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In The  
**Supreme Court of the United States**

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

*Petitioners,*

v.

THE INCLUSIVE COMMUNITIES PROJECT, INC.,

*Respondent.*

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

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**BRIEF OF SOCIOLOGISTS, SOCIAL  
PSYCHOLOGISTS, AND LEGAL SCHOLARS AS  
*AMICI CURIAE* SUPPORTING RESPONDENT**

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EVA PATERSON  
*Counsel of Record*  
ALLISON ELGART  
EQUAL JUSTICE SOCIETY  
1999 Harrison Street  
Suite 800  
Oakland, California 94612  
(415) 288-8703  
epaterson@  
equaljusticesociety.org

MONA TAWATAO  
RICHARD A. ROTHSCHILD  
WESTERN CENTER ON  
LAW & POVERTY  
3701 Wilshire Boulevard  
Suite 208  
Los Angeles, California 90010  
(213) 487-7211  
mtawatao@wclp.org

WILLIAM C. KENNEDY  
ANDREA MATSUOKA  
LEGAL SERVICES OF  
NORTHERN CALIFORNIA  
515 Twelfth Street  
Sacramento, California 95814  
(916) 551-2150  
bkennedy@lsnc.net

RACHEL D. GODSIL  
SETON HALL UNIVERSITY  
SCHOOL OF LAW  
1109 Raymond Boulevard  
Newark, New Jersey 07102  
(973) 642-8957  
rachel.godsil@gmail.com

DAVID J. BERGER  
MEGAN E. WALL-WOLFF  
REBECCA E. WOLITZ  
WILSON SONSINI GOODRICH  
& ROSATI, PC  
650 Page Mill Road  
Palo Alto, California 94304  
(650) 493-9300  
DBerger@wsgr.com

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**IDENTITY AND INTEREST OF *AMICI CURIAE***

*Amici curiae* are sociologists, social psychologists, and legal scholars who study the effects of implicit bias on individual behavior and institutional practices.<sup>1</sup> *Amici* have published numerous books and peer-reviewed articles and other nationally circulated publications on cognitive biases and their unintended effect on behavior. These publications cover social science research pertaining to urban inequality, racial harms stemming from implicit bias, the influence of implicit bias on perceptions of community disorder, criminality, property value, and individual decision-making in housing, physiological and psychological responses to intergroup contact, and the consequences of prejudice and stereotyping on traditionally stigmatized and dominant groups. *Amici* file this brief to provide the Court with current social science research on implicit bias, associations between race and space, and stereotyping, and to explain the role of these phenomena in present-day discrimination in housing decisions. The research by *amici* and others demonstrates that the disparate impact standard is crucial to achieve the Fair Housing Act's purpose of preventing housing discrimination and furthering residential integration.



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<sup>1</sup> Counsels of record have consented to the filing of this brief. No counsel of record authored this brief in whole or in part. No person other than *amici* and their counsel has made a monetary contribution to its preparation or submission.



## SUMMARY OF ARGUMENT

At a time when communities across the nation are erupting in protest over harms borne disproportionately by African Americans, the need for greater racial integration of our communities and the sharing of our collective strengths and community assets has never been more acute. Indeed, the recent protests in Ferguson, New York City, and elsewhere echo the period of civic unrest in the 1960s that provided the backdrop for the passage of the Fair Housing Act (“FHA”) and the catalyst for the Kerner Commission’s warning that the United States was splitting into two nations, one White, one Black. National Advisory Commission on Civil Disorders, Kerner Commission Summary Report, at 1 (1968). The FHA was intended to provide legal mechanisms to prevent race from affecting housing options and to help ensure that the dream of a genuinely unified citizenry is realized and that all Americans have the opportunity to thrive. This case involves the allegation that Petitioners disproportionately approved tax credit units in minority-concentrated neighborhoods and disproportionately disapproved them in predominantly Caucasian neighborhoods, thereby concentrating units in minority areas and maintaining and perpetuating segregated housing patterns – precisely what the FHA was enacted to prevent.

The current racial divide differs in important respects from earlier eras because the vast majority of Americans now agree that discrimination on the basis of race and ethnicity is wrong. Yet, as *amici*

demonstrate, contemporary social science research reveals that peoples' behavior continues to be affected by racial and ethnic difference as a result of *implicit* and *unconscious* biases, despite their egalitarian values. *Amici* present the Court with research showing that implicit biases and racial stereotypes affect a wide range of housing-related decisions. Empirical research has established that implicit racial bias skews perceptions of affordable housing – what it is like, where it is located, and where it “should” be located – and the people who live in it. These biased perceptions affect decision-making – in awarding low-income tax credits for development, in land use, and in housing sales and rentals – leading to significant harm to minority residents and home-seekers.

This research also provides reason for optimism that people are able to behave according to their consciously-held egalitarian values when they are aware of the possibility that bias may affect their decision-making. Moreover, the research shows that racial and ethnic biases are reduced when people spend time in more diverse environments, such as integrated neighborhoods.

The research of *amici* and others demonstrates the pervasiveness and harmful effects of implicit biases in housing which hinder the goals of the FHA and prevent “truly integrated and balanced living patterns” for all Americans. The disparate impact standard is necessary to ensure that courts are able to identify when decision-making has been tainted by implicit biases and stereotypes. Accordingly, this

Court should affirm the Fifth Circuit’s decision and enforce the FHA’s central objectives – to fully combat housing discrimination and housing segregation.

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◆

## ARGUMENT

### I. IMPLICIT BIASES AFFECT DECISION-MAKING IN INDIVIDUALS AND GOVERNMENTAL BODIES WHICH CAN PERPETUATE HOUSING DISCRIMINATION AND SEGREGATION

While most Americans now agree that racial and ethnic discrimination is wrong, this consensus has not translated into decision-making that reflects those values. Anthony G. Greenwald & Linda H. Krieger, *Implicit Bias: Scientific Foundations*, 94 Calif. L. Rev. 945, 946 (2006); *see also* Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 Ala. L. Rev. 741, 746 (2005). This apparent conundrum can be explained by research showing that “the operation of prejudice and stereotyping in social judgment and behavior does not require personal animus, hostility or even awareness. In fact, prejudice is often ‘implicit.’” Curtis D. Hardin & Mahzarin R. Banaji, *The Nature of Implicit Prejudice: Implications for Personal and Public Policy*, Behavioral Foundations of Public Policy, at 13 (Princeton U. Press 2013).

Social scientists use the term “implicit bias” to refer to stereotypes or attitudes that operate without

an individual's conscious awareness. Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 Ann. Rev. L. & Soc. Sci. 427 (2007). Research shows that individuals experience implicit biases toward a broad range of historically disadvantaged groups, often referred to by researchers as "out-groups," or those who are disadvantaged "with respect to race, ethnicity, nationality, gender, social status, and other distinctions." See John T. Jost et al., *The Existence of Implicit Bias is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies That No Manager Should Ignore*, 29 Res. Org. Behav. 39 (2009).

