination that is often hidden or masked—precisely the type of discrimination disparate impact claims were designed to defeat.

States have a strong interest in removing discriminatory barriers to opportunity, including those that attend residential segregation, because of their extensive social and financial costs. Among other things, concentrated poverty strains precious state

resources for individuals and families in need of support; poor-performing schools leave future workers unprepared for the labor force and undercut our economic competitiveness; chronic health problems strain medical resources and raise healthcare costs; and depressed home values lower tax bases for state and local governments.

Government enforcement of the FHA and similar state laws has found the disparate impact model to be an especially important tool to combat the kinds of discrimination that perpetuate segregation. This is due, in part, to the fact that government enforcement tends to be concentrated on widespread or systemic problems, where evidence of intent is especially elusive and statistical evidence of effects is more readily available.

#### **A. The Segregated Housing Patterns Targeted by the FHA Persist Throughout the Country**

Housing patterns across the United States remain largely segregated by race, and the social and economic consequences are significant. Data from the 2010 Census indicate that minorities continue to experience particularly high rates of racial isolation. For example, despite the fact that African-Americans make up only 13% of the total population, the average African-American lives in a census tract that is 46% African-American.<sup>5</sup> Similarly, the average Hispanic resident

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<sup>5</sup> Michelle Wilde Anderson & Victoria C. Plaut, *Property Law: Implicit Bias and the Resilience of Spatial Colorlines*, in *Implicit Racial Bias Across the Law*, 25, 27 (Justin D. Levinson & Robert J. Smith, eds. 2012) (citing William H. Frey, *Census Data: Blacks*

(16% of the population) lives in a tract that is 45% Hispanic.<sup>6</sup> By comparison, the average white American (64% of the population) lives in a census tract that is 79% white.<sup>7</sup> In addition, over the last three decades, Hispanic and Asian segregation has increased.<sup>8</sup> Notably, not all of this segregation is driven by economics. Research shows that even after controlling for differences in socioeconomic status, African-Americans live in neighborhoods that are more segregated than those occupied by whites.<sup>9</sup>

Residential segregation is not limited to race, of course. Other categories of Americans protected under the FHA also continue to experience a degree of isolation due to limited housing options. Families with children, for example, encounter obstacles to obtaining housing, particularly when faced with exclusionary

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*and Hispanics Take Different Segregation Paths*, Brookings Institute: State of Metropolitan America No. 21 (Dec. 16, 2010)).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> John R. Logan, *Separate and Unequal: The Neighborhood Gap for Blacks, Hispanics and Asians in Metropolitan America*, US2010 Project (July 2011); Camille Zubrinsky Charles, *The Dynamics of Racial Residential Segregation*, 29 *Ann. Rev. Soc.* 167, 169 (2003).

<sup>9</sup> Patrick Sharkey, *Stuck In Place: Urban Neighborhoods and the End of Progress Toward Racial Equality*, 25 (2013) (citing Douglas S. Massey & Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass*, Harvard University Press (1993)).

zoning policies or occupancy restrictions.<sup>10</sup> The same is true for individuals with disabilities.<sup>11</sup> Racial segregation in housing, however, remains of particular concern to state and local governments due in large part to the strong correlation between residential segregation and concentrated poverty. Racial minorities continue to be substantially more likely to live in high-poverty neighborhoods. According to data from the 2010 Census, of the 10 million people living in census tracts with the highest poverty rates (40% or more poor), 68% are African-American or Hispanic, even though these groups combined make up only about a quarter of the general population.<sup>12</sup> Similarly, 45% of poor African-American children and 35% of poor Hispanic children live in neighborhoods with concentrated poverty, as compared to only 12% of poor white children.<sup>13</sup> These data reflect little change from

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<sup>10</sup> See Edward Allen, *Six Years After Passage of the Fair Housing Amendments Act: Discrimination Against Families with Children*, 9 Admin. L.J. Am. U. 297, 300-01 (1995).

<sup>11</sup> *Discrimination Against Persons with Disabilities: Barriers at Every Step* 3, Urban Institute (June 2005), available at [www.hud.gov/offices/fheo/library/dss-download.pdf](http://www.hud.gov/offices/fheo/library/dss-download.pdf) (prepared for the Office of Policy Development and Research, HUD).

<sup>12</sup> U.S. Census Bureau, *Areas With Concentrated Poverty: 2006-2010*, (Dec. 2011), available at <http://www.census.gov/prod/2011pubs/acsbr10-17.pdf>.

