

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*
HOWARD UNIVERSITY SCHOOL
OF LAW FAIR HOUSING CLINIC
AND CIVIL RIGHTS CLINIC
IN SUPPORT OF RESPONDENTS**

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STATEMENT OF INTEREST

As one of the oldest among historically black colleges and universities, Howard University School of Law has long placed the defense of human rights, equality, and dignity at the heart of its educational practice.¹ This Court faces the question of whether disparate-impact claims are cognizable under the Fair Housing Act. Lack of fair housing options impacts nearly every aspect of an individual's wellbeing: employment, educational opportunities, and personal health. The effects of housing discrimination, both overt and covert and both conscious and unconscious, fall disproportionately upon racial and ethnic minorities. Consistent with the Howard University School of Law's mission², the Fair Housing and Civil Rights Clinics of Howard University School of Law respectfully submit this brief in order to urge the Court to retain disparate impact analysis under the Fair Housing Act as a vital tool to combat housing discrimination.

SUMMARY OF ARGUMENT

In our recent history, an essential principle of United States housing policy was that blacks were unfit to live next to whites. Neither ambiguous in

¹ No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. The parties have consented to amicus briefs.

² Howard University School of Law's mission, in part, is to "[e]ngage as an institution in the active pursuit of solutions to domestic . . . legal, social, economic and political problems that are of particular concern to minority groups."

purpose nor subtle in method, the policy was enshrined in government regulations, enforced by market practices, and policed by social customs. North and south, in cities large and small, the country set up ghettos where blacks were expected to live out their days separate and apart from the rest of society. These ghettos or—to be perfectly plain—slums existed for no reason other than to remind blacks of their inferiority, to keep them in their place, and to limit their aspirations, their choices, and their opportunities. And, like ghettos everywhere in all of recorded human history, these slums periodically rebelled and exploded in violence. Between 1935 and 1968, the United States experienced no fewer than fifteen so-called race riots that in one way or another resulted from an entire race of people having been methodically and systematically deprived of meaningful choices and opportunities. The Fair Housing Act (“FHA” or “the Act”) was, in part, a response not just to the sort of routine and petty racial discrimination that denied families and individuals the right to live where they chose, but also and more significantly the sort of racial ghettoization that denied entire communities their fair share of life choices and opportunities.

The denial of opportunity and choice in housing traps families and individuals in segregated communities that severely limit their access to opportunity in other significant areas. Segregated minority neighborhoods are much more likely to have subpar schools, be economically depressed, and host conditions that negatively impact residents’ health. Disparate impact analysis under the FHA is necessary to confront the deprivation of choice in housing that leads to such disparities.

Here in the Nation's capital, a short walk from where this Court sits, communities east of the Anacostia River in Wards 7 and 8 are plagued by the same difficulties as the majority-minority communities Respondents in this case seek to assist. To be sure, for many residents of Wards 7 and 8, these communities are home: faced with poor access to productive jobs, good schools, a clean environment, or indeed even healthy foods, these residents have managed, in the teeth of extraordinary deprivations, to go to work, send their children to school, raise their families and volunteer in their neighborhoods. However, the fact that Ward 7 and 8 residents have made the best of an awful bargain should not hide the reality that these communities represent some of the poorest and most racially isolated in the nation.

Despite comprising roughly 50% of the District of Columbia's population overall, black residents account for well over 90% of residents in Wards 7 and 8.³ The hyper-segregation of Wards 7 and 8 is neither natural nor accidental, but is instead the direct result of federal and local government policies, court decisions, and private actions that are neutral in name but discriminatory in effect. Today, here in D.C., and all over the country, lie neighborhoods that in details and symbols, and by any and every discernible measure are little different from the days when, as James

³ *Washington (city), District of Columbia*, U.S. Census Bureau, <http://quickfacts.census.gov/qfd/states/11/1150000.html> (D.C. Census Quickfacts) [hereinafter U.S. Census Bureau]; *DC 2012 Ward Profiles—Population*, NeighborhoodInfo DC, http://www.neighborhoodinfodc.org/wards/Nbr_prof_wrd7.html [hereinafter Ward 7 Profile]; *DC 2012 Ward Profiles—Population*, NeighborhoodInfo DC, http://www.neighborhoodinfodc.org/wards/nbr_prof_wrd8.html [hereinafter Ward 8 Profile].

Baldwin put it, “you were born where you were born and faced the future that you faced because you were black and for no other reason.”⁴ The FHA sought to remedy not just individual acts of racial discrimination but also the persistent and systemic consequences of residential segregation. However, the Act cannot remain an effective tool for ending residential segregation unless disparate impact analysis is used to identify policies and actions that will intensify segregation and deprive people equal access to fair housing opportunities and the benefits that result from fair housing opportunities.

ARGUMENT

I. WARDS 7 AND 8, TWO OVERWHELMINGLY BLACK AND OVERWHELMINGLY POOR AREAS OF THE NATION’S CAPITAL, ARE EMBLEMATIC OF THE HISTORY AND PRACTICE OF RESIDENTIAL RACIAL APARTHEID.

