No. 13-1371

In The
Supreme Court of the United States

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

Petitioners,

v.

THE INCLUSIVE COMMUNITIES PROJECT, INC.,

Respondent.

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

BRIEF OF HOUSING SCHOLARS AS *AMICI CURIAE* SUPPORTING RESPONDENT

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QUESTION PRESENTED

Are disparate-impact claims cognizable under the Fair Housing Act?

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INTEREST OF *AMICI CURIAE*

Amici curiae are historians, social scientists, demographers and housing scholars who study the history of housing segregation and its effects in the United States. *Amici*, listed in the Appendix, are college and university faculty and researchers who have published numerous books, articles, and reports on segregation. *Amici* file this brief to acquaint the Court with the dynamics of residential racial segregation and remind the Court of the history of governmental policies (federal, state, and local) in creating segregated patterns that persist in our metropolitan regions and to illustrate why disparate impact claims are necessary to ensure that contemporary housing policies avoid perpetuating these patterns in violation of the language and purpose of the Fair Housing Act (FHA).[1]

SUMMARY OF ARGUMENT

The Petitioners' administration and allocation of Low Income Housing Tax Credits (LIHTC) increases racial segregation in the state of Texas and the Dallas metropolitan region in violation of the FHA's requirement that the Texas Department of Housing and

[1] Petitioner and Respondents have consented to the filing of this brief in letters on file in the Clerk's office. No counsel for Petitioner or Respondents authored this brief in whole or in part, and no counsel or party made a monetary contribution specifically for the preparation or submission of this brief.

Community Affairs "affirmatively further fair housing." The Petitioners have administered the LIHTC program in a manner that has increased and exacerbated patterns of residential racial segregation produced by *de jure* and other overt discrimination in Dallas housing.

Racially segregated residential patterns were systematically promoted and often created by federal, state, and local public housing. The federal government implemented racially explicit mortgage guarantee policies intended to residentially segregate the races and create predominantly white middle-class towns and suburbs to surround central cities. These policies were reinforced by widespread private housing discrimination against non-white families. Both public and private housing discrimination throughout the twentieth century violated African-Americans' rights. *See Hills v. Gautreaux*, 425 U.S. 284 (1976); *Jones v. Alfred H. Mayer, Co.*, 392 U.S. 409 (1968); *Shelley v. Kraemer,* 334 U.S. 1 (1948); *Walker v. U.S. Dep't of Hous. & Urban Dev.*, 912 F.2d 819 (5th Cir. 1990).

Prohibited from living in white suburbs when they were being developed, African-Americans did not benefit from substantial twentieth century housing capital appreciation, as did white families, contributing to African-Americans' inability to move to integrated neighborhoods now, even if discrimination has diminished. African-Americans' incomes are also depressed because of intertwined public and private dual labor market policies that prevented

African-Americans from accumulating wealth and work experience necessary to afford housing in integrated neighborhoods with integrated schools. As a result of mutually reinforcing housing and labor market policies and practices, residents of racially isolated, low-income neighborhoods typically cannot afford to move into integrated neighborhoods.

Because housing patterns remain structured by a legacy of public policy and private behavior, the allocation of LIHTC in the manner conducted by the Petitioners has a disparate impact on African-Americans, violating the FHA's language and purpose. Petitioners approved tax credits for developments in overwhelmingly non-white neighborhoods, thwarting the mandate to "affirmatively further" fair housing. Petitioner's administration of the LIHTC program in Texas and the Dallas metropolitan region continues a long history of federally subsidized housing, fostering and magnifying racial segregation and the concentration of poverty in low-income neighborhoods.

The FHA intended to ameliorate and remediate segregation's harms and effects. As this Court recognized in *Trafficante*, the FHA's main purpose is to "replace ghettos 'by truly integrated and balanced living patterns.'" *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972). Consequently, the FHA not only prohibited discrimination, but also charged housing agencies with the duty of "affirmatively furthering fair housing." Therefore, this Court should affirm the Fifth Circuit's decision.

ARGUMENT

I. RESIDENTIAL PATTERNS OF RACIAL SEGREGATION ARE PRONOUNCED AND PERSISTENT

Residential racial segregation across the United States remains pervasive more than four decades after the passage of the Fair Housing Act. In most major metropolitan regions in the United States, residential racial segregation is not only pronounced, but severe. The racial segregation of major urban areas and their schools has in many cases intensified and deepened. Even where some measures of segregation have softened or slowly declined, partially on account of growing multi-racial diversity and the decline of entirely white neighborhoods, patterns of racial concentration and isolation are astonishingly severe.

One measure of segregation commonly employed by social scientists is the dissimilarity index, which measures how evenly various racial groups are spread across neighborhoods within metropolitan areas. A score of 100 indicates that every neighborhood has residents of only one particular group ("complete segregation"), whereas a score of zero indicates proportional representation of each group throughout the metropolitan region ("complete integration"). Nationally, the average metropolitan region had a black-white dissimilarity score index of 59 in 2010, widely considered a high level of segregation. John R. Logan & Brian J. Stults, *The Persistence of Segregation in the Metropolis: New Findings from the*

2010 Census (Mar. 24, 2011). This measure suggests that more than half of the African-American residents in the United States would have to move to achieve complete residential integration.

Nationwide segregation as measured by the dissimilarity index rose steadily during the course of the twentieth century from a relatively low level to a peak of about 80 in 1970. (*See infra* Fig. 1, App. 8). The slow decline since is partly attributable to the decline in the number of all-white neighborhoods. James H. Carr & Nandinee K. Kutty, *Segregation: The Rising Costs for America* (2008). A modest number of African-Americans moved into previously all white neighborhoods, but this fact has not changed the underlying patterns of residential segregation. The number and percentage of predominantly black neighborhoods has remained stable (in fact, rising from 10.1% of census tracts in 1970 to 11.4% in 2000). *Id*. As of 2010, the average white resident of a metropolitan area resides in a neighborhood that is 75.4% white, 7.9% Black, 10.5% Hispanic, and 5.1% Asian. In contrast, a typical African-American resident lives in a neighborhood that is 34.8% white, 45.2% Black, 14.8% Hispanic, and 4.3% Asian. *See* Logan and Stults, *supra.*

Given our increasingly multi-racial demography, the dissimilarity index is misleading as an accurate measure of segregation and masks entrenched patterns of racial isolation. It describes only what proportion of any particular group would have to relocate for their percentage in each census tract in a

metropolitan area to have the same percentage as in the metropolitan area as a whole. A chief cause of reduced segregation, by this definition, is that low-income Hispanic (and in some regions, Asian) immigrants have moved into neighborhoods that previously were mostly black. This reduces the proportion of Blacks in those neighborhoods (and thus causes a metropolitan area's dissimilarity index to fall), but does little to integrate African-Americans into white neighborhoods. This is especially true in the Dallas metropolitan area, where the combined Hispanic and Asian population has grown from 9.2% in 1980 to 33.4% in 2010. Russell Sage Found. & American Communities Proj., *Dallas-Fort Worth-Arlington, TX Metropolitan Statistical Area* (Dec. 20, 2014), http://www.s4.brown.edu/us2010/segregation2010/msa.aspx?metroid=19100.

A better measure of segregation describes the "exposure" of African-Americans to the majority white population. By this measure, segregation is today greater nationwide than it was in 1940, and has remained mostly unchanged since 1950. (*See infra* Fig. 2, App. 9). In 1940, the average African-American lived in a neighborhood that was 40% white. In 1950 it fell to 35% – where it remains today (according to the 2010 Census). By this measure there has been no progress in reducing segregation for the last 65 years. And, it is likely that since the 2010 Census, segregation has increased further nationally. The epidemic of foreclosures on homes with sub-prime mortgages since 2008 has disproportionately affected African-Americans, many who were able to move to first-ring

suburbs with white neighbors during the housing boom. Many of these displaced homeowners have had to relocate back to poorer and more racially isolated black neighborhoods. Richard Rothstein, *A Comment on Bank of America/Countrywide's Discriminatory Mortgage Lending and its Implications for Racial Segregation*, EPI Briefing Paper #335 (Economic Policy Institute), Jan. 23, 2012.

Moreover, the more general decline in the dissimilarity index masks deep patterns of racial concentration. According to 2006-2009 Census estimates, 75% of African-American families nationwide reside in just 16% of census tracts. Another measure of this hyper segregation is the fact that 30% of African-Americans live in Census Block Groups that are 75% African-American or more. Craig Gurian, *Mapping and Analysis of New Data Documents Still-Segregated America*, Remapping Debate (Jan. 18, 2011), http://www.remappingdebate.org/map-data-tool/mapping-and-analysis-new-data-documents-still-segregated-america.

These national patterns of segregation and racial isolation obtain in the Dallas metropolitan region. Figure 3 maps the distribution of non-white residents in the Dallas metropolitan region as of 2010. (*See infra* Fig. 3, App. 10). Although whites remain a slight majority of residents in the Dallas MSA, the region is characterized by racially identifiable neighborhoods and communities.

Despite enormous population growth and demographic changes, it is important to emphasize that

these patterns are not fundamentally dissimilar from those that existed before the passage of the FHA. Figures 4-8 illustrate the distribution of African-American residents in Dallas County from 1970, just two years after the passage of the FHA, to 2010. (*See infra* Fig. 4-8, App. 11-15). Figure 4 illustrates stark patterns of racial segregation and isolation for African-American families in Dallas, disproportionately concentrated in predominantly African-American neighborhoods in the South and Southeastern quadrant of Dallas urban core. Notably, this remains true in 2010 despite forty years of sprawl, massive Hispanic immigration, and residential growth. (*See infra* Fig. 8, App. 15). Too often, we ascribe extant patterns of racial residential segregation to 'natural' housing market decisions. Residential patterns, once put into place, tend to replicate themselves over time. The federal, state and local policies that segregated black families into particular neighborhoods has an observably enduring effect many decades later, despite the anti-discrimination provisions of the FHA.

II. FEDERAL, STATE, AND LOCAL GOVERNMENTS CREATED AND FOSTERED METROPOLITAN SEGREGATION

A. Federal Policy Promoting Residential Segregation

The federal government led in the establishment and maintenance of residential segregation in metropolitan areas. Chief among the tools by which this was accomplished were public housing and mortgage

guarantee programs. The public housing program helped to create or to sustain segregated black neighborhoods in urban areas. The mortgage guarantee and construction loan guarantee programs helped to create or to sustain exclusively white suburbs. Combined, these programs created residential patterns that continue to structure African-American housing opportunities. Petitioners' administration of the LIHTC program thus has a disparate impact on African-Americans, unless it makes adequate provision for African-American families in integrated neighborhoods.

1) Federal public housing programs helped create segregated African-American ghettos.

New Deal public housing policy placed projects according to residents' race. Harold Ickes, President Franklin Roosevelt's first housing administrator, established a "neighborhood composition rule"; declaring that public housing could not alter a neighborhood's previous racial pattern. Thus, projects for black occupancy were constructed in existing black areas, usually already considered "slums." *See, e.g.,* Arnold Hirsch, *Choosing Segregation. Federal Housing*, *in From Tenements to the Taylor Homes* (John Bauman, Roger Biles, and Kristin Szylvian, eds., 2000). In Chicago, e.g., there were eight segregated projects by 1947 (four each for Blacks and whites) in addition to two integrated projects (in previously mixed neighborhoods). *See* Robert Weaver, *The Negro Ghetto* (1948).