<sup>13</sup> Algernon Austin, *African Americans Are Still Concentrated In Neighborhoods With High Poverty and Still Lack Full Access to Decent Housing*, Economic Policy Institute Economic Snapshot (July 22, 2013), available at <http://www.epi.org/publication/african-americans-concentrated-neighborhoods/>.

a decade ago.<sup>14</sup> In fact, by some measures, concentrated poverty has worsened since 2000.<sup>15</sup>

This persistent racial segregation is not simply the enduring result of our history. Rather, segregation continues to be reinforced, and thus perpetuated, by contemporary forms of discrimination, including not only intentional discrimination but also unconscious bias in systemic, discretionary decision-making and purportedly “neutral” policies and practices.

Twenty-five years ago, this Court recognized that “subconscious stereotypes and prejudice” are “a lingering form of the problem” of discrimination, *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988), and that such biases have “precisely the same effects as a system pervaded by impermissible intentional discrimination.” *Id.* at 990-91 (describing subjective decision-making in the employment context). An extensive body of social and scientific research has confirmed this to be true.<sup>16</sup> Unconscious racial bias involves not only implicit preference for one racial group over another, but also the association of racial groups with specific negative conditions or concepts. For example, research has revealed strong, but often

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<sup>14</sup> Anderson & Plaut, *supra* note 5, at 27.

<sup>15</sup> Rolf Pendall et al., *A Lost Decade: Neighborhood Poverty and the Urban Crisis of the 2000s*, Joint Ctr. For Pol. & Econ. Studies, at 2 (Sept. 2011), available at <http://jointcenter.org/research/lost-decade-neighborhood-poverty-and-urban-crisis-2000s>.

<sup>16</sup> See, e.g., Anderson & Plaut, *supra* note 5, at 30-32; Mahzarin R. Banaji et al., *Implicit Stereotyping in Person Judgment*, 65 J. Personality & Soc. Psychol. 272, 272-81 (1993).

unconscious, cognitive associations between race on the one hand, and disorder and crime on the other.<sup>17</sup> Thus, even well-intentioned actors, who genuinely believe themselves to be fair and unbiased, often draw conclusions and make decisions based on negative, race-based associations. Like intentional discrimination, unconscious discrimination of this sort can create or reinforce disparities.<sup>18</sup>

In the housing context, discretionary decisions by individual and organizational actors, either motivated or influenced by bias, can shape neighborhoods and perpetuate segregation. These decisions include, for example: landlords and real estate professionals evaluating prospective buyers and tenants; appraisers estimating property values; lenders and mortgage brokers determining credit-worthiness; local governments and public agencies determining where to locate amenities and what land uses to approve; and private actors deciding how and where to invest money.<sup>19</sup> Institutional policies or practices that affect a large number of people, and that allow unconscious bias to influence decisions by multiple actors over numerous transactions, can have the aggregate effect

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<sup>17</sup> Anderson & Plaut, *supra* note 5, at 31-38.

<sup>18</sup> See, e.g., Kristin A. Lane et al., *Implicit Social Cognition and the Law*, 3 Ann. Rev. L. & Soc. Sci. 427 (2007); Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 Vand. L. Rev. 55, 74-77 (2009); Robert G. Schwemm, *Why Do Landlords Still Discriminate (And What Can Be Done About It)?*, 40 J. Marshall L. Rev. 455, 505-07 (2007).

<sup>19</sup> Anderson & Plaut, *supra* note 5, at 30-31.



of perpetuating racial discrimination and segregation. These outcomes are appropriately remedied through the enforcement of anti-discrimination laws and are likely impossible to address through claims of disparate treatment.

Finally, significant discrimination can also occur when policy and decision-makers are indifferent to the effects of seemingly neutral practices. Policies and practices that have an unnecessarily and disproportionately negative impact on a protected class—because, for example, they are driven by convenience rather than business necessity—may be just as harmful as intentional discrimination. When this form of discrimination harms historically marginalized groups, it too can reinforce and perpetuate historical inequities.

### **B. States Have a Strong Interest in Combating the Significant Social and Economic Consequences of Residential Segregation**

The social and economic consequences of persistent residential racial segregation and concentrated poverty are well documented.<sup>20</sup> Because most aspects of social and civic life—schools, government services, and electoral districts, for example—are organized by geography, there is a direct relationship between where people reside and the resources and opportunities

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<sup>20</sup> Kyle Crowder et al., *Neighborhood Diversity, Metropolitan Constraints, and Household Migration*, *Am. Psychol. Rev.* 325, 327 (2012).

available to them.<sup>21</sup> The disparities that result exact significant costs on state and local governments, giving them a substantial interest in ending the persistent poverty plaguing many families living in segregated and resource-poor areas.

