No. 11-1507

In the Supreme Court of the United States

TOWNSHIP OF MOUNT HOLLY, et al.,
Petitioners,

v.

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

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

BRIEF OF MASSACHUSETTS, CALIFORNIA, CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS, NEW MEXICO, NEW YORK, OREGON, UTAH, VERMONT, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT MT. HOLLY GARDENS CITIZENS IN ACTION, INC.

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INTEREST OF *AMICI CURIAE*

Amici States Massachusetts, California, Connecticut, Delaware, Hawaii, Illinois, New Mexico, New York, Oregon, Utah, Vermont, and Washington, file this brief in support of Respondent Mt. Holly Gardens Citizens in Action, 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 and resulting inequities 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, the *Amici* States believe that the ability to pursue disparate impact claims is indispensable to achieving the broad goals of the FHA.

SUMMARY OF ARGUMENT

Amici States urge the Court to uphold the unanimous opinion of the circuit courts that disparate impact discrimination claims are cognizable under the FHA. We know from experience that the ability to bring disparate impact claims is essential to combating discrimination and segregation in housing—the principal purposes of the FHA, and matters of considerable concern for state and local governments.

Though the FHA is now 45 years old, its promise remains unfulfilled. Despite significant gains during and after the Civil Rights Era, high rates of residential

segregation persist across the country. The social and economic costs for minority communities and for state and local governments are significant. And, given the correlation between segregated living patterns and concentrated poverty, the inequalities experienced in many minority neighborhoods continue to be passed from one generation to the next. The FHA therefore remains indispensable to achieving equality of opportunity by combating the various forms of discrimination that reinforce and perpetuate segregation.

Although present-day segregation and inequality derive from a long and painful history of discrimination, they are not simply historical vestiges. Discrimination is less common than it was in 1968, but nonetheless persists in meaningful and harmful forms. Contemporary manifestations of bias are often much more subtle and can be difficult to detect and prove. Intentional discrimination is more likely to be hidden and explained away. Unconscious bias affects discretionary decision-making at both the individual level and across institutions, yet often goes unchecked. Even in the absence of either intentional or unconscious bias, policy and decision-makers often are indifferent to the discriminatory effects of seemingly neutral policies and practices. By focusing on outcomes indicative of discriminatory intent or bias, disparate impact claims address these contemporary forms of discrimination, often more effectively than disparate treatment claims.

Not all adverse housing outcomes, or all causes of residential segregation, can be remedied through litigation. But enforcement actions under the FHA and

similar state laws are critical to combating discrimination and its pernicious effects. Disparate impact claims are needed to bridge the gap between the direct forms of discrimination provable through a disparate treatment framework, and more subtle forms of discrimination characterized by concealed or subconscious bias—all of which continue to operate in and shape housing markets. Such claims do not interfere inappropriately with local decision-making. Instead, they advance the interests of state and local governments in curbing the pervasive costs of discrimination. Disparate impact claims are also consistent with the language and intent of the FHA and necessary to further its broad purposes. Accordingly, the *Amici* States urge the Court to affirm the judgment of the Court of Appeals recognizing disparate impact claims under the FHA.

ARGUMENT

I. DISCRIMINATION AND RESIDENTIAL SEGREGATION POSE ONGOING CHALLENGES FOR STATE AND LOCAL GOVERNMENTS

In enacting the FHA, Congress sought to "remove the walls of discrimination which enclose minority groups," 114 Cong. Rec. 9563 (1968) (statement of Rep. Celler), and to foster "truly integrated and balanced living patterns." 114 Cong. Rec. 3422 (1968) (statement of Sen. Mondale). Those goals have yet to be fully realized.

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. These measures of inequality are not simply the enduring results of historical bigotry and intolerance. Instead, they are reinforced and perpetuated by contemporary forms of discrimination that manifest in more subtle ways, many of which can be difficult to detect and prove, particularly through the rubric of disparate treatment. As this Court recognized in *Washington v. Davis*, 426 U.S. 229 (1976), for example, it may be necessary to look to "the totality of the relevant facts" to see that discrimination is at work, and, in some cases, the fact that a law (or policy) "bears more heavily on one race than another" may be telling. *Id*. at 242.

Without question, States have a significant interest in curtailing the "moral damage of discrimination," *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 609 (1982), and that alone merits comprehensive enforcement tools under the FHA. States also 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.

These costs are part of a stubborn cycle of persistent inequality that requires effective solutions. Disparate impact claims—which focus attention on

discriminatory outcomes, rather than intent—are critical to this effort. Without this tool, it will be even more difficult to reach the contemporary forms of discrimination that reinforce segregation and its resulting inequities, and thus to realize fully the goals of the FHA.

A. States Have A Strong Interest In Combating The Social And Economic Consequences Of Persistent Residential Segregation.