Projects for whites developed many vacancies as national housing shortages eased and whites moved to suburbs. Projects for Blacks had long waiting lists. Pressed to create more African-American units in 1944, the National Housing Agency refused, stating that open sites were unavailable in traditionally black neighborhoods. *Id*.

These conditions were exacerbated by federal requirements that a slum unit be demolished for every public housing unit constructed. Displaced black families then crowded into neighboring African-American ghettos, overflowing into adjoining white neighborhoods that soon became predominantly African-American as well. This precipitated white flight to suburbs from now-overcrowded neighborhoods. *See* Kenneth Jackson, *Crabgrass Frontier: The Suburbanization of the United States* (1987).

This public housing segregation pattern was reinforced by federal housing for World War II production plant workers and military personnel. William Levitt and Sons built the largest federal projects in Norfolk, Portsmouth, and Pearl Harbor, all segregated. *Id.* This policy frequently established neighborhood segregation in cities where black workers had not previously lived in large numbers. *Id.*

In several cities, federal World War II policy established segregated housing where no, or very little, segregation had previously existed. In San Diego, the Navy itself managed housing, but excluded African-Americans. The Federal Public Housing

Authority also constructed war workers' housing with separate black and white sections. It enforced segregation rigidly. African-Americans were not admitted when the black section was filled, although many vacancies existed in the designated white sections. *Id.*

A Douglas Aircraft plant employing 44,000 workers, including many African-Americans, was located in Santa Monica. But, when the government proposed to subsidize a housing project adjoining the plant, community protests over the prospect of black neighbors caused removal of the project to Watts, an integrated neighborhood with an existing black population. Federal policy then turned Watts into a black ghetto where African-Americans were circumscribed, into the present. By 1965, six public housing projects had been built in or immediately adjacent to Watts. *See* Loren Miller, Testimony, in *Transcripts, Depositions, Consultants Reports, and Selected Documents of the Governor's Commission on the Los Angeles Riots*, Volume 10.

Public housing segregation continued post-war. In 1945, Detroit Mayor Edward Jeffries' successful reelection campaign warned white voters that housing projects with black residents would be located in their neighborhoods if his opponent were elected. His campaign literature proclaimed, "Mayor Jeffries is Against Mixed Housing." One Jeffries campaign leaflet was fraudulently depicted as having been issued by his opponent; the leaflet, advocating integration, was purportedly addressed to Blacks but actually distributed only in white neighborhoods to

arouse racial fears. In 1948-49, the Detroit city council held hearings on 12 proposed projects in predominantly white areas. Jeffries' successor (who also campaigned against "Negro invasions") vetoed all 12 but approved projects in predominantly black areas. *See* Thomas J. Sugrue, *The Origins of the Urban Crisis: Race and Inequality in Postwar Detroit* 80 (2005).

In 1949, Congress considered new public housing legislation. Opponents proposed "poison pill" amendments prohibiting racial discrimination, knowing that if they were adopted, southern Democrats who otherwise supported public housing would kill the legislation. Congress then rejected the amendments, so the 1949 Housing Act permitted localities to continue designing separate black and white public housing, or to segregate projects internally. *See* Richard O. Davies, *Housing Reform During the Truman Administration* 108 (1966).

Dearborn, Michigan, a Detroit suburb, maintained whites-only projects by accepting only tenants who had lived in Dearborn for the previous five years before being eligible for public housing. As no African-Americans (except a few domestic servants) lived in Dearborn, the policy guaranteed black ineligibility. In a 1956 interview, Dearborn's mayor described his delight regarding whites moving to Dearborn to flee integrated Detroit neighborhoods: "These people are so anti-colored, much more than [Southerners]. . . . Negroes can't get in here. Every time we hear of a Negro moving in, we respond quicker than you do to a fire." One black family that purchased a home in

defiance of city policy found its gas turned off and garbage uncollected, and finally fled. *See* Davis McEntire, *Residence and Race* 289 (1960). By the 2010 census, Dearborn's black population was still only 4%, with whites 89% (including many Arab-Americans). On Dearborn's border, in contrast, Detroit was 83% black, 11% white. *See* 2010 Census, Census.gov.

In 1971, construction of publicly funded townhouses began in an all-white Philadelphia neighborhood. A white homeowners' association blocked construction workers and equipment. Police refused to intervene or to enforce an injunction against the demonstrators. African-Americans awaiting public housing filed suit. Mayor Frank Rizzo rejected compromises because "people in the area felt that black people would be moving into the area if public housing were built"; he referred to public housing as "black housing" and vowed not to permit it in "white neighborhoods." *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3d Cir. 1977).

Meanwhile, the federal government rejected proposals to pressure Philadelphia by withholding other funds. In 1977, a federal appeals court ordered the city to permit construction. The project was completed in 1982, nearly a quarter-century after demolition of black residents' homes and their relocation to more segregated neighborhoods. *See* David Bartelt, *Housing the Underclass*, in *The Underclass Debate* (Michael B. Katz ed., 1993); *Resident Advisory Bd.*, 564 F.2d at 126.

In 1976, this Court found the Chicago Housing Authority, with federal complicity, had unconstitutionally selected sites to create segregation. *Gautreaux*, 425 U.S. at 284. With site selection subject to veto by aldermen of wards in which projects were proposed, 99½% of sites in white neighborhoods were vetoed, compared to 10% of sites in black neighborhoods. Mayor Richard J. Daley rejected all sites in predominantly white neighborhoods, saying that public housing should only go "where this kind of housing is most needed and accepted." *See* Alexander Polikoff, *Waiting for Gautreaux,* Northwestern University Press at 98 (2007). The Court ordered that future sites be found in predominantly white suburbs. The federal-city response was to cease building public housing altogether.

Rather than follow a path consistent with the Fair Housing Act's mandate, government policy exacerbated segregation. President Nixon told a 1970 news conference, "I believe that forced integration of the suburbs is not in the national interest" and followed with a formal statement that "a municipality that does not want federally assisted housing should not have it imposed from Washington." *See* The American Presidency Project, *Richard Nixon: "The President's News Conference*," December 10, 1970, *available at* http://www.presidency.ucsb.edu/ws/?pid=2840, *Richard Nixon: "Statement About Federal Policies Relative to Equal Housing Opportunity,"* June 11, 1971, *available at* http://www.presidency.ucsb.edu/ws/?pid=3042.

Other federal court decisions, for example in Yonkers, Dallas, Baltimore, East Texas, and elsewhere, have found that the government created or perpetuated ghettos by discriminatory decisions to locate public housing for African-Americans only in ghetto communities, or by assignment policies placing black tenants in all black projects and white tenants in all white projects. *See United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987); *Walker,* 912 F.2d at 819; *Thompson v. U.S. Dep't of Hous. & Urban Dev.*, 348 F. Supp. 2d 398 (D. Md. 2005); *Young v. Pierce*, 822 F.2d 1368 (5th Cir. 1987).

In 1988, a federal judge ordered the Department of Housing and Urban Development (HUD) to desegregate its public housing projects in Clarksville, Texas, by assigning black tenants to previously all-white projects and vice-versa. Before it complied with the order, however, HUD made a special grant to the local housing authority to be used for paving streets around the previous all-black projects – with whites now living in the projects, the housing authority apparently believed it necessary to improve the quality. *See* Julian, Elizabeth K. & Michael M. Daniel, *Separate and Unequal – The Root and Branch of Public Housing Segregation*, 23 Clearinghouse Review 666-76 (1989).

In none of these or other cases were remedies sufficient to undo segregation that federal policy created. By the time of these dispositions, vacant land in predominantly white neighborhoods where public

housing could previously have been built was no longer available.

In 1984, investigative reporters from the *Dallas Morning News* visited federally funded projects in 47 cities nationwide and found the nation's nearly 10 million public housing residents almost always segregated by race. *See* "Separate and Unequal." Craig Flournoy & George Rodrigue, Dallas Morning News, 10 Feb. 1985.

As the historian Kenneth Jackson concluded,

> "The result, if not the intent, of the public housing program of the United States was to segregate the races, to concentrate the disadvantaged in inner cities, and to reinforce the image of suburbia as a place of refuge [from] the problems of race, crime, and poverty."

Jackson, *supra*, at 219. In fact, it was the intent as well. "By every measure," Jackson added, "the Housing Act of 1937 was an important stimulus" to white flight from the cities. *Id.*

2) Federal mortgage guarantee programs helped create segregated white suburbs.

While federal public housing programs pushed African-Americans into more concentrated urban areas, federal private housing programs pulled whites into racially exclusive suburbs. The creation

and expansion of suburbs in metropolitan areas depended on federal support, including transportation policy (highways enabling suburbanites to commute) and tax policy (tax benefits for mortgage interest, making single family home ownership affordable). In the process, explicitly segregationist policies were inscribed into these formative and federally subsidized growth patterns.

The Federal Housing Administration supported suburbanization by insuring advance bank financing for developers to construct large multi-home tracts, and by insuring mortgage loans to homebuyers, reducing bank risk, thus lowering mortgage interest rates. These FHA policies made it substantially cheaper for qualified borrowers to buy suburban homes. *See, e.g.,* Jackson, *supra*, at 204-06. For the first time Americans became more likely to purchase homes than rent, transforming residential life. *See* Ira Katznelson, *When Affirmative Action Was White* (2005). However, these policies carried racially exclusionary requirements.

Beginning in 1935, the government instructed bank appraisers to give higher ratings where "[p]rotection against some adverse influences is obtained by the existence and enforcement of proper zoning regulations and appropriate deed restrictions," adding that "[i]mportant among adverse influences . . . are infiltration of inharmonious racial or nationality groups." In this way, a preference for segregated neighborhoods was institutionalized. These preferences influenced residential development more broadly.

These appraisal standards served as a model for restrictive covenants for private builders and developers to use. *See* Federal Housing Administration, *Underwriting Manual: Underwriting and Valuation Procedure Under Title II of the National Housing Act*, Sections 309-312, June 1, 1935; Miller, *supra*, at 6.

Until 1948, more than half of all new subdivisions built in the United States had racially restrictive covenants. *See* Kevin Fox Gotham, *Urban Space, Restrictive Covenants, and the Origins of Racial Residential Segregation in a U.S. City, 1900-50,* 42.3 Int'l J. of Urban and Regional Res. 616 (2000). A survey of 300 suburban subdivisions developed from 1935 to 1947 in or around New York City found that 85% of all subdivisions with 75 or more units (almost all of these required advance government guarantees) had restrictive covenants. *See* John P. Dean, *Only Caucasian*, 23 J. of Land & Pub. Util. Econ. 428, Table II, (1947).

The Veterans Administration (VA) also insured mortgages and adopted racial policies. Neither the Federal Housing Administration nor VA suspended builders who violated state anti-discrimination laws. In 1961, the VA claimed that no veterans housing could be built if the agency insisted on non-discrimination. *See* United States Commission on Civil Rights, *Book 4. Housing.* U.S. Government Printing Office (1961), 69-71 [*hereinafter USCCR Book 4*]. Levittown, a 1947 Nassau development of 17,500 homes, addressed the housing shortage for white veterans, but at the FHA's insistence, developer

William Levitt refused sales to Blacks and each contract included a provision prohibiting future such re-sales. Blacks were banned from Levittown rentals as well. When a renter violated the policy by subletting to a black family, the renter and sublessee were evicted.

