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 *AMICUS CURIAE* NATIONAL COMMUNITY LAND TRUST NETWORK IN SUPPORT OF RESPONDENT

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BRIEF FOR *AMICUS CURIAE* NATIONAL COMMUNITY LAND TRUST NETWORK IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae is the National Community Land Trust Network, a national organization and corporation made up of approximately 160 Community Land Trusts ("CLTs"), other local development organizations, and government inclusionary housing programs located in 46 states and the District of Columbia.

CLTs are membership-based non-profit organizations that provide access to land and housing to people who otherwise lack access to housing, increase long-term community control of neighborhood resources, empower local residents through community involvement and participation, and preserve affordable housing on a long term basis. CLTs own land in local communities nationwide and use that land to develop and sell affordable homes to low- and moderate-income families. CLTs offer a balanced perspective to housing development, as they are typically governed by equal parts residents of the CLT, non-CLT residents in the service area, and public representatives or community leaders. Because all CLTs are locally

[1] Pursuant to this Court's Rule 37.3(a), all parties have submitted to the Clerk blanket consents to the filing of all *amicus* briefs. Pursuant to this Court's Rule 37.6, *Amicus* states that no counsel for any party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief.

operated, they ensure local control over land and housing ownership, and they build leadership among local community residents. Over the past ten years, the number of CLTs nationwide has more than doubled, helping to fulfill a need for affordable housing in America.

Inclusionary housing programs (sometimes referred to as "inclusionary zoning") produce affordable housing by linking jurisdictional approval for construction of market-rate housing or other real estate projects to the creation of affordable homes for low- and moderate-income households. Inclusionary policies typically require or incentivize housing developers to support the creation of a certain percentage of affordable units. Inclusionary housing programs are intended to expand the availability of affordable housing and promote economic and social integration. The vast majority of inclusionary housing programs are designed not only to produce affordable homes but also to preserve a stock of housing that remains affordable over time. Production and preservation of affordable homes are critical for creating inclusive communities and addressing housing needs among families with modest incomes.

The National Community Land Trust Network has long been committed to promoting fair housing and advancing the Fair Housing Act's critical goals of preventing discrimination and promoting integration. For decades, members of the National Community Land Trust Network have provided strong leadership in developing housing with lasting affordability that

both helps to revitalize neighborhoods and promotes social, economic and racial integration. As part of these efforts, our members have successfully invoked the Fair Housing Act to challenge exclusionary ordinances that restrict the development of affordable housing in local communities.

As an organization whose members constantly engage in local housing development that must conform to the Fair Housing Act's legal standards, the National Community Land Trust Network believes that it is necessary for the Fair Housing Act to prohibit housing practices that are facially neutral but have an adverse impact on classes protected under the law. No different than discriminatory policies motivated by bias, neutral policies that have a disparate impact without legitimate business or social justification can cause substantial harm to local communities and residents. The National Community Land Trust Network views exposure under the law to disparate impact liability as creating a salutary incentive for all developers, real estate professionals, and local governments to anticipate how their housing-related decisions will impact all community stakeholders and, where they will, or have had, an adverse effect, to explore alternative approaches that ensure all community members are properly served.

SUMMARY OF ARGUMENT

Over the past four decades, both the federal courts and real estate professionals subject to the Fair Housing Act have commonly understood that claims challenging neutral policies that have an adverse effect on a protected group are cognizable under the Fair Housing Act. Since the early days of the Fair Housing Act, disparate impact claims have played an instrumental role in achieving the Fair Housing Act's broad remedial goals of protecting against discrimination and promoting integrated residential communities. And today the prospect of disparate impact liability continues to make the Fair Housing Act an effective tool in the decades-old pursuit of equality in the housing market, ensuring that private developers and local governments alike thoughtfully consider how protected classes will be impacted by their policies and whether legitimate interests can be achieved through less burdensome means.

Both private and public sector actors have longstanding experience with avoiding or reforming policies that will have a disparate impact, and are well equipped to find solutions that advance their interests as well as the goals of the Fair Housing Act. Moreover, disparate impact liability has long been part of the ground rules that developers and real estate professionals must follow, discouraging development that would exclude, prey on, or profit from discrimination against particular segments of our communities.