1. Housing Patterns Remain Substantially Segregated.

Housing patterns across the United States remain largely segregated by race, and the social and economic consequences are significant.[1] 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.[2] Similarly, the average Hispanic resident

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[1] John R. Logan, *Separate and Unequal: The Neighborhood Gap for Blacks, Hispanics and Asians in Metropolitan America*, US2010 Project (July 2011); John Iceland et al., *Racial and Ethnic Residential Segregation in the United States: 1980-2000*, U.S. Census Bureau (2002).

[2] Michelle Wilde Anderson & Victoria C. Plaut, *Implicit Bias and the Resilience of Spatial Colorlines*, Implicit Racial Bias Across the Law, at 27, Cambridge University Press (Justin D. Levinson & Robert J. Smith, eds. 2012), *citing* William H. Frey, *Census Data: Blacks and Hispanics Take Different Segregation Paths*, Brookings Institute: State of Metropolitan America No. 21 (Dec. 16, 2010).

(16% of the population) lives in a tract that is 45% Hispanic.[3] By comparison, the average white American (64% of the population) lives in a census tract that is 79% white.[4] In addition, over the last three decades, the level of Hispanic and Asian segregation has increased.[5] 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.[6]

There is also considerable variation in residential segregation patterns across the country. Minorities who represent a small share of their local population, for example, are more likely to be integrated throughout the community than minorities who make up a large share of the population.[7] Residential segregation also is not limited to race. Other categories of Americans protected under the FHA also continue to experience a degree of isolation due to limited housing

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[3] *Id.*

[4] *Id.*

[5] Logan, *supra* note 1, at 1; Camille Zubrinsky Charles, *The Dynamics of Racial Residential Segregation*, 29 Ann. Rev. Soc. 167, 169 (2003).

[6] Patrick Sharkey, *Stuck In Place: Urban Neighborhoods and the End of Progress Toward Racial Equality*, at 25, The University of Chicago Press (2013), *citing* Douglas S. Massey & Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass*, Harvard University Press (1993).

[7] Anderson & Plaut, *supra* note 2, at 27.

options. Families with children, for example, encounter obstacles to obtaining housing, particularly when faced with exclusionary zoning policies or occupancy restrictions.[8] The same is true for individuals with disabilities.[9]

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.[10] 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.[11] These data reflect little change

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[8] Edward Allen, *Six Years After Passage of the Fair Housing Amendments Act: Discrimination Against Families with Children*, 9 Admin. L.J. Am. U. 297, 300-301 (1995).

[9] *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 (prepared for the Office of Policy Development and Research, HUD).

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

[11] Algernon Austin, *African Americans Are Still Concentrated In Neighborhoods With High Poverty and Still Lack Full Access to*

from a decade ago.[12] In fact, by some measures, concentrated poverty has worsened since 2000.[13]

2. The Social and Economic Costs of Residential Segregation Are Significant.

The social and economic consequences of persistent residential racial segregation and concentrated poverty are well documented.[14] 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 individuals or families reside and the resources and opportunities available to them.[15] 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.

Decent Housing, Economic Policy Institute Economic Snapshot (July 22, 2013), *available at* http://www.epi.org/publication/african-americans-concentrated-neighborhoods/.

[12] Anderson & Plaut, *supra* note 2, at 27.

[13] 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://www.jointcenter.org/research/a-lost-decade-neighborhood-poverty-and-the-urban-crisis-of-the-2000s.

[14] Kyle Crowder et al., *Neighborhood Diversity, Metropolitan Constraints, and Household Migration*, American Sociological Review 77 (3), 327 (May 30, 2012).

[15] Sharkey, *supra* note 6, at 14-17.

Disparities in educational opportunities, for example, often track segregated housing patterns. The vast majority of African-American and Hispanic students attend majority nonwhite schools, with 43% of Hispanic students and 38% of African-American students attending "intensely segregated" schools (those 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.[16] Coupled with high poverty rates, this degree of segregation correlates with an array of factors that limit minority students' educational opportunities and outcomes.[17] 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.

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

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[16] Gary Orfield et al., *E Pluribus . . . Separation: Deepening Double Segregation for More Students*, The Civil Rights Project, at 7-8 (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.

[17] *Id.*

environmental hazards like unclean air and toxic soil; and proximity to undesirable land uses like freeways and industrial facilities.[18] 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 like asthma, diabetes, and hypertension; adverse birth outcomes; and overall higher rates of morbidity and mortality among both infants and adults.[19] 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 individuals will be able to find and maintain jobs.[20] For

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[18] Anderson & Plaut, *supra* note 2, at 27-28; Sharkey, *supra* note 6, at 14-15; *see also* Hope Landrine & Irma Corral, *Separate and Unequal: Residential Segregation and Black Health Disparities*, 19 Ethnicity & Disease 179, 180-182 (Spring 2009).

[19] David R. Williams & Chiquita Collins, *Racial Residential Segregation: A Fundamental Cause of Racial Disparities in Health*, 116 Public Health Reports 404, 408-409 (Sept.-Oct. 2001); Landrine & Corral, *supra* note 18, at 179.

