No. 11-1507

IN THE
Supreme Court of the United States

TOWNSHIP OF MOUNT HOLLY, ET AL.,
Petitioners,

v.

MT. HOLLY GARDENS CITIZENS IN ACTION, INC., ET AL.,
Respondents.

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

BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS[1]

The NAACP Legal Defense & Educational Fund, Inc. (LDF) is a non-profit legal organization that, for more than seven decades, has helped African Americans secure their civil and constitutional rights. Throughout its history, LDF has challenged public and private policies and practices that deny African Americans housing opportunities and isolate African-American communities. *See, e.g.*, *McGhee v. Sipes*, 334 U.S. 1 (1948) (companion case to *Shelley v. Kraemer*, 334 U.S. 1 (1948)) (racially restrictive covenants); *Cent. Ala. Fair Hous. Ctr. v. Lowder Realty Co.*, 236 F.3d 629 (11th Cir. 2000) (racial steering); *Comer v. Cisneros*, 37 F.3d 775 (2d Cir. 1994) (racial discrimination in public housing and assistance programs); *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992) (redlining); *Kennedy Park Homes Ass'n, Inc. v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970) (exclusionary zoning); *Thompson v. U.S. Dep't of Hous. & Urb. Dev.*, No. 95-309, 2006 WL 581260 (D. Md. Jan. 10, 2006) (federal government's obligation to affirmatively further fair housing); Consent Decree, *Byrd v. First Real Estate Corp. of Ala.*, No. 95-CV-3087 (N.D. Ala. May 14, 1998) (racial steering); *Price v. Gadsden Corp.*, No. 93-CV-1784 (N.D. Ala. filed Aug. 30, 1993) (unfair

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus state that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed blanket consent letters with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

lending practices); *Brown v. Artery Org., Inc.*, 654 F. Supp. 1106 (D.D.C. 1987) (redevelopment plans that unfairly eliminate affordable housing); *see also* LDF et al., *The Future of Fair Housing: Report on the National Commission of Fair Housing and Equal Opportunity* (Dec. 2008). LDF has also long played an instrumental role in advancing the doctrine of disparate-impact discrimination before this Court. *See, e.g.*, *Lewis v. City of Chicago*, 560 U.S. 205, 130 S. Ct. 2191 (2010); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

INTRODUCTION AND SUMMARY OF ARGUMENT

Since the enactment of the Fair Housing Act of 1968 (FHA), Pub. L. No. 90-284, 82 Stat. 81 (1968) (codified as amended at 42 U.S.C. §§ 3601-3631), in the immediate aftermath of Martin Luther King Jr.'s tragic assassination, this nation has made substantial progress toward eliminating racial segregation and discrimination in public and private housing. Yet, as Justice Kennedy has emphasized:

> . . . our tradition is to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain. This is especially true when we seek assurance that opportunity is not denied on account of race. The enduring hope is that race should not matter; the reality is that too often it does.

Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

In many housing markets across our nation, the

vestiges of *de jure* residential segregation still persist. *See, e.g.*, Margery Austin Turner et al., *Housing Discrimination against Racial and Ethnic Minorities 2012,* U.S. Dep't. of Hous. & Urb. Dev., xxiv (June 2013) ("Information gaps, stereotypes and fears, local regulatory policies, and disparities in purchasing power all work together to perpetuate segregation, even though many Americans—minority and white—say they want to live in more diverse neighborhoods."). Moreover, our recent economic crisis has laid bare racially discriminatory housing policies and practices that continue to deny housing opportunities to African Americans and to isolate African-American communities. *See, e.g.*, Joint Ctr. for Hous. Studies, *State of the Nation's Housing 2013*, 3 (2013) (noting that the recent foreclosure crisis is "especially pronounced among African-Americans, whose homeownership rate has now dropped 5.8 percentage points from the peak and is back to its lowest level since 1995"); Debbie Gruenstein Bocian et al., *Lost Ground 2011: Disparities in Mortgage Lending and Foreclosures*, Ctr. for Responsible Lending, 4 (November 2011) ("African-American and Latino borrowers are almost twice as likely to have been impacted by the [economic] crisis.").

In the ongoing struggle to ensure fair housing for all and promote a more just and inclusive society, one key tool is the FHA's prohibition against disparate-impact discrimination. It provides a commonsense approach to eliminate those housing practices that are as "disastrous and unfair to private rights and the public interest as the perversity of a willful scheme." *United States v. City of Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974) (internal quotation

marks omitted). LDF agrees with the Mount Holly Gardens Citizens in Action, Inc. and the other plaintiffs below, who are Respondents here, that this Court should adopt the consistent view of all eleven courts of appeals that have addressed the issue and hold that disparate-impact claims are authorized by the text, structure, and history of the FHA. Resp. Br. 17-40. To the extent there is any statutory ambiguity, LDF further agrees with Respondents that deference is warranted to the consistent and long-standing interpretation of the U.S. Department of Housing and Urban Development (HUD), as codified in the final rule that it recently promulgated. *See* HUD, Final Rule, *Implementation of the Fair Housing Act's Discriminatory Effects Standard*, 78 Fed. Reg. 11,460 (Feb. 15, 2013); Resp. Br. 40-47.

LDF writes separately to emphasize three key points. First, the disparate-impact standard is particularly critical where, as here, government officials seek to demolish and redevelop a neighborhood with high concentrations of minority residents. Before this Court, no one contests that the Township has a legitimate interest in combating blight in the Mount Holly Gardens neighborhood. *But see* Pet. Br. 9 n.9 (noting prior state-court litigation contesting the Township's blight designation). Yet, according to Respondents, the Township could accomplish this goal "in a far less heavy-handed manner" than its proposal to acquire and raze all of the homes in the *only* predominantly minority neighborhood in the jurisdiction. Pet. App. 25a-26a; Pet. Br. 7. Only 11% of the new units that the Township proposes to construct would be designated as affordable housing, and only 2% would be offered on a priority basis to

existing residents—many of whom are long-time homeowners. Resp. Br. 9. Moreover, there are very few other housing options available elsewhere in the Township or the surrounding region, due to the "severe shortage of affordable housing" throughout Burlington County, New Jersey. *Id.* at 10 (quoting J.A. 61).