In the District of Columbia just east of the Anacostia River, lie Wards 7 and 8. According to the 2010 United States Census, the population of Wards 7 and 8 are 95% and 94% black respectively even though overall blacks represent only 50.7% of the overall D.C. population.⁵ The median household income is approximately \$37,000 for Ward 7 and \$34,000 for Ward 8, as compared to \$58,000 district-wide, or \$102,000 for Ward 2, which is 70% white, and

⁴ James Baldwin, *The Fire Next Time* 7 (1993).

⁵ See Ward 7 Profile, *supra* note 3; Ward 8 Profile, *supra* note 3; U.S. Census Bureau, *supra* note 3.

\$116,000 for Ward 3, which is 78% white.⁶ The poverty rates for Wards 7 and 8 are 26% and 36%, by far the highest of any of D.C.'s eight wards.⁷ The pattern of racial segregation and inequality that defines Wards 7 and 8 is replicated in individual neighborhoods. For example, located in Ward 8, Anacostia is the most impoverished neighborhood in D.C.—the site of most of D.C.'s homicides, welfare recipients, Medicare patients, unemployed, and public housing residents.⁸ The story of how these two wards became a repository for poor black people is emblematic of the story of American residential racial segregation.

The area now designated as Wards 7 and 8 was originally developed in the 1850s as one of the

⁶ See U.S. Census Bureau, *supra* note 3; *DC 2012 Ward Profiles—Population*, NeighborhoodInfo DC, http://www.neighborhoodinfodc.org/wards/nbr_prof_wrd3.html (Ward 3); *DC 2012 Ward Profiles—Population*, NeighborhoodInfo DC, http://www.neighborhoodinfodc.org/wards/nbr_prof_wrd2.html (Ward 2).

⁷ See Ward 7 Profile, *supra* note 3; Ward 8 Profile, *supra* note 3.

⁸ See Labor Force, Employment, Unemployment and Unemployment Rate by Ward, D.C. Dep't of Emp't Servs. (Jan. 28, 2014), http://does.dc.gov/sites/default/files/dc/sites/does/release_content/attachments/DC%20Ward%20Data%20Dec13-Nov13-Dec12.pdf; Sarah Anne Hughes, *As Unemployment Rate Falls in Ward 8, A Call for More Job Training* (Jan. 29, 2014, 2:30 PM), http://dcist.com/2014/01/dcs_unemployment_rate_falls_to_81_p.php; see also Penny Ray, *Year-to-Date: D.C. on Track to Break 2012 Homicide Milestone*, Homicide Watch D.C. (May 15, 2013, 4:58 PM), <http://homicidewatch.org/2013/05/15/year-to-date-d-c-on-track-to-break-2012-homicide-milestone/>; Aaron Wiener, *This Is Where D.C.'s Housing Voucher Recipients Live*, Washington City Paper (June 12, 2014, 2:08 PM), <http://www.washingtoncitypaper.com/blogs/housingcomplex/2014/06/12/this-is-where-d-c-s-housing-voucher-recipients-live/>.

District's first suburbs for working class whites.⁹ Restrictive covenants prohibited the sale, rental, or lease of property to people of African or Irish descent, keeping the area majority white even during the Great Migration that brought blacks from the deep rural south to northern urban cities.¹⁰ After World War II, as black military personnel and veterans relocated to Anacostia Naval Station and Boiling Air Force Base, the area underwent a rapid and dramatic demographic change from 90% white to its current makeup of nearly 94% black.

The concentration of D.C.'s black population into Wards 7 and 8 was not the result of natural population settlement patterns. One practice used to isolate the District of Columbia's growing black population was urban renewal programs for land redevelopment.¹¹ In the District of Columbia's efforts to revitalize Southwest, for example, many of the buildings were destroyed and thousands of black families were displaced, forcing them into Wards 7 and 8.¹² Once black residents were isolated in Wards 7 and 8, obstructions to fair housing were implemented as a means to keep blacks in those areas. For example,

⁹ Thomas J. Cantwell, *Anacostia: Strength in Adversity*, 49 *Records of the Columbia Historical Society, Washington, D.C.* 330, 335 (1973).

¹⁰ Charlene Barker & Aderson François, *Unshared Bounty: How Structural Racism Contributes to the Creation and Persistence of Food Deserts* 9 (June 2012), <http://www.racialjusticeproject.com/wp-content/uploads/sites/30/2012/06/NYLS-Food-Deserts-Report.pdf>.

¹¹ Brett Williams, *A River Runs Through Us*, 103 *Am. Anthropologist* 409, 419 (2001).

¹² *Id.*

in 1967, the District of Columbia ordered the construction of 65,000 units of subsidized housing, yet almost half were located in Ward 8.¹³ Further, the construction of the Interstates I-495 and I-295 in the early 1960s cut off many Ward 7 and 8 neighborhoods from the Anacostia River and the rest of the District and had the effect of also cutting Ward 7 and 8 residents from accessibility to jobs.¹⁴ One District of Columbia resident was quoted as saying, “The Anacostia Freeway went up the same year as the Berlin Wall. It meant about the same thing.”¹⁵

The Housing Choice Voucher Program, which was intended to give its users choice in subsidized housing, has had, in many instances, the opposite effect. In 2011, 544 rental units accepting housing vouchers were listed on dchousingsearch.org, however, not one was located west of Rock Creek Park—a predominately white area of the District of Columbia.¹⁶

¹³ Derrick A. Scott, *A Case Study of Anacostia: The Role of Housing Vouchers on the Local Housing Market* 31 (2013) (unpublished Ph.D. dissertation, University of Maryland, College Park).