Rather than stifle development, the Fair Housing Act has been a powerful force for economic development in local communities across the United States. Housing developers – including members of the National Community Land Trust Network – have been very successful in using disparate impact claims under the Fair Housing Act to eliminate exclusionary zoning regulations that unduly restrict the development of affordable and multi-family housing. The development of affordable and multi-family housing is critical to integrating local communities and serving the needs of residents of color, who often lack access to quality, affordable housing as a result of historical patterns of discrimination. For developers who want to construct affordable and multi-family housing nationwide, it remains critically important that the Fair Housing Act affords developers the ability to use disparate impact claims to promote local housing development.

In 2013, the U.S. Department of Housing and Urban Development ("HUD") issued a final rule that establishes a uniform, nationwide standard for analyzing disparate impact claims under the Fair Housing Act and codifies the burden-shifting approach adopted by nearly every court of appeals.[2] This final rule is not only a reasonable interpretation of the

[2] Department of Housing and Urban Development, 24 CFR Part 100, Implementation of the Fair Housing Act's Discriminatory Effects Standard; Final Rule, 78 Fed. Reg. 11460 (Feb. 15, 2013).

Fair Housing Act that should receive deference by this Court, but it also is a fair approach for developers and other real estate professionals to which the Fair Housing Act applies. In interpreting the Fair Housing Act, HUD appropriately placed the ultimate burden of proving a disparate impact claim on plaintiffs, as kindred statutes, like Title VII of the Civil Rights Act of 1964, have done, thus requiring plaintiffs to prove that the defendant's "challenged practice could be served by another practice that has a less discriminatory effect."[3]

Amicus therefore respectfully supports Respondents in requesting that this Court affirm the holding of the U.S. Court of Appeals for the Fifth Circuit that disparate impact claims are cognizable under the Fair Housing Act.

ARGUMENT

I. Disparate Impact Liability Remains an Important Tool for Achieving the Fair Housing Act's Broad Remedial Goals of Protecting Against Discrimination and Promoting Integration

When Congress enacted the Fair Housing Act in 1968, it declared that "[i]t is the policy of the United States to provide, within constitutional limitations,

[3] 24 C.F.R. § 100.500(c)(3) (2013).

for fair housing throughout the United States."[4] This sweeping declaration reflected "the broad remedial intent of Congress embodied in the Act"[5] to remove discriminatory barriers in the housing market and achieve an integrated society.[6]

But the Fair Housing Act was not merely a powerful pronouncement that equality and fairness would be the governing principles of America's housing market. Banning "a broad range of discriminatory practices and enforceable by a complete arsenal of federal authority,"[7] the Fair Housing Act also represented an effort to craft a potent civil rights law that would effectively reform a housing market where discrimination and segregation had long been well-accepted norms and practices.

As eleven courts of appeals have concluded, Congress intended that the broad range of discriminatory practices banned by the Fair Housing Act would extend not only to discrimination motivated by bias but also to facially neutral policies that have an adverse impact on those protected by the statute and

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[4] 42 U.S.C. § 3601.

[5] *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982) (citing *Jones v. Alfred H. Mayer Co*., 392 U.S. 409, 417 (1968)).

[6] *Trafficante v. Metro. Life Ins. Co*., 409 U.S. 205, 211 (1972) (noting that "the reach of the [Fair Housing Act] was to replace the ghettos 'by truly integrated and balanced living patterns.'") (quoting 114 Cong. Rec. 3422).

[7] *Jones*, 392 U.S. at 417.

that lack a legitimate business justification.[8] Indeed, "[j]ust as Congress require[d] 'the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification,' such barriers must also give way in the field of housing."[9]

Over the past four decades, the common understanding that the Fair Housing Act protects against neutral housing policies that adversely affect protected groups has been instrumental to promoting residential development designed to be inclusive of all community members. For example, as developers of affordable housing throughout the nation, our members have been cognizant that it is not enough to simply avoid introducing into our business decisions any intent to rely on bias. We also understand the Fair Housing Act mandates that we achieve our business goals without imposing unnecessary or

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[8] *Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep't of Hous. & Urban Dev.*, 639 F.3d 1078, 1085 (D.C. Cir. 2011) ("Each of the eleven circuits that have resolved the matter has found the disparate impact theory applicable under the Fair Housing Act.") (citing *2922 Sherman Ave. Tenants' Ass'n v. District of Columbia*, 444 F.3d 673, 679 (D.C. Cir. 2006)).