The presence of implicit bias has been established using a wide variety of instruments, including measuring cardiovascular responses and neuronal activity, as well as the Implicit Association Test ("IAT"). See Jim Blascovich et al., *Perceiver Threat in Social Interactions With Stigmatized Others*, 80 J. Personality & Soc. Psychol. 253 (2001); Jason P. Mitchell et al., *Thinking about Others: The Neural Substrates of Social Cognition*, *Social Neuroscience: People Thinking About People* 63 (John T. Cacioppo et al. eds., 2006); Elizabeth A. Phelps et al., *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. Cognitive Neuroscience 729 (2000); Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. Personality & Soc. Psychol. 1464, 1464-66 (1998) (introducing the Implicit Association Test (IAT)); Brian A. Nosek et al.,

*The Implicit Association Test at Age 7: A Methodological and Conceptual Review*, *Automatic Processes in Social Thinking and Behavior* 265 (John A. Bargh ed., 2007).

According to these measures, implicit bias is widespread and has a significant negative impact on African Americans. See Lane et al., *supra*, at 437. The research demonstrates that implicit biases against minorities are held by people throughout the country and in virtually every profession, including those populated by elite practitioners. For example, a study of federal district judges found that, consistent with the general population, 87.1% of White judges showed strong implicit attitudes favoring Whites over Blacks. See Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 *Notre Dame L. Rev.* 1195, 1210 (2009). Moreover, studies examining explicit and implicit racial bias among doctors have found levels of bias that largely mirror the general population. Janice A. Sabin et al., *Physicians' Implicit and Explicit Attitudes About Race by MD Race, Ethnicity, and Gender*, 20 *J. Health Care Poor & Underserved* 896, 903 (2009). One recent study found that White physicians were less likely to refer Black patients with symptoms of acute coronary distress for thrombolysis, the preferred treatment for such conditions. Alexander R. Green et al., *Implicit Bias Among Physicians and its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 *J. Gen. Internal Med.* 1231, 1235 (2007). Implicit biases do not remain in the unconscious, but rather are predictive

of discriminatory behavior. See Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 *J. Personality & Soc. Psych.* 17, 19-20 (2009). As discussed below, research strongly suggests that implicit racial bias and stereotyping are also directly linked to decisions about housing and land use.

**A. Research demonstrates that bias and stereotyping are linked to pervasive racially discriminatory treatment of home-seekers by landlords, realtors, and institutions**

Social science research demonstrates the pervasiveness of racially discriminatory treatment of minorities by landlords, realtors, and institutions, with implicit bias as the animating cause. See Margery A. Turner & Stephen L. Ross, *How Racial Discrimination Affects the Search for Housing*, *The Geography of Opportunity: Race and Housing Choice in Metropolitan America* 81 (Xavier de Souza Briggs ed., 2005). Such discrimination may be so subtle that “minority home-seekers may not even be aware that they have been discriminated against.” *Id.* at 82. Similarly, although housing providers and lending institutions may not consciously make biased decisions, their actions throughout the housing acquisition process are often primed by stereotypes and subconscious perceptions of minority home-seekers. See J. Rosie Tighe, *How Race and Class Stereotyping*

*Shapes Attitudes Toward Affordable Housing*, Housing Studies, at 4-5 (Oct. 2012) (racial stereotyping has a significant influence on attitudes toward minorities, race-targeted policies, and social welfare policies).

**1. Implicit biases limit minority home-seekers' ability to access the housing market**

The impact of implicit bias begins when minority families initiate a search for housing. Research demonstrates that even before a landlord or realtor knows anything substantive about a minority home-seeker, an applicant's name or even voice can trigger unconscious and exclusionary discriminatory judgments. "In this day and age, there is ample opportunity for discrimination *before* a personal encounter between a landlord and renter." Douglas S. Massey & Garvey Lundy, *Use of Black English and Racial Discrimination in Urban Housing Markets: New Methods and Findings*, 36 Urb. Aff. Rev. 452, 454 (2001). Similarly, "[a]pplicants making initial inquiries as to the availability of an apartment . . . may have their ethnicity, character, competence, and attractiveness evaluated before they ever meet their prospective landlord, and the results may be tangible in the loss of an opportunity to find suitable housing." Adrian G. Carpusor & William E. Loges, *Rental Discrimination and Ethnicity in Names*, 36 J. Applied Soc. & Psychol. 934, 937 (2006).

Individuals may associate names with a host of social and demographic characteristics including ethnicity, gender, age, and socioeconomic status.<sup>2</sup> Carpusor & Loges, *supra*, at 936. Consequently, the “[c]ultural and semantic attributes associated with names have the potential to activate stereotypes” in housing providers’ minds. *Id.* at 935. Research shows that, given identical e-mail inquiries, housing providers demonstrate preferences for home-seekers with “White-sounding” names, and these preferences are expressed through large disparities in response rates to housing inquiries. *Id.* at 943-44. While “White-sounding names received a response to 89% of the inquiries, non-White-sounding names received a reply to only 61% of their inquiries.” *Id.* The authors report that “[o]n the whole, the White-sounding name was 79% likely to receive a positive reply to an inquiry, while non-White-sounding names received a positive reply to 40% of their inquiries.” *Id.* at 944. This same study found that inquiries from Arab-sounding names were three times more likely to be discouraged than inquiries sent from White-sounding names, and inquiries from Black-sounding names were four times more likely to be discouraged. *Id.* at 947.

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<sup>2</sup> Similar associations exist with regard to an individual’s manner of speech. Massey & Lundy, *supra*, at 467 (“Being identified as black on the basis of one’s speech pattern clearly reduces access to rental housing, but being black and female lowers it further, and being black, female, and poor lowers it further still.”).



In another study of responses to housing inquiries, researchers found that discrimination can occur through the encouragement of White tenants through positive language. Andrew Hanson et al., *Subtle Discrimination in the Rental Housing Market: Evidence from E-mail Correspondence with Landlords*, 20 J. Housing Econ. 276, 283 (2011). The researchers found that housing providers respond more quickly, write longer emails, and use more positive and descriptive language with home-seekers with White-sounding names. *Id.* at 279-82. Furthermore, providers are more likely to invite follow-up correspondence, use a formal greeting and polite language, provide contact information, and offer showings when responding to inquires of “White” home-seekers. *Id.*

## **2. Implicit biases may influence housing agents to provide less information and offer less assistance to non-White home-seekers**

Implicit biases also influence the fact that “minority home-seekers still cannot count on getting the same information and assistance that comparable whites receive when they visit real estate or rental offices to inquire about homes advertised in the local newspaper.” Turner & Ross, *supra*, at 82. Informational asymmetries include the denial of information regarding available properties and opportunities to inspect available units, and receipt of inferior financing. *Id.* at 86.

Some of these informational deficiencies lead to residential segregation, with minorities steered to different neighborhoods. *Id.* at 94; *see also* Maria Krysan et al., *Pathways to Residential Segregation, Choosing Homes Choosing Schools*, at 11 (Annette Lareau & Kimberly Goyette eds., 2013) (“Pathways to Racial Segregation”) (citing to Turner & Ross). For example, real estate agents may provide Whites with housing options in numerous neighborhoods, while simultaneously constraining options for Black customers. Turner & Ross, *supra*, at 94. Steering can frequently involve assumptions and stereotypes about social class, with Whites encouraged to consider more affluent neighborhoods than comparable minorities. *Id.* at 94-95. Research further shows that “realtors engage in discriminatory marketing of homes in integrating neighborhoods by posting fewer advertisements, using fewer positive terms to describe the neighborhood, and including photographs of White real estate agents less often. Realtors also resist showing homes in integrated neighborhoods.” Richard Moya, *Neighborhood Racial-Ethnic Change and Home Value Appreciation: Evidence from Philadelphia*, 35 *Urb. Geo.* 236, 237 (2014) (internal citations omitted). Thus, even after minority home-seekers are able to “access” the housing market, implicit biases may resurface through disparities in information, assistance, and encouragement.