[20] Williams & Collins, *supra* note 19, at 406-407; Sharkey, *supra* note 6, at 15, *citing, e.g.,* Judith K. Hellerstein & David Neumark, *Employment of Black Urban Labor Markets: Problems and Solutions*, National Bureau of Economic Research, Working Paper 16986 (April 2011).

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.[21] 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 correlated with segregation are so entrenched that they often are passed on from one generation to the next. A recent study by the Equality of Opportunity Project confirmed a significant correlation between intergenerational mobility (or lack thereof) and residential segregation.[22] 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 1970's.[23] Research also shows that, even when African-Americans reach higher-income brackets, that achievement often does not translate into residential mobility.[24]

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[21] *Id.*

[22] 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).

[23] Sharkey, *supra* note 6, at 45.

[24] Logan, *supra* note 1, at 15.

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 the goals of the FHA will remain unfulfilled.

B. Disparate Impact Claims Are Needed To Address Contemporary Forms Of Discrimination That Perpetuate Residential Segregation.

Racial segregation in housing in the United States is not simply the enduring result of our history. Rather, segregation continues to be reinforced, and thus perpetuated, by contemporary forms of discrimination. Disparate impact claims serve to root out intentional discrimination that may not be easily proven under a disparate treatment framework; combat the effects of unconscious bias in systemic, discretionary decision-making; and restrict purported "neutral" policies that perpetuate segregation and historical discrimination.

Discrimination is easiest to conceptualize in terms of obviously exclusionary actions (*i.e.*, laws or policies that are facially discriminatory or applied in a blatantly discriminatory manner), but explicit discrimination is less common today than in 1968, and contemporary forms of prejudice are often more subtle.[25] Modern norms dictate that discrimination is

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[25] Anderson & Plaut, *supra* note 2, at 30-32; *see also* John F. Dovidio, *On the Nature of Contemporary Prejudice: The Third Wave*, 57 J. Soc. Issues 829 (2001); Gordon Hodson, et al., *The Aversive Form of Racism,* The Psychology of Prejudice and

unacceptable, such that actors are unlikely to indicate or confess their discriminatory motivations and more likely to hide or disavow their discriminatory intent. Though it continues with regularity, intentional discrimination is increasingly difficult to detect and even harder to prove. As we know from disparate treatment cases, for example, intent can be difficult to prove and disparate impact evidence often is useful to uncovering and proving an actor's true motivations. *See, e.g., Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 n.24 (1979) ("What a legislature or any official entity is 'up to' may be plain from the results its actions achieve, or the results they avoid."); *Washington v. Davis*, 426 U.S. at 242 ("[D]iscriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because, in various circumstances, the discrimination is very difficult to explain on nonracial grounds."); *see also Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights,* 558 F.2d 1283, 1290 (7th Cir. 1977) ("'(I)ntent, motive and purpose are elusive subjective concepts,' and attempts to discern the intent of an entity such as a municipality are at best problematic. . . As overtly bigoted behavior has become more unfashionable, evidence of intent has become harder to find. But this does not mean that racial discrimination has disappeared.") (citations omitted); *United States v. City of Black Jack, Mo.*, 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."). By focusing on discriminatory outcomes, disparate impact

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Discrimination: Racism in America, at 120-130 (Jean Lau Chin ed. 2004).

claims can reach deliberately discriminatory conduct, even when it is not attended by statements indicating prejudice or other tell-tale signs of intentional discrimination. Thus, restricting the reach of the FHA to disparate treatment claims would severely reduce its effectiveness as a tool for rooting out all instances of intentional discrimination.

Moreover, discrimination can also occur in the absence of intent. 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 990-991 (describing subjective decision-making in the employment context). An extensive body of social and scientific research has confirmed this to be true.[26] 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 unconscious, cognitive associations between race on the one hand, and disorder and crime on the other.[27] Thus, even well-

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[26] *See, e.g.,* Anderson & Plaut, *supra* note 2, at 30-32; Mahzarin R. Banaji et al., *Implicit Stereotyping in Person Judgment*, 65 J. Personality & Soc. Psychol. 272, 272-281 (1993); Brian A. Nosek et al., *The Implicit Association Test at Age 7: A Methodological and Conceptual Review*, Social Psychology and the Unconscious: The Automaticity of Higher Mental Processes 265-292 (John A. Bargh, ed. 2007).

[27] Anderson & Plaut, *supra* note 2, at 31-38.

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 have the effect of creating or reinforcing disparities.[28]

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.[29] Not all biased decisions can be remedied through litigation, of course, particularly when the discrimination is unintentional and the decisions are made by individual actors in isolation. However, institutional policies or practices that affect a large number of people, and that allow unconscious bias to influence decisions by multiple actors across a number of transactions, can have the aggregate effect of

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[28] *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, 507 (2007).

[29] Anderson & Plaut, *supra* note 2, at 30-31.

perpetuating racial discrimination and segregation. These outcomes are appropriately remedied through the enforcement of anti-discrimination laws.

