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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.*,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL FAIR HOUSING ALLIANCE, NATIONAL ASSOCIATION OF HISPANIC REAL ESTATE PROFESSIONALS, NATIONAL ASSOCIATION OF REAL ESTATE BROKERS, AND ASIAN REAL ESTATE ASSOCIATION OF AMERICA IN SUPPORT OF RESPONDENTS

MORGAN WILLIAMS
NATIONAL FAIR HOUSING ALLIANCE
1101 Vermont Ave. NW
Suite 710
Washington, D.C. 20005
(202) 898-1661

MICHAEL B. DE LEEUW
Counsel of Record
ALLY HACK
TAMAR WISE
COZEN O'CONNOR
45 Broadway
New York, NY 10006
(212) 908-1331
mdeleeuw@cozen.com

Attorneys for Amici Curiae

250259

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTERESTS OF THE AMICI[1]

The National Fair Housing Alliance ("NFHA") is the only national organization dedicated solely to ending discrimination in housing. NFHA works to eliminate housing discrimination and to ensure equal housing opportunity for all people through leadership, education and outreach, membership services, public policy initiatives, advocacy and enforcement. NFHA was founded in 1988 and is headquartered in Washington DC. Today, NFHA is a consortium of more than 220 private, non-profit fair housing organizations, state and local civil rights agencies and individuals from throughout the United States. As NFHA represents fair housing professionals, including real estate professionals who may experience housing, lending, or insurance discrimination in their daily work, it has a direct interest in the types of claims cognizable under the Fair Housing Act ("FHA" or "Act"). Amici are dedicated to ensuring equal and fair access to housing and are therefore vitally interested in the ability of plaintiffs to bring disparate impact claims under the Act.

The National Association of Hispanic Real Estate Professionals ("NAHREP") is a membership organization made up of multicultural real estate professionals dedicated to increasing the rate of sustainable Hispanic homeownership and to serving the community at large. NAHREP is one of the largest

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[1] Petitioners' and Respondents' written letters of consent to amicus briefs have been lodged with the Clerk. Pursuant to Rule 37.6, counsel for amici authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity – other than amici, their members, and their counsel – contributed monetarily to the preparation or submission of this brief.

minority trade groups in the real estate industry and regularly addresses issues related to lending parameters, business practices and regulations that affect access to homeownership. NAHREP believes that strong consumer protection through laws like the Fair Housing Act is necessary to restore consumer and market confidence in homeownership.

The National Association of Real Estate Brokers ("NAREB") is a membership organization of predominately African American real estate professionals. Founded in 1947, NAREB is the nation's oldest and one of the largest minority real estate trade associations. NAREB was formed out of a need to secure the right to equal housing opportunities regardless of race, creed or color. Since its inception, NAREB has participated in advocacy efforts on behalf of minorities and fair housing for all.

The Asian Real Estate Association of America ("AREAA") is a nonprofit professional trade organization dedicated to promoting sustainable homeownership opportunities in Asian American communities by creating a powerful national voice for housing and real estate professionals that serve this dynamic market. Founded in 2003, AREAA is the only trade association dedicated to representing the interests of the Asian real estate market nationwide, and its membership represents a broad array of real estate, mortgage and housing-related professionals that serve the diverse Asian American market. AREAA advocates for policy positions at the national level that will reduce homeownership barriers facing the Asian-Pacific American community.

SUMMARY OF ARGUMENT

As a matter of public policy, open markets that are free of discrimination are critical to maintaining a healthy, robust real estate industry. Conversely, markets tainted by discrimination are inefficient and adversely affect all market participants. To this end, real estate developers and housing advocacy organizations have worked together as plaintiffs in FHA lawsuits to root out all forms of discrimination. *See, e.g.*, *Hallmark Developers, Inc. v. Fulton County, Ga.*, 466 F.3d 1276, 1279-80 (11th Cir. 2006) (private developer challenging city zoning ordinance); *Metropolitan Housing Development Corp. v. Village of Arlington Heights ("Arlington Heights")*, 558 F. 2d 1283, 1285-86 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978) (nonprofit developer challenging city's refusal to rezone property). Such cases often arise in response to the enactment of municipal zoning or housing codes that needlessly restrict the free movement of people and the efficient transfer of property. The availability of disparate impact claims under the FHA is therefore a keystone in combating discrimination in the housing market.