Disparities in educational opportunities, for example, often track segregated housing patterns. The vast majority of African-American and Hispanic students attend majority non-white schools, with 43% of Hispanic students and 38% of African-American students attending “intensely segregated” schools (with only 0-10% white students), and 15% and 14% of African-American and Hispanic students, respectively, attending schools that are less than 1% white.<sup>22</sup> Coupled with high poverty rates, this degree of segregation correlates with an array of factors that limit minority students’ educational opportunities and outcomes.<sup>23</sup> Because educational achievement can determine so many other opportunities, including, in particular, employment prospects, States have a unique interest in addressing these inequities and ensuring that all students receive a quality education.

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<sup>21</sup> Sharkey, *supra* note 9, at 14-17.

<sup>22</sup> Gary Orfield et al., *E Pluribus . . . Separation: Deepening Double Segregation for More Students*, The Civil Rights Project, at 7-9 (Sept. 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>.

<sup>23</sup> *Id.*

The correlation between residential segregation and public health disparities is similarly troubling. Racial segregation often corresponds with material neighborhood inequities, even after accounting for differences in socioeconomic status. These can include variations in housing standards; access to basic services; access to public amenities like parks, open spaces, and recreation centers; exposure to environmental hazards; and proximity to undesirable land uses.<sup>24</sup> These inequities are further linked to a variety of health disparities in minority communities, including reduced access to quality medical care; higher incidences of chronic diseases; adverse birth outcomes; and overall higher rates of morbidity and mortality among both infants and adults.<sup>25</sup> These disparities take a significant toll on minority communities. In addition, because state and local governments often bear the resulting healthcare costs, States have a substantial interest in reducing the confluence of factors leading to inequalities in public health.

Residential segregation also directly affects employment prospects, as the geographic location of industries influences significantly the likelihood that

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<sup>24</sup> Anderson & Plaut, *supra* note 5, at 27-28; Sharkey, *supra* note 9, at 14-15; *see also* Hope Landrine & Irma Corral, *Separate and Unequal: Residential Segregation and Black Health Disparities*, 19 *Ethnicity & Disease* 179, 180-82 (2009).

<sup>25</sup> David R. Williams & Chiquita Collins, *Racial Residential Segregation: A Fundamental Cause of Racial Disparities in Health*, 116 *Pub. Health Reports* 404, 408-09 (2001); Landrine & Corral, *supra* note 24, at 179.

individuals will be able to find and maintain jobs.<sup>26</sup> For example, research suggests that the migration of many jobs to the suburbs has caused both a “spatial mismatch” and a “skills mismatch” affecting African-Americans concentrated in urban areas.<sup>27</sup> This variance between people who need work and the location of good jobs hurts jobseekers (and their families), and has broad, negative consequences for the labor market that are of significant concern to States.

The disparities in outcomes and opportunities correlating with segregation are so entrenched that they often are passed from one generation to the next. A recent study confirmed a significant correlation between intergenerational mobility (or lack thereof) and residential segregation.<sup>28</sup> A separate study concluded that nearly three out of four African-American families living in the country’s poorest, most segregated neighborhoods are the same families that lived in those neighborhoods in the 1970s.<sup>29</sup> Research

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<sup>26</sup> Williams & Collins, *supra* note 25, at 406-07; Sharkey, *supra* note 9, at 15 (citing, e.g., Judith K. Hellerstein & David Neumark, *Employment of Black Urban Labor Markets: Problems and Solutions* (Nat’l Bureau of Econ. Research, Working Paper No. 16986, 2011)).

<sup>27</sup> *Id.*

<sup>28</sup> Raj Chetty et al., *Summary of Project Findings, The Equality of Opportunity Project* (July 2013), available at <http://obs.rc.fas.harvard.edu/chetty/website/IGE/Executive%20Summary.pdf> (also finding significant correlation between upward mobility and K-12 school quality, social capital indices, and measures of family structure).

<sup>29</sup> Sharkey, *supra* note 9, at 45.

also shows that, even when African-Americans reach higher-income brackets, that achievement often does not translate into residential mobility.<sup>30</sup>

In short, the effects of racial segregation and concentrated poverty are far-reaching and long-lasting, and the costs to state and local governments are significant. Without a comprehensive set of tools to combat these problems, the inequities will persist and, in some circumstances, worsen.

### **C. States Rely Increasingly on Disparate Impact Theories to Combat Systemic Housing Discrimination That Would Otherwise Go Unaddressed**

Enforcement actions under the FHA and similar state laws are a critical component of *Amici* States' efforts to combat discrimination and ensure greater equality of opportunity. While some of our cases address explicit discrimination by individual landlords or real estate professionals, others rely on disparate impact theories to challenge the seemingly neutral policies and practices of larger, sophisticated actors that discriminate against protected groups.