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, and is therefore also appropriately remedied through enforcement of anti-discrimination laws.

Further compounding the challenge of enforcement against these contemporary, difficult-to-prove forms of discrimination, is the fact that discrimination in the housing context can be especially difficult to identify in the first place. This is due in large part to the fact that the victims of discrimination typically do not have any means of comparing themselves to similarly-situated counterparts and, absent a transparently discriminatory statement or policy, often do not know that they have been discriminated against.[30] Recognizing discrimination is made particularly difficult by the fact that transactions often are

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[30] *See, e.g.,* Margery Austin Turner et al., *Discrimination in Metropolitan Housing Markets: National Results from Phase I HDS 2000* (discriminatory practices often become apparent only when measuring their impact), *available at* http://www.urban.org/publications/410821.html.

conducted at arm's length, and the victims of discrimination (*e.g.*, borrowers, buyers, and renters) tend not to have repeated or frequent interactions with the relevant actors over time (*e.g.*, mortgage brokers, real estate agents, and landlords). In addition, relatively few people fully understand their rights under fair housing laws, and even fewer are likely to report perceived discrimination.[31] Because state and federal housing enforcement systems depend largely upon the victims of discrimination to self-identify, in the first instance, many cases of even intentional discrimination go unreported and without remedy. If enforcement authorities cannot rely on pattern or statistical evidence to pursue claims where there is no direct evidence of intent, many widespread harms will be difficult, if not impossible, to remedy.

C. The Example of Discriminatory Mortgage Lending.

As discussed below (Part II.B, *infra*), the mortgage market has been a particular focus of disparate impact claims by States. The history of housing sales and mortgage lending—particularly as it relates to African-Americans—provides a powerful example of the broad impact of segregation, the evolution of discrimination, and the ways in which contemporary forms of discrimination continue to reinforce racial segregation and resulting inequities. That history also illustrates the vital importance of disparate impact claims as an enforcement tool.

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[31] Martin D. Abravanel, *Do We Know More Now? Trends in Public Knowledge, Support and Use of Fair Housing Law*, U.S. Dep't of Housing and Urban Development (Feb. 2006).

During the first half of the 20th century, a combination of overt forms of discrimination—violence, intimidation, municipal zoning restrictions, and racial covenants—were used to isolate African-Americans and exclude them from white neighborhoods.[32] The federal government also institutionalized 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).[33] Combined with the post-World War II growth of the suburbs, discriminatory lending severely limited African-American mobility out of urban areas and thus further intensified racial segregation. When lenders targeted minority neighborhoods, first through redlining and then reverse-redlining (both intentional forms of discrimination), they only worsened the problem.[34] State and federal attorneys general brought

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

[33] Steil, *supra* note 32, at 68-69; *see also* Sharkey, *supra* note 6, at 58-62; Massey, *supra* note 32, at 69-73.

[34] Steil, *supra* note 32, at 69-73; Sharkey, *supra* note 6, at 58-62.

enforcement actions to curb these predatory practices,[35] 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, 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.[36] Even today, minority borrowers are twice as likely as white borrowers to be denied conventional loans.[37] Moreover, studies show that minority loan applicants tend to receive less information, less time with loan officers, and fewer loan offers than white borrowers with the same

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[35] *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).

[36] Steil, *supra* note 32, 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, 116-118 (Fall 2011).

[37] Bocian et al., *supra* note 36, 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.

qualifications.[38] Together, these lending practices raise the cost of borrowing and limit the number and location of homes available to minority homebuyers. While many of these practices have been the focus of an increasing number of state and federal enforcement actions, *see* Part II.B, *infra*, given the lack of direct evidence of intentional discrimination, almost all of these cases have relied on disparate impact analysis.

Discriminatory lending not only costs minority borrowers more and constrains their choices, but also leads to higher foreclosure rates, which in turn have far-reaching effects on individuals, households, and communities of color.[39] For a variety of reasons—including the prevalence of high-risk loans in minority neighborhoods—the foreclosure crisis has hit minority households particularly hard.[40] Overall drops in homeownership have been especially severe among minorities generally, and African-Americans in particular. In fact, the homeownership rate for African-American households is at its lowest level since 1995, and the black-white gap in homeownership has reached historic proportions.[41]

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[38] Sharkey, *supra* note 6, at 54-55, *citing* William C. Apgar & Allegra Calder, *The Dual Mortgage Market: The Persistence of Discrimination in Mortgage Lending*, The Geography of Opportunity: Race and Housing Choice in Metropolitan America, The Brookings Institution (Xavier de Sousa Briggs, ed. 2005).

[39] Steil, *supra* note 32, at 83-86.

[40] Bocian et al., *supra* note 36, at 10, 19.

[41] *The State of the Nation's Housing 2013*, *supra* note 37, at 17.