Regrettably, the Township's plans for the Gardens neighborhood are not unique. Rather, they fit into a broader historical and persistent pattern of "so-called 'urban renewal' programs" that "have long been associated with the displacement of blacks." *Kelo v. City of New London*, 545 U.S. 469, 521-22 (2005) (Thomas, J., dissenting). Indeed, "[i]n cities across the country, urban renewal came to be known as 'Negro removal.'" *Id.* (citation omitted).

Given that unfortunate context, the FHA should not, as the Township and its amici contend, immunize municipalities from disparate-impact claims that challenge redevelopment plans purporting to "improve a blighted area." *See* Pet. Br. 44-46; Int'l Mun. Lawyers Assoc. Amicus Br. 11, 13 [hereinafter "IMLA Br."]. The disparate-impact standard provides an effective mechanism for redressing the unfair and unjustified denial of housing opportunities while protecting the bona fide, non-discriminatory interests of defendants. In the redevelopment context, in particular, the disparate-impact standard encourages local governments to take into account less discriminatory alternatives. These include, for instance, creative solutions that could help ensure the availability of affordable housing for displaced residents either on-site or in nearby areas with access to the sort of community assets that create an

infrastructure of opportunity, such as quality schools and jobs.

Second, there is no evidence that the well-established application of the disparate-impact standard to redevelopment plans, as well as other housing policies, is either infeasible or unduly burdensome. *Cf.* Pet. Br. 39, 44-48; IMLA Br. 10-13; Am. Fin. Svcs. Assoc. et al. Amicus Br. [hereinafter "AFSA Br."] 11-20; Nat'l Leased Hous. Assoc. et al. Amicus Br. [hereinafter "NLHA Br."] 9, 11-12; Am. Ins. Assoc. et al. Amicus Br. [hereinafter "AIA Br."] 10. Although the Court declined to review the appropriate standard for disparate-impact claims in this case, *see Twp. of Mount Holly v. Mount Holly Gardens Citizens in Action, Inc.*, 133 S. Ct. 2824 (2013) (limiting grant of certiorari to Question 1), examination of the functional operation of the burden-shifting framework—which has been endorsed by a majority of the courts of appeals and by HUD in its recently promulgated rule—shows that disparate-impact enforcement effectively distinguishes between claims that are undeserving and those that are meritorious. Courts have demonstrated, time and again, the workability of this framework, including in cases, such as this one, challenging redevelopment projects.

Finally, the canon of constitutional avoidance does not preclude FHA disparate-impact enforcement. The Township and its amici claim that disparate-impact enforcement necessarily leads to racial classifications, racial balancing, and racial quotas, *see, e.g.*, Pet. Br. 38-44; Pac. Legal Found. Amicus Br. 17-20, but these are red herrings. In most FHA cases, court-approved remedies do not allocate relief

based on individual racial classifications and, thus, are facially race-neutral. To the extent that disparate-impact remedies or voluntary compliance efforts by government officials trigger strict scrutiny in particular circumstances, that does not provide a basis for eliminating disparate-impact enforcement entirely; rather, courts are well-equipped to apply rigorous constitutional review on a case-by-case basis.

ARGUMENT

I. Long experience with the adverse consequences of redevelopment projects weighs against exempting them from disparate-impact enforcement.

Notwithstanding the contentions of the Township and its amici to the contrary, *cf.* Pet. 44-45; IMLA Br. 10-13, government officials' plans to demolish and redevelop neighborhoods should not be categorically excluded from disparate-impact enforcement. Especially where, as here, those neighborhoods are home to predominantly minority and low-income residents, careful review is warranted, because redevelopment plans do not necessarily improve housing options for displaced residents; nor do they always advance the FHA's equally important goal of "replac[ing] segregated neighborhoods with 'truly integrated and balanced living patterns.'" 90 Cong. Rec. 3422 (1968) (Sen. Mondale); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972).

To the contrary, there is a long history of urban renewal projects that have disproportionately displaced minority residents without either expanding affordable housing or promoting integration. Of course, not every redevelopment proposal violates

the FHA. Many receive broad-based community support. But disparate-impact enforcement is a critical tool to promote careful consideration of alternative approaches to ensure that redevelopment projects advance—and do not undermine—the FHA's key goals.

A. The Township's plans fit into a broader pattern of "urban renewal" projects that have disproportionately affected African Americans.

No one contests that reducing neighborhood blight can be a legitimate and even praiseworthy government interest. Yet, there are numerous examples where municipalities' designations of neighborhoods as "blighted" have been "infused with racial and ethnic prejudice." Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 Yale L. & Pol'y Rev. 1, 6 (2003). "While [the term] purportedly assessed the state of urban infrastructure, blight was often used to describe the negative impact of certain residents on city neighborhoods" and "justify" their removal. *Id.*

In many cases, both past and present, urban renewal projects have used blight reduction in predominantly minority neighborhoods as a façade to facilitate other municipal goals that have had little to do with enhancing housing opportunities for residents. These priorities have included constructing highways, developing shopping districts, expanding facilities for large public or private institutions, or constructing middle-class or luxury residences to lure professionals and white-collar workers. *See,*

e.g., Raymond A. Mohl, *The Interstates and the Cities: Highways, Housing, and the Freeway Revolt*, Poverty & Race Research Action Council, 3 (2002) ("Highway builders and downtown redevelopers had a common interest in eliminating low-income housing and, as one redeveloper put it in 1959, freeing blighted areas 'for higher and better uses.'" (citation omitted)). As one scholar recently concluded, "urban renewal was more a policy for economic revitalization than for housing, and the true benefits of urban renewal went to private developers." Patrick Sharkey, *Stuck in Place: Urban Neighborhoods and the End of Progress Toward Racial Equality* 61-62 (2013). Like blight reduction, none of these goals are objectionable in and of themselves. All too often, however, government officials have been indifferent or outright hostile to alternatives that would have accomplished legitimate municipal objectives while still creating or preserving affordable housing for the residents whose homes were demolished.