The mortgage lending industry provides many of the most recent examples of state enforcement efforts based on disparate impact theories. The history of discrimination in the industry is well documented. In the 20th century, discriminatory lending severely limited African-American mobility out of urban areas and thus further intensified racial segregation resulting from a combination of overt forms of

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<sup>30</sup> Logan, *supra* note 8, at 15.

discrimination, including violence, intimidation, municipal zoning restrictions, and racial covenants.<sup>31</sup> The federal government helped to institutionalize discriminatory loan-underwriting standards that were adopted by most banking institutions (*e.g.*, categorizing loans according to the degree of neighborhood integration or proximity to African-American neighborhoods).<sup>32</sup> When lenders targeted minority neighborhoods, first through redlining and then reverse-redlining (both intentional forms of discrimination), they only worsened the problem.<sup>33</sup> State and federal attorneys general brought enforcement actions to curb these predatory practices,<sup>34</sup> but discrimination persisted.

During the boom of the subprime market in the last decade, discretionary pricing systems allowed both the intentional and unconscious bias of individual loan officers and brokers to operate unchecked. As a result,

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<sup>31</sup> Justin P. Steil, *Innovative Responses to Foreclosures: Paths to Neighborhood Stability and Housing Opportunity*, 1 Colum. J. Race & L. 63, 68-69 (2011); Douglas Massey, *Origins of Economic Disparities: The Historic Role of Housing Segregation*, in *Segregation: The Rising Costs for America* (James H. Carr & Nandinee K. Kutty eds., 2008).

<sup>32</sup> Steil, *supra* note 31, at 68-69; *see also* Sharkey, *supra* note 9, at 58-62; Massey, *supra* note 31, at 69-73.

<sup>33</sup> Steil, *supra* note 31, at 69-73; Sharkey, *supra* note 9, at 58-62.

<sup>34</sup> *See, e.g.*, Richard Cole, *The Attorney General's Comprehensive Program to Reform the Mortgage Lending Industry in Massachusetts*, 28 J. Marshall L. Rev. 383 (1995); *see also* *Justice Department Attacks Bank Marketing, Branching Patterns for First Time*, 13 No. 16 Banking Pol'y Rep. 4 (1994).

African-American and other minority borrowers were more likely to receive subprime loans, pay higher rates, and incur more charges than white borrowers—even after controlling for income and neighborhood characteristics.<sup>35</sup> Even today, minority borrowers are twice as likely as white borrowers to be denied conventional loans.<sup>36</sup>

State attorneys general have utilized disparate impact theories to pursue these practices. In 2011, Massachusetts resolved by consent judgment an enforcement action against Option One Mortgage Corp., a subsidiary of H&R Block, Inc. See *Commonwealth v. H&R Block, Inc.*, Civ. No. 08-2474-BLS1 (Suffolk Sup. Ct. 2011). The Massachusetts Attorney General alleged that Option One’s discretionary pricing policy—the manner by which its independent mortgage brokers were compensated—caused African-American and Hispanic borrowers to pay, on average, hundreds of dollars more for their loans than similarly-situated white borrowers. While there was no direct evidence of intentional discrimination with respect to the pricing policy,

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<sup>35</sup> Steil, *supra* note 31, at 80-83; Debbie G. Bocian et al., *Lost Ground, 2011: Disparities in Mortgage Lending and Foreclosures*, Center for Responsible Lending, at 11 (Nov. 2011), available at <http://www.responsiblelending.org/mortgage-lending/research-analysis/Lost-Ground-2011.pdf>; Jared R. Bybee, *Fair Lending 2.0: A Borrower-Based Solution to Discrimination in Mortgage Lending*, 45 U. Mich. J.L. Reform 113, 116-18 (2011).

<sup>36</sup> Bocian et al., *supra* note 35, at 11; *The State of the Nation’s Housing 2013*, Joint Center for Housing Studies of Harvard University (2013), at 19-20, available at <http://www.jchs.harvard.edu/research/publications/state-nations-housing-2013>.

Massachusetts pursued this claim because Option One's practices caused demonstrable and widespread harm to minority borrowers.