Making matters worse, there is growing evidence of banks, servicers, and other institutions failing to maintain foreclosed properties in minority neighborhoods to the same standard as properties in white neighborhoods, and devoting less time and fewer resources to marketing (and therefore reselling) those properties.[42] Whether these disparities result from intentional discrimination, biased decision-making, or just indifference, the results are significant. Given that African-American homeowners have already seen their home values decrease more than twice as much on average as white homeowners, disparities in the upkeep and resale of foreclosed properties in minority neighborhoods only exacerbate an already serious problem.[43] The end result is that the wealth gap between African-Americans and white Americans is at an historical high.[44]

Because contemporary forms of discrimination play such a prominent role in disparate lending and related practices, and because the consequences are so severe,

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[42] *The Banks Are Back – Our Neighborhoods Are Not: Discrimination in the Maintenance and Marketing of REO Properties,* National Fair Housing Alliance, at 2 (2012), *available at* http://www.mvfairhousing.com/pdfs/2012-04-04%20The%20Banks%20Are%20Back.PDF.

[43] *The State of the Nation's Housing 2013*, *supra* note 37, at 14.

[44] Bocian et al., *supra* note 36, at 31; Thomas Shapiro et al., *The Roots of the Widening Racial Wealth Gap: Explaining the Black-White Economic Divide*, Institute on Assets and Social Policy, Research and Policy Brief (Feb. 2013), *available at* http://iasp.brandeis.edu/pdfs/Author/shapiro-thomas-m/racialwealthgapbrief.pdf.

it is crucial that States and others have the tools to redress them. The widespread discriminatory impact of subprime lending, for example, has been no less harmful than the transparent discrimination behind redlining and reverse-redlining, but the policies and practices are much more difficult, if not impossible, to prove as intentional discrimination. The same is true of the disparate handling of foreclosed properties. Without the availability of disparate impact claims, the States' efforts to fight these discriminatory practices would have been severely, if not completely, compromised.

II. STATES RELY ON DISPARATE IMPACT THEORIES TO COMBAT DISCRIMINATION.

Amici States recognize that not all forms of discrimination or causes of residential segregation can be remedied through litigation. Nevertheless, enforcement actions under the FHA and similar state laws are a critical component of the *Amici* States' efforts to combat discrimination and to ensure 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. Because contemporary forms of discrimination continue to reinforce and perpetuate housing inequality and segregation, focusing on discriminatory outcomes rather than asserted intent allows the *Amici* States to reach these more subtle, but no less harmful, forms of discrimination. At the same time, the FHA leaves

ample room for state and local governments to make land use and development decisions according to the best interests of their respective communities, and thus does not raise federalism concerns.

A. States Play A Key Role In Guarding Against Housing Discrimination.

Amici States share Congress's commitment to combating discrimination and, to that end, each has its own anti-discrimination laws that prohibit discrimination in housing, employment, public accommodations, and other areas. These laws also establish state-level regimes for the investigation and enforcement of alleged civil rights violations that complement the central role of HUD and other federal agencies.

Nationally, there are 98 state and local agencies that receive funding from HUD to review and investigate housing discrimination complaints.[45] The volume of matters handled by these agencies remains quite high. During each of the past four years, between 7,500 and 8,500 complaints were filed with these agencies.[46] Many of these complaints were eventually prosecuted in state courts, with claims pursued under both the FHA and state fair housing laws.[47]

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[45] *See* U.S. Dep't of Housing & Urban Development, *Annual Report on Fair Housing FY 2011* at 16, *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=FY2011_annual_rpt_final.pdf.

[46] *Id.* at 18.

[47] Irrespective of the actual claims asserted, the FHA is often pertinent to these matters. Many state courts look to federal case law interpreting the FHA when analyzing state analogues. *See*

For example, the Massachusetts Commission Against Discrimination (MCAD) works in partnership with HUD to review and investigate complaints of housing discrimination. *See* Mass. Gen. Laws c. 151B, § 5; 42 U.S.C. § 3610(f). If the MCAD makes a finding of probable cause following an investigation, the matter proceeds either administratively or, if one party elects judicial determination, through the courts. *Id.* In the latter instance, the matter is sent to the Massachusetts Attorney General for statutorily-mandated prosecution, utilizing a process similar to the one followed by HUD and the U.S. Department of Justice. *Id.* The Massachusetts Attorney General also has the authority to initiate housing cases in the absence of an initial complaint to the MCAD. *See* Mass. Gen. Laws c. 151B, § 9. Other states have substantially similar schemes for investigating and prosecuting fair housing complaints. *See, e.g.,* Conn. Gen. Stat. 46a-55; Or. Rev. Stat. §§ 659A.820 & 659A.885.

In addition to enforcing fair housing laws, the *Amici* States also play a key role in educating both private and public actors. Many of the *Amici* States conduct trainings and seminars, issue written guidance, review town by-laws, and engage in other community outreach efforts on a variety of issues related to fair housing.[48]

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e.g., Andover Hous. Auth. v. Shkolnik, 443 Mass. 300, 306 (2005); *AvalonBay Cmtys., Inc. v. Town or Orange*, 256 Conn. 557, 591 (2001).