¹⁴ Charlene Barker & Aderson François, *supra* note 10, at 10; Brett Williams, *supra* note 11, at 420.

¹⁵ Brett Williams, *supra* note 11, at 420.

¹⁶ Patricia Sullivan, *Housing Discrimination Lingers*, Wash. Post, July 15, 2011, at B03.

II. THE PURPOSE OF THE FAIR HOUSING ACT IS TO GUARANTEE OPPORTUNITY AND CHOICE IN HOUSING AND TO FOSTER RESIDENTIAL INTEGRATION.

A. Prior to the Passage of the Fair Housing Act, Housing Discrimination was Overt and Deeply Rooted in the Country.

Wards 7 and 8 are but two local examples of the consequence of national policies and practices by the government and private entities that perpetuated housing discrimination against black communities, resulting in their segregation and economic isolation and rendering them particularly vulnerable to the whims of detrimental government policies and practices.¹⁷ Laws and systems, such as Jim Crow and redlining, allowed housing discrimination to become deeply embedded in the United States, taking many forms and limiting black people's access to predominantly white neighborhoods.¹⁸

Agencies, such as the Fair Housing Administration, consistently engaged in racial discrimination in the administration of their programs. For example, the Federal Housing Administration refused to insure mortgages that would introduce “inharmonious racial groups” to certain neighborhoods, effectively excluding black people from moving into predominantly white

¹⁷ See Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 Vand. L. Rev. 1747, 1765—66 (2005).

¹⁸ Leonard S. Rubinowitz & Ismail Alsheik, *A Missing Piece: Fair Housing and the 1964 Civil Rights Act*, 48 How. L.J. 841, 853, 857 (2005).

neighborhoods.¹⁹ Moreover, the Federal Housing Administration required racially restrictive covenants in deeds on homes purchased with Federal Housing Administration insured mortgages.²⁰ This government-enforced discrimination gave rise to urban ghettos—communities of geographic and social isolation that trapped blacks in neighborhoods lacking access to education, employment and adequate healthcare.²¹

This de jure residential discrimination helped spark urban riots that broke out across the country in the 1960s.²² As a result, President Lyndon B. Johnson appointed the Kerner Commission to investigate the causes of the riots. The Kerner Commission concluded, “[O]ur nation is moving towards two societies, one black and one white—separate and unequal.”²³ The Commission called for a federal fair housing law as a solution to reunite the dividing nation.²⁴ Even after years of racial unrest across the United States, Congress was not moved to pass the Fair Housing Act until the demonstrations following the assassination of Dr. Martin Luther King, Jr.²⁵

¹⁹ *Id.* at 857.

²⁰ *Id.*

²¹ Charlene Barker & Aderson François, *supra* note 10, at 20.

²² Robert Schwemm, *Housing Discrimination: Law and Litigation* 4–5 (1990).

²³ *Id.*

²⁴ *Id.* at 5; *see also, e.g., Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489, 496–97 (S.D. Ohio 1976) (noting that the National Advisory Commission acknowledged that rioting was a symptom of a greater illness to be addressed by the FHA).

²⁵ *See* Schwemm, *supra* note 22.

B. The Fair Housing Act's Legislative History Confirms Congressional Intent to Address Housing Segregation and Promote Integration through Housing Opportunities.

Congress promulgated the FHA to combat housing discrimination with a key virtue in mind, one that would become the legislation's namesake: fairness. The Act states that it is "unlawful to refuse to sell or rent . . . or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."²⁶ Courts have continuously interpreted the FHA to be used as a tool to break down the walls of discrimination and as an affirmative vehicle for attaining integration.²⁷ Proponents of the law in both the House and Senate repeatedly argued that the FHA was not only intended to expand housing choices for individual black

²⁶ 42 U.S.C. § 3604.

²⁷ See *U.S. v. Black Jack*, 508 F.2d 1179 (8th Cir. 1974) (Over 40 years ago, and under facts similar to those presented in the present case, the 8th Circuit held that disparate impact claims are cognizable under the FHA, and every court confronted with the issue since then has either assumed or decided similarly); see also, *United States v. Starret City Assocs.*, 840 F.2d 1096, 1101 (2d Cir. 1988) (stating congressional intent of antidiscrimination yielding integration); *Thompson v. HUD*, 348 F. Supp. 2d 398, 456 (D. Md. 2005) (emphasizing legislative goal of reducing isolation of ghettos); *Burney v. Hous. Auth.*, 551 F. Supp. 746, 769 (W.D. Pa. 1982) ("Congress believed that . . . abolition of racially discriminatory housing practices ultimately would result in residential integration.").

residents, but also to foster racial integration for the benefit of all Americans.²⁸

In passing the FHA, Congress was clear that its intention was not just to confront overtly discriminatory practices, but also to root out the causes of segregation and to provide opportunities for mobility to those whose options had been limited by ubiquitous public and private housing discrimination. For example, Senator Mondale, the principal sponsor of the FHA, acknowledged the role past governmental discrimination played in establishing and perpetuating urban ghettos stating,

“Negroes who live in slum ghettos . . . have been unable to move to suburban communities and other exclusively White areas An important factor contributing to [the] exclusion of Negroes from such areas . . . has been the policies and practices of agencies of government at all levels.”²⁹

Senator Mondale concluded that the purpose of the FHA was to replace ghettos with “truly integrated and balanced living patterns.”³⁰ House Representatives Ryan and Cellar echoed Senator Mondale’s sentiments, stating that there was a need to eliminate the “blight of segregated housing and the pale of the ghetto”³¹ and the FHA was a way to “achieve the aim of an integrated society.”³²

²⁸ Schwemm, *supra* note 22, at 2–7.