New York also resolved an investigation involving similar allegations against Countrywide Home Loans through an Assurance of Discontinuance. *See In re Countrywide Home Loans, Assurance of Discontinuance Pursuant to N.Y. Exec. § 63(15)* (Nov. 22, 2006). Underlying that matter was the New York Attorney General's finding of statistically significant disparities in "discretionary components of pricing, principally [p]ricing [e]xceptions in the retail sector and [b]roker [c]ompensation in the wholesale sector." *Id.* at 3. In addition, Illinois filed two discriminatory lending lawsuits alleging that African-American and Hispanic borrowers were disproportionately placed in high-cost loans and paid more for their loans.<sup>37</sup>

Though the allegations in each of these cases differ slightly, they all concern discretionary decision-making aggregated over large groups of borrowers. While direct proof of overt bias was unavailable, there were substantial and statistically significant disparities that

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<sup>37</sup> The Department of Justice entered into a \$335 million settlement with Countrywide, relating to similar allegations of discrimination in lending based on race, national origin, and marital status. *See United States v. Countrywide Fin. Corp.*, No. 2:11-CV-10540 (C.D. Cal. 2011). That case was premised on disparate impact claims under the FHA and the Equal Credit Opportunity Act. Illinois's suit against Countrywide was resolved in connection with the Consent Order obtained by the Department. Similarly, in 2012, the Department settled with Wells Fargo for \$175 million, which also resolved Illinois's discriminatory lending claims.



state attorneys general did not believe could be justified by legitimate, nondiscriminatory business needs.<sup>38</sup>

In addition, the nature of the industry made disparate impact claims more feasible. Mortgage lending is a complicated multistep process involving numerous decision-makers making discretionary judgments. There are a variety of reasons why minority borrowers disproportionately receive predatory mortgages.<sup>39</sup> In some cases, lenders encourage minorities to apply for less favorable mortgages.<sup>40</sup> In other cases, independent brokers set stricter lending criteria for minority borrowers.<sup>41</sup> Just as in the land-use and zoning contexts, the discretionary decision-making scheme obscures the factors that defendants use to make decisions. And because the ultimate result

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<sup>38</sup> A recent investigation by the New York Attorney General found that between 2009 and 2012, one major Buffalo bank processed more than a thousand mortgage applications from residents of white neighborhoods, but only eight from residents of black neighborhoods—a rate far lower than all comparable banks in a city that is more than one-third black. Complaint, *People ex rel. Schneiderman v. Evans Bancorp, Inc.*, No. 14 Civ. 726, ECF No. 1 (W.D.N.Y. Sept. 2, 2014).

<sup>39</sup> Margery Austin Turner & Felicity Skidmore, *Mortgage Lending Discrimination: A Review of Existing Evidence*, The Urban Institute, at 3-6 (June 1999), available at [http://www.urban.org/UploadedPDF/mortgage\\_lending.pdf](http://www.urban.org/UploadedPDF/mortgage_lending.pdf).

<sup>40</sup> *Id.*

<sup>41</sup> See, e.g., Robert G. Schwemm & Jeffrey L. Taren, *Discretionary Pricing, Mortgage Discrimination, & the Fair Housing Act*, 45 Harv. C.R.-C.L. L. Rev. 375, 380 & nn.32-33 (2010).

is the cumulative product of multiple actors, it is difficult, if not impossible, to isolate where the taint of discriminatory motive infects the decisional chain. Further compounding the challenge of enforcement, the victims of lending discrimination typically do not have any means of comparing themselves to similarly situated counterparts. And because federal law prohibits false statements on mortgage applications, “testers” cannot submit hypothetical applications to probe for discriminatory intent in the mortgage context as they can in the rental context.<sup>42</sup>

States’ use of disparate impact claims in the housing context is not limited to cases involving either lending or racial discrimination. States have also used disparate impact claims to challenge zoning ordinances, occupancy restrictions, and English-only policies. *See, e.g., Support Ministries for Persons with AIDS, Inc. v. Village of Waterford*, 808 F. Supp. 120 (N.D.N.Y. 1992) (Waterford’s interpretation and application of a local zoning ordinance had disparate impact on basis of disability); *Connecticut Comm’n on Hum. Rts. & Opps. (“CHRO”) ex rel. Hurtado*, CHRO No. 8230394 (landlord’s English-only policy had disparate impact based on national origin and ancestry); *CHRO ex rel. Schifini*, CHRO No. 8520090 (landlord’s policy of limiting occupancy had disparate impact based on familial status); *In re Accusation of the Dep’t of Fair Employment and Hous. v. Merribrook Apartments, James C. Beard, Owner*, FEHC Dec. No. 88-19, 1988 WL 242651, at \*12-13 (Cal. F.E.H.C. Nov.

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<sup>42</sup> *Id.* at 386.

9, 1988) (facially neutral occupancy limit had adverse disparate impact on prospective renters with children).