[48] For example, the Massachusetts, New York, and Illinois Attorneys General offer extensive information on their websites describing prohibited housing practices. *See, e.g.,* http://www.mass.gov/ago/consumer-resources/your-rights/civil-rights/housing; http://www.illinoisattorneygeneral.gov/rights/Hous

The *Amici* States know that better information and education prevents fair housing violations, improves reporting of fair housing violations when they occur, and motivates public and private actors alike to ensure equal opportunity.

B. States Rely Increasingly On Disparate Impact Theories, Particularly In Cases Of Systemic Housing Discrimination.

Amici States know from experience that without disparate impact causes of action under the FHA and similar state laws, many widespread harms would be difficult, if not impossible, to remedy. States rely increasingly on these claims to combat contemporary forms of housing discrimination.

The mortgage lending industry provides many of the most recent examples of state enforcement efforts based on disparate impact theories under state and federal fair housing laws. For example, Massachusetts recently 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). In the underlying complaint, 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.

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ing_Discrimination_Card.pdf; http://www.ag.ny.gov/civil-rights/fair-housing.

While there was no evidence of intentional discrimination with respect to the pricing policy, 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. *In the Matter of: Countrywide Home Loans*, Assurance of Discontinuance Pursuant to N.Y. Exec. Law 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, one each against Wells Fargo and Countrywide, alleging that African-American and Hispanic borrowers were disproportionately placed in high-cost loans and paid more for their loans.[49]

Though the allegations in each of these cases differ slightly, they all concern discretionary decision-making aggregated over large groups of borrowers. None of the cases involved evidence of policies or practices that

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[49] The U.S. 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 U.S. v. Countrywide Financial Corp.*, 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.

clearly showed intentional misconduct, but there were substantial and statistically significant disparities that state attorneys general did not believe could be justified by legitimate, nondiscriminatory business needs.

The States' use of disparate impact claims in housing 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. Vill. of Waterford, N.Y.*, 808 F. Supp. 120 (N.D.N.Y. 1992) (holding that Waterford's interpretation and application of a local zoning ordinance had a disparate impact on the basis of disability); *Connecticut Comm'n on Hum. Rts. & Opps. ("CHRO") ex rel. Hurtado v. Falk*, CHRO No. 8230394 (landlord's English-only policy had a disparate impact based on national origin and ancestry); *CHRO ex rel. Schifini v. Hillcroft Partners*, CHRO No. 8520090 (landlord's policy of limiting occupancy had disparate impact based on familial status).

States also rely on the U.S. 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. States therefore have a strong interest in the continued availability of disparate impact claims to these parties as well. Like the States, these groups have used disparate impact theories increasingly in recent years to address contemporary manifestations of discrimination. For example, the Department of Justice has filed and resolved a number of cases against mortgage lenders in

recent years alleging disparate impact claims based on loan pricing disparities that discriminate against minority borrowers.[50] 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. In another mortgage lending case, the Department settled allegations against a California bank that imposed a minimum loan amount policy that disproportionately excluded African-American and Hispanic borrowers. The evidence in the case showed that the bank originated significantly fewer loans in majority-minority census tracts than other comparable lenders. *U.S. v. Luther Burbank Savings*, 2:12-cv-07809 (C.D. Cal. 2012) (alleging claims under the FHA and ECOA).

The Department and others have also relied upon disparate impact theories in a number of cases outside the lending context. For example, the Department recently resolved a lawsuit alleging that St. Bernard Parish, Louisiana's zoning laws had the discriminatory effect of preventing African-Americans and other minorities from resettling there after Hurricane Katrina. *U.S. v. St. Bernard Parish*, 2:12-cv-00321 (E.D. La. 2012). In 2012, the Fair Housing Justice

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[50] *See, e.g.*, *U.S. v. SunTrust Mortgage, Inc.*, 3:12-cv-00397 (E.D. Va. 2012) (alleging claims under the FHA and ECOA); *U.S. v. Wells Fargo Bank, N.A.*, 1:12-cv-01150 (D.D.C. 2012); (same); *U.S. v. GFI Mortgage Bankers*, 1:12-cv-02502 (S.D.N.Y. 2012) (same); *U.S. v. Countrywide Financial Corp.*, 2:11-cv-10540 (C.D. Cal. 2011) (same); *U.S. v. C&F Mortgage Corp.*, 3:11-cv-653 (E.D. Va. 2011) (same); *U.S. v. PrimeLending*, 3:10-cv-02494 (N.D. Tex. 2010) (same).

Center settled a lawsuit against the Town of Yorktown, NY, 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*, 7:10-cv-09337 (S.D.N.Y. 2012). And, earlier this year, 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 Development Group, LLC v. Vill. of Wheeling*, 1:12-cv-07419 (N.D. Ill. 2013).

These cases, like those brought by the 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 some cases, were indicative of discriminatory intent. Had disparate impact claims not been available, the victims of the challenged discriminatory policies and practices likely would have been left without a meaningful remedy.