[9] *United States v. City of Black Jack, Mo.*, 508 F.2d 1179, 1184 (8th Cir. 1974) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971)); *accord Graoch Assocs. # 33, L.P. v. Louisville/Jefferson Cnty. Metro Human Relations Comm'n*, 508 F.3d 366, 374 (6th Cir. 2007) (following *Griggs*); *Huntington Branch, NAACP v. Town of Huntington, N.Y.*, 844 F.2d 926, 935 (2d Cir.), *aff'd* 488 U.S. 15 (1988) (same).

unjustified adverse effects on those protected by the statute. As a result, over the past several decades our members – and real estate professionals in myriad industries – have routinely considered the potential impact on all community stakeholders before finalizing development plans, resulting in the implementation of policies and practices that do a far better job of promoting integration and equal housing opportunity in communities across America.

As our members have seen firsthand, facially neutral policies that have an unjustified disparate impact often have the same harmful impact as policies that are motivated by racial bias or other animus, and can ordinarily be avoided in the first place. As this Court recognized in *Griggs v. Duke Power Company*, facially neutral practices may be "fair in form, but discriminatory in operation," and "even [practices] neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory [ ] practices."[10] While this reasoning undoubtedly applied to the employment market of the early 1970s, the same kinds of barriers were just as prevalent, and possibly more entrenched, in the housing market when the Fair Housing Act was enacted several years before *Griggs* was decided. And while our nation has made some progress towards integrating residential housing patterns in our neighborhoods – in part, due to the strength of the

[10] *Griggs*, 401 U.S. at 430-31.

Fair Housing Act and other civil rights laws – highly segregated housing still persists in many metropolitan areas across the United States.[11] The mandate Congress issued with its enactment of the Fair Housing Act to end housing discrimination and promote integration in our nation's communities remains equally important today in order to protect against the adoption of policies that, while fair in form, may lock in place, rather than overcome, patterns attributable to past segregation and discrimination.

II. Disparate Impact is Vital to Setting a Level Playing Field and Preventing the Costly Effects of Discrimination

The Fair Housing Act establishes important ground rules for developers and other real estate professionals, and for the past four decades the federal courts have agreed that those ground rules proscribe facially neutral policies that have a disparate impact on those protected by the statute and for which less burdensome options exist.[12] Those ground rules set a level playing field for every person who interacts with the housing market and create a strong disincentive for developers, banks and others

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[11] *See generally* Richard Wright, Mark Ellis, Steven Holloway, & Sandy Wong, Patterns of Racial Diversity and Segregation in the United States: 1990-2010, The Professional Geographer (2013).

[12] *Greater New Orleans Fair Hous. Action Ctr.*, 639 F.3d at 1085.

to engage in development at the expense of those protected by the Fair Housing Act where less burdensome alternatives exist.[13]

Exposure to liability for housing policies that have a disproportionate effect on those protected by the Fair Housing Act and the reasonable likelihood of enforcement by public and private agents create a powerful incentive for developers and financial institutions alike to pursue policies that will accommodate the various interests of all members of our society. Without these conditions, neutral policies that perpetuate the effects of past discrimination and mask intentional bias can proceed unchecked.[14]

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[13] As studies on the impact of housing discrimination have confirmed, discrimination in the housing market costs American families billions of dollars each year and thus reinforces the racial inequality that has persisted since long before the Fair Housing Act. *See, e.g.*, David Rusk, The "Segregation Tax": The Cost of Racial Segregation to Black Homeowners 1 (The Brookings Institution), October 2001, http://www.brookings.edu/~/media/research/files/reports/2001/10/metropolitanpolicy%20rusk/rusk.pdf (finding that "black homeowners received 18 percent less value for their homes than white homeowners" and that "[t]his gap in home values or 'segregation tax' imposed on black homeowners, primarily results from a high degree of racial segregation in neighborhoods."); John Yinger, Closed Doors, Opportunities Lost: The Continuing Costs of Housing Discrimination 98-103 (1995) (estimating that in the mid-1990s, discrimination in the housing market cost blacks $2 billion annually and Hispanics $1.2 billion annually); *see also infra* at n.15.