Moreover, disparate impact liability is consistent with the purpose of the Fair Housing Act, which was passed in the immediate aftermath of Dr. Martin Luther King Jr.'s assassination and at a time of increasing concern that the United States was "moving towards two societies, one black, and one white—separate and unequal." *Report of the National Advisory Commission on Civil Disorders* ("*Kerner Report*") 1 (1968). The Act's expansive purpose is to provide "fair housing throughout the United States." 42 U.S.C. § 3601. Thus, the Act must be construed so as to advance the "broad remedial intent of Con-

gress." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982). But with or without a broad construction, the legislative history of the FHA strongly supports the use of disparate impact analysis in cases brought under the FHA. Every circuit court that has considered the issue has held that disparate impact claims exist under the FHA. *See, e.g.*, *Mt. Holly Gardens Citizens in Action v. Township of Mount Holly*, 658 F.3d 375, 384 (3d Cir. 2011) ("All of the courts of appeal that have considered the matter . . . have concluded that plaintiffs can show the FHA has been violated through policies that have a disparate impact.").

In line with the circuit courts, the Department of Housing and Urban Development ("HUD") as the agency charged by Congress to interpret the Act, recently issued a final rule codifying HUD's longstanding acknowledgement of disparate impact as a form of liability under the FHA. *See Implementation of the Fair Housing Act's Discriminatory Effects Standard: Final rule*, 78 Fed. Reg. 11460-11482 (Feb. 15, 2013), 24 C.F.R Part 100. HUD's final rule is a reasonable construction of the Fair Housing Act and thus is entitled to deference under *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984) (holding that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer").

ARGUMENT

I. OPEN MARKETS, FREE FROM DISCRIMINATION, ARE CRITICAL TO THE PROSPERITY OF THE REAL ESTATE INDUSTRY

Where discrimination occurs, it distorts and limits access to markets. It not only harms those who are the specific victims of the discrimination but also hurts all who participate or want to participate in those markets. For that reason, developers and others in the real estate industry have, on many occasions, brought suits under the FHA to combat overt and covert discrimination and arbitrary practices with discriminatory effects. For example, in *Greater New Orleans Fair Housing Action Center. v. St. Bernard Parish* ("*St. Bernard*"), a developer and a non-profit housing organization joined together in bringing an action challenging a moratorium on the construction of multi-family housing in the parish. The Plaintiffs proceeded under the FHA and also sought to enforce a prior consent decree that had settled a previous fair housing claim relating to the post-Katrina enactment of a "blood relative ordinance," which restricted residents from renting to anyone other than blood relatives. *See* 641 F. Supp. 2d 563, 565-66 & 565 n.1 (E.D. La. 2009) (describing the initial action and defendants' later violations of the consent order). In the underlying action, one of the plaintiffs' claims alleged that the "colorblind" ordinance had a disparate impact under the FHA because it effectively locked blacks out of the 93 percent white parish.[2] In the consent decree enforcement action, the court found that the moratorium on the development of multi-family dwellings also had a dis-

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

parate impact on African Americans. *Id.* at 565-67, 574.

a. Discrimination Creates Inefficiencies in Housing and Financial Markets

For more than fifty years, economists have studied the negative impacts of discrimination on free markets. In 1957, economist Gary Becker published a groundbreaking work on the impact of discrimination on economic markets. Gary S. Becker, *The Economics of Discrimination* (2d ed. 1971). In it, he provided the first systematic effort to use economic theory to analyze the effects of prejudice on the earnings, employment and occupations of minorities. Since then, many studies have built on his work. *See, e.g.*, David Rusk, *The "Segregation Tax": The Cost of Racial Segregation to Black Homeowners*, (The Brookings Institution 2001), *available at* http://www.brookings.edu/~/ media/Files/re/reports/2001/10metropolitanpolicyrusk/rusk.pdf (finding that in the 100 largest metropolitan areas, black homeowners receive 18 percent less value for their homes than white homeowners); John Yinger, *Closed Doors, Opportunities Lost: The Continuing Cost of Housing Discrimination* 98-103 (1995) (estimating the annual cost of discrimination in the mid-1990s housing market at $2.0 billion for Blacks and $1.2 billion for Hispanics).

In fact, Alan Greenspan, while Chairman of the Federal Reserve, observed that, quite simply, discrimination is bad for business[3]:

[3] The Court also recently noted that the financial benefits of diversity and integration are "not theoretical but real, as major

> Discrimination is against the interests of business — yet business people too often practice it. To the extent that market participants discriminate, they erect barriers to the free flow of capital and labor to their most profitable employment, and the distribution of output is distorted. In the end, costs are higher, less real output is produced, and national wealth accumulation is slowed. By removing the non-economic distortions that arise as a result of discrimination, we can generate higher returns to both human and physical capital.