²⁹ 114 Cong. Rec. 3422 (1968) (statement of Sen. Mondale).

³⁰ *Id.*

³¹ Schwemm, *supra* note 22, at 2–7; 114 Cong. Rec. 9591 (1968) (statement of Rep. Ryan).

³² *Id.*

The Act's purpose was clear—Congress intended the FHA to remedy segregated housing patterns and the problems associated with them such as segregated schools, lost job opportunities for minorities, and the social alienation between blacks and whites caused by the lack of meaningful interaction that occurs when individuals live in the same community.³³ To that end, black people were not the law's sole intended beneficiaries. Rather, as Senator Javits stated in support of the bill, the Act would benefit "the whole community."³⁴

III. RACIALLY ISOLATED AND SEGREGATED COMMUNITIES HAVE SEVERELY LIMITED ACCESS TO QUALITY EDUCATION, ECONOMIC OPPORTUNITIES, CLEAN ENVIRONMENTS, MEDICAL TREATMENT, AND HEALTHY FOODS.

A. Residential Segregation Limits Equal Access to Quality Education.

Isolated and segregated communities generally provide access to fewer public and private resources. For example, there has long been an established link between residential segregation and segregation in the public school system.³⁵ Housing opportunity, neighborhood conditions, and residential stability—

³³ Schwemm, *supra* note 22, at 2—7.

³⁴ *Id.* at 2—8.

³⁵ See Kenneth L. Karst, *Equal Citizenship at Ground Level: The Consequences of Nonstate Action*, 54 Duke L.J. 1591, 1606—07 (2005).

all connected to residential segregation—have substantial effects on educational performance.³⁶

For the majority of people in the United States, the racial makeup of their neighborhood is the most significant predictor of the caliber of schools they will attend.³⁷ Living in one community rather than another can mean the difference between attending a high-achieving school with ample resources and attending a low-achieving school deprived of resources.³⁸ This problem is not just one of poverty; race matters. Today, about 40% of black students attend schools that are less than 10% white.³⁹ Since *Brown*, it has been well established that racially segregated schools have detrimental effects on black communities.⁴⁰

Often, the diminished quality of education available in these communities is largely attributable to past and present housing discrimination. De jure residential discrimination caused the isolation of minority communities, which then diminished the quality of education in those racially isolated

³⁶ See Sara Aronchick Solow, *Racial Justice at Home: The Case for Opportunity—Housing Vouchers*, 28 Yale L. & Pol’y Rev. 481, 493—94 (2010).

³⁷ “Between 1990 and 2000, the average black child in the United States attended a school that was 65% poor, while the average white child attended a school that was 30% poor.” *Id.* at 494.

³⁸ See *id.*; Erika K. Wilson, *Leveling Localism and Racial Inequality in Education Through the No Child Left Behind Act Public Choice Provision*, 44 U. Mich. J.L. Ref. 625, 648 (2011).

³⁹ Richard Rothstein, *Segregated Housing Policies Still Haunt Schools*, Educ. Wk., Mar. 26, 2014, available at http://www.edweek.org/ew/articles/2014/03/26/26rothstein_ep.h33.html.

⁴⁰ *Id.*

communities. The poor educational opportunities, in turn, influence residential choices, perpetuating the pattern of housing segregation.⁴¹

This cyclical process can be seen in communities throughout the United States, including right here in Washington, D.C. In 2013, the District of Columbia Public School system slated 15 public schools for closure; six of the schools were located in Wards 7 and 8.⁴² The three high schools remaining in Wards 7 and 8 are classified as “priority” schools, the lowest level of achievement on the DC Comprehensive Assessment System standardized test.⁴³ Whereas more than 69% of students were deemed “proficient” or above on math and reading in the largest public high schools in Wards 2 and 3, not one of the three public high schools in Wards 7 or 8 saw more than 25% of its students deemed “proficient” or above.⁴⁴

⁴¹ See Sarah Max, *School, What Is It Good For?*, CNN (Aug. 30, 2004, 11:08 AM), http://money.cnn.com/2004/08/27/real_estate/buying_selling/schools/ (showing property value appreciation can be linked to school quality).

⁴² Emma Brown, *15 D.C. Public Schools to Close*, Wash. Post, Jan. 18, 2013, at A01.

⁴³ *School Comparison: Anacostia, Ballou & H.D. Woodson High Schools*, District of Columbia Public Schools, <http://profiles.dcps.dc.gov/Compare.aspx?tab=1&school=450,452,464>.

⁴⁴ *School Comparison: School Without Walls, Woodrow Wilson & H.D. Woodson High Schools*, District of Columbia Public Schools, <http://profiles.dcps.dc.gov/Compare.aspx?tab=1&school=464,466,463>; *School Comparison: Anacostia, Ballou, & H.D. Woodson High Schools*, District of Columbia Public Schools, <http://profiles.dcps.dc.gov/Compare.aspx?tab=1&school=450,452,464>.