### **3. Implicit biases influence mortgage providers' lending patterns with minorities**

Implicit biases and raced preferences in housing transactions may be especially detrimental to minority home-seekers since lenders – like realtors and landlords – are “gatekeepers” to housing. Vincent J. Roscigno et al., *The Complexities and Processes of Racial Housing Discrimination*, 56 Soc. Probs. 49, 53 (2009). Research demonstrates that discrimination occurs both in a minority home-seeker’s ability to qualify for a mortgage as well as the terms on which a mortgage is accepted. Katrin B. Anacker & Kristen B. Crossney, *Analyzing CRA Lending During the Tsunami in Subprime Lending and Foreclosure in the Philadelphia MSA*, 28 Housing Stud. 529, 532 (2013) (reviewing the literature); see also Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 Ann. Rev. Soc. 181, 189-90 (2008). Audit research shows that “black testers are less likely to receive a quote for a loan than are white testers and that they are given less time with the loan officer, are quoted higher interest rates, and are given less coaching and less information than are comparable white applicants.” Pager & Shepherd, *supra*, at 190 (citation omitted). When purchasing a home, minority home-seekers often obtain financial arrangements that are inferior to equally qualified Whites. See, e.g., William C. Apgar & Allegra Calder, *The Dual Mortgage Market: The*

*Persistence of Discrimination in Mortgage Lending, Geography of Opportunity: Race and Housing Choice in Metropolitan America*, at 23 (Xavier de Souza Briggs ed., 2005); Jeffrey D. Dillman, *Subprime Lending in the City of Cleveland and Cuyahoga County, Where Credit is Due: Bringing Equity to Credit and Housing After the Market Meltdown* 140-162 (Christy Rogers & John A. Powell eds., 2013). Some, including *amici* in support of Petitioners, argue that disparities in the terms of credit may be attributed to “differences in the economic and credit characteristics across race and ethnicity.” Br. for the Am. Fin. Servs. Ass’n, the Consumer Mortg. Coal., the Indep. Cmty. Bankers of Am., and the Mortg. Bankers Ass’n as *Amici Curiae* in Support of Petitioners, at 28. However, numerous studies suggest that differences in the economic profile of applicants cannot fully account for the disparities.

Patterns of subprime lending are also seen among both affluent *and* poor minorities. Apgar & Calder, *supra*, at 2-3. Among affluent minorities, African Americans and Latinos with a FICO score over 660 “received a high[er] interest rate loan more than three times as often as white borrowers.” Debbie Gruenstein Bocian et al., *Lost Ground, 2011: Disparities in Mortgage Lending and Foreclosures*, at 5 (2011). Moreover, research shows that “the racial gap in *prime* lending persists even after controlling for borrower income.” Apgar & Calder, *supra*, at 10 (emphasis added). For African American borrowers in particular, researchers have tested and “conclusively

reject the hypothesis that lenders behave in a competitive fashion” and are convinced that lenders “charge borrowers in neighborhoods that are predominantly black significantly more than can be rationalized by their subsequent termination behavior.” James B. Kau et al., *Racial Discrimination and Mortgage Lending*, 45 J. Real Est. Fin. Econ. 289, 302 (2012).

The cumulative effect of the various forms of bias that may arise for minority home-seekers and the steering of Whites toward particular neighborhoods helps to explain the continued residential segregation even in a society with far more positive conscious attitudes toward residential integration than existed when the FHA was enacted. Though these behaviors may be the result of implicit bias and stereotyping or in-group preference rather than active animus, they nonetheless constrict choices for both White and minority home-seekers, and prevent minority home-seekers from gaining equal access to capital for home purchasing.

### **B. Research demonstrates the link between bias and stereotyping and housing and land-use decisions**

In addition to affecting the treatment of those seeking new housing options, research indicates that housing and land-use related decisions, such as siting affordable housing units in predominantly minority neighborhoods, may be spurred by stereotypes about the race of affordable housing residents and implicit

biases about them. Even if unintentional, research suggests that those biases have a high risk of serving as the impetus for decisions that promote or exacerbate racial segregation in housing.

**1. Decisions challenged in this case may be explained by the implicit racial biases and stereotypes concerning non-elderly affordable housing**

This case involves the approval and disapproval of tax credits for the development of low income housing and whether approval of such housing for the non-elderly<sup>3</sup> in predominantly “minority neighborhoods and, conversely, [the] disproportionate[ ] deni[al of] tax credits for non-elderly housing in predominantly Caucasian neighborhoods” violates the FHA. *Inclusive Cmty. Project*, 749 F. Supp. 2d at 499. The Texas Department of Housing and Community Affairs (“TDHCA”) made decisions about whether to grant low income tax credits that would either allow or disallow affordable housing in neighborhoods with different racial compositions. While a body of research on such governmental decision-makers has yet to be developed, there is overwhelming support for the conclusion that members of the public have

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<sup>3</sup> “[F]rom 1998 to 2008, TDHCA approved tax credits for 70.2% of the proposed elderly units in 90% or greater Caucasian census tracts, [but] just 37.4% of proposed non-elderly units in the same tracts.” *Inclusive Cmty. Project, Inc. v. Tex. Dep’t of Hous. & Cmty. Affairs*, 749 F. Supp. 2d 486, 502 (N.D. Tex. 2010).

strongly-held stereotypes and racial associations about affordable housing. There is therefore every reason to believe that government officials are vulnerable to the same implicit biases as the general public, even though their conscious intentions are, like judges and doctors, to be objective and fair. *See* Rachlinski et al., *supra*; Sabin et al., *supra*; Green et al., *supra*.

**a. Negative associations between race and place contribute to the perception that a neighborhood is poorly maintained or blighted**

Researchers have found significant evidence that race is linked to inaccurate stereotypes about neighborhood disorder. In a 2004 study, the racial and economic composition of a neighborhood better predicted perceived physical disorder than observed physical disorder. Robert J. Sampson & Stephen W. Raudenbusch, *Seeing Disorder: Neighborhood Stigma and the Social Construction of “Broken Windows”*, 67 Soc. Psychol. Q. 319, 320 (2004); *see also* Michelle W. Anderson & Victoria C. Plaut, *Implicit Bias and the Resilience of Spatial Colorlines*, in *Implicit Racial Bias Across the Law*, at 9 (Justin D. Levinson & Robert J. Smith eds., 2012). In fact, race was the single biggest factor influencing perceived disorder – “approximately three times larger than that of observed disorder/decay, with controls for all personal characteristics and neighborhood ecology.” Sampson & Raudenbusch, *supra*, at 332. These perceptions translate into

decisions about where affordable housing should be located in light of assumptions about the race of its inhabitants. *See, e.g., Tighe, supra*, at 11. It is thus more important than ever that courts have some mechanism to combat mistaken perceptions rooted in the implicit bias of decision-makers.