Plans for subdivisions like Levitt's were submitted for Federal Housing Administration or VA preapproval, the agencies determined the appraised values on which loans were made, and banks advanced construction capital based on the government guarantees. Deeds cited FHA policy, with preambles such as: "Whereas the Federal Housing Administration requires that the existing mortgages on the said premises be subject and subordinated to the said [racial] restrictions. . . ." Dean, *supra*, at 430.

Suburban projects were constructed with Federal Housing Administration and VA racial restrictions, nationwide. The first major post-war subdivision financed on a racially restricted basis by the federal government was Oak Forest on Houston's northwest side. *See* VerPlanck, Christopher, "*We're Sitting Pretty in Daly City": A Critical Analysis of Suburban Planning in Henry Doelger's Westlake Subdivision, Daly City, California* (2008) (draft of paper for presentation at annual conference of Society of Architectural Historians, Cincinnati, Ohio, March 20).

By 1950, the FHA and VA insured half of all new mortgages nationwide, usually requiring racial restrictions. White families, who prior to the post-war

housing boom lived in urban neighborhoods in proximity to or among African-Americans, were relocated by FHA policy to more isolated white enclaves. In a 1961 report, the U.S. Commission on Civil Rights called its "central finding" that "at all levels of the housing and home finance industries. . . . Federal resources are utilized to accentuate [the] denial of equal housing opportunity on racial grounds." *USCCR Book 4*. In 1973, the commission concluded that the "FHA was responsible for the widespread use of racial covenants," and that the "housing industry, aided and abetted by Government, must bear the primary responsibility for the legacy of segregated housing. . . . Government and private industry came together to create a system of residential segregation." USCCR, *Understanding Fair Housing*, Clearinghouse Publication 42 (1973); *see also* Hirsch (2000), *supra*, at 144-45.

State courts typically enforced restrictive covenants by issuing injunctions to prevent black purchasers from moving into white neighborhoods, or by ordering eviction of black homeowners and cancellation of sales. In 1948, this Court ruled that restrictive covenants could not be enforced by state courts, because such enforcement would constitute state action. *Shelley*, 334 U.S. at 1. But the Court's decision did not preclude property owners from voluntarily agreeing to racial covenants, or county clerks (also state actors) from continuing to accept covenants for recording. *See* Garrett Power, *Meade v. Dennistone*, 63 Md. L. Rev. 773 (2004).

Although the FHA removed explicitly racist language from its manuals in the 1950s, private firms, associations and banks continued to use such language through the 1970s. The FHA set national standards of valuation and appraisal used throughout the housing market, which reinforced and institutionalized housing segregation on a national scale. In this way, the ranking system created by the government persisted long after its disuse by government actors. Underwriting and pricing of home insurance policies adversely affect minority households and communities and reinforce patterns of segregation. *See* Gregory Squires, *Racial Profiling, Insurance Style*, 25 J. Urb. Aff. 391 (2003).

By 1968, when the Fair Housing Act was adopted, black-ghetto/white-suburb segregation was firmly established. Neighborhoods acquired a racial association that persisted long after practices that created those associations were dismantled. Jurisdictions locked-in these patterns with exclusionary zoning rules and other "race-neutral" practices.

3) Federal and state regulation of financial institutions kept African-Americans out of white suburbs and contributed to deterioration of segregated African-American neighborhoods.

While federal policy ensured that few African-Americans could live in predominantly white suburbs, it also ensured that segregated urban communities

would deteriorate. Banks and thrift institutions discriminated against African-American mortgage borrowers, independent of Federal Housing Administration pressure. Even for non-insured loans, twentieth century financial institutions practiced "redlining," a refusal to issue mortgages, on terms comparable to those whites enjoyed, to African-Americans in their own, segregated neighborhoods. Congress adopted the Community Reinvestment Act (12 U.S.C. § 2901) in 1977 in an attempt to prohibit this practice.

Redlining was not simply private banking practice. Banks and thrifts were heavily regulated since the 1930s. Government deposit insurance programs underwrite bank and thrift institution profits; in return, there is extensive regulation of lending practices. Federally, and state-chartered banks and thrifts regularly host examiners from the Federal Reserve, Comptroller of the Currency, Federal Deposit Insurance Corporation (FDIC), and Office of Thrift Supervision, who ensure sound loan practices. Banks and thrifts could engage in racial discrimination only if regulators chose to permit it. Until recently, regulators ignored discrimination. *USCCR Book 4*.

In 1961, the United States Commission on Civil Rights questioned regulators about redlining. Ray M. Gidney, then-Comptroller of the Currency, responded, "Our office does not maintain any policy regarding racial discrimination in the making of real estate loans by national banks." FDIC chairman Earl Cocke responded that banks he supervised should deny

loans to African-Americans because whites' property values might fall if Blacks moved nearby. Federal Reserve chairman William McChesney Martin responded that "Neither the Federal Reserve nor any other bank supervisory agency has – or should have – authority to compel officers and directors of any bank to make any loan against their judgment." If black applicants are denied loans because of race, Martin asserted "the forces of competition" would ensure that other banks will make the loans. *See USCCR Book 4,* at 42-51. With regulatory authority over all banks in the Federal Reserve System, and with virtually all banks engaging in discrimination, Martin's claim contradicted available evidence.

In the mid-twentieth century, because conventional financing was not available to them, African-Americans resorted to high-interest installment (contract) purchases where single missed payments could lead to eviction, and no equity accumulated until purchases were fully paid. Such contracts were widespread nationwide, in Chicago, Baltimore, Cincinnati, Detroit, Washington, D.C., and elsewhere. *See* James Alan McPherson, *The Story of the Contract Buyers League*, Atlantic Monthly, Apr. 1972.

When banks failed to issue mortgages to African-Americans in predominantly black communities, or the FHA declined to insure them, the government contributed to ghetto deterioration. With financing difficult to obtain, homes for sale stayed vacant for longer periods in black than in white communities and were more likely to be vandalized or in visible

disrepair. The poor maintenance contributed to white suburbanites' fears that if they dropped resistance to African-American neighbors, their communities would also deteriorate. High contract-purchase costs meant lower relative African-American incomes and wealth accumulation. Along with lack of equity, the result was growing unaffordability of suburban moves for African-Americans, even after overtly discriminatory barriers diminished.

In recent years, redlining gave way to reverse redlining, as historically credit-deprived neighborhoods were targeted for predatory loans to satisfy the secondary mortgage market's voracious demand for securitized loan products. Because low-income, minority areas were historically excluded from the traditional lending markets, lenders were able to saturate these neighborhoods with subprime loan solicitations; the loans, including those to borrowers with credit eligibility for conventional loans, were five times as likely in African-American than in white neighborhoods. Lenders even steered African-American borrowers with prime credit to take out subprime loans. The mortgages, with deceptive teaser rates, above-market longer-term rates, impractical balloon payments, and exorbitant closing costs and prepayment penalties, led to foreclosure waves in lower-middle class African-American neighborhoods in cities and first-ring suburbs, forcing many first-time homeowners back into rental housing in lower-income ghettos, increasing racial segregation. Large institutions negotiated settlements of suits that

alleged civil rights violations, although the institutions did not admit liability. *See* Rothstein, *supra.*

4) Other federal policies contributed to segregating metropolitan areas.

Public housing for black ghettos, mortgage insurance for white suburbs, and a denial of credit to African-American borrowers or prospective homeowners were the principal instruments of federal segregation policy. But, there were others, including tax exemptions, highway construction and urban renewal policy.

Where developers did not include restrictions in initial deeds, covenants were mutual agreements made subsequently by neighboring homeowners. Neighborhood associations organizing racial covenants were non-profit organizations or were sponsored by non-profit religious institutions, hospitals, or universities. For example, the University of Chicago spent $100,000 from 1933 to 1947 on legal services to defend restrictive covenants in its neighborhood. *See* Arnold Hirsch, *Making the Second Ghetto* 144-45 (1983). *Shelley*, the 1948 decision of this Court that held racial covenants were unenforceable at law, stemmed from a St. Louis restrictive covenant organized by a church-sponsored neighborhood association whose trustees provided funds from the church

treasury to finance the lawsuit to enforce the covenant. *Shelley,* 334 U.S. at 1. Such church involvement and leadership in racially-purposed property owners' associations was commonplace throughout the nation.

The government subsidized non-profit associations, hospitals, religious institutions, and universities by granting tax exemptions and making contributions to them tax deductible. The Internal Revenue Service maintained the tax-exempt status of organizations that discriminated. *See* William T. Coleman, Jr., *Brief of Amicus Curiae* in *Bob Jones Univ. v. United States*, 461 U.S. 574 (Aug. 25, 1982) (citing *Norwood v. Harrison*, 413 U.S. 455 (1973)). As the Court concluded in 1983, "an examination of the [Internal Revenue Code's] framework and the background of congressional purposes reveals unmistakable evidence that, underlying all relevant parts of the IRC, is the intent that entitlement to tax exemption depends on meeting certain common law standards of charity – namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy." *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). Tax subsidies that promoted racially restrictive covenants reinforced the government's shared responsibility for residential segregation.

The interstate highway system exacerbated segregation. Clearance for highways displaced large and disproportionate numbers of black families because when interstate highways were constructed

to bring suburbanites downtown, they were also often used as "slum clearance" to displace low-income neighborhoods deemed too close to downtown businesses. Frequently these neighborhoods, although with many black residents, were integrated. Local officials foresaw that displaced black families would have to relocate by crowding into outlying black neighborhoods, increasing metropolitan segregation. Planners selected some routes to create barriers between white and black neighborhoods to halt the spread of black residence. Weaver, *supra*. For example, in Dallas, a large segment of the city's black community was relocated into the south part of the city in order to build the Central Expressway. *See* Patrick Sharkey, *Stuck in Place* 56 (2013).

The executive director of the American Association of State Highway Officials, influential in Congressional highway design, later acknowledged that "some city officials expressed the view in the mid-1950's that the urban Interstates would give them a good opportunity to get rid of the local 'niggertown.'" The Senate deleted a provision for relocation assistance in the 1956 highway bill. *See* Gary T. Schwartz, *Urban Freeways and the Interstate System*, 49 So. Cal. L. Rev. 406, 485 n. 481, 483 (1975-76).

In Chicago, the Dan Ryan Expressway was routed to create a barrier between overwhelmingly black housing projects and white neighborhoods. In Atlanta, routes were chosen to create obstacles for black migration into white areas. *See* Raymond A. Mohl, *The Interstates and the Cities*, Poverty and

Race Research and Action Council (2002); Yale Rabin, *The Roots of Segregation in the Eighties, in Divided Neighorhoods* (Gary A. Tobin ed., 1987).

Interstate highways through Atlanta, Charlotte, Pittsburgh, Pasadena, Cleveland, Columbus, Milwaukee, Detroit, St. Paul, New Orleans, Columbia, Birmingham, and Montgomery, among others, all rejected available alternative routes that would have resulted in minimal housing loss, and instead routed highways through black communities. Alabama's highway director openly stated that his aim in Montgomery was to eliminate the church of Martin Luther King, Jr's deputy, Rev. Ralph Abernathy. After Abernathy complained to President Kennedy, the federal highway administrator advised the Alabama official to "let the dust settle for about six months and then proceed with construction of the project." Mohl (2002), *supra*, at 32-34.