B. Residential Segregation Limits the Employment Opportunities for People Trapped in Economically Depressed Neighborhoods.

Residential segregation substantially impacts employment opportunities and wealth accumulation for black workers. As early as the late 1960s, scholars argued that the concentration of black workers in segregated neighborhoods limits their access to employment, because jobs are increasingly distributed among predominately white neighborhoods.⁴⁵ Furthermore, the ratio of available jobs relative to the population is higher in predominantly white neighborhoods than in predominantly black neighborhoods.⁴⁶ Residential segregation and isolation have a direct correlation to disproportionate levels of unemployment in black communities.

In November of 2014, the black unemployment rate was 11.1%, while the white unemployment rate was only 4.9%.⁴⁷ At the same time, the underemployment rate (defined as the rate of those who are jobless or working part-time but desiring full-time work) was 20.5% for black workers, but only 11.8% for white workers. The disproportionate rate of black unemployment and underemployment can be attributed to a dearth of jobs in their segregated

⁴⁵ Margery Austin Turner, *Limits on Housing and Neighborhood Choice: Discrimination and Segregation in U.S. Housing Markets*, 41 Ind. L. Rev. 797, 809 (2008).

⁴⁶ Justin P. Steil, *Innovative Responses to Foreclosures: Paths to Neighborhood Stability and Housing Opportunity*, 1 Colum. J. Race & L. 63, 75 (2011).

⁴⁷ See *The Employment Situation—November 2014*, Bureau of Lab. Stat. (Dec. 5, 2014), <http://www.bls.gov/news.release/empsit.nr0.htm>.

neighborhoods.⁴⁸ This lack of opportunity contributes to long-term unemployment and encourages many to eventually drop out of the labor force altogether.⁴⁹ Consequently, the issues of concentrated areas of unemployment caused by housing segregation contribute to a persistent black underclass that will be increasingly difficult to address without disparate impact analysis.⁵⁰

Again, we can see how segregation, often perpetuated by unintentional discrimination, creates concentrated pockets of unemployment just a few miles from where this Court sits. There are significant disparities in employment between the eight wards in the District of Columbia—“unemployment is almost [3%] in Ward 3, and more than 26% in Ward 8.”⁵¹ Wards 7 and 8 have the highest unemployment rates among all the wards and have the highest concentrations of black residents.⁵² Conversely, Ward 3 has the highest concentration of white residents and

⁴⁸ Solow, *supra* note 36, at 494.

⁴⁹ *Id.*

⁵⁰ *See id.* at 495 (asserting a persistent black underclass is attributable to racial ghettos).

⁵¹ Elahe Izadi, *Five Takeaways from ‘Division of Labor,’* DCentric (Dec. 12, 2011, 3:21 PM), <http://dcentric.wamu.org/feature/division-of-labor/index.html>.

⁵² *See* Elahe Izadi, *Division of Labor: Examining D.C.’s Unemployment Disparity*, DCentric (Dec. 5, 2011, 6:00 AM), <http://dcentric.wamu.org/2011/12/division-of-labor-digging-into-d-c-s-unemployment-disparities/index.html>. In 2010, Ward 7’s population was 95% black and Ward 8’s population was 94% black. Ward 7’s poverty rate from 2007-2011 was 26% and Ward 8’s was 36%. *Neighborhood Profiles*, NeighborhoodInfo DC, http://www.neighborhoodinfodc.org/comparisontables/comparison_tables.html (follow “2012 Ward comparison table” hyperlink).

the lowest unemployment rate.⁵³ This “employment gap” between the District of Columbia’s black and white neighborhoods has widened dramatically in recent years.⁵⁴

High unemployment rates cause businesses to move out of black communities; unfortunately, new businesses are less likely to move in because unemployed residents do not have disposable income.⁵⁵ This in turn has the circular effect of making access to employment within these communities more difficult.

Ms. Bilal,⁵⁶ a current resident of Barry Farm in Ward 8, expressed her concern with employment opportunities in her community. She commented: “People are going to have to commute anyways [for employment opportunities]. There are no real job opportunities over here The businesses that are opening up, I don’t see them hiring the people from the community.”

Further limiting access to employment in Wards 7 and 8, all of the District of Columbia’s top private-

⁵³ See Elahe Izadi, *supra* note 52. In 2010, Ward 3’s population was 78% white and its poverty rate from 2007-2011 was 7.9%. *Neighborhood Profiles*, *supra* note 52.

⁵⁴ Office of Labor Mkt. Research and Info., Dep’t of Emp’t Servs., *District of Columbia Economic Report 5* (2011), <http://does.dc.gov/sites/default/files/dc/sites/does/publication/attachments/2011%20DC%20Economic%20Report-FINAL.pdf>.

⁵⁵ See Elahe Izadi, *supra* note 52.

⁵⁶ To support this brief, a student of Howard University School of Law’s Fair Housing Clinic interviewed residents of Wards 7 and 8 to assess their concerns regarding employment, health, and education in their communities.

sector employers are located outside of those wards—the wards suffering the most from mass unemployment. Specifically, the District of Columbia’s top ten employers are primarily located in Wards 1 through 3.⁵⁷ Ward 1’s population is 40% white and Wards 2 and 3 are 70% and 78% white, respectively—double the District of Columbia’s average of 35%.⁵⁸ When the largest employers are located in predominantly white neighborhoods, it limits access to employment for black workers who have been relegated to racially isolated and low-opportunity neighborhoods.⁵⁹ By not providing individuals who need affordable housing with opportunities to live outside of low-income, predominantly black neighborhoods, access to employment is severely limited for many.