[14] *See City of Black Jack*, 508 F.2d at 1185 ("Effect, and not motivation, is the touchstone, in part because clever men may easily conceal their motivations[.]"); *see also Pfaff v. U.S. Dep't of*

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Recent litigation by the U.S. Department of Justice and others has demonstrated that the nation's worst economic crisis since the Great Depression was caused, at least in part, by housing practices that had a disparate impact on African Americans and Hispanics.[15] Even with the current protections against facially neutral housing policies that adversely affect certain types of homeowners and borrowers, these discriminatory housing practices occurred. Absent such protections, these practices and others like them will likely recur and even flourish, perpetuating segregation and insulating firms that behave irresponsibly from liability.

Hous. & Urban Dev., 88 F.3d 739, 746 n.2 (9th Cir. 1996) (stating the same and following *City of Black Jack*, 508 F.2d at 1184-85); *Jackson v. Okaloosa Cnty., Fla.*, 21 F.3d 1531, 1541 & n.16 (11th Cir. 1994) (same); *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1036-37 (2d Cir. 1979) (same).

[15] In 2012, for example, the Department of Justice entered a consent decree with Wells Fargo Bank, N.A., settling allegations that Wells Fargo had "engaged in a pattern or practice of discrimination on the basis of race and national origin in violation of" the Fair Housing Act in which facially neutral policies of giving loan brokers excessive discretion and financial incentives to place borrowers in subprime mortgages had a disparate impact on African American and Hispanic borrowers who were far more likely to receive subprime mortgages than similarly situated white borrowers. Consent Order, *United States v. Wells Fargo Bank, N.A.*, No. 1:12-cv-01150-JDB (D.D.C. Sept. 21, 2012), at 2-3. Earlier, the Department of Justice settled a similar Fair Housing Act action against Countrywide Financial Corporation, which was acquired by Bank of America, N.A. *See* Consent Order, *United States v. Countrywide Financial Corp.*, No. 2:11-cv-10540-PSG-AJW (C.D. Cal. Dec. 28, 2011).

III. Disparate Impact Claims Help Developers Overcome Burdensome Local Regulations That Unfairly Stop the Development of Affordable Housing

While some *amici* have cast the Fair Housing Act as a statute that is used to stall development, the reality is quite different. Rather than putting the brakes on economic development, the Fair Housing Act promotes development strategies and decisions that encourage the inclusion of all segments of society and increase the likelihood that the tide of economic development will lift all boats.

In particular, the Fair Housing Act provides to developers a critically important and powerful tool to challenge local regulations that unjustifiably restrict the development of affordable housing and other types of housing transactions that foster diversity within residential housing. By protecting against policies that unnecessarily have an adverse impact, the Fair Housing Act makes it unlawful for local governments to "[e]nact[ ] or implement[ ] land-use rules, ordinances, policies, or procedures that restrict or deny housing opportunities or otherwise make unavailable or deny dwellings to persons because of race, color, religion, sex, handicap, familial status, or national origin," even when there is no evidence of an intent to discriminate.[16] Historically,

[16] 24 C.F.R. § 100.70(d)(5); *see also id.* § 100.5(b) ("The illustrations of unlawful housing discrimination in this part may be established by a practice's discriminatory effect, even if not

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developers have successfully invoked the Fair Housing Act to challenge local ordinances, neutral on their face, that unduly restrict the development of affordable housing that would be occupied primarily by minorities.

For example, in one of the early and leading disparate impact cases brought under the Fair Housing Act, *United States v. City of Black Jack*, the United States challenged a city's "zoning ordinance which prohibited the construction of any new multiple-family dwellings," and thus "operated to preclude construction of a low to moderate income integrated townhouse development."[17] Because the residents of the City of Black Jack, a suburb of St. Louis, were overwhelmingly Caucasian, whereas the residents of the City of St. Louis were predominantly black, the Eighth Circuit concluded that the "ultimate effect" of the ordinance banning multi-family housing development in the City of Black Jack "was to foreclose 85 percent of the blacks living in the metropolitan area from obtaining housing in Black Jack, and to foreclose them at a time when 40 percent of them were living in substandard or overcrowded units."[18] Because the City of Black Jack could not proffer a substantial, legitimate interest in support of its

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motivated by discriminatory intent, consistent with the standards outlined in § 100.500.").