Eventually, Congress required that relocation housing had to be provided for highways constructed after 1965, but by that time, the interstate highway network through downtown areas was mostly complete. Federally funded redevelopment plans (urban renewal), functioned similarly. Typically, low-income downtown neighborhoods were condemned for university or hospital expansion, or for middle-class housing to bring professionals back to cities.

Although the 1949 Housing Act provided federal financial assistance for relocation housing, it also permitted suburbs to veto construction of such housing

within their borders; most predominantly-white suburbs did so. Relocation housing, mostly high-rise public towers, was constructed almost exclusively in other all-black low-income ghettos, because once old neighborhoods were redeveloped from urban renewal, former residents could no longer afford to live in them. *See USCCR Book 4*, at 96-102.

B. State and Local Policy Promoting Residential Segregation

State and local governments systematically promoted residential segregation through their failure to regulate the real estate industry's discriminatory practices, tolerance of violence to prevent integration of white neighborhoods, and the discriminatory provision of services to African-American ghettos.

1) Real estate and insurance industry supervision

Real estate brokers are licensed by every state. All states require written examinations and most also require classroom instruction prior to licensure. State authorities revoke licenses for violations of regulations. Throughout the twentieth century, state-licensing practices included few or no efforts to discourage racially discriminatory activity by licensed brokers.

The most egregious form of licensed real estate activity that advanced racial segregation was blockbusting. This practice involved purposefully selling to

African-Americans in predominantly white neighborhoods bordering ghettos. Licensed brokers and agents then publicized these sales widely to panic white neighbors that they would suffer severe property value losses if they did not sell their homes quickly. *See* McPherson, *supra*.

Speculators (often licensed agents themselves) then purchased these properties at below market prices, quickly re-selling them at inflated prices to African-Americans desperate to flee overcrowded ghettos. The neighborhoods soon turned all black, and blockbusters then employed similar tactics in the next adjoining predominantly white neighborhood. The practice ensured that border areas surrounding black ghettos could not remain integrated. As of 1961, Baltimore was the only city nationwide with an ordinance prohibiting blockbusting. *See* Amanda Irene Seligman, *White Homeowners and Blockbusters in Postwar Chicago*, 94 J. Ill. St. Hist. Soc'y 70 (2001). Had state regulators withdrawn licenses from brokers who participated, urban integration might have been possible.

The regulated real estate industry openly promoted racial discrimination during the first half and more of the twentieth century. In 1920, the Chicago Real Estate Board issued a public congratulation to the Kenwood and Hyde Park Property Association for keeping African-Americans out of its neighborhood, and the following year adopted a resolution promising that "[i]mmediate expulsion from the Chicago Real Estate Board will be the penalty paid by any member

who sells a Negro property in a block where there are only white owners." *See* St. Clair Drake and Horace R. Cayton, *Black Metropolis. A Study of Negro Life in a Northern City*, Harper and Row at 179 (1945, 1962).

Throughout that decade, as African-Americans from the first "Great Migration" increased in number in Northern areas, licensed brokers who led real estate boards of large cities publicly identified neighborhoods where black occupancy was to be permitted. In developing its plan in 1924, for example, the New York City Realtors Association wrote to the Birmingham (Alabama) Real Estate Board, soliciting advice about how to "prevent negro encroachment on white residential territory." The St. Louis Real Estate Board conducted a referendum of its members to identify the boundaries of black and white areas. *See* McEntire, *Residence and Race, supra,* 244-45.

The 1968 Fair Housing Act made such rules unlawful, yet enforcement has been weak, mainly falling to non-governmental organizations to identify discrimination, usually by sending testers – matched black and white teams, posing as potential buyers, to real estate offices. Testers posing as well-qualified minority homeseekers continue to observe discriminatory treatment. Most important, they are told about and shown fewer homes and apartments than whites. These subtle forms of persistent discrimination in the housing market raise the costs of housing search for minorities and restrict their housing options. *See* Margery Austin Turner, et al., *Housing Discrimination against Racial and Ethnic Minorities*

2012, U.S. Dept. of Housing and Urban Development (2013).

The insurance industry is one of the most heavily regulated by state government and it, too, practiced redlining, denying insurance to African-American communities at terms similar to those offered white communities. Since 1995, fair housing organizations have filed lawsuits and administrative complaints resulting in favorable settlements with the largest insurers in the U.S. including State Farm, Allstate, Nationwide, American Family, Liberty Mutual, and others. In each case the insurers have agreed to increase the provision of their products in urban communities, in some cases targeting racial minorities in particular. *See* Squires, *supra*.

2) State-tolerated violence to prevent integration

When African-Americans attempting to move into predominantly white neighborhoods were frequently met with mob violence, perpetrators were rarely prosecuted and sometimes encouraged by state political and law enforcement authorities. Cross burnings on lawns of or adjacent to African-American pioneers were commonplace and rarely attracted the serious interest of police.

Such was the experience, for example, of Mallie Robinson when she moved with her children, including Jackie – later the baseball pioneer – to predominantly white Pasadena in 1922. What did attract

police attention, however, was when Jackie or his siblings ventured off Robinson property and into the neighborhood. The police responded daily to prevent it. *See* Arnold Rampersad, *Jackie Robinson* 23 (1997).

Following World War II, racial violence against black movers to white neighborhoods became commonplace. In Chicago by 1950 there were 350 incidents of such violence, fire-bombs, for example; in the first 10 months of 1947 alone, there were 26 such arson attacks, without a single arrest. Detroit had over 200 acts of intimidation and violence to deter African-American movers during this period. Similar violence took place in Atlanta, Birmingham, Cincinnati, Cleveland, Dallas, East St. Louis, Indianapolis, Kansas City, Los Angeles, Louisville, Philadelphia, Miami, Tampa, and elsewhere. *See especially* Leonard S. Rubinowitz and Imani Perry, *Crimes Without Punishment*: *White Neighbors' Resistance to Black Entry,* 92 J. Crim. L. & Criminology 335 (2001).

Typically, when black families moved into white neighborhoods and faced mob violence, police did not intervene, sometimes telling movers that police resources were insufficient to prevent violence and that leaving would be the best course, sometimes actively encouraging rioters. In 1964, African-American college students rented an apartment in a white Chicago neighborhood. A mob pelted the apartment with rocks. Police removed the students' belongings and told them they had been evicted. *Id.* at 351-52, 389, 390, n. 356.

Many violent protests were formally organized by neighborhood associations. Leaders were easily identified but not prosecuted. A U.S. Senate committee concluded that "[a]cts of racial terrorism have sometimes gone unpunished and have too often deterred the free exercise of constitutional and statutory rights." *See* Jeanine Bell, *The Fair Housing Act and Extralegal Terror*, 41 Ind. L. Rev 537, 540 (2008). The share of prosecuted incidents is now high, suggesting how tolerant law enforcement agencies were previously.

Police forces also enforced residential segregation by frequently documented incidents of selective harassment of African-American motorists or pedestrians venturing into predominantly white neighborhoods. In Plainfield, New Jersey, one of many where black ghetto youth rioted in 1967, an ongoing grievance was that police frequently stopped them without cause when they crossed the ghetto boundary. *See* Peter Dreier, *Riot and Reunion: Forty Years Later*, The Nation, July 30, 2007.

Moving-in violence intimidated African-Americans from attempting to integrate neighborhoods. Survey data that black respondents prefer predominantly black neighborhoods more likely result from this historically pervasive intimidation than from self-segregation preferences. *See* Joe Feagin & Melvin Sikes, *Living with Racism* (1994).

3) Discriminatory provision of municipal services

Overcrowding and poor maintenance in ghettos, a direct result of federal housing policy, created an image for whites of African-Americans having slum characteristics, reinforcing resistance to integration. Contributing to these visible slum conditions was municipal policy denying adequate public services to African-American neighborhoods.

The 1968 National Advisory Commission on Civil Disorders found that disparate and inadequate municipal services such as sanitation, garbage removal, paving and street lighting were grievances by ghetto residents in about half of cities surveyed where riots recently occurred. The Commission observed that inadequate sanitation and garbage removal led white residents of nearby neighborhoods to fear their own homes would soon lose value, and that they should flee. *See* National Advisory Commission on Civil Disorders, *Report of the National Advisory Commission on Civil Disorders* 14, 145, 273 (1968).

A frequent distinction between Northern black and white neighborhoods was the absence of adequate park and recreational facilities for African-Americans. Robert Moses, New York State's and City's mid-twentieth century organizer of public services, refused to build parks in black neighborhoods, asserting that Blacks were dirty and would not keep parks clean. He built one playground in all of

Harlem, claiming land there was too expensive, yet built many playgrounds in neighborhoods where land was more expensive. Moses kept one pool near a black ghetto unheated, hoping this would drive African-Americans away, while heating other pools throughout the city. In 1943, a grand jury concluded that lack of recreational facilities, compared to other areas of the city, contributed to a Brooklyn ghetto's high crime rate, but the grand jury was powerless to order a rebalancing of city services. *See* Robert Caro, *The Power Broker* (1975).

As recently as 2008, a federal jury awarded $11 million in damages to residents of an unincorporated African-American neighborhood on the Zanesville, Ohio border, where black plaintiffs were denied water service for 50 years. *See* James Dao, *Ohio Town's Water at Last Runs Past a Color Line*, N.Y. Times, Feb. 17, 2004. As late as the 1980s, a water authority official asserted "those niggers will never have running water." Blacks' cost of water (e.g., from purchased bottled water) was ten times as great as costs for white homeowners who obtained municipal water. *Kennedy v. City of Zanesville*, 505 F. Supp. 2d 456 (S.D. Ohio 2007).

C. Government-enforced Dual Labor Market

Unaffordable suburban residence for many African-Americans today partly results from federally sustained (and partly created) dual labor markets

during the twentieth century. The Fair Labor Standards Act, Social Security Act, and National Labor Relations Act excluded agricultural or domestic service workers, where African-Americans were present in large numbers. Congressional debates show that racial motivation of the legislative exclusions was explicit. *See* Katznelson, *supra*.

During World War II, hundreds of thousands of African-Americans migrated to urban areas to work in defense industries where they were often barred from all but the lowest-skilled jobs. Unions representing workers at defense plants controlled hiring and promotions, and frequently barred African-Americans from membership. Although a 1941 presidential order prohibited discrimination by defense contractors and unions, many covered employers and unions ignored the order.

The National Labor Relations Board (NLRB) certifies unions for exclusive bargaining rights. In no cases during the war, when white workers were climbing the economic ladder in industrial and craft unions, did the NLRB refuse to certify unions that maintained explicit policies of racial exclusion. *See* Thurgood Marshall, *Negro Status in the Boilermakers Union*, The Crisis (March 1944); Herbert R. Northrup, *Organized Labor and Negro Workers*, 51 J. Pol. Econ. 206 (1943).

The federal government recognized and bargained with segregated unions representing its own workforce. For example, the National Association of

Letter Carriers, the exclusive bargaining agent for postal workers who delivered mail, did not permit African-American letter carriers to join, in some areas into the 1970s. Black letter carriers could not, therefore, file grievances through their union. It was not until 1962 that President Kennedy issued an executive order prohibiting racial discrimination by unions representing federal employees. As in the case of the Letter Carriers, such discrimination continued at least for another decade. *See* Nat'l Assoc. of Letter Carriers, AFL-CIO, *Same Work, Different Unions*, Postal Record, June 2011, at 8.