Beginning in the mid-twentieth century, urban renewal "brought about an entirely new level of segregation in urban neighborhoods, by race and by class." *Id.* at 62. African Americans and other racial minorities were disproportionately displaced by these projects. *See, e.g.*, *Kelo*, 545 U.S. at 522 (Thomas, J., dissenting) ("Of all the families displaced by urban renewal from 1949 through 1963, 63 percent of those whose race was known were nonwhite." (citation omitted)).[2] Displaced minority residents were

[2] While LDF endorses Justice Thomas's analysis of the disparate impacts of urban renewal, we take no position on the constitutionality of the eminent domain action at issue in *Kelo*.

often forced to relocate to other high-poverty, minority-concentrated neighborhoods, which were typically even further isolated from access to decent jobs and quality schools. *See, e.g.*, Kevin Douglas Kuswa, *Suburfication, Segregation, and the Consolidation of the Highway Machine*, 3 J.L. Soc'y 31, 53 (2002) (describing how "a governing apparatus operating through housing and the highway machine implemented policies to segregate and maintain the isolation of poor, minority, and otherwise outcast populations").

For example, urban renewal projects in Atlanta during the 1950s and 1960s tore down predominantly African-American "slums" to construct a stadium, a civic center, and an expressway. *See* Ronald H. Bayor, *Race & the Shaping of Twentieth-Century Atlanta* 70 (1996). In the process, these projects destroyed more housing than was rebuilt, and the overwhelmingly African-American residents were relocated, over their objections, to outlying, isolated housing projects. *See id*. at 70-71; *see also Kelo*, 545 U.S. at 522 (Thomas, J., dissenting) ("Public works projects in the 1950's and 1960's destroyed predominantly minority communities in St. Paul, Minnesota, and Baltimore, Maryland.").

In the same period, Detroit engaged in widespread urban renewal, including demolition of dilapidated housing predominantly occupied by African Americans in the Gratiot area, east of the business district. *See* June Manning Thomas, *Redevelopment and Race: Planning a Finer City in a Postwar Detroit* 55 (1997). "The major flaw with this project was its effects on the original residents of the sites. Like early clearance projects throughout the

United States, the Gratiot project eliminated more low-income housing than it produced, and it abused and alienated Black inner-city residents in the process." *Id.* at 56. When asked why the area east of the business district was chosen for redevelopment when the area west of it was also in poor condition, one planner noted that the only "practical difference" was that west-side residents were predominantly white. *Id.* at 58. Moreover, this project, like so many others in Detroit and elsewhere, "forced the households with the least resources to move at a time when the city's tight housing market could not accommodate them." Thomas J. Sugrue, *The Origins of the Urban Crisis: Race and Inequality in Postwar Detroit* 50 (1996).

The lingering effects of urban renewal have continued into the present, and in some cases, recent redevelopment projects seemingly have failed to learn the lessons of history. *See, e.g.*, *City of Joliet v. Mid-City Nat'l. Bank of Chicago*, No. 05-6746, 2012 WL 5463792, at *1, *9 (N.D. Ill. Nov. 5, 2012) (vast majority of tenants in an area slated for demolition were "very low income, African-Americans for whom there was effectively no alternative housing in the city"); john a. powell & Marguerite L. Spencer, *Giving Them the Old "One-Two": Gentrification and the K.O. of Impoverished Urban Dwellers of Color*, 46 How. L.J. 433, 458-59 (2003) (exodus of thousands of low-income, minority families from Washington, D.C. in 1990-2000 was attributable to revitalization and gentrification projects).

B. Disparate-impact enforcement has helped ameliorate the adverse effects of urban renewal.

In some cases, residents of affected communities mobilized to challenge the loss of their neighborhoods to urban renewal and the failure to provide replacement housing on-site or in opportunity-rich communities elsewhere.

Some litigated constitutional or FHA disparate-treatment claims, with varying degrees of success. *See, e.g.*, *Arrington v. City of Fairfield*, 414 F.2d 687, 692 (5th Cir. 1969) (reversing dismissal and finding that plaintiffs were entitled to have the chance "to show that the City will knowingly and actively precipitate the dislocation of persons who, because of a citywide practice of residential discrimination, will have no place to go"). For instance, residents of Joliet, Illinois recently challenged the city's stated purposes in condemning certain property—*i.e.*, to eliminate blight and improve the health, safety, and welfare of the tenants—as pretexts for discrimination against low-income African Americans. *City of Joliet*, 2012 WL 5463792, at *9.

Yet disparate-impact claims often have been critical when practices appeared facially neutral. In Alexandria, Virginia, for instance, LDF filed a lawsuit challenging the conversion of units in two apartment complexes from low-rent to high-rent, because it would have resulted in the displacement of their overwhelmingly African-American and Hispanic tenants. *Brown v. Artery Org.*, 654 F. Supp. 1106, 1108-09, 1117 (D.C. Cir. 1987). The district court granted a preliminary injunction, after finding

"extensive proof of discriminatory effect," and noting that the "vast majority" of the approximately 2,000 tenants in the two complexes would be unable to find affordable housing anywhere else in Alexandria due to "low vacancy rates," "high rents for available apartments," and "the continued existence of racial discrimination" in the housing market. *Id.* As a result, "according to plaintiffs, such progress as may have been made in recent times with respect to the inclusion of significant numbers of blacks and other minorities in the Alexandria population will largely be wiped out: that city will, once again, be essentially lily-white." *Id.* The case ultimately settled. *See Brown v. Artery Org.*, No. 86-3285, 1987 WL 18471 (D.D.C. Oct. 2, 1987) (final approval of settlement).

Similarly, in *Fox v. U.S. Department of Housing and Urban Development*, homeowners and renters "alleged that defendants' urban renewal activities drove low and moderate income persons, predominantly nonwhites, out of [Philadelphia's Washington Square West] Area and transformed a formerly racially and economically integrated community into a predominantly white, affluent one." 468 F. Supp. 907, 910 (E.D. Pa. 1979). The court approved a settlement requiring the construction or rehabilitation of 131 low-income housing units as part of the project. *Id.* at 911, 919. In the order approving the settlement, the court noted that "plaintiffs appear to have a good chance of proving that the effects of defendants' urban renewal activities were discriminatory." *Id.* at 915; *see also Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 146 (3d Cir. 1977) (permitting disparate-impact challenge to Philadelphia's failure

to construct replacement housing as part of an urban renewal project); *Keith v. Volpe*, 858 F.2d 467, 484 (9th Cir. 1988) (holding that the City of Hawthorne, California violated the FHA by failing to offer a legitimate justification for its refusal to approve construction of housing for low- and moderate-income residents displaced by freeway construction, which had twice the adverse impact on minorities).