[17] *City of Black Jack*, 508 F.2d at 1181-82.

[18] *Id.* at 1183, 1186.

ordinance, the Eighth Circuit held that the ordinance had an unlawful, disparate effect and blocked its enforcement.[19]

Similarly, in one of the latest challenges to an exclusionary zoning ordinance, a developer successfully challenged an ordinance of Bernard Parish, Louisiana that "placed a moratorium on the construction of all multi-family housing (i.e. buildings with more than 5 units)" for an entire year.[20] At the time the moratorium was passed, African Americans were struggling to find affordable housing in the aftermath of Hurricane Katrina, and a real estate developer was starting to construct four affordable housing developments of 72 units each.[21] The U.S. District Court for the Eastern District of Louisiana concluded the moratorium would have a disproportionate effect on African-American households, as locally African Americans "are 85% more likely to live in structures with more than 5 units than Caucasian households," are "twice as likely as Caucasians to live in rental housing," "are far more likely to have incomes within the income ranges for the proposed affordable housing developments," and the developer expected the tenants to be "approximately 50% African-American,

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[19] *Id.* at 1186-88.

[20] *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish*, 641 F. Supp. 2d 563, 566 (E.D. La. Mar. 25, 2009).

[21] *Id.*

25% other minority, and 25% Caucasian."[22] Finding no substantial justification for the moratorium, the Court held the ordinance violated the Fair Housing Act (as well as the terms of a prior consent decree that enjoined Saint Bernard Parish from enforcing a "blood relative" ordinance that had prohibited the rental or leasing of properties to non-relatives).[23]

As developers of affordable housing, members of the National Community Land Trust Network have similarly invoked the Fair Housing Act to overcome unduly restrictive local housing regulations. For instance, in 2012 the U.S. Department of Justice settled an action under the Fair Housing Act against Sussex County, Delaware, which had refused to approve a 50-lot affordable housing development proposed by the Diamond State Community Land Trust, based in part on assumptions that the development's residents would be African American and Latino.[24]

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[22] *Id.* at 567-68.

[23] *Id.* at 565-66, 578-79. In an analogous case, the U.S. District Court for the Northern District of Texas struck down an ordinance that completely banned the construction of apartment complexes in a Dallas, Texas suburb whose residents were 94% white and less than 1% black, holding that the apartment ban had a disparate impact on the availability of housing for African Americans in the broader Dallas County area and perpetuated racial segregation in Dallas County. *Dews v. Town of Sunnyvale, Tex.*, 109 F. Supp. 2d 526, 564-70 (N.D. Tex. 2000).

[24] U.S. Department of Justice, Justice Department Settles Lawsuit Against Sussex County, Delaware, for Blocking Affordable

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These types of exclusionary ordinances clearly and directly undercut the Fair Housing Act's goals of protecting against discrimination and promoting integration. They unfairly prevent developers from meeting unmet demands for affordable housing in localities throughout the nation. For years, federal courts have recognized that these restrictive ordinances not only stand in the way of development but also "interfere[ ] with the exercise of the right to equal housing opportunity"[25] and "reinforce[ ] racial segregation in housing."[26] Due to the strength of these claims and their clear connection to achieving the goals of the Fair Housing Act, plaintiffs challenging regulations that restrict housing development have been "twice as successful as FHA disparate impact plaintiffs on average."[27] Because of these rulings invalidating restrictive ordinances and the ongoing risk of disparate impact liability associated with exclusionary zoning ordinances, local housing regulations have become less restrictive and more open to

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Housing (Nov. 28, 2012), http://www.justice.gov/opa/pr/2012/November/12-crt-1418.html.

[25] *City of Black Jack*, 508 F.2d at 1186-88.

[26] *Huntington*, 844 F.2d at 937-38 (holding that the Town of Huntington's "refusal to amend the restrictive zoning ordinance to permit privately-built multi-family housing outside the urban renewal area," which was largely populated by minorities, "significantly perpetuated segregation in the Town").

[27] Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims under the Fair Housing Act*, 63 Am. U. L. Rev. 357, 400 (Dec. 2013).

the development of affordable and integrated housing.