States also rely on the Department of Justice and a variety of private organizations to assist and supplement our efforts to combat discrimination and its resulting social and economic costs. Like the States, these groups have used disparate impact theories increasingly in recent years to address contemporary manifestations of discrimination, particularly in the mortgage lending context. These cases are substantially similar to the cases brought by Massachusetts, New York, and Illinois, in that they challenged the discriminatory effects of discretionary decision-making across large groups of actors.<sup>43</sup>

The Department of Justice and others have also relied upon disparate impact theories in a number of cases outside the lending context. For example, the Department resolved a lawsuit alleging that the zoning laws of St. Bernard Parish, Louisiana, had the discriminatory effect of preventing African-Americans and other minorities from resettling there after

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<sup>43</sup> See, e.g., *Ramirez v. Greenpoint Mortgage Funding, Inc.*, 268 F.R.D. 627, 632-33 (N.D. Cal. 2010) (citing testimony that higher APRs of African-Americans compared to similarly situated whites could not be explained by legitimate risk factors); see also *NAACP v. Ameriquest Mortgage Co.*, 635 F. Supp. 2d 1096, 1103-04 (C.D. Cal. 2009), *as amended* (Jan. 13, 2009) (refusing to dismiss claims that marketing of subprime loans, deployment of financial incentives, and lack of meaningful review of loan applications had a disparate impact on African-Americans); *Garcia v. Countrywide Fin. Corp.*, No. 07-1161, 2008 WL 7842104, at \*3-7 (C.D. Cal. Jan. 17, 2008) (plaintiffs sufficiently alleged that bank's facially neutral practice of allowing discretionary fees resulted in disparate impact on minority borrowers).

Hurricane Katrina. *United States v. St. Bernard Parish*, No. 2:12-cv-00321 (E.D. La. 2012). In 2012, the Fair Housing Justice Center settled a lawsuit against the Town of Yorktown, New York, alleging that residency preferences included in the town's Section 8 program had an adverse impact on African-Americans and Hispanics and reinforced the town's racially segregated housing patterns. *Fair Hous. Justice Ctr., Inc. v. Town of Yorktown*, No. 7:10-cv-09337 (S.D.N.Y. 2012); see also *Cnty. Action League v. City of Palmdale*, No. 11-cv-4817 (C.D. Cal. 2012). And, in 2013, a private real estate developer obtained an injunction against the Village of Wheeling, Illinois, after alleging that its categorization of group homes for individuals with mental disabilities as "social service facilities," rather than as housing, prevented development in residential areas and therefore had a discriminatory impact on individuals with disabilities in violation of the FHA. *Daveri Dev. Group, LLC v. Village of Wheeling*, No. 1:12-cv-07419 (N.D. Ill. 2013).

These cases, like those brought by States challenging zoning and occupancy restrictions, all involved policies that were not expressly discriminatory, but nonetheless had a direct impact on residential housing patterns in ways that perpetuated segregation and, in many instances, indicated discriminatory intent. Had disparate impact claims not been available, the victims of the discriminatory policies and practices likely would have been left without a meaningful remedy.

### III. DISPARATE IMPACT CLAIMS DO NOT UNDULY BURDEN DECISION-MAKING OR RAISE CONSTITUTIONAL CONCERNS FOR GOVERNMENTAL ACTORS

While *Amici States* are acutely sensitive to federal incursions into state and local matters, we disagree with Petitioners' suggestion that disparate impact claims under the FHA intrude upon the ability of local governments to regulate land use and development to a degree that raises constitutional concerns. Disparate impact claims have been available under the FHA for more than three decades, and local governments have not been unduly restricted.<sup>44</sup> To the contrary, for all of the reasons discussed herein, the inequities that result from housing discrimination and segregation are a serious concern for state and local governments, and disparate impact claims are important to *furthering* our interests in remedying those problems.

Petitioners and their *amici* raise two principal concerns about disparate impact claims under the FHA. First, they contend that disparate impact liability is incompatible with local control over land use and development, given the likelihood that any land use decision will have a disparate impact on some protected group in some way. This possibility, they assert, hinders decision-makers and exposes governmental entities to continuous litigation. Pet. Br. 26-29. Second, they maintain that the doctrine of constitutional

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<sup>44</sup> Moreover, state and local activities are already subject to limitations through other federal statutes—including, for example, Title VI, the Americans with Disabilities Act, and the Religious Land Use and Institutionalized Persons Act.

avoidance counsels against disparate impact liability because it may require governmental actors to engage in unconstitutional conduct—intentional discrimination. *Id.* at 42-43. Neither assertion is supported by history.