In these and other contexts, disparate-impact enforcement serves two interrelated purposes. First, as described in greater detail in Section III.B *infra*, it helps root out the subtle and sophisticated types of discrimination that are often more commonplace in today's society than instances of overt racial animus. Resp. Br. 46. As the Third Circuit has noted in the employment context:

> Anti-discrimination laws and lawsuits have "educated" would-be violators such that extreme manifestations of discrimination are thankfully rare. . . . Regrettably, however, this in no way suggests that discrimination based upon an individual's race, gender, or age is near an end. Discrimination continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms. It has become easier to coat various forms of discrimination with the appearance of propriety, or to ascribe some other less odious intention to what is in reality discriminatory behavior. In other words, while discriminatory conduct persists, violators have

> learned not to leave the proverbial "smoking gun" behind.

Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1081-82 (3d Cir. 1996).

Second, as also explained further in Part III.B *infra*, disparate-impact enforcement helps eliminate housing policies and practices that may be facially race-neutral but have the effect of perpetuating segregation and "freez[ing]" in place a discriminatory "status quo." *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971). The legacy of racial segregation and other discriminatory policies intentionally perpetrated by government actors at all levels continue to shape key features of the housing "status quo," including: (a) the concentration of African Americans and other racial minorities into neighborhoods isolated from quality educational and economic opportunities; and (b) limitations on the availability of affordable housing opportunities elsewhere. *See generally* Housing Scholars Amicus Brief; Douglas S. Massey & Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* (1993). The FHA's prohibition against disparate-treatment discrimination, alone, would be insufficient to challenge policies and practices that have the effect, if not the intent, of perpetuating a discriminatory status quo.

Thus, long experience weighs strongly against according redevelopment projects a blanket exemption from disparate-impact enforcement, as the Township and its amici propose. *See* Pet. 44-45; IMLA Br. 10-13. In any event, HUD reasonably considered and rejected similar proposals for "safe harbors or ex-

emptions from discriminatory effects liability" when it finalized its recently promulgated disparate-impact rule. 78 Fed. Reg. at 11,477. HUD correctly "note[d] . . . that Congress created various exemptions from liability in the text of the Act, and that in light of this and the Act's important remedial purposes, additional exemptions would be contrary to Congressional intent." *Id.* (internal citation omitted); *see also Graoch Assocs. #33, L.P. v. Louisville/Jefferson County Metro Human Relations Comm'n*, 508 F.3d 366, 374 (6th Cir. 2007) (declining to exempt from disparate-impact liability the refusal of landlords to participate in a Section 8 program for low-income tenants).

II. The disparate-impact standard is workable, fair, and effective at rooting out unjustified barriers to housing opportunity.

Not only is the application of the disparate-impact standard to redevelopment plans (and other housing policies) consistent with the purposes of the FHA, but there is also no evidence that the use of the disparate-impact standard in any context leads to the parade of horribles conjured up by the Township and its amici. *See, e.g.*, Pet. Br. 45 ("local governments seeking to avoid disparate-impact litigation would face strong political and economic incentives to build inefficiencies into a redevelopment plan"); IMLA Br. 3 (disparate-impact liability would undermine cities' efforts "to promote safe and sanitary housing conditions and protect the welfare of all residents"); NLHA Br. 8 (there would be no way for a housing provider to determine, prior to a court or HUD decision on the issue, whether its facially-neutral policies violate the FHA). Although the dis-

parate-impact burden-shifting framework is not directly at issue in this case, *Twp. of Mount Holly*, 133 S. Ct. at 2824 (limiting certiorari to Question 1), understanding how it operates in practice may be helpful in debunking claims that disparate-impact enforcement is unworkable or burdensome. The burden-shifting framework has proven to be a feasible approach to protect those policies and practices that are necessary to achieve legitimate, nondiscriminatory objectives, as illustrated not only by its long-standing application in fair housing cases, *see, e.g., Huntington Branch*, *NAACP v. Town of Huntington*, 844 F.2d 926, 939 (2d. Cir. 1988), *aff'd*, *Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15 (1988) (per curiam), but also in equal employment litigation, *see, e.g.*, *Lewis v. City of Chicago*, 560 U.S. 205, 130 S. Ct. 2191 (2010); *Griggs*, 401 U.S. 424, and other contexts, *see, e.g.*, Civil Rights Division, U.S. Dep't of Justice, *Title VI Legal Manual* 47-53 (2001).

A. The threshold showing required at the prima facie stage adequately polices the boundaries of disparate impact.

In the Title VII context, this Court has made clear that the first stage of the three-part burden-shifting framework, which requires a prima facie showing of disparate impact, imposes "constraints that operate to keep [disparate-impact] analysis within its proper bounds." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988). The same rationale applies under the FHA.

To begin, plaintiffs at the prima facie stage must offer evidentiary proof that "a challenged practice

caused or predictably will cause a discriminatory effect." 24 C.F.R. § 100.500(c)(1). This Court has eschewed a "rigid mathematical formula" for the adverse effects showing. *Watson*, 487 U.S. at 995. Instead, the Court has expressed a preference for a "case-by-case approach" to accommodate the "'infinite variety'" of statistical methods and the reality that the "'usefulness [of different methods] depends on all of the surrounding facts and circumstances.'" *Id.* at 995 n.3 (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 (1977)). In its final regulation, HUD endorsed the same "case-by-case" approach. 78 Fed. Reg. at 11,469; *see also id.* at 11,468 (emphasizing that "[w]hether a particular practice results in a discriminatory effect is a fact-specific inquiry"). Defendants may utilize a variety of tools to challenge the reliability of plaintiffs' statistical evidence. *See Watson*, 487 U.S. at 996 (describing different methods to refute plaintiffs' data).

Moreover, plaintiffs do not establish a prima facie case unless they demonstrate a causal relationship between the disputed practice and the discriminatory effect. 24 C.F.R. § 100.500(c)(1). Courts of appeals have recognized that inferences may be utilized to establish this causal link. *See, e.g.*, *Hallmark Developers, Inc. v. Fulton Cnty.*, 466 F.3d 1276, 1287 (11th Cir. 2006) (collecting cases); *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 577 (2d Cir. 2003) (supporting similar causal analysis); *Keith*, 858 F.2d at 484 (same); *Rizzo*, 564 F.2d at 142 (same).