Remarks by Alan Greenspan, "*Economic Challenges in the New Century*," before the Annual Conference of the National Reinvestment Coalition (March 22, 2000), *available at* http://www.federalreserve.gov/boarddocs/ speeches/2000/20000322.htm.

The negative financial consequences of segregation and discrimination have been well documented. *See, e.g.*, Alan Berube & Bruce Katz, *Katrina's Window: Confronting Concentrated Poverty Across America* (The Brookings Institution 2005), *available at* http://www.brookings.edu/~/media/Files/re/reports/2005/10poverty_berube/20051012_Concentratedpoverty.pdf (discussing the relationship between segregation and concentrated poverty); Thomas M. Shapiro, *The Hidden Cost of Being African American:* How Wealth

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American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Grutter v. Bollinger*, 539 U.S. 306, 330-31 (2003).

Perpetuates Inequality, 105-25 (2004) (discussing how segregation and discriminatory financing contribute to wealth inequality). The hyper-segregation of blacks and Latinos in urban areas has also led to inferior access to public services, education, jobs and transportation, all of which have a negative economic impact. *See American Apartheid,* 148-85. "[B]arriers to spatial mobility are barriers to social mobility, and where one lives determines a variety of salient factors that affect individual well-being: the quality of schooling, the value of housing, exposure to crime, the quality of public services, and the character of children's peers." *Id.* at 150.

Segregation also contributes to wealth inequality, since, for example, American familial wealth is closely tied to home values and homes located in neighborhoods with high concentrations of nonwhites tend to be undervalued.[4] *See generally* Melvin L. Oliver & Thomas M. Shapiro, *Black Wealth / White Wealth* 6-7 (1997). And discrimination in housing and mortgage markets impose significant costs on minority households when they search for houses to purchase, "whether or not [they] actually encounter discrimination." John Yinger, *Cash in Your Face: The Cost of Racial and Ethnic Discrimination in Housing*, 42 J. URB. ECON. 339, 340 (1997).

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[4] In the aftermath of the foreclosure crisis, communities of color have experienced a disproportionate loss of wealth. Between 2005 and 2009, median wealth adjusted for inflation fell by 66 percent among Latino households and 53 percent among African-American households, compared with 16 percent among white households. Rakesh Kochhar et al., Pew Research Ctr., *Twenty-to-One: Wealth Gaps Rise to Record Highs Between Whites, Blacks and Hispanics* 1 (2011) *available at* http://www.pewsocialtrends.org/.files/2011/07/SDTWealth-Report_7-26-11_FINAL.pdf.

b. Disparate Impact Liability Promotes Efficiency in the Financial and Housing Markets

Often the only way to weed out facially neutral but nonetheless discriminatory practices in housing markets—and thus improve those markets for all participants—is for market participants to pursue disparate impact claims where appropriate. It is hard (though not impossible) to imagine in 2013 that a federal agency, state government, local municipality, planning board, or private firm would support an overtly discriminatory, Jim Crow-style housing policy.[5] But that is not to say that housing discrimination has been eradicated—far from it.

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[5] Of course, amici are well-aware that intentional discrimination in violation of the FHA continues to exist. *See, e.g.*, *United States v. Beck*, No. 09-CV-1143, Consent Decree and Order (D. Minn. Feb. 28, 2011), *available at* http://www.justice.gov/crt/about/hce/documents/becksettle.pdf (settling case in which landlord refused to rent to an African American); *United States v. Biswas*, No. 09-cv-683, Consent Decree and Order (M.D. Ala. Feb. 3, 2011), *available at* http://www.justice.gov/crt/about/hce/documents/biswassettle.pdf (settling case wherein landlords admitted to white testers that they had adopted rental policies intended to discourage African-American applicants). *United States, NFHA & LIHS v. Uvaydov*, No. 09-04109, Settlement Agreement and Order (E.D.N.Y. Oct. 21, 2010), *available at* http://www.justice.gov/crt/about/hce/documents/uvaydovsettle.pdf (settling lawsuit which alleged that defendants had expressed a desire not to rent to African Americans); *Regional Economic Community v. City of Middletown*, 294 F. 3d 35, 48-52 (2d Cir. 2002) (finding triable issues of facts as to whether the city intentionally discriminated based on disability); *Kormoczy v. HUD*, 53 F. 3d 821, 823-25 (7th Cir. 1995) (upholding administrative law judge decision that defendants had intentionally discriminated based on familial status).