In suggesting that disparate impact liability unduly fetters local governments' ability to regulate land use and development, Petitioners ignore the reality of four decades of disparate impact litigation under the FHA. An examination of the outcomes of these cases demonstrates that, far from exposing state and municipal actors to broad liability, disparate impact claims under the FHA have imposed only modest restrictions on local governments' planning decisions. There have been thousands (likely even millions) of land use decisions since disparate impact claims were first recognized under the FHA. Very few have been challenged under the FHA. Far fewer have been successful. For example, of the 92 FHA disparate impact claims considered by federal Courts of Appeals between 1974 and 2013, only 18 resulted in positive outcomes for plaintiffs.<sup>45</sup> Considered against this backdrop, the recent cases in which this Court granted certiorari on this issue, including *Magner v. Gallagher*, 132 S. Ct. 548 (2011), and *Township of Mount Holly v. Mount Holly Gardens Citizens in Action, Inc.*, 133 S. Ct. 2824 (2013), are decidedly atypical. In fact, the success

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<sup>45</sup> Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims under the Fair Housing Act*, 63 Am. U. L. Rev. 357, 393 (2013).

rate of FHA disparate impact claims at the appellate level has dropped every decade since the 1980s.<sup>46</sup>

Far from construing disparate impact liability expansively, courts have engaged in increasingly rigorous analyses of FHA disparate impact claims across a range of contexts, rejecting such claims in cases involving redevelopment plans,<sup>47</sup> siting and construction of housing developments,<sup>48</sup> disbursement of federal housing funds,<sup>49</sup> and passage of zoning ordinances.<sup>50</sup>

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<sup>46</sup> *Id.* at 393-94.

<sup>47</sup> *See, e.g., City of Fort Lauderdale v. Scott*, 888 F. Supp. 2d 1279, 1298 (S.D. Fla. 2012), *aff'd*, 551 F. App'x 972 (11th Cir. 2014); *Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth.*, 417 F.3d 898, 903-06 (8th Cir. 2005); *Catanzaro v. Weiden*, 188 F.3d 56, 65 (2d Cir. 1999).

<sup>48</sup> *See, e.g., Fair Hous. in Huntington Comm. Inc. v. Town of Huntington*, 316 F.3d 357, 367 (2d Cir. 2003) (proposed housing justified by “urgent need for senior housing in the community”); *Ventura Vill., Inc. v. City of Minneapolis*, 318 F. Supp. 2d 822, 827-28 (D. Minn. 2004), *aff'd*, 419 F.3d 725 (8th Cir. 2005); *Strykers Bay Neighborhood Council, Inc. v. City of New York*, 695 F. Supp. 1531, 1543 (S.D.N.Y. 1988).

<sup>49</sup> *See, e.g., Oti Kaga, Inc. v. S.D. Hous. Dev. Auth.*, 342 F.3d 871, 884 (8th Cir. 2003) (state housing development authority, “charged with the responsibility of distributing a finite number of state HOME program dollars among competing interests,” adopted policy that was “exercise of discretion reasonable and necessary to accomplish the daunting task [it] faces”).

<sup>50</sup> *See, e.g., Homebuilders Ass'n of Miss., Inc. v. City of Brandon*, 640 F. Supp. 2d 835, 843 (S.D. Miss. 2009).

By contrast, those disparate impact claims that have been successful under the FHA have often unmasked intentionally exclusionary housing policies. For example, following Hurricane Katrina, local officials in St. Bernard Parish, Louisiana, undertook a series of zoning actions that restricted the availability of rental and multifamily housing. *See Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish*, 641 F. Supp. 2d 563, 569 (E.D. La. 2009). These actions constituted a thinly veiled effort to exclude African-Americans from the Parish and thus maintain its predominantly Caucasian demographics. Among the Parish's enactments was a "blood relative ordinance," which prohibited the rental of single-family residences to persons unrelated by blood. *Id.* at 565, n.1. After a consent order settled a legal challenge to these enactments, the Parish placed a moratorium on the construction of multifamily housing with more than five units. *Id.* at 565-66. The court found that the moratorium disparately impacted African-Americans, noting that "African-American households are 85% more likely to live in [such structures] than Caucasian households." *Id.* at 567.