In 1964 the National Labor Relations Board for the first time denied certification to a private sector union because it practiced racial discrimination. *Indep. Metal Workers, Locals 1 & 2 (Hughes Tool Co.)*, 147 NLRB 1573 (1964). It was another decade before African-Americans were admitted without discrimination to many craft unions, but seniority meant it would be many years until African-Americans rose in rank to the point where their incomes were comparable to whites'. By then, racial income inequality was firmly established. As the nation deindustrialized, the benefits for African-Americans of non-discrimination in the labor market were much less than they would have been a half-century earlier, severely limiting African-Americans' opportunities to accumulate wealth for home ownership.

III. DISPARATE IMPACT CLAIMS ARE NECESSARY TO DISINTERMEDIATE PATTERNS OF RESIDENTIAL SEGREGATION FOSTERED BY FEDERAL, STATE, AND LOCAL POLICIES.

Publicly enforced dual labor markets, along with public policies creating urban ghettos and white suburbs, share responsibility for the segregation that structures African-Americans' geographic mobility in metropolitan areas. By the Fair Housing Act's 1968 adoption, racially discriminatory public policy and private discrimination had produced entrenched patterns of residential segregation and resource disparities that continue despite subsequent anti-discrimination statutes, court decisions, and strengthened fair housing legislation and regulations.

The Fair Housing Act (FHA) arrived too late in the day to disestablish residential racial segregation in the way that *Brown v. Board of Education* sought to do for public education. *Brown,* 347 U.S. 483 (1954). Moreover, the enforcement mechanisms of the Act, whether filed through the administrative apparatus or by civil action, were largely individualistic, anti-discriminatory tort approaches. The FHA may have increased freedom of choice for many homebuyers, but its enforcement mechanisms were insufficient to reverse decades of segregative public policies, unwind the widespread association of black families with declining home values, or produce integrated neighborhoods.

The FHA targeted not only individual housing discrimination but also charged the government with "affirmatively furthering" fair housing. However, federal, state and local housing agencies failed to adequately enforce this mandate. HUD has only recently proposed a rule that would condition grants on policies to affirmatively further fair housing, but that such a rule is now being considered nearly 47 years after the Fair Housing Act required it, is itself suggestive of how racial segregation has been permitted to rigidify. *See* Department of Housing and Urban Development (HUD), 78 Fed. Reg. 43,710 (proposed July 13, 2013) (to be codified at 24 CFR Parts 5, 91, 92, et al.), *available at* http://www.huduser.org/portal/affht_pt.html.

Housing values in predominantly white areas have now appreciated to the point that most African-Americans, barred from participating in the boom that created these values, can no longer voluntarily integrate most suburban communities. Vacant land is no longer plentiful in predominantly white suburbs, and where land is available, suburbs typically lock in racial exclusivity with facially-neutral zoning ordinances that forbid construction of affordable housing. Requiring larger lot development and low-density zoning depresses growth of rental housing, increases housing costs, and limits the influx of African-American and Latino households. Rolf Pendall, *Local Land Use Regulations and the Chain of Exclusion*, 66 J. Am. Plan. Assoc. 125-42 (2000). Fragmented local governments and fragmented

school districts in metropolitan areas enable municipalities to enact such parochial policies that perpetuate residential segregation.

Such exclusionary zoning practices are not only common, but are indirectly subsidized by HUD's continued provision of block grants to suburbs where racial homogeneity persists and exclusionary practices remain in place. Federal and state subsidized housing also contributes to perpetuation of racial segregation, because subsidized housing is clustered in inner-city minority communities. As of 2000, three-quarters of the nation's assisted housing units, and 58% of its Low Income Housing Tax Credit units, were located in central cities, home to only 37% of the nation's metropolitan population. Lance Freeman, *Siting Affordable Housing*, Brookings Institution (2004). In metropolitan areas, most of the remainder are sited in newly segregated first-ring suburbs where minority populations have concentrated as inner cities gentrify. That this pattern holds in Dallas is the ground for this suit, and underscores the need for disparate impact liability.

Petitioner has approved LIHTC developments overwhelmingly in non-white communities. Figure 9 represents the distribution of LIHTC subsidized developments in Dallas County as of 2010. (*See infra* Fig. 9, App. 16). In fact, only six out of 162 LIHTC projects were sited in majority white neighborhoods. (*See* Table 1, *infra* App. 17). Seventy-two percent of projects approved in the Dallas Metropolitan area are sited in predominantly non-white census tracts. *Id.*

Policies such as those administered by the Petitioners, including the LIHTC program, exacerbate and contribute to these patterns of extant residential racial segregation and isolation.

In 1961, the U.S. Commission on Civil Rights concluded that as a result of an inseparable pattern of public policy and private discrimination, "[r]esidential segregation is so deeply ingrained in American life that the job of assuring equal housing opportunity to minority groups means not only eliminating present discriminatory practices but correcting the mistakes of the past as well." *USCCR Book 4*, at 3-5. Because of the enduring effects of federal, state, and local policies and actions that segregated metropolitan areas, subsequent public policies and private actions perpetuate these residential patterns and frequently exacerbate them. The FHA targeted practices that were neutral on their face but nonetheless froze the harmful effects of prior racial discrimination. The segregative effects of new, facially race-neutral policies in the context of historical policies described in this brief have been profound.

Disparate impact claims require governmental entities to ensure they neither perpetuate patterns of residential segregation nor exacerbate them inadvertently. In *Croson*, this Court was careful to note that local governments have authority to remedy private discrimination if they have become a "passive participant" in a system of racial exclusion. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989). Where segregative patterns are erected on

structures that flow from past intentional discrimination, they should not be permitted to continue, regardless of intent. Limiting FHA claims to a showing of intentional discrimination would permit the perpetuation and exacerbation of these patterns in violation of the clear meaning and intent of the FHA.

The LIHTC program has become the dominant affordable housing program in the United States. Indirectly subsidized by federal coffers, states enjoy enormous discretion in administering this program. Permitting states to channel hundreds of millions of dollars per year in federal funds to perpetuate segregation would be to effectively thwart the mandate to 'affirmatively further' fair housing. *See* Novogradac Affordable Housing Resource Center, *Low-Income Housing Tax Credit: Federal LIHTCs 2014 Federal Tax Credit Info. by State* (Dec. 21, 2014), *available at* http://www.novoco.com/low_income_housing/lihtc/federal_lihtc.php. Disparate impact claims are necessary to fulfill the purposes and function of the Fair Housing Act, and are essential to redress and disestablish entrenched patterns of residential segregation. For these reasons, we ask this Court to affirm the decision of the Fifth Circuit Court of Appeals in this case.

CONCLUSION

On the basis of the foregoing arguments and authorities, the Housing Scholars urge this Court to

affirm the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

Dated: December 23, 2014

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Figure 1

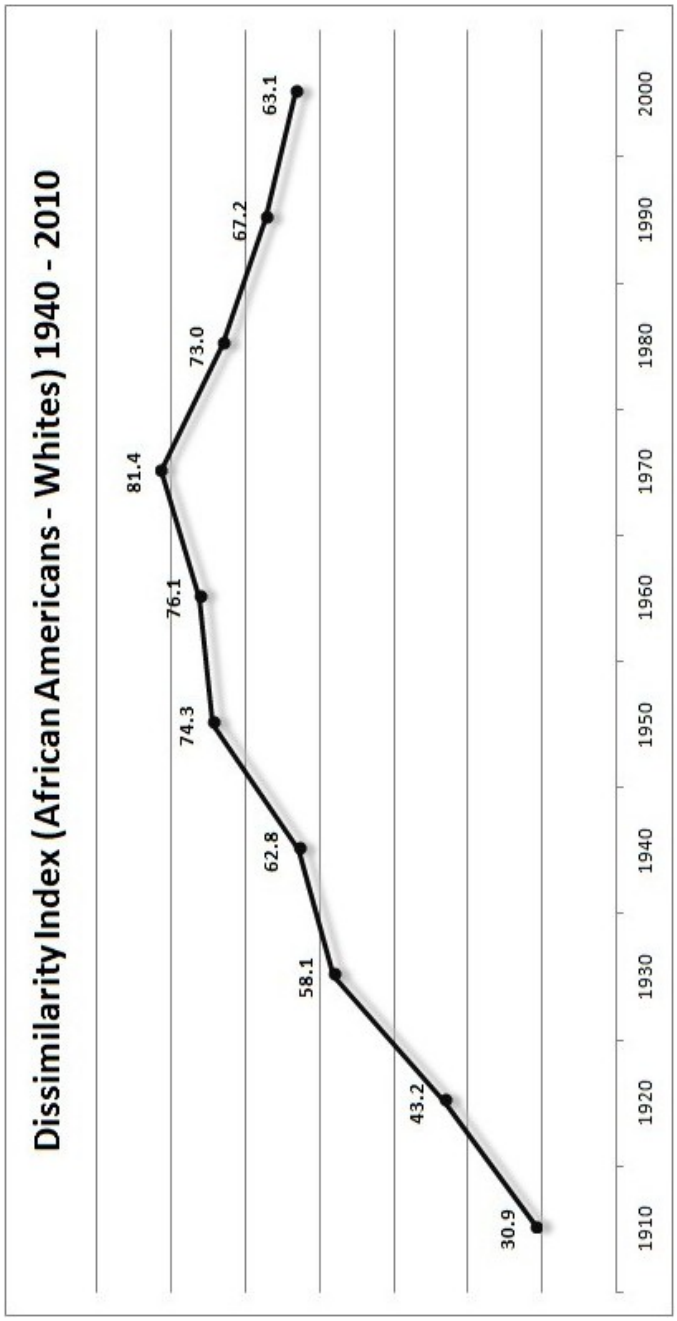
Dissimilarity Index (African Americans - Whites) 1940 - 2010
81.4
76.1
74.3
62.8
58.1
43.2
30.9
73.0
67.2
63.1
1910
1920
1930
1940
1950
1960
1970
1980
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Figure 2