**b. Negative associations between race and place influence perceptions of crime and criminality**

Another primary factor in shaping decisions regarding affordable housing is the perception of crime and criminality. Research consistently establishes that Americans maintain strong associations between race and crime, which is significantly rooted in the distorted media portrayals of violent crimes committed by black men. Travis L. Dixon, *Who is the Victim Here? The Psychological Effects of Overrepresenting White Victims and Black Perpetrators on Television News*, 9 *Journalism* 582 (2008).

Moreover, interactions with “Black strangers” create heightened fears about the risk of crime. Lincoln Quillian & Devah Pager, *Estimating Risk: Stereotype Amplification and the Perceived Risk of Criminal Victimization*, 73 *Soc. Psychol. Q.* 79, 82 (2010) (“*Estimating Risk*”). While “race can act as a proxy for a long list of characteristics, qualities, and statuses” in American society, “[t]he association with perhaps the most far-reaching effects is that of race as a proxy for criminality and deviance.” Lu-in Wang,



*Race as Proxy: Situational Racism and Self-Fulfilling Stereotypes*, 53 DePaul L. Rev. 1013, 1014 (2004). This association between race and crime transcends individual perceptions of criminality. Social science research has identified widespread perceptions of predominantly black neighborhoods as crime-ridden and disorderly. *Estimating Risk, supra*, at 82; Anderson & Plaut, *supra*, at 9. Even after controlling for actual crime rates, the percentage of young black men in a neighborhood is positively related to perceptions of crime and the believed severity of a neighborhood crime problem. *See, e.g.*, Anderson & Plaut, *supra*, at 11; *see also* Courtney M. Bonam et al., *Polluting Black Space*, at 2, 36 (June 30, 2013) (unpublished manuscript) (on file with authors) (finding that black neighborhoods are “highly associated with crime, disorder, neglect, and poverty” and “are perceived as under-resourced, dirty, and crime-ridden”); *see also* Rebecca Wickes et al., “*Seeing*” *Minorities and Perceptions of Disorder: Explicating the Mediating and Moderating Mechanisms of Social Cohesion*, 51 *Criminology* 519 (2013). This systematic and incorrect over-association of black residents with higher crime rates is linked to opposition to affordable housing. Nancy Belden et al., *Valuing Housing: Public Perceptions of Affordable Housing in the Chicago Region*, at 8 (2003). Because affordable housing units are perceived to be predominantly inhabited by racial minorities, the arrival of affordable housing in predominantly White communities may trigger fears of increased criminality. It is thus likely that property-related decision-making is influenced by widespread

implicit biases involving perceptions that predominantly Black neighborhoods have disproportionate rates of crime. *See* Anderson & Plaut, *supra*, at 10.

**c. Implicit associations between race and place affect decisions about land uses**

Well-documented social science research has established that negative associations between race and space cause people to evaluate neighborhoods based on the race of those who occupy them, and these stereotypes affect important decisions about property values, neighborhood desirability, and land use. *See* Anderson & Plaut, *supra*, at 8-9. The research is robust that race alone, unexplained by other factors, affects evaluations of the desirability of homes, which creates significant risk when government actors are making discretionary decisions about housing. For example, in one recent study participants were asked to evaluate a middle-class, suburban house for sale. The characteristics of the house remained constant except for the perceived race of the family selling the home. Researchers manipulated this variable by including either a Black or White family photograph in the living room of the house, ensuring that the family photographs did not differ in dimensions of perceived social class, racial prototypicality, friendliness, or attractiveness. Bonam, *supra*, at 9, 15-16. Despite the fact that the houses were otherwise identical, when the prospective home was owned by a Black family the study participants

estimated a lower value for the house, liked the house less, and rated the neighborhood as less desirable. *Id.* at 17-18. The researchers concluded that the mere presence of Black people in a physical space activates images of blight, lower quality schools and municipal services, less access to commerce, and lower perceived safety. Those images caused the subjects to then devalue the property itself. *Id.* at 19-20.

Similarly, participants in another recent study viewed a video of either a middle-class or working-class neighborhood with actors of different races playing its inhabitants. When White participants were asked to give impressions and predictions about neighborhood conditions such as property upkeep, housing cost, safety, future property values, and quality of schools, the results showed that simply seeing Black (as opposed to White) residents in a neighborhood elicited significantly more negative evaluations of neighborhood conditions – even though the neighborhoods were identical in all respects other than race. See Maria Krysan et al., *In the Eye of the Beholder*, 5 Du Bois Rev.: Soc. Sci. Res. on Race 5, 22 (2008). The researchers concluded that “[i]n the absence of any other information, Whites assume that neighborhoods where Blacks live have less expensive housing, are less safe, are less likely to appreciate in value, and have lower-quality schools than do identical neighborhoods with White residents.” *Id.* at 16. These presumptions derive from a single factor: the “observed presence of African Americans in the neighborhood.” *Id.* at 16; see also Pathways to Residential Segregation, *supra*, at 18; Maria Krysan et

al., *Does Race Matter in Neighborhood Preferences? Results from a Video Experiment*, 115 Am. J. Soc. 527, 548-52 (2009).

Thus, even in the absence of overt discrimination, implicit bias causes people to view houses and neighborhoods more negatively when more Black families live in those neighborhoods. In light of this research, there is reason to be concerned when discretionary decisions are made that perpetuate the link between race and land uses considered less desirable. Such race-based devaluation has wide-ranging effects not only on the financial well-being of people of color, but on their entire communities. The impact of these negative associations are reflected in multiple studies showing that, although participants often supported affordable housing in theory, they justified opposition to siting affordable housing near their own neighborhoods in part due to concern about property values. *See, e.g., Tighe, supra*, at 11 (62% of respondents expressed concern about the negative impact of affordable housing on their property values). These effects contribute to racial isolation and inequity that Congress sought to remedy through the FHA.

Implicit biases can also guide municipal decisions about land use that negatively impact minority communities. A recent study asking White participants to determine in which neighborhood the city should place a chemical plant found that the racial composition of a neighborhood was the decisive factor in determining the location of the plant. *See Bonam, supra*, at 30-31. Study participants were less likely to

oppose the construction of a chemical plant in a residential area when the neighborhood was predominantly Black, even controlling for perceptions of house values, environmental concerns, and participants' explicit feelings toward Blacks. *Id.* at 34. While it may be unlikely that the average person would intentionally choose to make someone suffer from the adverse effects of a chemical plant based on that person's race, implicit biases can and do "produce behavior that diverges from a person's avowed or endorsed beliefs or principles." Implicit Bias, *supra*, at 951. It is precisely for this reason that implicit bias must be considered when evaluating housing and land use decisions.

The significance of implicit bias in housing and land use data tracks outcomes throughout the United States. A national report based on data collected over twenty years shows an overconcentration of industrial and toxic waste facilities in communities of color. Robert D. Bullard et al., *Toxic Wastes and Race at Twenty: 1987-2007*, at xii (2007). People of color comprise a majority in communities where commercial hazardous waste facilities are sited, and make up much larger majorities – over two thirds of the population – in communities with multiple, clustered hazardous waste facilities. *Id.* This disparity is so high that researchers have concluded that "[r]ace continues to be an independent predictor of where hazardous wastes are located, and it is a stronger predictor than income, education and other socioeconomic indicators." *Id.* Unsurprisingly, dramatic

disparities in exposure to environmental hazards along racial lines have negative health consequences for residents of minority communities. *Id.* Housing discrimination and its resultant segregation “contributes to dramatic racial disparities in exposure to environmental hazards, access to healthy food choices, and exposure to crime and other sources of environmental stress, thereby helping to produce profound and persistent racial disparities in health.” Pathways to Residential Segregation, *supra*, at 8-9 (internal citations omitted).