In this case, for example, the Third Circuit concluded that Respondents had provided sufficient evidence of their prima facie case to withstand sum-

mary judgment. Pet. App. 15a. Observing that "[n]o single test controls," *id.* (quoting *Hallmark Developers*, 466 F.3d at 1286), the Third Circuit determined that plaintiffs' statistical showing "plausibl[y]" demonstrated that African Americans and Latinos residing in the Mount Holly Gardens neighborhood would be disproportionately displaced by the township's redevelopment plan, *id.* "[T]he vast majority" would not be able to afford the proposed market-rate units or find affordable housing elsewhere in the region. *Id.* at 10a.

This standard by no means guarantees plaintiffs success at the prima facie stage. Courts can and do reject disparate-impact claims that fail to provide sufficient evidence, through inferences or otherwise, of a causal relationship between the disputed practice and its alleged adverse effects. *See, e.g.*, *McCauley v. City of Jacksonville*, 739 F. Supp. 278, 282 (E.D.N.C. 1989) (granting summary judgment to a municipality due to the lack of "evidence in the record from which one could infer that a significantly higher percentage of . . . families [qualified to rent low-income units] would have been black").

B. After a prima facie case is established, liability attaches only if the defendant fails to justify its policy *or* if its legitimate objective can be achieved by some other less discriminatory means.

Importantly, disparate-impact liability does not attach unless the defendant fails to show that the disputed policy "is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests." 24 C.F.R. § 100.500(c)(2). If the defendant succeeds

at this second stage, plaintiffs must then demonstrate that those interests "could be served by another practice that has a less discriminatory effect." *Id.* at § 100.500(c)(3).

Defendants may rebut a prima facie case of disparate impact by demonstrating that the challenged practice is justified by an interest that is "substantial" (*i.e.*, "a core interest of the organization that has a direct relationship to the function of that organization"), "legitimate" (*i.e.*, "genuine and not false"), and itself "nondiscriminatory." 78 Fed. Reg. at 11,470. Provided these criteria are satisfied, there is no dispute that legitimate government interests may include alleviating blight, as in the instant case, or protecting local infrastructure, such as sewage systems, *see Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev.*, 56 F.3d 1243, 1255-57 (10th Cir. 1995), or addressing quality of life concerns, such as density, traffic flow, and pedestrian safety, *see id.*

Therefore, the objections of the Township and its amici—that they will be precluded from pursuing legitimate business goals, *see* AFSA Br. 12-13; AIA Br. 9-10, or promoting the public welfare, Pet. Br. 44-48; NLHA Br. 9—are unfounded. The FHA's prohibition against disparate-impact discrimination does not condemn policies simply because they have adverse effects. Rather, it precludes only those policies that have adverse effects *and* are unnecessary to the achievement of the defendant's substantial, legitimate, non-discriminatory goals. 24 C.F.R. § 100.500(c)(2); *see Graoch Assocs.*, 508 F.3d at 374-75 ("Of course, not every housing practice that has a disparate impact is illegal. We use the burden-

shifting framework described above . . . to distinguish the artificial, arbitrary, and unnecessary barriers proscribed by the FHA from valid policies and practices crafted to advance legitimate interests.").[3]

If defendants make this showing of a substantial, legitimate, non-discriminatory interest, the case proceeds to the third stage of the burden-shifting framework, where plaintiffs must propose an alternative, which can then be compared to the challenged practice. 24 C.F.R. § 100.500(c)(3); *see, e.g.*, Pet. App. 24a-28a; *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 70 (D. Mass. 2002). The trier of fact must then determine whether plaintiffs' proposal is workable and furthers defendants' legitimate goals while reducing the disparate effects on the protected class. *See* Pet. App. 26a-27a; *Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth.*, 417 F.3d 898, 902-03 (8th Cir. 2005). The feasibility of

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[3] While some amici supporting the Township argue that the burden should not shift to the defendant at the second stage, *see* AFSA Br. 13 n. 22, defendants have better knowledge of and access to information regarding their own interests and how best to serve them. *See* 78 Fed. Reg. at 11,473-474. Moreover, allocating the burden to plaintiffs at the second stage would have limited utility given that they bear the burden of proof at the *third* stage of demonstrating that "the substantial, legitimate, non-discriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect." 24 C.F.R. § 100.500(c)(3). Such a showing by plaintiffs at the third stage naturally requires some understanding of the *actual* grounds upon which the defendants relied when they adopted the policy or practice. *Cf. United States v. Virginia*, 518 U.S. 515, 535-36 (1996) (discussing "actual purpose" requirement in context of equal protection challenge).

the alternative offered by plaintiffs "must be supported by evidence, and may not be hypothetical or speculative." 24 C.F.R. § 100.500(b)(2); 78. Fed. Reg. at 11,473.

Accordingly, any allegation that the disparate-impact standard requires courts to ignore, for example, a lender's interest in assessing credit risk, *see* AFSA Br. 12-13, is unfounded. "[A] less discriminatory alternative need not be adopted unless it could serve the substantial, legitimate, nondiscriminatory interest at issue." 78 Fed. Reg. at 11,473. As HUD noted in finalizing its rule, "if the lender's interest in imposing the challenged practice relates to credit risk, the alternative would also need to effectively address the lender's concerns about credit risk." *Id.* Liability results only if the fact-finder determines that a challenged practice is not "necessary" to defendants' legitimate interests because another practice, offered by plaintiffs, can effectively serve those same interests. *Id.* at 11,475 (noting that the "burden-shifting framework" distinguishes "unnecessary barriers" from "valid policies and practices crafted to advance legitimate interests") (quoting *Graoch Assocs.*, 580 F.3d at 374-75). This means that redevelopment plans that have both beneficial *and* discriminatory effects may still be unlawful if there is another, less discriminatory means to accomplish the same objective.

C. Courts are adept at applying the burden-shifting framework in the redevelopment context.

In the redevelopment context, courts are well-equipped to use the burden-shifting framework to

distinguish practices that have an unjustified discriminatory effect from those that are necessary to serve legitimate interests.

