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June 24, 2014

VIA PRIORITY MAIL

Hon. Scott S. Harris
Clerk of the Court
U.S. Supreme Court
One First Street, NE
Washington, DC 20543

**Re: *Texas Dep't of Housing & Community Affairs v. The Inclusive Communities Project, Inc.*, No. 13-1371 (U.S.);
Request for Leave to Lodge Non-Record Materials (Rule 32.3)**

Dear Mr. Harris:

Pursuant to this Court's Rule 32.3, *amicus curiae* Eagle Forum Education Legal Defense Fund ("Eagle Forum") respectfully offers to lodge non-record material with the Court in support of arguments made in its *amicus* brief filed in the above-captioned matter on June 16, 2014. Specifically, Eagle Forum proffers data from the U.S. Census Bureau's American Community Survey ("ACS") for 2012 income, by race, in the relevant metropolitan area. This letter describes the proffered non-record material and explains why the Court properly may consider that material.

Introduction

The above-captioned petition asks whether and how disparate-impact claims against facially neutral policies for allocating public funding to projects for low-income housing are cognizable under the Fair Housing Act, 42 U.S.C. §§3601-3619. The plaintiff, The Inclusive Communities Project ("ICP"), seeks to house Texans of African ancestry in publicly assisted housing in predominantly Caucasian neighborhoods of the Dallas metropolitan area, and ICP claims that Texas's funding criteria underfund projects for such housing in predominantly Caucasian neighborhoods. For example, ICP argues (and the district court found) that Texas "approved tax credits for 49.7% of proposed non-elderly units in 0% to 9.9% Caucasian areas, but only approved 37.4% of proposed non-elderly units in 90% to 100% Caucasian areas." Pet. App. 165a (footnote omitted). Under ICP's disparate-impact theory, that discrepancy is unlawful, even if the discrepancy was not the result of intentional, race-based discrimination. *Amicus* Eagle Forum argues that race correlates with income and that income – not race – is the controlling factor for the funding of low-income housing. As part of that argument, Eagle Forum relies on U.S. Census Bureau data to show that the two relevant subpopulations in the Dallas metropolitan area differ profoundly in the distribution of income, by race,

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which likely explains how the discrepancy, by race, in the funding of low-income housing projects arises without any race-based housing discrimination.

The Census Bureau's website makes the ACS data available at the "American FactFinder" page: <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml> (last visited June 24, 2014). This website allows users to access data subdivided by various categories, including metropolitan region, income levels, and race. *Amicus Eagle Forum* selected the 2012 income data (the most recent data available) for the Dallas-Fort Worth-Arlington Urbanized Area, selecting first "Black or African American" and then "White, not Hispanic or Latino." The website then outputs a PDF file that provides the requested data and identifies the screening parameters chosen. The ACS income data are broken down by the ranges used in the chart in *Eagle Forum's* brief. It is these ACS-generated PDF outputs that *Eagle Forum* proffers to the Court.¹

Authorization to Consider the Proffered Material

Although parties generally cannot rely on non-record evidence on appeal, *Witters v. Washington Dep't of Services for Blind*, 474 U.S. 481, 486 n.3 (1986), that general rule provides no barrier to judicially noticeable evidence. *New York Indians v. U.S.*, 170 U.S. 1, 32 (1898) (appellate courts may take judicial notice of "records, or public documents... or other similar matters of judicial cognizance"); *Muller v. Oregon*, 208 U.S. 412, 421 (1908) ("[w]e take judicial cognizance of all matters of general knowledge"); *cf.* FED. R. EVID. 201(b)(2), (f). As explained *infra*, the census data that *Eagle Forum* proffers fit within this exception to the general rule.

Relevance of Proffered Materials

The ACS data show a strong correlation between race and income, particularly at higher income levels. That correlation likely explains ICP's discrepancy, by race, in Texas's approval of funding for low-income housing. In essence, the race-income relationship makes high-income areas appear to be high-Caucasian areas when they are, in fact, merely high-income areas. Put another way, neighborhoods with high concentrations of Caucasians are likely to be high-income areas for reasons that have nothing to do with racial discrimination in housing. The decision not to put low-income housing in high-income areas is a

¹ By email dated June 17, 2014, *Eagle Forum* provided a PDF copy of the ACS data to the parties' counsel.

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defensible, facially neutral policy decision. The ACS income data thus provide a non-discriminatory explanation for the correlation that ICP has identified, which is relevant to rejecting ICP's disparate-impact claim.

Proffered Material is Judicially Noticeable and Otherwise Admissible

As indicated above, the proffered materials are data collected and published by the U.S. Census Bureau and posted on that agency's website. The Court may consider these non-record materials on appeal because they are judicially noticeable as public records. *See, e.g., New York Indians*, 170 U.S. at 32 (quoted *supra*); *cf. FED. R. EVID. 201(b)(2), (f); U.S. v. Phillips*, 287 F.3d 1053, 1055 n.1 (11th Cir. 2002) (court "take[s] judicial notice of ... census figures"); *Nebraska v. E.P.A.*, 331 F.3d 995, 998 & n.3 (D.C. Cir. 2003) (judicial notice of data collected on federal agency's website). Accordingly, the proffered materials are judicially noticeable and admissible.

Conclusion

For the foregoing reasons, the Court may consider the proffered material pursuant to Rule 32.3. As required by that rule, however, *amicus* Eagle Forum will not submit the proposed material unless the Court requests the material.

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Please contact me at 202-355-9452 with any questions about this matter.

Yours sincerely,



Lawrence J. Joseph
*Counsel for Amicus Curiae Eagle Forum
Education & Legal Defense Fund*

cc: Counsel of Record (Certificate of Service attached)

CERTIFICATE OF SERVICE

I hereby certify that, on this 24th day of June, 2014, I have caused one copy of the foregoing "Request for Leave to Lodge Non-Record Materials" to be served on the following by U.S. Mail, postage prepaid.

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In addition, I certify that on the same day, I electronically transmitted a PDF copy of the foregoing document to the email addresses identified above.



Lawrence J. Joseph