C. Residential Segregation Contributes to Adverse Health Outcomes Due to Government Waste Dumps, Food Deserts, Hospital Deserts, and Inferior Medical Treatment.

Residential segregation contributes to health disparities, particularly for blacks, who are most likely to live in isolated neighborhoods.⁶⁰ Low-income black

⁵⁷ District of Columbia Zip Codes and Wards (map), NeighborhoodInfo DC (Aug. 14, 2008), http://www.neighborhoodinfodc.org/pdfs/ward_zip.pdf.

⁵⁸ *DC City Profile—Population*, NeighborhoodInfo DC, http://www.neighborhoodinfodc.org/city/nbr_prof_city.html; *Neighborhood Profiles*, *supra* note 52.

⁵⁹ Turner, *supra* note 45, at 809—810.

⁶⁰ See Kenneth J. Cooper, *Residential Segregation Contributes to Health Disparities for People of Color*, America’s Wire, <http://americaswire.org/drupal7/?q=content/residential->

communities are often used as dumping grounds for all manner of municipal pollution that no affluent neighborhood would want or tolerate. Air quality in many of these neighborhoods has become dangerously poor, affecting the health of their impoverished residents who lack the opportunity to relocate.⁶¹ Exposure to toxins is five to twenty times higher in these neighborhoods than in more affluent, white neighborhoods.⁶²

Several other factors negatively impact the health outcomes of residents in isolated communities. For instance, there are two to three times more fast food restaurants in black neighborhoods than in white neighborhoods.⁶³ This disproportionate distribution of inexpensive, unhealthy eateries contributes to increased rates of obesity, hypertension, and diabetes among black people.⁶⁴

Nationwide, only 8% of black people live in communities with access to a supermarket.⁶⁵ Comparatively, white communities are nearly four

segregation-contributes-health-disparities-people-color (last visited Dec. 14, 2014).

⁶¹ Tom Sherwood, *Ivy City Residents Fight Bus Depot at Crummell School Site*, NBC Washington (Nov. 26, 2012, 10:51 PM), <http://www.nbcwashington.com/blogs/first-read-dmv/Ivy-City-Residents-Fight-Bus-Depot-at-Crummell-School-Site-180938721.html>.

⁶² See Cooper, *supra* note 60.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Sarah Treuhaft & Allison Karpyn, *The Grocery Gap: Who Has Access to Healthy Food and Why It Matters* 11 (2010), http://thefoodtrust.org/uploads/media_items/grocerygap.original.pdf.

times as likely to have an accessible supermarket.⁶⁶ Even when black neighborhoods have access to chain supermarkets, they only have access to half as many as their white counterparts.⁶⁷ The contrast in minority access to supermarkets is even more alarming when major cities are separately considered. Detroit, which is 83% black and 6% Latino,⁶⁸ had no major chain supermarkets for years.⁶⁹ In Los Angeles, predominantly white residential areas have 3.2 times as many supermarkets as predominantly black areas.⁷⁰

While black communities suffer greater rates of asthma and obesity, they also have far less access to health care facilities than white communities. There is also a rising trend of hospital closures in urban, minority communities, leaving urgent care out of reach for many.⁷¹ When hospitals are located in

⁶⁶ *Id.*

⁶⁷ *Id.* at 13 (“Predominantly black zip codes have about half the number of chain supermarkets compared to predominantly white zip codes, and predominantly Latino areas only a third as many.”).

⁶⁸ Sarah Treuhaft, Michael J. Hamm & Charlotte Litjens, *Healthy Food For All: Building Equitable and Sustainable Food Systems in Detroit and Oakland* 17 (2009), http://www.fairfoodnetwork.org/sites/default/files/HealthyFoodForAll_FullReport.pdf.

⁶⁹ See Tracie McMillan, *Can Whole Foods Change the Way Poor People Eat?*, Slate (Nov. 19, 2014, 11:30 PM), http://www.slate.com/articles/life/food/2014/11/whole_foods_detroit_can_a_grocery_store_really_fight_elitism_racism_and.html.

⁷⁰ Sarah Treuhaft, Michael J. Hamm & Charlotte Litjens, *supra* note 68, at 17.

⁷¹ Brietta Clark, *Hospital Flight From Minority Communities: How Our Existing Civil Rights Framework Fosters Racial*

minority communities they are often under-resourced and have few specialized care programs, when compared to hospitals in white communities.⁷²

Again, we see this disparity play out just miles from where this Court sits. Several toxic sites exist along the Anacostia River that pose health risks to residents in Wards 7 and 8.⁷³ The toxic sites include Poplar Point, Kenilworth Landfill, Washington Gas and Light Company, Washington Navy Yard, and Southeast Federal Center/The Yards.⁷⁴ Collectively, these sites contribute to contaminated soil, sediment, groundwater, surface water, and overall pollution in the wards.⁷⁵ Moreover, Wards 7 and 8 receive waste—“trash, pollution, and foul water flow”—from the other wards.⁷⁶

Inequality in Healthcare, 9 DePaul J. Health Care L. 1023, 1024 (2005).