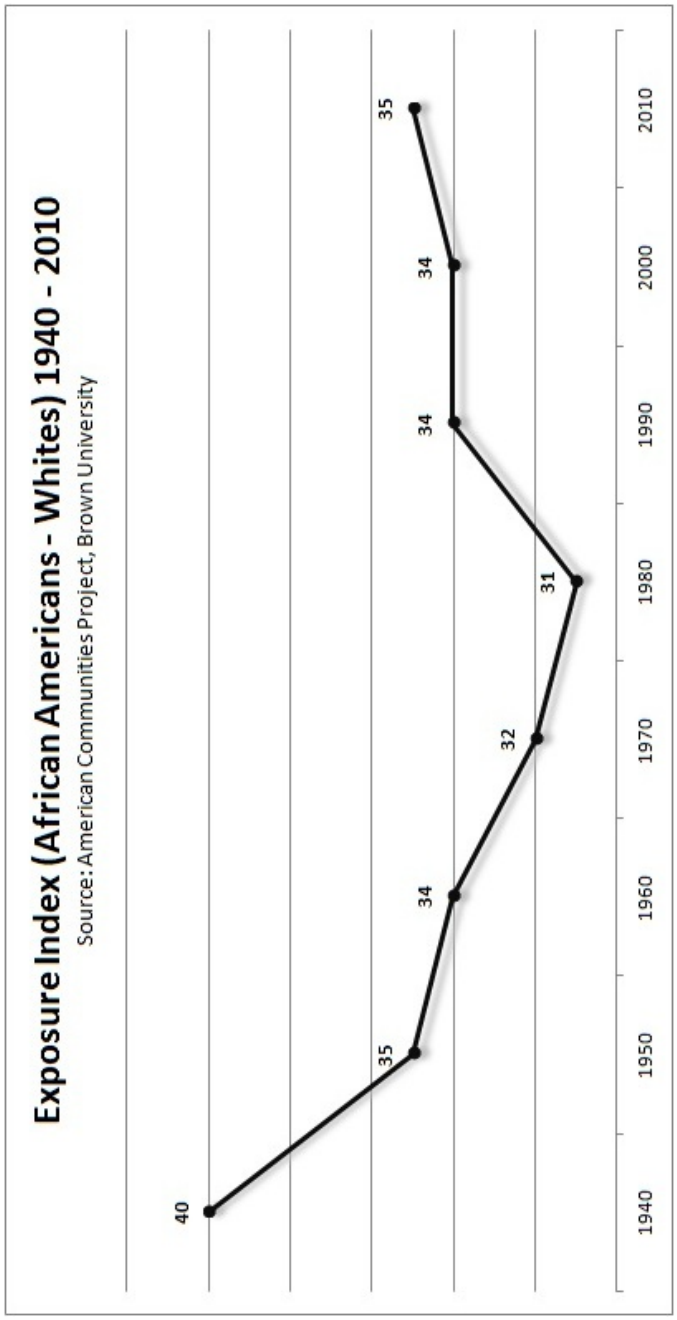
Exposure Index (African Americans - Whites) 1940 - 2010
Source: American Communities Project, Brown University
40
35
34
32
31
34
34
35
1940
1950
1960
1970
1980
1990
2000
2010

Figure 3

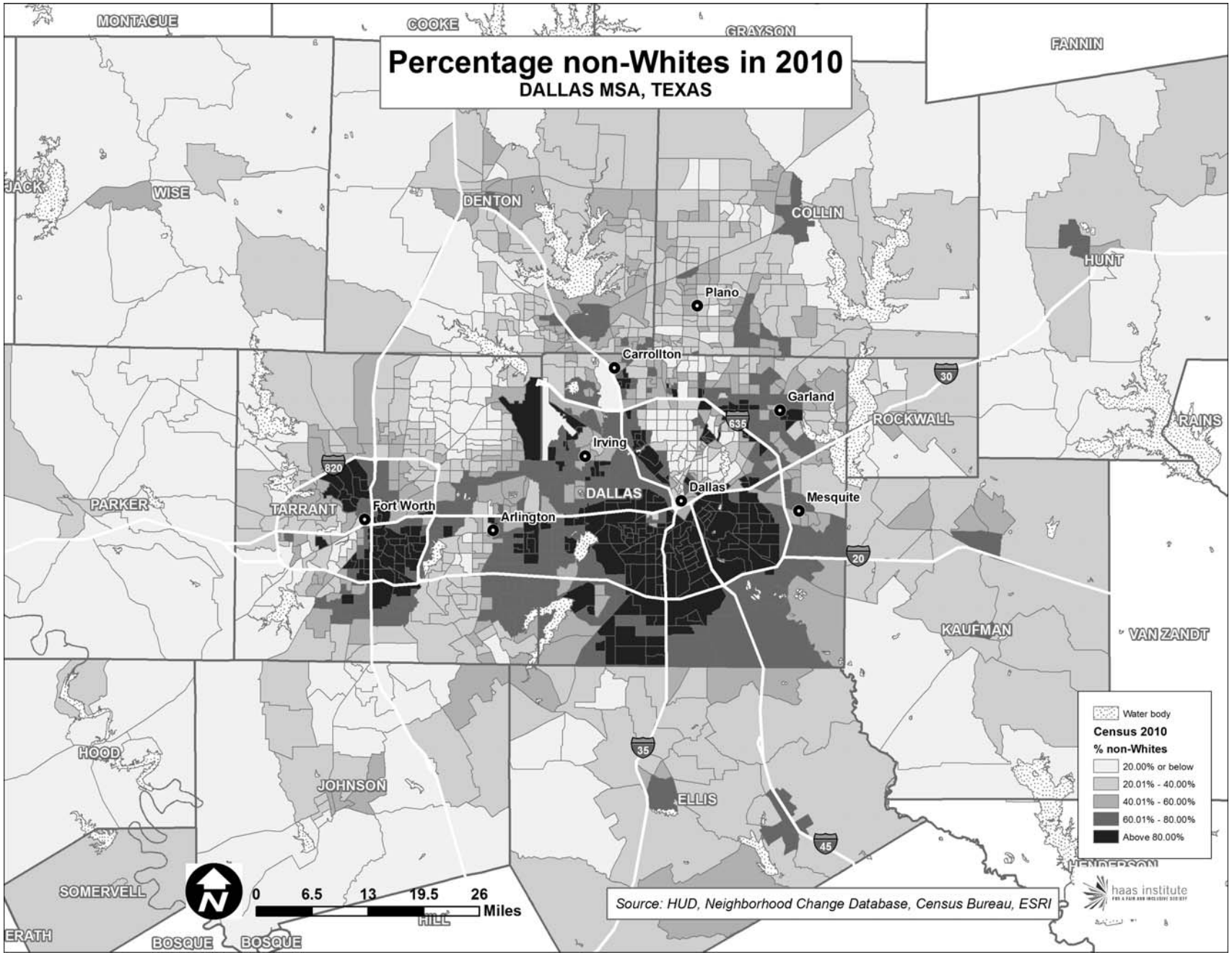
Percentage non-Whites in 2010
DALLAS MSA, TEXAS
MONTAGUE
COOKE
GRAYSON
FANNIN
JACK
WISE
DENTON
COLLIN
HUNT
Plano
Carrollton
Garland
ROCKWALL
RAINS
Irving
DALLAS
Dallas
Mesquite
PARKER
TARRANT
Fort Worth
Arlington
KAUFMAN
VAN ZANDT
HOOD
JOHNSON
ELLIS
SOMERVELL
BOSQUE
HILL
0 6.5 13 19.5 26
Miles
Water body
Census 2010
% non-Whites
20.00% or below
20.01% - 40.00%
40.01% - 60.00%
60.01% - 80.00%
Above 80.00%
Source: HUD, Neighborhood Change Database, Census Bureau, ESRI
haas institute

Figure 4

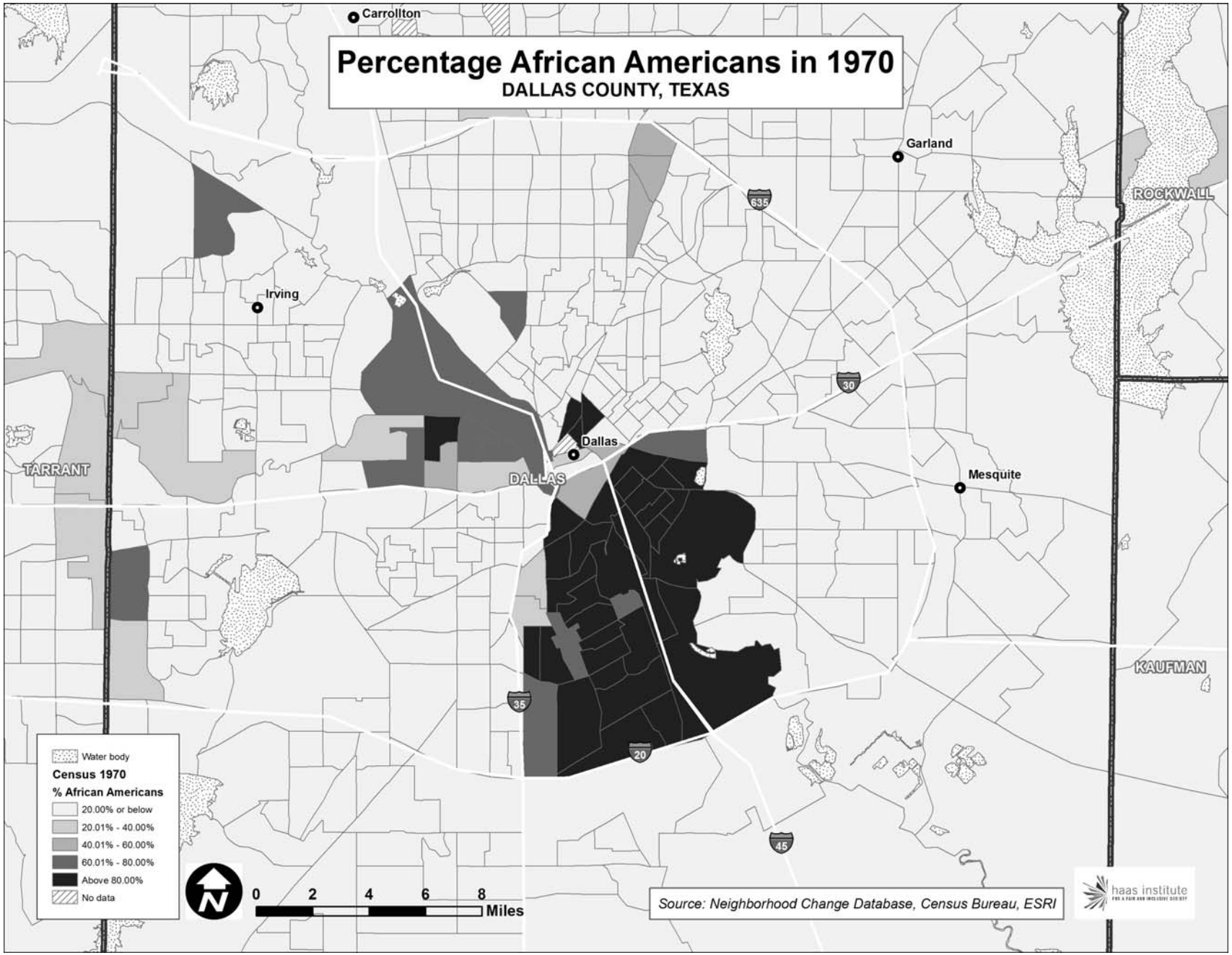
Carrollton
Percentage African Americans in 1970
DALLAS COUNTY, TEXAS
Garland
ROCKWALL
635
Irving
30
Dallas
TARRANT
DALLAS
Mesquite
KAUFMAN
35
20
45
Water body
Census 1970
% African Americans
20.00% or below
20.01% - 40.00%
40.01% - 60.00%
60.01% - 80.00%
Above 80.00%
No data
0 2 4 6 8
Miles
Source: Neighborhood Change Database, Census Bureau, ESRI
haas institute