C. Disparate Impact Claims Do Not Unduly Interfere With Local Decision-Making.

While the *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 Tenth Amendment concerns.[51] Disparate impact claims have been available under the FHA for several decades, and local governments have not been unduly restricted. Moreover, state and local activities are already subject to limitations through other federal statutes—including, for example, Title VI, Title VII, the Americans with Disabilities Act, and the Religious Land Use and Institutionalized Persons Act. All of these laws either implicate land use or permit disparate impact liability, and none has been found to conflict with federalism principles. *See, e.g., Groome Res. Ltd., L.L.C. v. Parish of Jefferson*, 234 F.3d 192, 215 (5th Cir. 2000) ("local land use authority cannot defeat congressional action predicated on a nexus between discrimination and commerce"); *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007) (RLUIPA does not violate the Tenth Amendment).

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. Disparate impact claims under the FHA are a critical part of our own efforts to combat inequality, while at the same time leaving ample room for local governments to make decisions according to the best interests of their respective communities. Disparate impact liability does not

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[51] Petitioners' reliance on the clear statement doctrine is therefore inapposite.

effectively require local governments to balance racial outcomes, as Petitioners suggest, but rather requires only that decision-makers take care to consider the effects of their decisions and the existence of less discriminatory options. These considerations do not unduly infringe on local discretion. Moreover, to the extent that disparate impact claims serve as a method of rooting out and redressing intentional discrimination, there is no conflict with the legitimate interests of local governments, regardless of the degree of the intrusion. And, as Petitioners acknowledge, Congress is well within its authority under Section 5 of the Fourteenth Amendment to prohibit intentional discrimination of any kind.

III. DISPARATE IMPACT CLAIMS ARE CONSISTENT WITH THE LANGUAGE AND INTENT OF THE FHA, AND NECESSARY TO ADVANCE ITS BROAD PURPOSES.

The Congressional record is clear as to the purposes of the FHA: to eradicate discrimination and segregation in housing. These broad purposes, as well as the operative language of the statute, are consistent with other civil rights legislation of the era and should be interpreted accordingly. *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 935 (2d Cir. 1988) (analyzing the FHA as part of "a coordinated scheme of federal civil rights laws enacted to end discrimination"). The Court has already recognized disparate impact claims under many civil rights statutes, and should do the same with the FHA.

The FHA was introduced after the Court and Congress had already paved the way for integration of our public facilities, schools, and workplaces. Speaking

in favor of the bill, its principal sponsor, Senator Mondale, argued: "America's goal must be that of an integrated society, a stable society. . . . If America is to escape apartheid we must begin now, and the best way for this Congress to start on the true road to integration is by enacting fair housing legislation." 114 Cong. Rec. S3422 (1968). However, opponents delayed passage of the FHA for two years. Congress finally voted to enact the statute after the assassination of Martin Luther King, Jr. in April 1968, with the express purpose of advancing equal opportunity in housing and fostering residential integration.[52]

These purposes were reaffirmed with the passage of the Fair Housing Amendments Act in 1988. Congress found that, twenty years after the enactment of the FHA, segregation and discrimination persisted throughout America's housing markets.[53] *See* H.R. Rep. No. 711, 15 (1988). Congress therefore passed the amendments to expand the scope of the FHA by incorporating new prohibitions against familial status and disability-based discrimination, and to add enhanced enforcement mechanisms.[54] Congress again affirmed the broad purposes of the FHA when it

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[52] Sharkey, *supra* note 6, at 8; *History of Fair Housing*, U.S. Dep't of Housing and Urban Development, *available at* http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/aboutfheo/history.

[53] Leland B. Ware, *New Weapons for an Old Battle: The Enforcement Provisions of the 1988 Amendments to the Fair Housing Act*, 7 Admin. L.J. Am. U. 59, 60-63 (1993) (discussing the impact of racial discrimination in housing).

[54] *Id.* at 80-82.

marked the 40th anniversary of the law 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).

This Court's interpretation of the FHA is in accord. Classifying housing integration as a "policy that Congress considered to be of the highest priority," the Court has held that the FHA should be broadly construed in order to achieve that goal. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209-212 (1972) ("The language of the Act is broad and inclusive," and is therefore accorded a "generous construction.") (interpreting standing under 42 U.S.C. § 3610(a)); *see also City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731-32 (1995) (interpreting the FHA's exception to disability discrimination "narrowly in order to preserve the primary operation of the policy") (internal quotation omitted).