⁷² *Id.*

⁷³ See *Summary of Toxic Sites Along the Anacostia River*, Anacostia Watershed Society, <https://www.anacostiaws.org/userfiles/file/SummaryofToxicSitesAlongtheAnacostiaRiver.doc.pdf> (last visited Dec. 14, 2014).

⁷⁴ *Id.*

⁷⁵ See *id.*; The Johnson Company, Inc., Nat'l Park Serv., *Feasibility Study Report: Kenilworth Park Landfill* ii–iv (Apr. 2012), <http://www.nps.gov/nace/parkmgmt/upload/feasibility-report.pdf>; *Urban Waterways and Diverse Populations*, Smithsonian, <http://my.si.edu/initiatives/waterways/ACM/Urban-Waterways-and-Diverse-Populations> (last visited Dec. 14, 2014); *NPL Site Narrative for Washington Navy Yard*, EPA, <http://www.epa.gov/superfund/sites/npl/nar1503.htm> (last visited Dec. 14, 2014).

⁷⁶ See *Urban Waterways and Diverse Populations*, *supra* note 75.

More residents of Ward 7 have been diagnosed with cardiovascular disease and asthma compared to the other wards.⁷⁷ Wards 7 and 8 tie for the highest rates of obesity in the District;⁷⁸ and Ward 8 has the highest rate of diabetes. In addition, children in these wards experience a high degree of “environmental risk factors that often give rise to developmental delays and long-term health problems.”⁷⁹ These risk factors “include high incidences of infant mortality, infant morbidity [and] low birth weights.”⁸⁰

Avenues to promote health through good nutrition are also severely limited in Wards 7 and 8.⁸¹ Wards 7 and 8 only “have [1] supermarket for every 70,000 residents compared to 1 supermarket for approximately every 12,000 residents in [Wards 2 and 3].”⁸²

With significant health problems and lack of access to nutritious food, access to healthcare is essential; however, both Wards 7 and 8 lack needed specialty services like oncology and pain management

⁷⁷ RAND Health, *District of Columbia Community Health Needs Assessment* 21 (2013), http://www.rand.org/content/dam/rand/pubs/research_reports/RR200/RR207/RAND_RR207.pdf.

⁷⁸ *Id.* at xv (“Obesity is more prevalent in Wards 7 and 8 (21 percent and 32 percent, respectively)[.]”).

⁷⁹ *Children’s Health Project of the District of Columbia*, D.C. Primary Care Ass’n, <http://www.dcpca.org/health-centers/childrens-health-dc/> (Children’s Health Project of the District of Columbia provides mobile healthcare to medically underserved children in Wards 7 and 8) (last visited Dec. 14, 2014).

⁸⁰ *Id.*

⁸¹ RAND Health, *supra* note 77, at 68.

⁸² Charlene Barker & Aderson François, *supra* note 10, at 6 n.19.

services.⁸³ United Medical Center is the only hospital serving residents in Wards 7 and 8—a population of roughly 145,000.⁸⁴

When communities have few hospitals, those hospitals are often overburdened and understaffed.⁸⁵ For example, roughly once a month, current resident of Ward 8, Ms. Hamilton,⁸⁶ travels by wheelchair to Ward 2 to receive medical care at George Washington University and Georgetown University Hospitals. Although United Medical Center is her preference due to it being local, she is not a patient there because of capacity issues.

IV. DISPARATE IMPACT ANALYSIS IS NECESSARY TO FURTHER THE PURPOSE OF THE FAIR HOUSING ACT BECAUSE THE TYPES OF DISCRIMINATION THAT PERPETUATE CURRENT SEGREGATED HOUSING PATTERNS ARE OFTEN FACIALLY NEUTRAL AND SUBCONSCIOUS.

Forty-six years after the FHA was enacted, its goal to provide housing integration remains unfulfilled in communities across the country, and in the Nation's capital.⁸⁷ While overtly discriminatory public and private actions initially relegated blacks to ghettos, seemingly neutral government decisions and private actions keep segregated housing patterns in place.

⁸³ RAND Health, *supra* note 77, at xix—xx.

⁸⁴ *Id.* at 40; *Neighborhood Profiles*, *supra* note 52.

⁸⁵ Clark, *supra* note 71, at 1024.

⁸⁶ *Supra* note 56.

⁸⁷ In 2010, Ward 7's population was 95% black and Ward 8's population was 94% black. *Neighborhood Profiles*, *supra* note 52.

Disparate impact analysis is essential to root out the insidious effects of facially neutral laws that perpetuate housing segregation.

Although disparate treatment analysis has been an effective tool for combating some forms of housing discrimination, this tool's narrow focus on overtly intentional discrimination is insufficient to achieve the goals of the FHA. An intent-based approach is inadequate because what is in the mind of a particular decision-maker is not relevant to whether an action that undermines the goals of the FHA has occurred. Disparate impact analysis remedies this deficiency. Unlike an intent-based approach, disparate impact analysis reflects the basic reality—now well documented by social scientists—that “many people who act in biased ways are genuinely unaware of their biases.”⁸⁸

An overwhelming body of social science evidence shows that people are not colorblind.⁸⁹ Indeed, awareness of race and ethnicity is a basic function of human cognitive processes, which rely on social categorization “when dealing with the complex, social world in which we all live.”⁹⁰ Moreover,

[R]equiring proof of conscious or intentional motivation as a prerequisite to [] recognition that a

⁸⁸ Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 Harv. L. Rev. 493, 532–33 (2003).