Figure 5

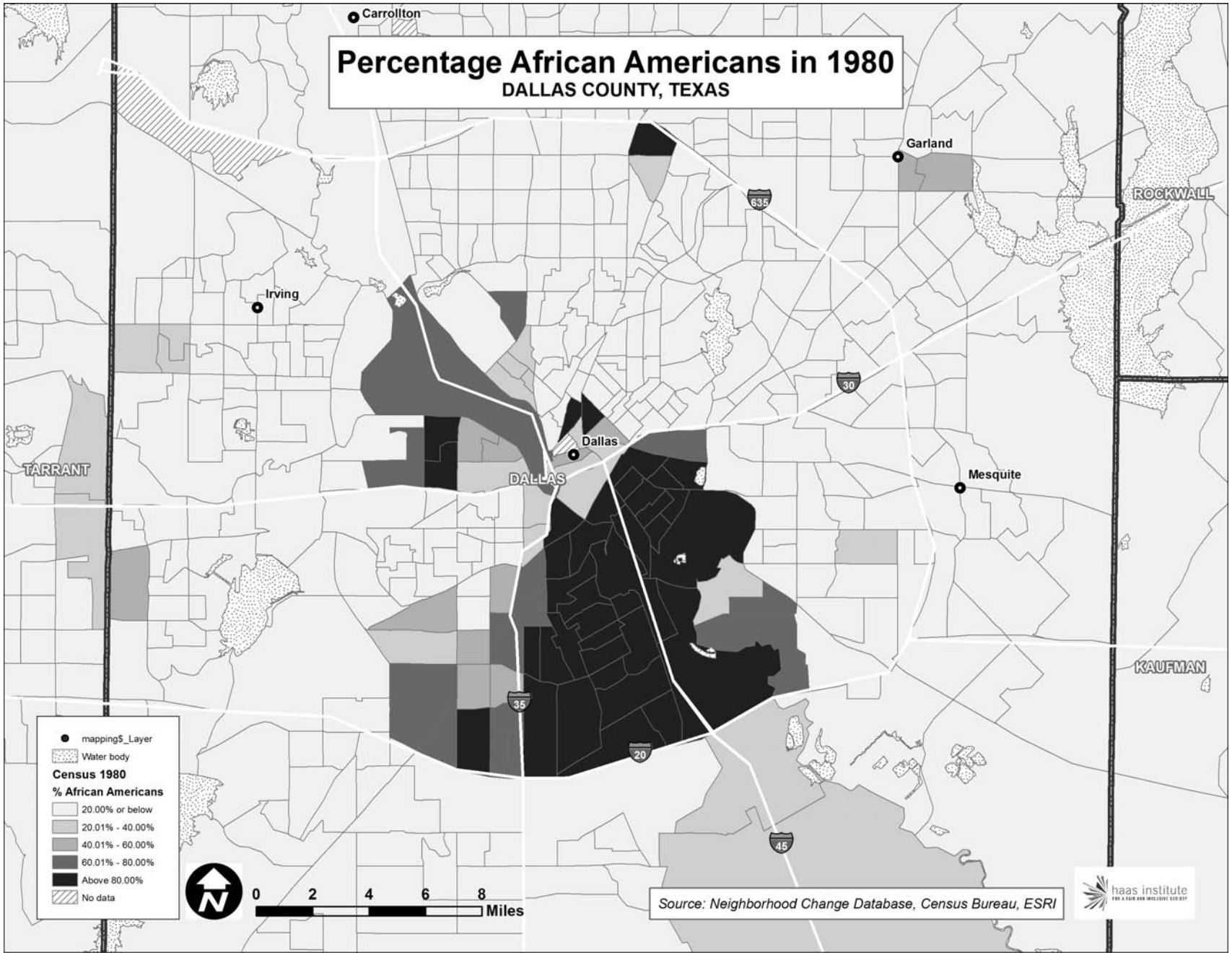
Percentage African Americans in 1980
DALLAS COUNTY, TEXAS
Carrollton
Garland
ROCKWALL
Irving
Dallas
DALLAS
TARRANT
Mesquite
KAUFMAN
635
30
35
20
45
mapping$_Layer
Water body
Census 1980
% African Americans
20.00% or below
20.01% - 40.00%
40.01% - 60.00%
60.01% - 80.00%
Above 80.00%
No data
0 2 4 6 8
Miles
Source: Neighborhood Change Database, Census Bureau, ESRI
haas institute

Figure 6

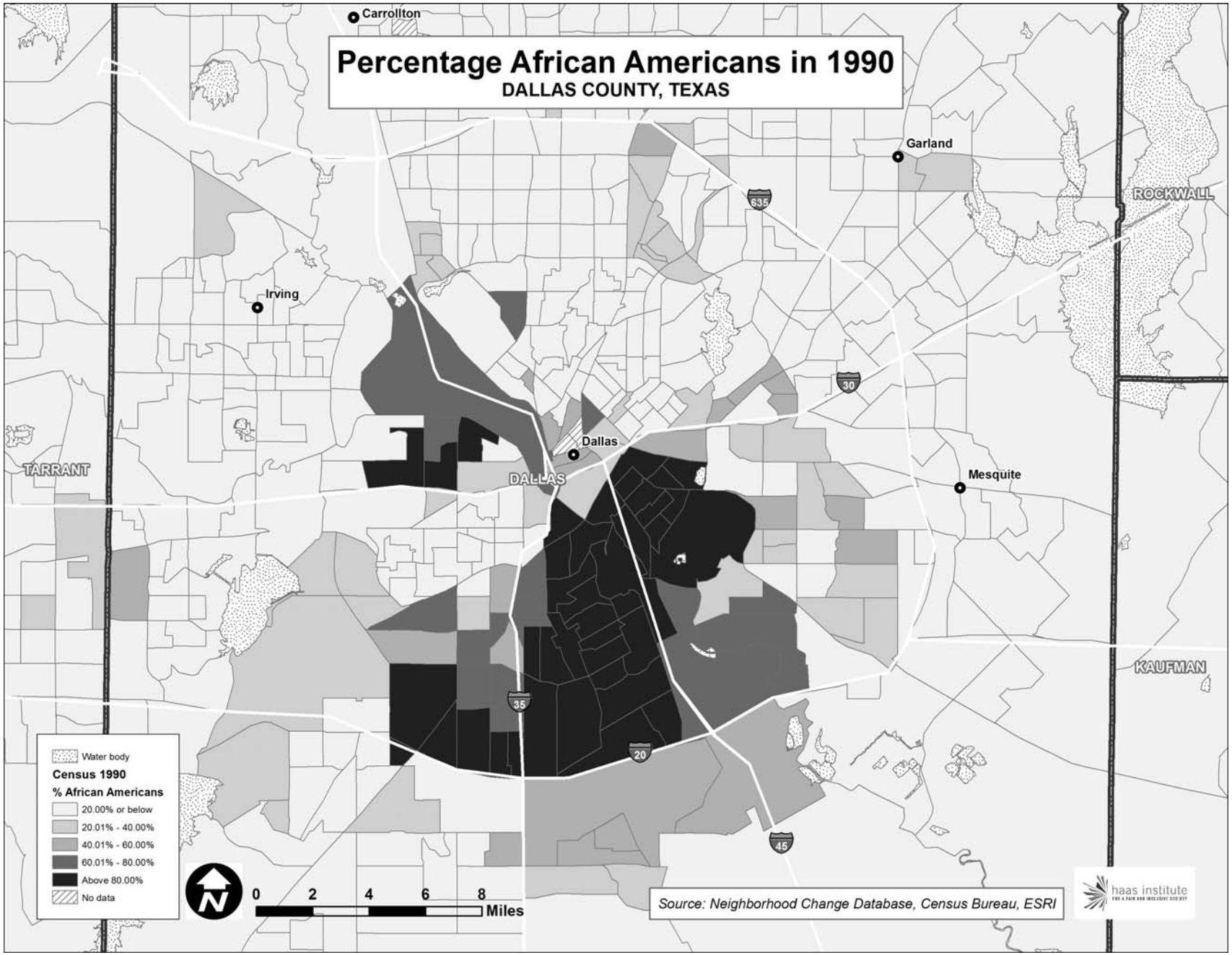
Percentage African Americans in 1990
DALLAS COUNTY, TEXAS
Carrollton
Garland
ROCKWALL
Irving
Dallas
DALLAS
TARRANT
Mesquite
KAUFMAN
635
30
35
20
45
Water body
Census 1990
% African Americans
20.00% or below
20.01% - 40.00%
40.01% - 60.00%
60.01% - 80.00%
Above 80.00%
No data
0 2 4 6 8
Miles
Source: Neighborhood Change Database, Census Bureau, ESRI
haas institute

Figure 7

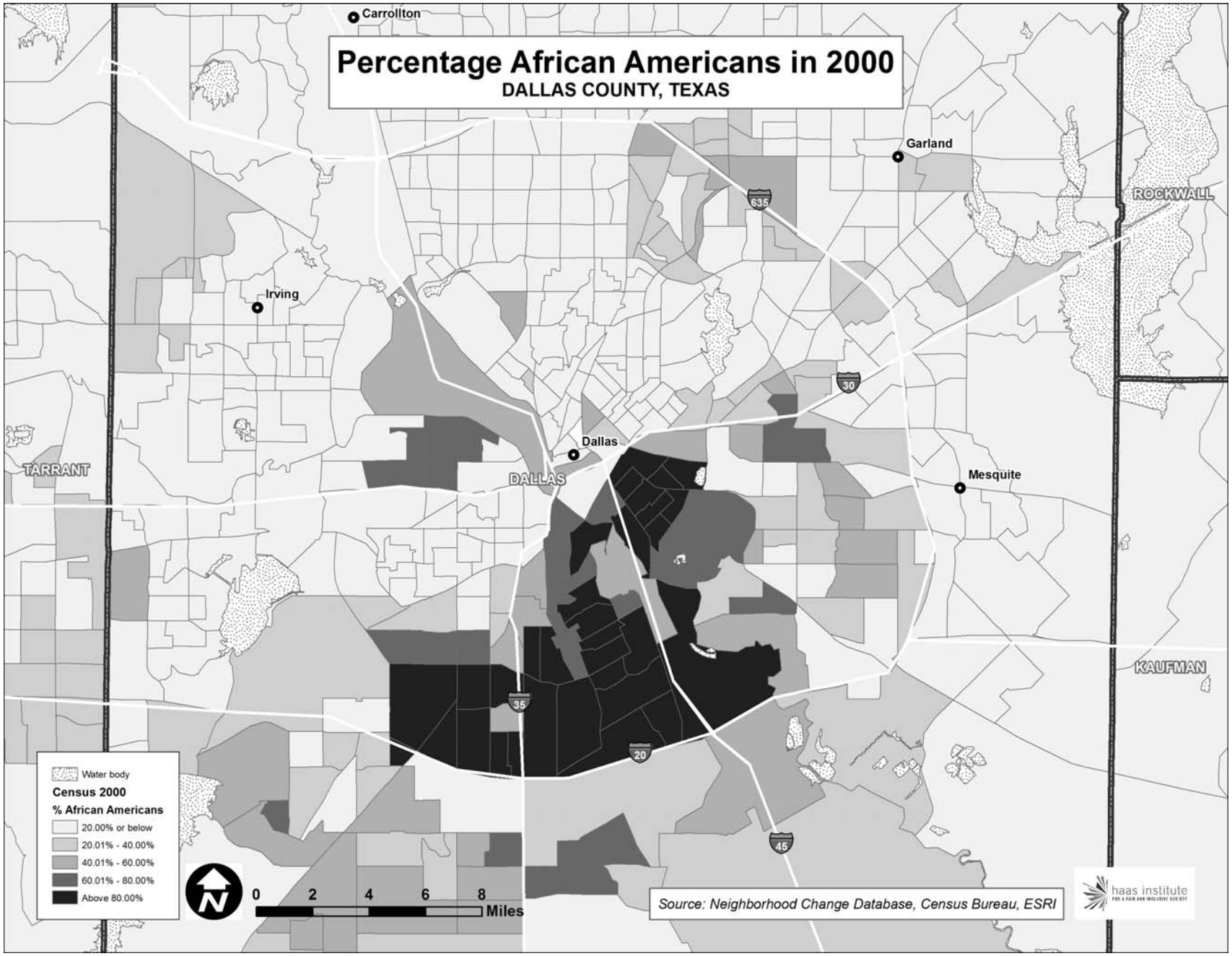
Carrollton
Percentage African Americans in 2000
DALLAS COUNTY, TEXAS
Garland
ROCKWALL
635
Irving
30
Dallas
TARRANT
DALLAS
Mesquite
KAUFMAN
35
20
45
Water body
Census 2000
% African Americans
20.00% or below
20.01% - 40.00%
40.01% - 60.00%
60.01% - 80.00%
Above 80.00%
N
0 2 4 6 8
Miles
Source: Neighborhood Change Database, Census Bureau, ESRI
haas institute