Negative associations between race and space thus affect minority communities in pervasive and devastating ways, with long-lasting consequences. While race-based perceptions of home value can affect the financial well-being of minority families, race-based decisions about the placement of chemical plants, toxic waste sites, and other environmental hazards can adversely affect their very health and quality of life. *See, e.g.*, Bonam, *supra*, at 35; *see also* Anderson & Plaut, *supra*, at 12-13; Bullard et al., *supra*, at xii; Pathways to Residential Segregation, *supra*, at 8-9.

**d. Stereotypes perpetuate racial segregation and isolate minorities from access to resources, capital and social networks, and opportunity**

“[F]ears about the people who might reside in affordable housing is a primary factor driving

concerns about or opposition to affordable housing projects.” Tighe, *supra*, at 16. The pernicious opposition to affordable housing development based on implicit racial bias or negative association may help explain why segregation persists. Reports of data from the 2010 census and data analyses of the 2000 census indicate a slight decrease in segregation overall, but that minority groups still experience high rates of racial isolation. Anderson & Plaut, *supra*, at 2. The data reveals that the average White resident lives in a census tract that is 79% White (Whites comprise 64% of the general population); the average Black person resides in a tract that is 46% Black (Blacks comprise 13% of the general population); and the average Hispanic lives in a tract that is 45% Hispanic (Hispanics comprise 16% of the general population). See Anderson & Plaut, *supra*, at 2-3. Minority preferences account for some segregation, but research indicates that these preferences are largely the result of fear of White hostility. See Maria Krysan & Reynolds Farley, *The Residential Preferences of Blacks: Do They Explain Persistent Segregation?*, 80 Soc. Forces 937, 962 (2002).

Rates of segregation track with concentrated poverty. Blacks and Hispanics are much more likely to live in neighborhoods with high rates of poverty. The most recent analysis available reveals that despite representing only a quarter of the general population, 69% of the eight million people living

in census tracts with the highest poverty rates were Black or Hispanic. Alemayehu Bishaw, *Areas with Concentrated Poverty: 1999*, U.S. Census Bureau, July 2005, at 5, 8. By contrast, more than 72% of Whites live in higher income communities where the poverty rate is below the national average. *Id.*

Evidence of “raced space also captures material conditions in people’s neighborhoods, including: housing standards; access to basic services like water, wastewater disposal, sidewalks, and streetlights; access to amenities like parks, open space, and transportation; and proximity to locally undesirable land-uses (LULUs) like freeways and industrial facilities.” Anderson & Plaut, *supra*, at 3; *see also, e.g.*, Pascale Joassart-Marcelli, *Leveling the Playing Field? Urban Disparities in Funding for Local Parks and Recreation in the Los Angeles Region*, 42 *Env’t & Plan.* 1174 (2009) (case studies of specific locales reveal deteriorated housing conditions in minority communities while amenities such as parks are concentrated in whiter communities). Moreover, systematic national evidence shows that LULUs are over-concentrated in communities of color, resulting in dramatic public health disparities between White and minority neighborhoods. *See, e.g.*, Bullard et al., *supra*; Rachel Morello-Frosch & Russ Lopez, *The Riskcape and the Color Line: Examining the Role of Segregation in Environmental Health Disparities*, 102 *Envtl. Res.*



181 (2006). All of these factors contribute to racial isolation and inequity.

**2. The research strongly indicates that implicit biases affect discretionary government decision-making about housing and land use**

The multiple studies described above showing how negative racial associations and implicit biases held by members of the public are linked to housing and land use decisions strongly indicate that government officials operate under the same biases and negative associations. This is evidenced by the correlation between studies showing that, irrespective of their explicit feelings toward Blacks, Whites were significantly more likely to recommend placing a chemical plant in a Black neighborhood than a White neighborhood, a result confirmed by the real-world data showing the grossly disproportionate placement of hazardous facilities in minority communities. *See Bonam, supra*, at 34. Thus, implicit bias may explain how TDCHA, in relying on what it viewed as proper selection criteria for assigning points to and ranking LIHTC proposals, would consistently undervalue the positive effects that would flow from siting affordable housing in nonminority census tracts.

Moreover, “[a] decisionmaking process where the subjective judgments of the selecting officials are the primary criteria is particularly at risk for [unconscious] discrimination” and “the potential for

unconscious stereotypes and biases to intrude . . . is greatest when subjective judgments are involved.” Hart, *supra*, at 742, 744. Indeed, at least one federal court has recognized that public officials’ “subjective decision-making processes” are “‘particularly susceptible to being influenced not by overt bigotry and hatred, but rather by unexamined assumptions about others that the decisionmaker may not even be aware of.’” *Id.* at 742-43 (quoting *Thomas v. Troy City Bd. of Educ.*, 302 F. Supp. 2d 1303, 1309 (M.D. Ala. 2004)).

Here, TDHCA was awarding points to prospective low-income tax credit unit applications not just with respect to statutory criteria (so-called “above-the-line” criteria) by which it was bound, but also based on discretionary factors (“below-the-line” criteria). See *Inclusive Cmty. Project, Inc. v. Tex. Dep’t of Hous. & Cmty. Affairs*, 747 F.3d 275, 277-78 (5th Cir. 2014) (discussion). Thus, this case involves a governmental decision-making process about the placement of affordable housing with a significant subjective component – a combination particularly prone to the implicit bias created by negative associations between race, neighborhoods, and other housing spaces. The disparate impact standard is an important enforcement tool both for courts and government decision-makers charged with the important determinations likely to have a large impact on peoples’ lives – such as where they can live – to identify and remove discriminatory subjectivity from the decision-making process. Indeed, research shows that “implicit bias is like a habit that can be broken

through a combination of awareness of implicit bias, concern about the effects of that bias, and the application of strategies to reduce bias.” Patricia G. Devine et al., *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. Experimental Soc. Psychol. 1267 (2012).

**C. Implicit bias and housing segregation can be redressed through mechanisms that promote diverse and integrated communities, such as the disparate impact standard**

Infrequency of contact or lack of exposure to meaningful diversity may result from housing segregation. Research shows that initial interactions with “out-groups” can stimulate anxiety and distress. *See* Blascovich et al., *supra*, at 254. Conversely, the research demonstrates that increasing diversity can help mitigate the stress response of cross-group interactions, which in turn decreases implicit biases over time. *See* Nilanjana Dasgupta & Luis M. Rivera, *When Social Context Matters: The Influence of Long-Term Contact and Short-Term Exposure to Admired Outgroup Members on Implicit Attitudes and Behavioral Intentions*, 26 Soc. Cognition 112, 120-21 (2008); *see also* Blascovich et al., *supra*, at 263 (exposure to diversity helps regulate cardiovascular threat response); Elizabeth Page-Gould et al., *Intergroup Contact, Facilitates Physiological Recovery Following Stressful Intergroup Interactions*, 46 J. Experimental Soc. Psychol. 854, 854-56 (2010) (previous interracial

contact predicts better recovery from an autonomic nervous system (ANS) stress response); Elizabeth Page-Gould et al., *With a Little Help From My Cross-Group Friend: Reducing Anxiety in Intergroup Contexts Through Cross-Group Friendship*, 95 *J. Personality & Soc. Psychol.* 1080, 1085, 1089 (2008) (interracial contact significantly decreases the release of stress hormone cortisol over the course of multiple interracial interactions).