⁸⁹ See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1987); Primus, *supra* note 88, at 532–33; Destiny Peery, Note & Comment, *The Colorblind Ideal in a Race-Conscious Reality: The Case for a New Legal Ideal for Race Relations*, 6 Nw. J. L. & Soc. Pol'y 473, 481 (2011).

⁹⁰ Peery, *supra* note 89, at 481; see also Lawrence III, *supra* note 89, at 323.

decision is race-dependent ignores much of what we understand about how the human mind works. It also disregards both the irrationality of racism and the profound effect that the history of American race relations has had on the individual and collective unconscious.⁹¹

Scientific studies show that implicit race biases “are especially important in influencing non-deliberate or spontaneous discriminatory behaviors.”⁹²

This Court recognized the role that subconscious discrimination plays in the realm of employment.⁹³ In *Watson v. Fort Worth Bank & Trust*, a plurality of the Court noted that “even if one assumed that [intentional] discrimination can be adequately policed through disparate *treatment* analysis, the problem of subconscious stereotypes and prejudices would remain” in the absence of a disparate *impact* analysis.⁹⁴

Without disparate impact analysis, the myriad effects of housing discrimination are too readily dismissed as an individual’s unfortunate reality for which no one is responsible.⁹⁵ There is good reason to believe that “to accept a narrative of post-racialism is to succumb to a form of ‘racial amnesia’—a desire to forget that those marked by race neither asked for the

⁹¹ Lawrence III, *supra* note 89, at 323.

⁹² Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 Cal. L. Rev. 945, 961 (2006).

⁹³ *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988) (plurality opinion).

⁹⁴ See Primus, *supra* note 88, at 533 n.163 (citing *Watson*, 487 U.S. at 990 (plurality opinion)) (emphasis added).

⁹⁵ Karst, *supra* note 35, at 1606—07.

designation nor can they escape its present day meanings and effects.”⁹⁶

The threat of accountability for both intentional and subconscious discrimination under a disparate impact analysis assures a powerful deterrent that would be lost if this Court limits the manner in which lower courts have employed disparate impact analysis.⁹⁷ “Housing providers have strong incentives to provide equal treatment to all their customers, regardless of race or ethnicity, when fair housing organizations bring suits against discriminatory real estate and rental agents based on systematic paired testing and when courts impose substantial penalties in high-profile cases.”⁹⁸

Finally, even where neither intentional nor subconscious discrimination exist, the historical legacy of government-mandated segregation and discrimination⁹⁹ may still serve to undermine equal and fair housing opportunities for vulnerable communities of color.¹⁰⁰ Not only does disparate impact analysis allow for identification of hidden intentional and unintentional discrimination, such an approach recognizes the invidious role of historical *government-supported* discrimination in disparately undermining communities of color in the present.¹⁰¹

⁹⁶ Mario L. Barnes et al., *A Post-Race Equal Protection?*, 98 Geo. L.J. 967, 979 (2010).

⁹⁷ See Turner, *supra* note 45, at 806.

⁹⁸ *Id.*

⁹⁹ See *supra*, Part I.

¹⁰⁰ Primus, *supra* note 88, at 533–34.

¹⁰¹ See, e.g., *id.* (discussing the historical legacy of past discrimination in shaping current and future employment opportunities).

By requiring a heightened barrier to prosecution of housing discrimination cases, both intentional and facially neutral discriminatory practices should be expected to continue. Consequently, racial segregation of communities in the housing, education, and employment contexts will persist, frustrating the core purpose of the FHA.¹⁰²

CONCLUSION

No one who cares to look can seriously doubt that our country has managed, behind the veil of neutrality, to maintain the walls of the ghettos created by explicit and governmentally enforced racial segregation. The human damage of racial segregation today is as devastating as that which existed when it was the explicit policy of American government, businesses, and institutions to keep blacks separate, and apart from the rest of society. We no longer hold true to that explicit policy, claiming instead to abide by what many insist, with all apparent sincerity, are neutral policies. And yet, these facially neutral policies have seemingly achieved virtually the same outcomes as facially discriminatory actions: racially segregated neo-ghettos that are as bereft of life choices and opportunities as their Jim Crow counterparts. In light of that reality, it defies all reason to insist that the educational, economic, environmental, and health harms that day in and day out are visited upon individuals, families, and entire communities may be addressed under the Fair Housing Act if (and only if) they can be directly traced to some overt racist statement or act on the part of a

¹⁰² See Eric W.M. Bain, Note, *Another Missed Opportunity to Fix Discrimination in Discrimination Law*, 38 Wm. Mitchell L. Rev. 1434, 1463 (2012).

government official too lacking in dissemblance to hide invidious motives and discriminatory actions behind bland pronouncements of neutral policy-making. The Fair Housing Act was designed to remedy not just individual acts of racial discrimination but also the persistent and systemic consequences of residential segregation. Without disparate impact as an analytical tool, the central goal of the Act is bound to remain unrealized.

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