IV. The Risk of Disparate Impact Liability Ensures Local Governments Interact With the Housing Market in a Way That Fosters Democracy and Responsible Development

Petitioners argue that the prospect of disparate impact liability constantly requires local governments and private sector actors to make decisions based on race and other classifications. As developers who work closely with local governments and officials on a regular basis, we believe that this concern is misplaced. Petitioners' argument does not reflect the reality of how public and private institutions make decisions to avoid having a harmful, adverse effect on those protected by the Fair Housing Act, and ignores the broader landscape of federal civil rights law that has appropriately informed the conduct of local governments for nearly fifty years.

In our experience, the prospect of disparate impact liability has an immensely positive consequence of creating incentives for developers, other real estate professionals, and governments to think critically and proactively about how their decisions may impact all segments of our society – including women and men, people with disabilities, families with children, and people of different racial backgrounds or national origins – and whether their goals can be achieved in a manner that does not unduly

burden any particular group. This type of critical thinking and analysis promotes a range of important democratic values, such as inclusiveness, the integration of people and communities, balanced and sustainable development, and shared opportunity, which make local communities stronger and more cohesive.[28]

Furthermore, in our experience working with governments throughout the United States, state and local governments are well acquainted with the process of formulating public policies with the goal of preventing or reducing adverse effects on people protected by the Fair Housing Act and other federal statutes. Since 1964, state and local governments that administer programs wholly or partly supported by "Federal financial assistance" have been barred by Title VI of the Civil Rights Act of 1964 from discriminating on the basis of race, color, or national origin.[29] As such, they have been banned from implementing facially neutral policies that unnecessarily have a disparate effect, and the pursuit of such policies has exposed them to administrative and judicial enforcement.[30] Thus, when state or local governments spend

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[28] These democratic values are closely aligned with the guiding principles of the National Community Land Trust Network, which include: perpetual affordability in housing; community health, cohesion, and diversity; community stewardship of land; sustainability; representative governance; and resident and community empowerment.

[29] 42 U.S.C. § 2000d.

[30] *See id.* §§ 2000d, 2000d-2; *Alexander v. Sandoval*, 532 U.S. 275, 281-82 (2001) (assuming "regulations promulgated

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federal funds on housing programs, they must ensure their programs do not unnecessarily have a disproportionate effect on groups of people protected by Title VI and the Fair Housing Act. State and local governments are keenly aware of these responsibilities and they ordinarily are willing to work constructively with all community members to avoid implementing policies that will have an unjustified disparate effect on particular segments of those communities.

Likewise, state and local governments are subject to Title VII of the Civil Rights Act as public employers, and thus have longstanding experience complying with that statute's prohibition on employment practices that have an adverse effect.[31] Moreover, Title VII's burden-shifting framework for disparate impact claims closely resembles the standard that

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under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups," and noting that five justices in *Guardians Ass'n v. Civil Serv. Comm'n of the City of New York*, 463 U.S. 582 (1983), supported the same assumption).

[31] 42 U.S.C. §§ 2000e(b), 2000e(k), 2000e-2. In addition, state and local governments must comply with other federal civil rights laws that create the risk of disparate impact liability for employment discrimination, such as the Age Discrimination in Employment Act and the Americans With Disabilities Act. *See Smith v. City of Jackson, Miss.*, 544 U.S. 228, 231-32 (2005) (holding the ADEA "does authorize recovery in 'disparate-impact' cases comparable to *Griggs*" in a case involving a public employer); *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003) (stating that "disparate-impact claims are cognizable under the ADA," and citing 42 U.S.C. § 12112(b)).

HUD and nearly all the courts of appeals have adopted for analyzing disparate impact claims under the Fair Housing Act,[32] as well as the burden-shifting approach that courts apply when deciding Title VI disparate impact claims.[33]

V. Promoting Inclusive and Integrated Communities Furthers a Critical Purpose of the Fair Housing Act and Benefits Everyone in Our Society

From the early days of the Fair Housing Act, this Court has made clear the Act was not only intended to eliminate discrimination in the residential housing market, but also to encourage "'integrated and

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[32] *See* 78 Fed. Reg. at 11462 & n.34 (noting that "[a]ll but one of the federal courts of appeals that use a burden-shifting approach place the ultimate burden of proving that a less discriminatory alternative exists on the plaintiff, with some courts analogizing to the burden-shifting framework established for Title VII of the Civil Rights Act of 1964 (Title VII), which addresses employment discrimination," and following the same approach in the final rule) (citing *Graoch*, 508 F.3d at 373 ("[C]laims under Title VII and the [Fair Housing Act] generally should receive similar treatment")).