Figure 8

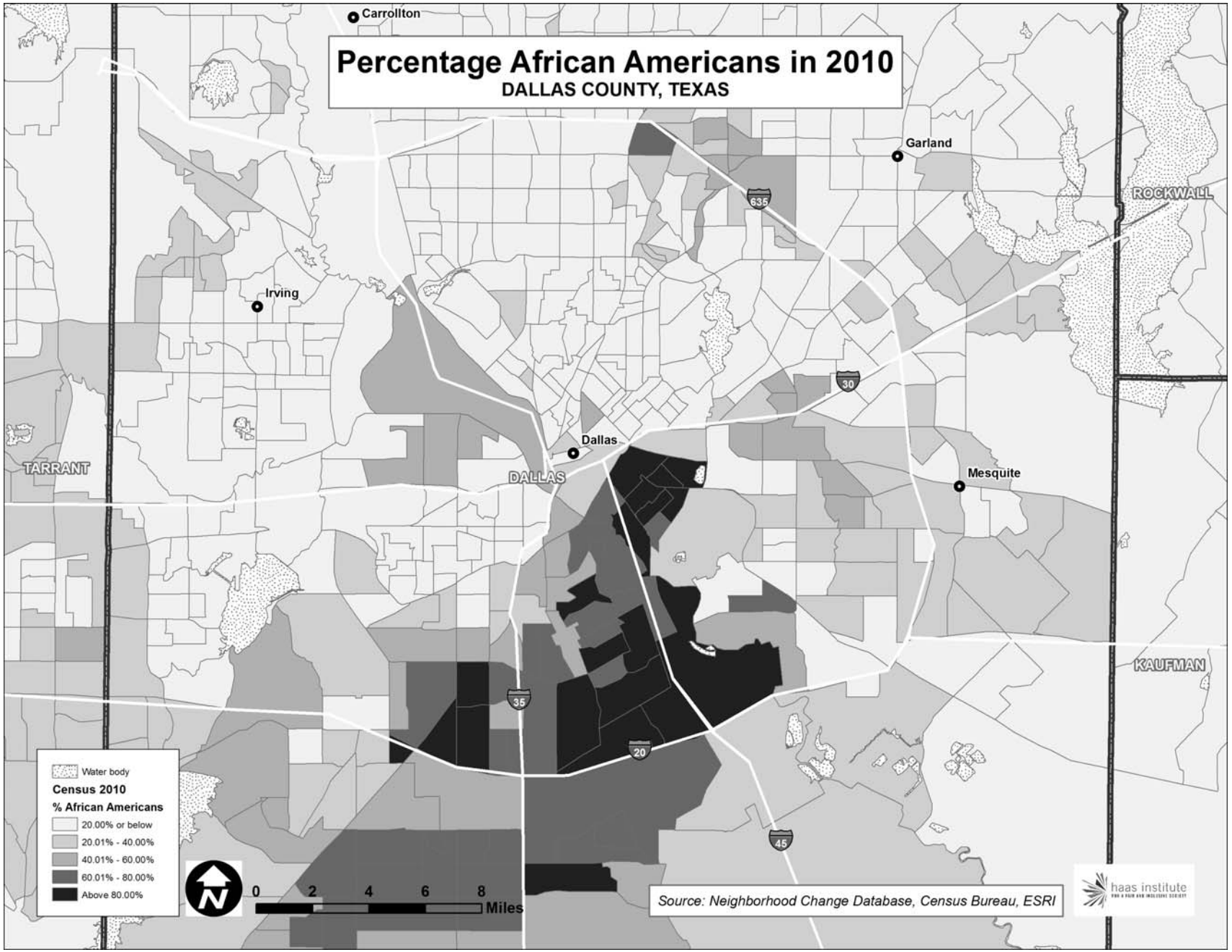
Carrollton
Percentage African Americans in 2010
DALLAS COUNTY, TEXAS
Garland
ROCKWALL
635
Irving
30
Dallas
TARRANT
DALLAS
Mesquite
KAUFMAN
35
20
45
Water body
Census 2010
% African Americans
20.00% or below
20.01% - 40.00%
40.01% - 60.00%
60.01% - 80.00%
Above 80.00%
0 2 4 6 8
Miles
Source: Neighborhood Change Database, Census Bureau, ESRI
haas institute

Figure 9

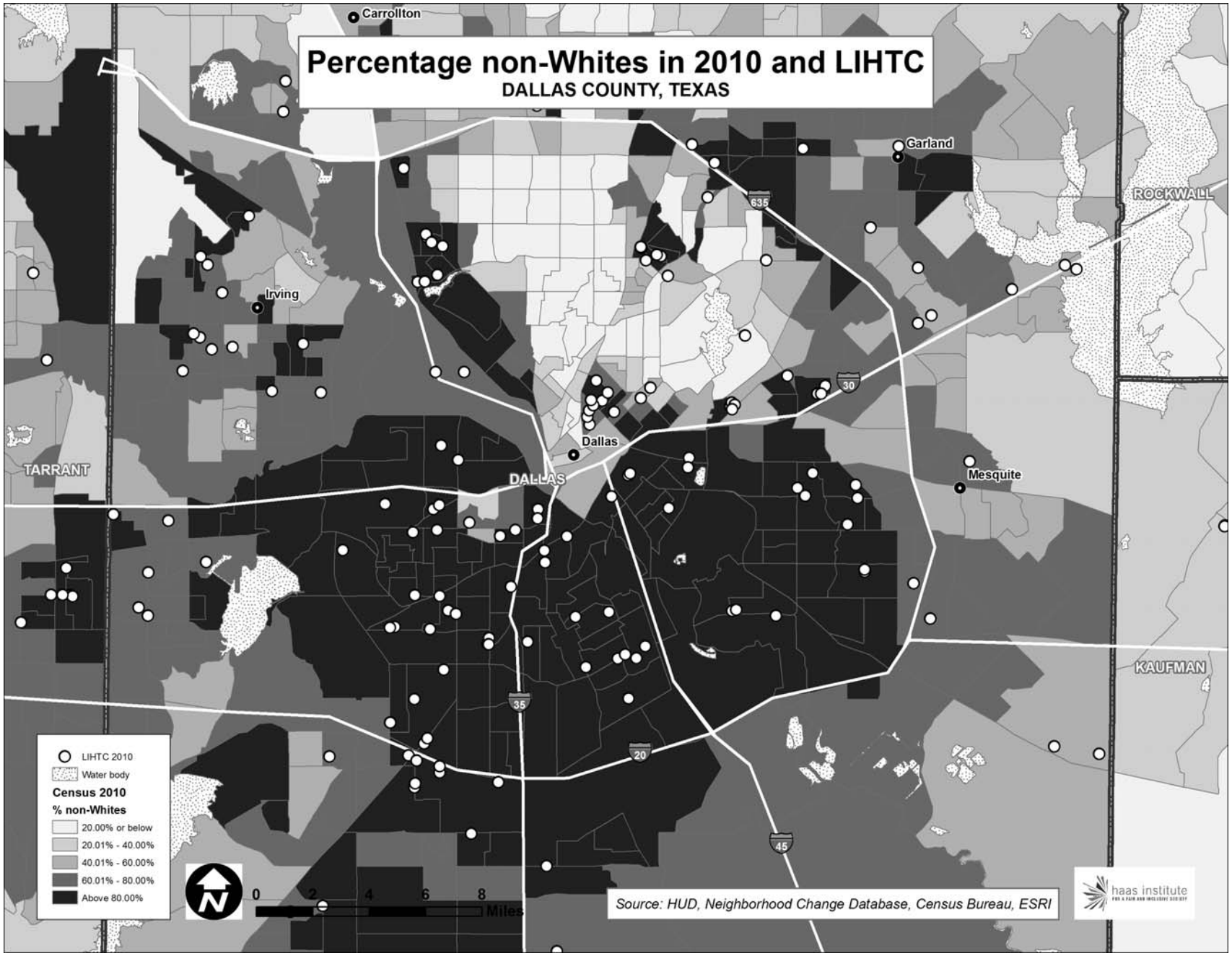
Percentage non-Whites in 2010 and LIHTC
DALLAS COUNTY, TEXAS
Carrollton
Garland
ROCKWALL
635
Irving
30
Dallas
TARRANT
DALLAS
Mesquite
KAUFMAN
35
20
45
LIHTC 2010
Water body
Census 2010
% non-Whites
20.00% or below
20.01% - 40.00%
40.01% - 60.00%
60.01% - 80.00%
Above 80.00%
N
0 2 4 6 8
Miles
Source: HUD, Neighborhood Change Database, Census Bureau, ESRI
haas institute

TABLE 1

LIHTC 2010	DALLAS MSA				DALLAS COUNTY			
Non-Whites	No. of projects	**% projects**	No. of units	**% units**	No. of projects	**% projects**	No. of units	**% units**
10.00% or below	0	0.00%	0	0.00%	0	0.00%	0	0.00%
10.01% - 20.00%	23	6.32%	1713	3.43%	1	0.62%	152	0.59%
20.01% - 30.00%	32	8.79%	2179	4.36%	0	0.00%	0	0.00%
30.01% - 40.00%	21	5.77%	2036	4.07%	0	0.00%	0	0.00%
40.01% - 50.00%	26	7.14%	4118	8.24%	5	3.09%	909	3.54%
50.01% - 60.00%	35	9.62%	5508	11.02%	11	6.79%	1106	4.30%
60.01% - 70.00%	41	11.26%	5856	11.72%	19	11.73%	2437	9.48%
70.01% - 80.00%	45	12.36%	6645	13.29%	20	12.35%	2825	10.99%
80.01% - 90.00%	45	12.36%	6333	12.67%	34	20.99%	5119	19.92%
Above 90.00%	96	26.37%	15599	31.21%	72	44.44%	13146	51.16%
Total	364		49987		162		25694	

Source: HUD Picture of Subsidized Households 2010. http://www.huduser.org/portal/datasets/picture/yearlydata.html