In another instance of discriminatory local conduct, a court approved a settlement where a municipality "began purchasing and demolishing multifamily residential structures in two of [its] largest Hispanic neighborhoods." *Hispanics United of DuPage County v. Village of Addison*, 988 F. Supp. 1130, 1135 (N.D. Ill. 1997). The locality claimed that it chose the target areas based on purportedly neutral reasons of blight, housing code violations, and population density. *Id.* at 1141-42. Applying disparate impact analysis, the court concluded that the municipality had "embarked on a



selective course of action” that predominantly affected Hispanic areas. *Id.* at 1155. These cases illustrate the effectiveness of disparate impact claims in challenging policies that, while facially neutral, clearly effectuate a discriminatory purpose. Thus, this theory of liability remains a critical tool for uncovering and successfully prosecuting deliberate discrimination by both local governments and private actor, without unnecessarily restricting local decision-making.<sup>51</sup>

History also offers no support for Petitioners’ constitutional avoidance argument. They have identified no housing cases in which a claim of intentional discrimination was asserted against governmental actors for seeking to avoid disparate impact liability. And *Amici* States are aware of none. Under such circumstances, the “grave” constitutional concerns required to give rise to the Court’s application of the constitutional avoidance canon are not met. *Rust v. Sullivan*, 500 U.S. 173, 191 (1991).<sup>52</sup>

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<sup>51</sup> Petitioners’ contention that certain state programs focusing on disadvantaged communities would be subject to FHA enforcement is speculative at best. The referenced programs appear to be designed precisely to advance Congress’s stated goals in enacting the FHA. Even if a disparate impact challenge were brought, Petitioners offer no indication that a hypothetical plaintiff could prove that there was a less discriminatory alternative to advance the important purposes of these programs. Further, the suggestion that HUD would engage in selective enforcement based on such an inchoate claim is specious.

<sup>52</sup> In suggesting that compliance with the FHA requires “race-based decisions,” Petitioners seek to create a constitutional question by significantly overstating the issue. Pet. Br. 44. They erroneously reframe the requirements of the FHA as “racial balancing,” when it merely demands that state and local actors

If Petitioners were correct, nearly every instance of land use decision-making would trigger scrutiny under the Fourteenth Amendment because all planning decisions affect members of groups protected by the FHA. For example, consider a town that proposes particular boundaries for a redevelopment area, hears public comments, and, based on concerns that it will disproportionately displace African-American or Hispanic families, decides against the proposal. Subsequently, the town proposes a second redevelopment area, mindful of prior concerns. If this deliberation could constitute intentional racial discrimination, then the Fourteenth Amendment would limit land use and other local regulatory decisions to the same extent Petitioners complain disparate impact claims do.

In any event, avoiding disparate impact liability under the FHA is not the only way in which state and local governments may run afoul of the Constitution. Evidence of disparities can support a claim of intentional discrimination under the Fourteenth Amendment. Because cities and towns may genuinely be concerned about perpetuating segregation, they might make choices similar to those in the hypothetical described above even absent fear of disparate impact liability.

More fundamentally, though, Petitioners' constitutional avoidance arguments seek to call into question the broad goals of the FHA. Beyond discrimination claims, the FHA imposes obligations on

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consider the effects of their policies to ensure that they are appropriately justified.

governmental actors to affirmatively further fair housing opportunities. These obligations extend beyond ensuring that policies are neutral in their terms and that decision-makers avoid invidious discrimination. They require the elimination of barriers for groups that have been historically disadvantaged, ranging from prioritizing disability access to removing residence qualifications for programmatic participation. These programs remain a critical component of our combined efforts to enhance access to housing, and do not result in invidious discrimination against other individuals or groups simply because they are not as frequently “benefitted” by such policies and programs.

Residential segregation continues to be a significant impediment to equal access to a wide range of opportunities for historically disadvantaged groups. Disparate impact liability, combined with the affirmative obligations imposed by the FHA, remains a critical tool to achieving meaningful equality of opportunity. Petitioners seek to dismantle this tool in one fell swoop based on little more than speculation and supposition. The Court should reject those arguments.

### CONCLUSION

For the foregoing reasons, *Amici* States respectfully submit that the Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

ERIC T. SCHNEIDERMAN <i>Attorney General of the State of New York</i>	MARTHA COAKLEY <i>Attorney General of Massachusetts</i>
BARBARA D. UNDERWOOD <i>Solicitor General</i>	JONATHAN B. MILLER GENEVIEVE C. NADEAU*
CECELIA C. CHANG <i>Special Counsel to the Solicitor General</i>	<i>Assistant Attorneys General</i>
KRISTEN CLARKE <i>Chief, Civil Rights Bureau</i>	One Ashburton Place Boston, MA 02108 (617) 727-2200 genevieve.nadeau@state .ma.us
MATTHEW W. GRIECO <i>Assistant Solicitor General</i>	<i>* Counsel of Record for Amici Curiae</i>
120 Broadway, 25th Floor New York, NY 10271	

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Boston, Massachusetts