For instance, tenants brought a disparate-impact claim against the Charleston, Missouri Housing Authority, challenging its revitalization plan that included the demolition of public housing units predominantly occupied by African-American tenants. *Charleston Hous. Auth. v. U.S. Dep't of Agric.*, 419 F.3d 729, 733 (8th Cir. 2005). The Eighth Circuit affirmed the district court's conclusion that, at the second stage of the burden-shifting analysis, the Housing Authority's proffered interests were not legitimate because "they were unsupported by evidence." *Id.* at 741.

With respect to the Housing Authority's contention that its actions were necessary to reduce the density of low-income housing in the area, the district court found that the "Housing Authority had mischaracterized the density by overstating the number of low-income rental units contained within the area under examination." *Id.* at 741. The Housing Authority also claimed "a need to eliminate a housing design that contributed to a concentration of criminal activity and drug use," but "[t]he statistical evidence did not support [the Housing Authority's] assertion that crime was a particular problem at the apartments." *Id.* (quoting district court opinion). Finally, the Housing Authority claimed "a lack of funding to make improvements," but the district court found that "the Housing Authority's records . . . belied its claim of severe financial constraints." *Id.* at 742. "On appeal, the Housing Authority offer[ed] little evidence to attack these findings[,]" and

the Eighth Circuit concluded that they "were not clearly erroneous." *Id.*

Conversely, in *Darst-Webbe Tenants Association Board v. St. Louis Housing Authority*, decided the same year as *Charleston Housing Authority*, the Eighth Circuit concluded that the plaintiff tenant associations failed to meet their burden at the third stage. *Darst-Webbe*, 417 F.3d at 906. The Eighth Circuit assumed that the tenant associations made out a prima facie case with evidence that St. Louis's revitalization plan for a public housing facility greatly reduced the number of low-income housing units available, especially units with sufficient bedrooms for families with children. *Id.* at 902. Nonetheless, at the second stage of the burden-shifting test, the Eighth Circuit determined that the plan furthered the defendants' legitimate, nondiscriminatory objectives—namely, strengthening homeownership, improving resident services, reducing the concentration of low-income housing, and creating a sustainable mixed-income community. *Id.* At the third stage, the Eighth Circuit affirmed the district court's conclusion that the plaintiffs' proposed alternative, which called for construction of more and larger affordable units as part of the redevelopment plan, was not supported by reliable expert testimony demonstrating its marketability. *Id.* at 905.

As in *Darst-Webbe*, the key question at issue in this case is whether plaintiffs satisfied the less discriminatory alternative stage of the burden-shifting framework. As the case comes to this Court, the record on this issue has not been fully developed, but the Third Circuit's judgment was assuredly correct

that Respondents should be allowed to make their case. Viewing the record in the light most favorable to Respondents, there are genuine issues of material fact that preclude summary judgment in favor of the Township on the issue of whether it could have accomplished its goal of reducing blight in the Mount Holly Gardens neighborhood "in a far less heavy-handed manner." Pet. App. 25a-26a.

III. The canon of constitutional avoidance is inapplicable.

As Respondents explain, the FHA's text, structure, and legislative history authorize disparate-impact claims. *See* Resp. Br. 17-35. Should the Court find the statute ambiguous, however, the canon of constitutional avoidance is inapplicable, notwithstanding the contrary arguments of the Township and its amici. *See, e.g.*, Pet. Br. 39-42; Judicial Watch Amicus Br. 10-12; Project on Fair Representation Amicus Br. 8; Pac. Legal Found. Amicus Br. 26-27.

Under this canon, the Court strives "to construe the statute to avoid [constitutional] problems if it is fairly possible to do so." *Boumediene v. Bush*, 553 U.S. 723, 787 (2008) (internal citations and quotation marks omitted). But this canon is applicable only where there are "grave" constitutional concerns. *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (citation omitted). There are no such grave constitutional concerns here that trump deference to the consistent and long-standing determination of the courts of appeals and HUD, as confirmed in its recently promulgated rule, that the disparate-impact framework advances the FHA's core purposes.

A. Most FHA remedies do not trigger strict scrutiny.

The Township's invocation of the canon of constitutional avoidance is premised on the deeply flawed notion that application of disparate-impact to redevelopment plans would "necessarily" and "affirmatively require [local government actors] to 'classify individuals by race and allocate benefits and burdens on that basis,'" Pet. Br. 39-40 (quoting *Parents Involved*, 551 U.S. at 783 (Kennedy, J., concurring in part and concurring in the judgment)), and therefore compel "local policymakers to engage in racial balancing in every redevelopment choice." *Id.* at 44. Nothing could be further from the truth.

First, the Township's concerns about "racial balancing" are overwrought. Municipal governments are surely cognizant of this Court's holdings that "outright racial balancing," for its own sake, is "patently unconstitutional." *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

Second, there are many options for government officials to avoid or redress disparate-impact liability that do not trigger strict scrutiny, as the Township effectively concedes. Pet. Br. 39. For instance, when government officials utilize "mechanisms [that] are race conscious but do not lead to different treatment based on a classification that tells each [individual] he or she is to be defined by race, . . . it is unlikely any of [these mechanisms] would demand strict scrutiny to be found permissible." *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring in part and concurring in the judgment). In the school context, these mechanisms might include "strategic site se-

lection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race." *Id.*; *cf. Ricci v. DeStefano*, 557 U.S. 557, 585 (2009) (declining to "question an employer's affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions will be made"). Similarly, when locating replacement housing or making other redevelopment decisions, local governments should be able to factor the demographics of targeted neighborhoods without triggering strict scrutiny; as in the context of school attendance zones, the result would be a policy that benefits the neighborhood as whole, rather than only residents of a particular race. *Cf. United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1184, 1236 (2d Cir. 1987) (upholding order to build 200 public housing units in areas that were predominantly nonminority to further racial integration); *Rizzo,* 564 F.2d at 153 (affirming order requiring construction of a low-income housing project in a predominantly white neighborhood to redress disparate-impact and intentional violations).