Research on the psychological effects of integration parallel the results of the physiologically-focused studies: having past intergroup contact significantly lowers a range of prejudice measures (including cognitive, social distance, and affective indicators). Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 *J. Personality & Soc. Psychol.* 751 (2006) (conducting a meta-analysis of over 200 studies). Furthermore, repeated interracial interactions produced more positive emotional experiences comparable to those of participants engaging in same-race interactions. See Negin R. Toosi et al., *Dyadic Interracial Interactions: A Meta-Analysis*, 138 *Psychol. Bull.* 1, 16, 18 (2012).

These analyses indicate that regular interracial interactions, which are more likely to occur in racially integrated communities, help reduce the negative physical and psychological responses associated with lack of contact and exposure to racial diversity – responses caused by or symptomatic of implicit bias. As the FHA recognizes, more robust integration confers inestimable benefits not just to Black families

who gain more equitable access to opportunities routinely enjoyed by nonminority families, but to society as a whole, as the myriad negative effects of persistently harmful racial stereotypes are reduced through greater cross-race contact.

Preserving the disparate impact standard as a mechanism to increase the presence of underrepresented groups in communities that would otherwise remain segregated enables courts to allow for this kind of meaningful intergroup contact and, consistent with the purpose of the FHA, break the cycle of housing segregation.

## **II. THE FAIR HOUSING ACT'S MANDATE THAT PROHIBITS RACIAL DISCRIMINATION IN HOUSING WILL ONLY BE MET IF THE COURT AFFIRMS THE AVAILABILITY OF THE DISPARATE IMPACT STANDARD**

### **A. The Fair Housing Act broadly prohibits actions that result in racial discrimination and segregated communities**

The FHA makes it unlawful to “make unavailable or deny” housing to a protected class “by, among other things, action that limits the availability of affordable housing.” 42 U.S.C. § 3604(a); *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mt. Holly*, 658 F.3d 375, 381 (3d Cir. 2011). In enacting the FHA, Congress aimed to combat conduct that perpetuates segregation, so that we could move towards a “truly

integrated and balanced” society. *See* 114 Cong. Rec. 3422 (1968) (statement of Sen. Mondale); *see also* 114 Cong. Rec. 3133 (1968) (statement of Sen. Mondale) (recognizing that prohibiting housing discrimination was a means to remedy “hard-core unemployment” and improve the “deplorable state” of segregated minority schools). With the FHA, Congress also aimed to stop the harmful effects of housing discrimination. 114 Cong. Rec. 2529 (1968) (statement of Sen. Tydings) (“Racial discrimination in housing . . . is not conducive to good health, educational advancement, cultural development, or to improvement in general standards of living” for isolated minorities); 114 Cong. Rec. 2524 (1968) (statement of Sen. Brooke) (housing discrimination affects all Americans and thwarts progress toward an ideal society).

**B. Retaining the disparate impact standard is critical to ensure that the anti-discrimination and anti-segregation purposes of the FHA are realized**

**1. Disparate impact recognizes that implicit biases can produce discriminatory results even without intent, and allows for such results to be remedied**

As *amici* have shown, social science research exposes implicit bias as a very real and pervasive form of discrimination that perpetuates harm to individuals and society. The research demonstrates that in order to truly address discrimination in

housing as Congress intended, courts must be able to address implicit as well as explicit bias. Courts must therefore be allowed to conduct a disparate impact analysis.

Discriminatory conduct and conduct that perpetuates segregation is often unintentional and unknown even to the actor. In fact, today implicit bias may be more explanatory of racial discrimination and segregation than explicit bias. *See, e.g.*, *Implicit Bias, supra*, at 954-55 (“[I]mplicit measures of bias have relatively greater predictive validity than explicit measures in situations that are socially sensitive, like racial interactions, where impression-management processes might inhibit people from expressing negative attitudes or unattractive stereotypes.”); *see also* Toosi et al., *supra*, at 5 (“With the emergence of more inclusive social norms, explicit expressions of racial attitudes have gradually become less biased; however, people often harbor more racially prejudiced views than they are willing to report.”). In other words, discrimination today “is most likely to occur in contexts where it can be justified as something other than discrimination,” or in contexts where discriminatory intent will be hard or impossible to prove. *See* Hart, *supra*, at 747. The studies cited above also show that implicit biases play a large role in causing and fueling housing segregation in particular by distorting perceptions and valuations of people of color as neighbors and residents.

New research also concludes that implicit bias may take the form of favoritism toward “in-groups,”

and can be as pernicious as bias based upon “out-group” hostility. Noted cognitive scientists have written that “[o]ur strong conclusion is that, in present-day America, discrimination results more from helping in-group members than from harming out-group members,” and that “[q]uite often ingroup favoritism is hidden even from those who practice it.” See Anthony G. Greenwald & Thomas F. Pettigrew, *With Malice Toward None and Charity for Some: Ingroup Favoritism Enables Discrimination*, 69 *Am. Psychologist* 669, 680 (2014). Greenwald’s and Pettigrew’s research suggests an approach of out-group “helping” as a way to level the in-group favoritism playing field and reduce discrimination. See *id.* at 680.

The studies cited in this brief show that, whether they manifest as animus or in-group favoritism, implicit biases lead to housing discrimination and segregation. Accordingly, fulfilling the FHA’s purpose of combating housing discrimination and segregation requires a framework that recognizes that biases are often implicit and that discriminatory conduct is often unintentional, allowing for challenges to such conduct.

Discriminatory intent does *not* provide such a framework. The conventional discriminatory intent standard focuses the inquiry on the decision-maker’s intent at the moment the decision is made, and thereby fails to recognize that discrimination “can intrude much earlier, as cognitive process-based errors in perception and judgment subtly distort the



ostensibly objective data set upon which a decision is ultimately based.” See Linda H. Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 *Stan. L. Rev.* 1161, 1211 (1995); see also Wang, *supra*, at 1020 (“[I]ndividual adjudication under the intentional model of discrimination is inadequate to redress the largest share of modern discrimination, because the situations in which discrimination is easy to see are not the ones in which it is most likely to be found.”).

Disparate impact, on the other hand, is a framework that recognizes the range of conduct that fuels racial discrimination and segregation today. Disparate impact provides the courts with a way to address and remedy conduct that “has the necessary and foreseeable consequence of perpetuating segregation[, which] can be as deleterious as purposefully discriminatory conduct in frustrating the national commitment to replace the ghettos by truly integrated and balanced living patterns.” *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1289-90 (7th Cir. 1977) (citations omitted) (internal quotation marks omitted). By focusing on the disproportionate nature of a decision or action’s impact, the disparate impact standard correctly assumes that actions taken “because of” an individual’s or community’s race can be discriminatory regardless of animus or even a decision-maker’s *conscious* intent. It moves the analysis forward, allowing courts to analyze whether legitimate bases for the decision or action exist in

situations where decision-makers may not have intended to discriminate but may have been improperly influenced by implicit biases, whether it be out-group hostility or in-group favoritism.