[33] *See Georgia State Conf. of Branches of NAACP v. Covin*, 775 F.2d 1403, 1417 (11th Cir. 1985) ("The elements of a disparate impact claim may be gleaned by reference to cases decided under Title VII[.]") (citing *NAACP v. Medical Ctr., Inc.*, 657 F.2d 1322, 1331 (3d Cir. 1981) (en banc) (Title VII standards instructive in Title VI case)); *Larry P. by Lucille P. v. Riles*, 793 F.2d 969, 982 & n.9 (9th Cir. 1984) (applying the same burden-shifting framework of Title VII to analyze a Title VI disparate impact case).

balanced living patterns.'"[34] As this Court observed in *Trafficante*, when a housing provider defends or promotes segregation by excluding people of color from housing opportunities, that conduct harms "'the whole community'" who would benefit from integrated living.[35] The prospect of disparate impact liability serves as an incentive for governments or publicly-funded housing programs to build affordable housing that enhances the diversity of our communities, and thus advances the Act's purpose of "'integrated and balanced living patterns.'"[36] Indeed, without the prospect of disparate impact liability, governments and developers would be free to construct housing in a manner that reinforces entrenched patterns of segregation and directly undermines a central purpose of the Fair Housing Act.

Moreover, encouraging the construction of geographically dispersed, affordable housing – in low-, moderate- and higher-income areas – promotes

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[34] *Trafficante*, 409 U.S. at 211 (quoting 114 Cong. Rec. 3422 (Senator Mondale describing the purpose of the Act)).

[35] *Id.* (quoting 114 Cong. Rec. 2706 (Senator Javits describing the impact of discriminatory housing practices). Indeed, in *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979), Justice Powell, writing for the Court, recognized that when "an integrated neighborhood is becoming a segregated community because of [a defendant's] conduct," it results in "the deprivation of the benefits of interracial associations[.]" *Id.* at 113 n.26.

[36] *Trafficante*, 409 U.S. at 211 (quoting 114 Cong. Rec. 3422 (Senator Mondale's describing the purpose of the Act)).

integration and delivers a range of social and economic benefits. For example, nearly 500 local jurisdictions have housing programs that require or encourage developers to create affordable housing for low- and moderate-income households as part of broader for-profit developments, which are known as inclusive zoning or housing programs.[37] Recent studies show that these inclusive housing programs: (1) increase the likelihood that affordable housing units are built in low-poverty, high opportunity areas; (2) foster racial integration; and (3) create better educational opportunities and outcomes for low-income children.[38]

In a 2012 RAND Corporation study, researchers analyzed 11 inclusive zoning ("IZ") programs and found the programs resulted in affordable housing being dispersed throughout the relevant jurisdictions, 75% of the IZ homes being located in low-poverty

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[37] Robert Hickey, Lisa Sturtevant, & Emily Thaden, Achieving Lasting Affordability through Inclusionary Housing 18-19 (Lincoln Institute of Land Policy Working Paper) (2014), https://www.lincolninst.edu/pubs/dl/2428_1771_Achieving%20Lasting%20Affordability%20through%20Inclusionary%20Housing%20-%20Final%20-%206-9-14-NS07-14.pdf. Typically, to facilitate this affordable housing construction, a local government will provide indirect subsidies to residential developers in the forms of density bonuses, zoning variances, expedited permitting, and cost offsets through tax breaks or fee reductions. *See id.* at 1, 3; Federal Reserve Bank of Atlanta, Inclusionary Housing Policies: A Promising Tool for Housing Affordability (Sept.-Oct. 2014), https://www.frbatlanta.org/commdev/publications/partnersupdate/14no5/14no5_housing_affordability.