Third, even in the context of court-approved settlements and court-ordered remedies for FHA disparate-impact claims, most relief is facially race-neutral insofar as it benefits all individuals, and not just the disparately impacted racial minorities who

were subjected to the challenged policy. This is especially true in the redevelopment context.[4]

Nor, as Respondents point out, Resp. Br. 51, and notwithstanding the Township's contention to the contrary, Pet. Br. 39, would a remedy in this case require the allocation of benefits or burdens based on individual racial classifications. For instance, providing additional relocation assistance for all individuals displaced by a redevelopment project, such as the one at issue here, would benefit minority and nonminority residents alike. Indeed, the less discriminatory alternative proposed by Respondents' planning expert was facially race-neutral. The expert advocated an "alternate redevelopment plan that would rely on the targeted acquisition and rehabilitation of some of the existing Gardens homes," rather than "the wholesale destruction and rebuild-

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[4] *See, e.g.*, *Huntington Branch*, 844 F.2d at 941-42 (ordering defendants to eliminate a zoning ordinance that restricted multi-family housing to an already segregated "urban renewal zone"); Consent Decree, *United States v. City of Pooler*, No. 4:01-263 (S.D. Ga. June 16, 2003) (requiring a city to construct 68 low-income units and to advertise and fill them on a nondiscriminatory basis); Consent Decree, *United States v. Jacksonville Housing Authority*, No. 3:00-1165-J-25A (M.D. Fla. Oct. 18, 2000) (requiring a city to replace demolished public housing with new buildings restricted to certain census tracts and accessible via public transportation, and to develop a Section 8 mobility counseling program); *see also Brown v. Artery Organization, Inc.*, No. 86-3285, 1987 WL 16846, at *2-3 (D.D.C. Sep. 1, 1987) (preliminarily approving a settlement requiring defendants to maintain a certain number of low-income units and reopen a wait list to receive Section 8 voucher holders); *Fox*, 468 F. Supp. at 911 (approving a settlement requiring construction or rehabilitation of affordable housing).

ing of the neighborhood." Pet. App. 25a-26a; Resp. Br. 13.

B. Any racial classifications utilized to remedy particular instances of disparate-impact discrimination can be addressed by case-specific application of strict scrutiny.

Even if remedies for disparate-impact discrimination may allocate benefits or burdens based on individuals' race, that mere possibility should not automatically trigger any "grave" constitutional concerns with the overall statutory disparate-impact framework. *Rust*, 500 U.S. at 191. As the Township concedes, Pet. Br. 40, there is a well-established strict scrutiny standard for evaluating the constitutionality of racial classifications on a case-by-case, context-specific basis.

While such rigorous constitutional review would apply to a racial classification that is part of a remedy for a government actor's disparate-impact discrimination under the FHA (or any other federal civil rights statute that permits such claims), it would not as the Township contends, Pet. Br. 40, "face serious difficulty in satisfying" either the "compelling interest" or the "narrow tailoring" prong of strict scrutiny.

1. *Compelling Interest*. This Court has invariably presumed that compliance with presumptively valid federal antidiscrimination law is a compelling interest. *See*, *e.g.*, *Bush v. Vera*, 517 U.S. 952, 977 (1996); *Shaw v. Hunt*, 517 U.S. 899, 915 (1996); *Shaw v. Reno*, 509 U.S. 630, 656 (1993). The presumption should apply here. This Court has re-

peatedly endorsed disparate-impact analysis, without ever questioning its constitutionality. *See*, *e.g.*, *Lewis*, 130 S. Ct. at 2197-98: *Watson*, 487 U.S. at 986-87; *Griggs*, 401 U.S. at 431.

There are two complementary goals of the FHA's prohibition against disparate-impact discrimination. Neither triggers constitutional concerns.

First, disparate impact furthers the FHA's goals by rooting out subtle or surreptitious intentional discrimination, as discussed in Part II.B *supra*. It is widely accepted that evidence of disproportionate burden will usually "provide an important starting point" in the constitutional equal protection inquiry. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). Moreover, as this Court has recognized in other contexts, severe disparate impact may constitute probative evidence of discriminatory intent. *See*, *e.g.*, *Teamsters*, 431 U.S. at 339-40 & n.20 (1977); *Arlington Heights*, 429 U.S. at 266.

Through the three-part burden-shifting framework discussed above, the disparate-impact standard provides a powerful evidentiary tool—by countering, in an orderly and sensible fashion, explanations for policies or practices that have a demonstrably adverse impact. *Cf. Albemarle Paper Co. v. Moody*, 422 U.S. 405, 422, 425-36 (1975) (explaining disparate impact in Title VII context); *In re Emp't Discrimination Litig. Against Ala.*, 198 F.3d 1305, 1321 (11th Cir. 1999) (same). Even "[t]hough the plaintiff is never explicitly required to demonstrate discriminatory motive, a genuine finding of disparate impact can be highly probative of the [defendant]'s motive

since a racial 'imbalance is often a telltale sign of purposeful discrimination.'" *Id.* (quoting *Teamsters*, 431 U.S. at 339-40 n.20).

Thus, the reasonable operation of the burden-shifting framework renders "an affirmative defense for good-faith" unnecessary to assuage any equal protection concerns raised by disparate-impact enforcement. *Cf.* Resp. Br. 53; *Ricci*, 557 U.S. at 595 (Scalia, J., concurring). Rebuffing a constitutional challenge to Title VII's prohibition against disparate-impact discrimination in the workplace, the Eleventh Circuit reasoned: "If, after a *prima facie* demonstration of discriminatory impact, the employer cannot demonstrate that the challenged practice is a job related business necessity, what explanation can there be for the employer's continued use of the discriminatory practice other than that some invidious practice is probably at work?" *In re Emp't Discrimination Litig. Against Ala.*, 198 F.3d at 1321-22. Evidence offered at the third stage of the burden-shifting framework may also be probative of discriminatory intent: "In the context of the plaintiff's further option of demonstrating an alternative practice that has less discriminatory impact, the Supreme Court has been even more unambiguous in characterizing an employer's refusal to adopt the alternative practice as 'evidence that the employer was using its tests merely as a "pretext" for discrimination.'" *Id.* at 1322 (quoting *Albemarle Paper*, 422 U.S. at 425). Accordingly, a finding of disparate-impact discrimination may be tantamount to evi-

dence of clandestine intentional discrimination.[5]

Of course, not every practice with an unlawful disparate impact is actually motivated by intentional discrimination. Instead, the Court has recognized that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997). Using that rationale, this Court has endorsed "prophylactic legislation" prohibiting disparate-impact discrimination in order to enforce the Fourteenth Amendment's equal protection guarantee. *Tennessee v. Lane*, 541 U.S. 509, 520 (2004) ("When Congress seeks to remedy or prevent unconstitutional discrimination, § 5 [of the Fourteenth Amendment] authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause."); *see also Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 737-38 (2003).