Recognizing these broad purposes, each Court of Appeals that has ruled on the issue has interpreted the FHA to include disparate impact liability. *See, e.g., Huntington*, 844 F.2d at 934 ("The Act's stated purpose to end discrimination requires a discriminatory effect standard; an intent requirement would strip the statute of all impact on de facto segregation."); *Vill. of Arlington Heights*, 558 F.2d at 1290 ("A strict focus on intent permits racial discrimination to go unpunished . . . ."). HUD and the Department of Justice have done the same, and their interpretations have been followed by nine other federal agencies. *See* 24 C.F.R. § 100.500. Indeed, because the Department of Justice and HUD

are charged with primary enforcement authority (42 U.S.C. § 3610), their interpretations of the FHA are entitled to particular deference. [55]

These decisions are not only consistent with the Court's overall interpretation of the FHA, but also with the Court's interpretation of similar civil rights statutes. In particular, the Court has recognized disparate impact claims under both of the federal discrimination statues immediately preceding the FHA: the Civil Rights Act of 1964 (Title VII) and the Age Discrimination in Employment Act of 1967 (ADEA). *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Smith v. City of Jackson*, 544 U.S. 228 (2005). These statutes make it unlawful for an employer "to limit, segregate, or classify his employees in any way" that would "deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of" a protected characteristic. 42 U.S.C. § 2000e-2(a)(2); 29 U.S.C. § 623(a)(2). Recognizing that Congress's objective "to achieve equality of employment opportunities and remove barriers" was plain from the language of the statute, the Court held in *Griggs* that Title VII proscribes acts or practices perpetuating discrimination, regardless of intent. 401 U.S. at 429-430. The Court similarly held in *Smith* that the same language in the ADEA supports

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[55] *See, e.g., Schuetz v. Banc One Mortgage Corp.*, 292 F.3d 1004, 1012 (9th Cir. 2002) (interpreting *Barnhart v. Walton*, 535 U.S. 212 (2002) to determine that HUD policy statements deserve *Chevron* deference); *see also Smith v. City of Jackson*, 544 U.S. 228, 239 (2005) (noting that the Department of Labor and EEOC "have consistently interpreted the ADEA to authorize relief on a disparate-impact theory").

application of disparate impact analysis. 544 U.S. at 235-236. The relevant language of the FHA—making it unlawful "to otherwise make unavailable or deny" housing "because of" a protected characteristic—is substantially similar in that it extends the reach of the statute beyond overt discrimination and focuses on discriminatory outcomes in addition to intent.[56] *See* 42 U.S.C. § 3604(a).

Moreover, just a few years after the FHA, Congress enacted the Equal Credit Opportunity Act, explicitly instructing that Title VII cases should guide its interpretation as well. *See* S. Rep. 94-589, 94th Cong., 2d Sess. at 406 (1976) ("Thus, judicial constructions of antidiscrimination legislation in the employment field, in cases such as *Griggs*, and *Albemarle Paper Company v. Moody* (U.S. Supreme Court, June 25, 1975), are intended to serve as guides in the application of this Act, especially with respect to the allocations of burdens of proof.").[57] Because disparate impact claims are clearly available under ECOA, and the FHA and ECOA often intersect in the context of housing discrimination, it simply would not make sense to recognize disparate impact claims under one statute and not the other.

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[56] Lindsey E. Sacher, *Through the Looking Glass and Beyond: The Future of Disparate Impact Doctrine Under Title VIII*, 61 Case W. Res. L. Rev. 603, 611 (2010).

[57] In June 1995, the Federal Reserve Board staff amended its Regulation B Commentary, adding an explicit "effects test" to ECOA regulations. *See* 12 C.F.R. Part 202, Supp. I, Official Staff Interpretations, Comment 6(a)-2 (1995).

Finally, the legislative history of the FHA makes it clear that Congress never intended to limit the reach of the FHA to intentional discrimination. In fact, in 1968, Congress rejected an amendment that sought to impose an intent requirement on claims against individual homeowners. *See, e.g.,* 114 Cong. Rec. 5214-5222 (1968). And the Congressional record from the 1988 amendments makes it clear that Congress was then aware that the FHA had been interpreted by a number of circuit courts to permit disparate impact liability and that it expected the continued viability of such causes of action. *See* 134 Cong. Rec. 23711-12 (1988) ("Congress accepted th[e] consistent judicial interpretation. . . of the Federal courts of appeals that the FHA prohibit[s] act that have discriminatory effects, and that there is no need to prove discriminatory intent.") (Sen. Kennedy); H.R. Rep. No. 100-711 at 89 (1988) (House Judiciary Committee rejected an amendment eliminating disparate impact liability for zoning decisions); *see also* H.R. Rep. No. 100-711 at 25 ("Acts that have the effect of causing discrimination can be just as devastating as intentional discrimination.").

Congress enacted the FHA to eliminate both intentional discrimination and the avoidable discriminatory effects of housing policies and practices. It did so based on its understanding that conduct with the effect of perpetuating residential segregation and inequality can be as harmful as explicit discrimination. Thus, to keep faith with the broad purposes of the FHA, and to ensure consistency among related federal statutes, the Court should recognize disparate impact causes of action under the FHA as well.

CONCLUSION

For the foregoing reasons, the *Amici* States respectfully submit that the Court should hold that disparate impact claims are cognizable under the FHA and affirm the judgment of the Court of Appeals.

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