[38] *See id.* at 5-6 (summarizing findings of prior studies).

areas, and students in IZ homes typically living in areas with elementary schools whose students had significantly higher math and English test scores than elementary schools in areas without IZ homes.[39] As the authors of the study emphasized, "residential context can have a large effect over the long term on both children and adults," and "if economically integrative housing policies such as [Inclusive Zoning] succeed in integrating families" into middle class communities, "such policies would likely have positive and substantive impacts on academic achievement, cognitive ability, and health."[40]

In addition to benefitting low- and moderate-income families, inclusive housing programs increase the racial and socioeconomic diversity in middle class areas, and thus deliver the associated benefits of such diversity to students and families of all backgrounds in those areas.[41]

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[39] Heather L. Schwartz, Liisa Ecola, Kristin J. Leushner, and Aaron Kofner, Is Inclusionary Zoning Inclusionary 19-20, RAND Technical Report (2012), http://www.rand.org/content/dam/rand/pubs/technical_reports/2012/RAND_TR1231.pdf

[40] *Id.* at 9-10.

[41] *See Grutter v. Bollinger*, 539 U.S. 306, 327-28 (2003) (recognizing educational benefits of a diverse student body, and noting expert testimony that "when a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no minority viewpoint but rather a variety of viewpoints among minority students") (internal quotations and citations committed); *see also Parents Involved in Comm. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788-89 (2007) (Kennedy, J., concurring

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VI. HUD's Disparate Impact Rule Represents a Fair and Reasonable Approach for Developers and Other Real Estate Professionals

We agree with Respondents and the United States that HUD's final rule makes a reasonable determination that the Fair Housing Act authorizes disparate impact claims, that Congress delegated to HUD the legal authority to issue such a regulation, and that this Court should defer to HUD's reasonable interpretation of the Fair Housing Act under the *Chevron* doctrine. *See United States v. Mead Corp.*, 533 U.S. 218, 227-29 (2001). However, as developers of housing who are subject to HUD's disparate impact rule, we address this issue separately to explain why HUD's disparate impact rule strikes a fair and reasonable approach for developers and other entities regulated by the Fair Housing Act.

First, the disparate impact rule does not impose a high burden on a defendant to rebut the plaintiff's prima facie case. Instead, the rule merely requires a defendant to show that the "challenged practice" "[i]s necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the

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in part and concurring in the judgment) (noting "school authorities" who "are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students," may take action, including "race conscious measures," to promote diversity that will enhance the educational opportunities of all students).

[defendant]."[42] In the lion's share of cases, a defendant will have no trouble making this minimal showing and, in turn, shifting the burden back to the plaintiff to prove "that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect."[43]

Second, the disparate impact rule appropriately places the ultimate burden of proof on the plaintiff to establish that the defendant could adopt an alternative practice that has a less discriminatory effect but still advances the same substantial, legitimate interests of the defendant.[44] This is a demanding standard for plaintiffs to satisfy, particularly since defendants often have greater experience and expertise in justifying the policies they have adopted and in knowing what changes to those policies are viable. Accordingly, in many cases, defendants have won summary judgment because the plaintiff could not proffer evidence on the existence of a viable alternative practice.[45]

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[42] 24 C.F.R. §§ 100.500(b), (c)(2).

[43] *Id.* § 100.500(c)(3).

[44] *See id.*

[45] *See, e.g.*, *Oti Kaga, Inc. v. S.D. Hous. Dev. Auth.*, 342 F.3d 871, 883-84 (8th Cir. 2003) (affirming summary judgment order in favor of state agency in disparate impact claim, as plaintiff could not "articulate any alternative policy which would meet [the state agency's] needs as effectively without the alleged discriminatory effects" after the state proffered a reasonable explanation for not providing the state's own federal housing

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Furthermore, by placing the burden on the plaintiff to identify a viable alternative policy, HUD's disparate impact rule ensures that a defendant will not be required "to prove a negative," that is, to show that the defendant could not have adopted a less discriminatory alternative.[46] This "burden of proof allocation" is clearly "the fairest and most reasonable approach to resolving" disparate impact claims, and represents the approach endorsed by most courts of appeals.[47] And now that HUD has implemented a uniform standard that applies nationwide, developers and other entities will have far greater certainty about the legal standard that governs our conduct.

funds to local jurisdictions that already received federal funds directly).

[46] 78 Fed. Reg. at 11474.

[47] *Id.* at 11473-74; *see also id.* at 11462 & n.34.

CONCLUSION

The Court should affirm the Fifth Circuit's opinion and hold that the Fair Housing Act authorizes disparate impact claims.

Respectfully Submitted,

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