Notably, this Court's cases recognizing Congressional intent to prohibit disparate-impact discrimination under Title VII do not justify disparate-impact merely as an evidentiary dragnet; instead, the Court has recognized that disparate-impact enforcement also operates as a broader "prophylactic"

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[5] In addition, "even if one assumed that [intentional] discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain." *Watson*, 487 U.S. at 990.

measure to further Congress's goal "of achieving equality of employment 'opportunities' and removing 'barriers' to such equality." *Connecticut v. Teal*, 457 U.S. 440, 449 (1982) (quoting *Griggs*, 401 U.S. at 429-30); *see also Albemarle Paper*, 422 U.S. at 417 (same).

This brings us to the second and equally important goal of the FHA disparate-impact framework: It eliminates—through the same burden-shifting framework—practices that may be neutral on their face, but nevertheless perpetuate racial discrimination without any legitimate justification. *See Watson*, 487 U.S. at 987 ("[T]he 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."); *Huntington Branch,* 844 F.2d at 935 ("Often [facially race-neutral] rules bear no relation to discrimination upon passage, but develop into powerful discriminatory mechanisms when applied.").

There is no question that when Congress enacted the FHA in 1968 and amended it in 1988, it had before it a record filled with evidence that the legacy of persistent segregation and racial discrimination by both public and private actors still affected housing opportunities. *See, e.g.,* 114 Cong. Rec. 2277 (Feb. 6, 1968) (Sen. Mondale) ("An important factor contributing to exclusion of Negroes from [suburban communities and other exclusively white areas], moreover, has been the policies and practices of agencies of government at all levels."); 134 Cong. Rec. 10454 (Aug. 1, 1988) (Sen. Kennedy) ("Housing discrimination exists in America today, and it exists in epi-

demic proportions."). And, as highlighted in the introduction to this amicus brief, the recent economic crisis has exposed predatory housing policies that continue to deny housing opportunities to African Americans and to isolate African-American communities.[6]

Disparate-impact enforcement reflects a concern that the disadvantages faced by "minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 806 (1973) (citing *Griggs*, 401 U.S. at 430). To a substantial and unfortunate degree, such disadvantages are the result of prior unconstitutional state action, and the case law is abundantly clear that government officials have both the constitutional authority and the responsibility to assure that the legacy and vestiges of those discriminatory practices are not given any more effect than legitimately necessary. *See, e.g.*, *City of Richmond v. J.A. Croson*, 488 U.S. 469, 532-33 (1989). Moreover, the removal of such barriers instills greater community confidence in the

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[6] This second rationale for disparate-impact enforcement as providing a means to redress facially neutral practices that "freeze" in place a discriminatory "status quo," *Griggs*, 401 U.S. at 430, is consistent with, although ultimately broader than, the "segregation" prong of HUD's disparate-impact rule. *See* 24 C.F.R. § 100.500(a) ("A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons *or creates, increases, reinforces, or perpetuates segregated housing patterns*." (emphasis added)); *see* 78 Fed. Red. at 11,463; *Graoch Assocs.*, 508 F.3d at 378; *Huntington Branch*, 844 F.2d at 937.

fairness of public housing policies, and as a consequence, the legitimacy of the government itself. *Cf. Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 290 (1986) (O'Connor, J., concurring).

2. *Narrow Tailoring*. Because disparate-impact discrimination is a presumptively valid tool to effectuate the FHA's goals and, thus, satisfies the "compelling interest" prong of strict scrutiny, any lingering concerns about the constitutionality of a specific race-conscious remedy or voluntary compliance effort implemented by a government actor should be addressed as a matter of narrow tailoring review in the particular circumstances at issue. Some of the Township's amici, *see, e.g.*, Project on Fair Representation Amicus Br. 3; Pac. Legal Found. Amicis Br. 23, 26, focus on Justice Scalia's concurrence in *Ricci*, where he speculated about potential tension between disparate impact and disparate treatment. *Ricci*, 557 U.S. at 594 (Scalia, J., concurring). Yet the narrow-tailoring prong of strict scrutiny already builds in a framework that fully and adequately addresses any possible tension based on the facts of a specific case. *See Croson*, 488 U.S. at 500; *United States v. Paradise*, 480 U.S. 149, 171 (1987); *Wygant*, 476 U.S. at 277 (plurality opinion).

Courts have adeptly applied narrow-tailoring in those instances where racial classifications in the housing context have been challenged. *Compare United States v. Starrett City Assocs.*, 840 F.2d 1096, 1103 (2d Cir. 1988) (striking down tenant selection procedure that utilized "rigid racial quotas of indefinite duration to maintain a fixed level of integration"), *with Jaimes v. Lucas Metro. Hous. Author.*, 833 F.2d 1203, 1206-07 (6th Cir. 1987) (upholding a

tenant selection plan for a municipal housing complex, which classified applicants based on their race).[7]

Thus, FHA disparate-impact enforcement presents no significant constitutional concerns as a general matter, and any specific remedies that involve racial classifications in the allocation of individual relief provided by government actors—unlike the less discriminatory alternatives proposed in this case—can be addressed through well-established mechanisms of judicial review.

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[7] In comparison, efforts to combat discrimination in employment are more likely than those in the FHA context to result in remedies that may be perceived as a "zero-sum" game, providing limited resources (*e.g.*, jobs, promotions) to certain individuals as opposed to others. In many cases, these "zero-sum" perceptions are inconsistent with the realities of workplace operations. *Cf.* Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 Ind. L.J. 63, 133-35 (2002). Regardless of whether these perceptions are accurate, however, strict scrutiny provides a means of rigorous case-specific review in the Title VII context as well, and therefore a wholesale constitutional repudiation is entirely unwarranted.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Third Circuit.

Respectfully submitted,

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