The disparate impact standard also incentivizes decision-makers to be more proactive in combating racial discrimination and segregation. Unlike the discriminatory intent standard, which may incentivize decision-makers to hide any discriminatory intent they have from others<sup>4</sup> and even themselves, the disparate impact standard incentivizes decision-makers to confront and address the possible effects of bias. Knowing that a court's focus will be on the disproportionate impact of their policies, decision-makers will more closely analyze their proposals, anticipate any disproportionate outcomes that will result, attempt to mitigate those outcomes, and consider less harmful alternatives.<sup>5</sup>

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<sup>4</sup> See, e.g., David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 Geo. L.J. 1619, 1645 (1991) ("Today, predictably, employers have long since adjusted to the existence of Title VII. Few are foolish enough to discriminate overtly, at least on a large scale, and if they do discriminate they cover their tracks.").

<sup>5</sup> See Cheryl I. Harris & Kimberly West-Faulcon, *Reading Ricci: Whitening Discrimination, Racial Test Fairness*, 58 UCLA L. Rev. 73, 163 (2010) ("Disparate impact doctrine under Title VII requires that employers evaluate the effects of their selection policies – that they be racially attentive – not to achieve racial proportionality but to achieve merit."); George Rutherford, *Disparate Impact, Discrimination, and the Essentially Contested Concept of Equality*, 74 Fordham L. Rev. 2313, 2336

(Continued on following page)

Some have argued that encouraging decision-makers to be attentive to the racial outcomes of their policies impedes progress by moving society away from a colorblind approach.<sup>6</sup> Indeed, this Court has made clear that decision-makers must be exceedingly cautious in attempting to redress policies that have a racially disproportionate effect *after* such policies have been implemented if the ex post attempt may have a race-specific effect. *Ricci v. DeStefano*, 557 U.S. 557 (2009). However, this concern does not support the conclusion that decision-makers must ignore the racial outcomes of their actions in the first instance. Research suggests the opposite conclusion, and recognition that race may play a role in decision-making has been shown to be crucial to combatting

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(2006) (“[T]he theory of disparate impact gives greater prominence to objective evidence of discrimination, based on the actual effects of employment practices rather than the employer’s elusive state of mind, and it makes the balance between effective enforcement and government intervention explicit.”); Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 Wm. & Mary L. Rev. 911, 997-1001 (2005) (disparate impact analysis encourages a “cost-benefit” or “risk-allocation” analysis, whereby decision-makers will minimize their policies’ risk of disproportionate impact to the maximum extent consistent with their business interests).

<sup>6</sup> See Helen Norton, *The Supreme Court’s Post-Racial Turn Towards a Zero-Sum Understanding of Equality*, 52 Wm. & Mary L. Rev. 197, 229 (2010) (depicting recent Supreme Court decisions as evidence of a post-racial jurisprudence in which “a decision maker’s attention to the disparities experienced by members of traditionally subordinated racial groups” are “inextricable from an intent to discriminate against others, and thus sufficiently suspicious to demand justification.”)

discrimination. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1172-79 (2012) (awareness and accountability have been shown to decrease the influence of bias). As a result, the interests of the FHA will be advanced by decision-makers policing themselves and contributing to the fight against housing discrimination and segregation.

## **2. Disparate impact also combats housing discrimination in cases where intent may exist, but is subtle or hidden**

While research suggests that implicit, as opposed to explicit, bias is more prevalent in contemporary society, those who continue to hold racially prejudiced views are likely to keep those views covert in recognition of more egalitarian social norms. *See, e.g.*, Toosi et al., *supra*, at 5 (“With the emergence of more inclusive social norms, explicit expressions of racial attitudes have gradually become less biased; however, people often harbor more racially prejudiced views than they are willing to report.” (citations omitted)); *id.* at 19 (noting that self-reported “negative affect” in interracial interactions is higher in realistic field studies than lab studies, suggesting that “participants are less likely to try to present themselves in a more positive light when no experimenter is present”).

This Court has recognized that biases are often not identifiable as intentional discrimination. *See*

*Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (“[W]e know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons. . .”). Courts have also recognized that savvy decision-makers are often highly effective at veiling discriminatory animus:

Municipal officials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority. Even individuals acting from invidious motivations realize the unattractiveness of their prejudices when faced with their perpetuation in the public record.

*Smith v. Town of Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982); see also *United States v. City of Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974) (noting that “clever men may easily conceal their motivations”).

As this Court has long acknowledged, disparate impact can be a critical tool to ferret out covert or subtle forms of discrimination. In *Griggs v. Duke Power Co.*, the Court recognized as unlawful a facially neutral policy that disproportionately disqualified African American job applicants, as it had the same effect as the employer’s unlawful policy of hiring and assigning employees on the basis of race. 401 U.S. 424, 435-36 (1971). Later, the Court noted in *Watson v. Fort Worth Bank & Trust* that “the necessary premise of the disparate impact approach is that

some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination.” 487 U.S. 977, 987 (1988); *see also* Christine Jolls, *Antidiscrimination and Accommodation*, 115 Harv. L. Rev. 642, 652 (2001) (“A leading gloss on the conception of disparate impact liability arising from [*Griggs*] is that disparate impact functions as a means of smoking out subtle or underlying forms of intentional discrimination on the basis of group membership.”).

In the housing context, allowing disparate impact liability under the FHA is critical to combating housing practices that may be motivated by these persistent but more subtle forms of intentional discrimination. As the Seventh Circuit held on remand from this Court in an early FHA case:

A strict focus on intent permits racial discrimination to go unpunished in the absence of evidence of overt bigotry. 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. We cannot agree that Congress in enacting the Fair Housing Act intended to permit municipalities to systematically deprive minorities of housing opportunities simply because those municipalities act discreetly.

*Metro. Hous. Dev.*, 558 F.2d at 1290.

Indeed, with respect to some of the most common housing and lending practices that yield substantially

disparate opportunities, the ability to allege disparate treatment may be virtually if not completely impossible before discovery. “[D]isparate impact allows plaintiffs, in good faith, to challenge practices that have immense and predictable discriminatory effects” where “traditional evidence of intentional discrimination is not revealed.” Michael G. Allen et al., *Assessing HUD’s Disparate Impact Rule: A Practitioner’s Perspective*, 49 Harv. C.R.-C.L.L. Rev. 155, 162-64, 182-89 (2014). For example, publicly available data may reveal broad racial disparities in a bank’s home lending practices. Before discovery, an individual borrower will be unable to access loan files of similarly situated comparators that might reveal evidence of discriminatory intent to support a discrimination claim. The availability of the disparate impact standard allows her to challenge lending practices that have plain disparate results, as well as to obtain discovery that might ultimately prove discriminatory intent as well.

Recognizing disparate impact liability in cases brought under the FHA is also consistent with holdings by this Court and several Circuit courts that “a genuine finding of disparate impact can be highly probative of [discriminatory] motive” in the absence of direct evidence of discriminatory intent. *See In re Emp’t Discrimination Litig. Against Ala.*, 198 F.3d 1305, 1321 (11th Cir. 1999) (allowing plaintiffs’ disparate impact claims to proceed); *see also Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977) (“Statistics showing racial or ethnic imbalance

are . . . often a telltale sign of purposeful discrimination. . . .”); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 935 (2d Cir. 1988) (recognizing that facially neutral rules that “develop into powerful discriminatory mechanisms when applied” may belie covert discriminatory intent). Consistent with this caselaw, HUD’s disparate impact rule allows for discriminatory intent where a practice with a discriminatory effect does not have a legitimate purpose; the defendant’s unwillingness to renounce a practice with a discriminatory effect could, in itself, provide evidence of discriminatory intent. See 24 C.F.R. § 100.500(b). As the Eighth Circuit has explained, “[i]f the adverse impact of a facially neutral policy cannot be plausibly explained on a neutral ground, the impact itself would signal that the real classification made by the policy was in fact not neutral.” *Keevan v. Smith*, 100 F.3d 644, 650 (8th Cir. 1996) (citing *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 275 (1979)); see also *Lanning v. Se. Pa. Transp. Auth.*, 181 F.3d 478, 489-90 (3d Cir. 1999) (“The disparate impact theory of discrimination combats . . . a type of covert discrimination in which facially neutral practices are employed to exclude, unnecessarily and disparately, protected groups from employment opportunities.”).





**CONCLUSION**

For the reasons set forth above, *amici* urge the Court to affirm the judgment of the Court of Appeals.

Respectfully submitted,

EVA PATERSON

*Counsel of Record*

ALLISON ELGART

EQUAL JUSTICE SOCIETY

1999 Harrison Street

Suite 800

Oakland, California 94612

(415) 288-8703

epaterson@equaljusticesociety.org

MONA TAWATAO

RICHARD A. ROTHSCHILD

WESTERN CENTER ON

LAW & POVERTY

3701 Wilshire Boulevard

Suite 208

Los Angeles, California 90010

(213) 487-7211

mtawatao@wclp.org

WILLIAM C. KENNEDY

ANDREA MATSUOKA

LEGAL SERVICES OF

NORTHERN CALIFORNIA

515 Twelfth Street

Sacramento, California 95814

(916) 551-2150

bkennedy@lsnc.net

RACHEL D. GODSIL  
SETON HALL UNIVERSITY  
SCHOOL OF LAW  
1109 Raymond Boulevard  
Newark, New Jersey 07102  
(973) 642-8957  
rachel.godsil@gmail.com

DAVID J. BERGER  
MEGAN E. WALL-WOLFF  
REBECCA E. WOLITZ  
WILSON SONSINI GOODRICH  
& ROSATI, PC  
650 Page Mill Road  
Palo Alto, California 94304  
(650) 493-9300  
DBerger@wsgr.com

**APPENDIX: LIST OF AMICI CURIAE<sup>1</sup>**

**Dr. Laura Babbitt** is a social psychologist and post-doctoral scholar at Tufts University. Her research has examined the psychological factors that influence interracial interaction outcomes, making use of both experimental and meta-analytic techniques. Her current research investigates intergroup dynamics in apparel factories, in connection with the International Labor Organization.

**Dr. Hilary B. Bergsieker** is an Assistant Professor of Psychology at the University of Waterloo. Her research examines stereotyping, prejudice, and interpersonal dynamics of interracial interactions, with a focus on distrust and asymmetric experiences between racial groups.

**Dr. Camille Zubrinsky Charles** is the Edmund J. and Louise W. Kahn Term Professor in Social Sciences at the University of Pennsylvania. She is the author of *Won't You Be My Neighbor? Race, Class, and Residence in Los Angeles*. She currently serves as the Director of the Center for Africana Studies at the University of Pennsylvania and on the editorial boards of the *American Sociological Review* and *Du Bois Review: Social Science Research on Race*. Her research interests are in the areas of urban inequality, racial attitudes and intergroup relations, racial

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<sup>1</sup> Affiliations are listed for identifications purposes only. *Amici* submit this brief in their individual capacities alone, and not on behalf of any institution or organization.

residential segregation, minorities in higher education, and racial identity.

**Professor Sharon L. Davies** is the Gregory H. Williams Chair in Civil Rights & Civil Liberties at The Ohio State University Moritz College of Law and the Executive Director of the Kirwan Institute for the Study of Race & Ethnicity. The Kirwan Institute is a nationally respected interdisciplinary research institute that works to deepen understanding of the causes of and solutions to racial and ethnic disparities. It is also the publisher of the widely-cited annual *State of the Science Implicit Bias Review*, which highlights emerging mind science evidence concerning the ways in which facially neutral discretionary practices and implicit biases can produce racial harms, often unintentionally.

**Dr. George Galster** is the Hilberry Distinguished Professor of Urban Affairs at Wayne State University. Since earning his PhD in Economics from MIT he has published extensively on the motives, extent, nature, and consequences of housing market discrimination and segregation. He has been a consultant to HUD, DOJ and numerous local governments and fair housing groups on these issues and served on the Consumer Advisory Council of the Board of Governors of the Federal Reserve.

**Dr. Elizabeth Page-Gould** is an Associate Professor of Psychology at the University of Toronto and the Canada Research Chair in Social Psychophysiology. Dr. Page-Gould's research has primarily taken an

experimental and longitudinal approach to understand the role that cross-ethnic friendship plays in psychological and physiological thriving in diverse contexts.

**Dr. Maria Krysan** is a Professor in the Department of Sociology and the Institute of Government and Public Affairs at the University of Illinois, Chicago. Her research focuses on racial residential segregation and racial attitudes.

**Dr. Douglas S. Massey** is the Henry G. Bryant Professor of Sociology and Public Affairs at Princeton University. He is the co-author of *American Apartheid: Segregation and the Making of the Underclass*, which won the Distinguished Scholarly Publication Award from the American Sociological Association. He currently serves on the Council of the National Academy of Sciences and is the President of the American Academy of Political and Social Science.

**Dr. Thomas Pettigrew** is Research Professor of Social Psychology at the University of California, Santa Cruz. With more than 450 publications, he is an expert in Black-White relations in the United States and has conducted intergroup research in Australia, Europe, and South Africa. He formerly served as the President of the Society for the Psychological Study of Social Issues.

**Dr. Jennifer Richeson** is a MacArthur Foundation Chair and a Professor of Psychology and African American Studies at Northwestern University. Her research focuses on psychological phenomena associated

with diversity with an emphasis on antecedents and consequences of prejudice and stereotyping from both traditionally stigmatized and dominant groups. Her current work includes research on the dynamics and consequences of interracial contact and diversity.

**Dr. Samuel R. Sommers** is an Associate Professor of Psychology at Tufts University. An experimental social psychologist, Dr. Sommers' research examines issues related to stereotyping, prejudice, and group diversity. His scholarly work focuses on two often overlapping topics: race and social perception, judgment, and interaction; and the intersection of psychology and law.

**Dr. Linda R. Tropp** is a Professor of Psychology at the University of Massachusetts Amherst. Dr. Tropp has conducted extensive research on the effects of intergroup contact, including meta-analytic, experimental, and longitudinal studies on the expectations, experiences, and outcomes of contact among diverse racial and ethnic groups.

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