Discrimination and segregation endure for two main reasons. First, "because clever men may easily conceal their motivations . . . ." *Black Jack*, 508 F.2d at 1185 (citations omitted). Defendants today are less likely to discriminate blatantly than they were in the past. Disparate impact claims are therefore vital in stopping facially-neutral policies that have the same discriminatory effects as Jim Crow laws.

Second, even in the absence of "clever" machinations, courts have recognized that "the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme." *Id.* Or as Saint Bernard of Clairvaux put it, "hell is full of good wishes and desires." The ability to prosecute disparate impact claims is therefore necessary because it allows plaintiffs to pursue FHA lawsuits that would not otherwise survive as disparate treatment claims alone. *See, e.g.*, *Oti Kaga, Inc. v. S.D. Hous. Dev. Auth.*, 342 F.3d 871, 883 (8th Cir. 2003) (denying plaintiff developer's disparate treatment claim for lack of evidence, but remanding a disparate impact claim for further consideration); *Arlington Heights*, 558 F. 2d at 1287- 88 (rejecting plaintiffs' disparate treatment claim, but remanding the disparate impact claim, and emphasizing the differences between the two). "A 21st century local government bureaucrat or elected official did not create racial segregation in housing, but he or she can virtually guarantee its perpetuation, with or without discriminatory purpose, by simply engaging in practices that help maintain the residential status quo." Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Dis-*

parate Impact Claims under the Fair Housing Act , 63 AM. U. L. REV. at 65 (forthcoming Dec. 2013).

In the interest of supporting open markets, real estate developers often bring FHA suits against municipalities. In such suits, it can be difficult to divine the intent of municipal legislators or planners who adopt rules with discriminatory effects. And "[o]ften, such rules bear no relation to discrimination upon passage, but develop into powerful discriminatory mechanisms when applied." *See Huntington*, 844 F.2d at 935. Because it lacks an intent requirement, a disparate impact claim is more likely to survive to weed out policies or practices with a discriminatory effect that bear no relation to legitimate or bona fide concerns. *See, e.g., NSP Dev., Inc. v. City of Newberg*, No. 96–1450-HA, 2000 WL 900474, at *8-12 (D. Or. Jan. 21, 2000) (allowing a developer's disparate impact claim to continue, but rejecting its disparate treatment claim because of a lack of direct evidence of discriminatory intent); *Hispanics United of DuPage County v. Village of Addison*, Ill., 988 F. Supp. 1130, 1154-57 (N.D. Ill. 1997) (granting consent decree and concluding that plaintiffs, landlords and tenants, presented facts that "could have shown discriminatory effect").

Disparate impact analysis is necessary to guard against the passage of similar "neutral" laws with discriminatory results that restrict market access and decrease efficiency. The ability to pursue disparate impact claims therefore is essential to the efficient operation of housing markets and to combat-

ing public or private actions that distort those markets.[6]

Certainly, the broader integration goals of the FHA are also best served by disparate impact claims, which recognize "[e]ffect, not motivation, [as] the touchstone because a thoughtless housing practice can be as unfair to minority rights as a willful scheme." *Mount Holly*, 658 F.3d at 385 (*quoting Smith v. Anchor Bldg. Corp.*, 536 F.2d 231, 233 (8th Cir. 1976))

Several of the *amicus* briefs filed in support of Petitioners describe the *sturm und drang* that will ensue if the Court upholds disparate impact liability as a viable theory under the FHA. The American Insurance Association argues that disparate impact liability would "undermine the foundational principles of sound insurance practice more generally, calling into question insurer's ability to adequately insure against risk." *See* Am. Ins. Ass'n. Br. at 10. The Consumer Data Industry Association claims that "[T]his Court's ratification of disparate impact liability will open a floodgate of potentially ruinous litigation over a variety of routine tenant screening practices." *See* Consumer Data Indus. Ass'n. Br. at 21. The National Leased Housing Association warns

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[6] The elimination of disparate impact liability may endanger other forms of FHA liability, such as the Seventh Circuit's "exploitation theory" wherein "the plaintiffs must show that (1) as a result of racial segregation, dual housing markets exist, and (2) defendant sellers took advantage of this situation by demanding prices and terms unreasonably in excess of prices and terms available to white citizens for comparable housing." *Honorable v. Easy Life Real Estate Sys.*, 100 F. Supp. 2d 885, 886-87 (N.D. Ill. 2000) (citing *Clark v. Universal Builders, Inc.*, 706 F.2d 204, 206 (7th Cir. 1983)).

that "the prospect of disparate impact claims may prevent housing providers, lenders and others from adopting policies that are needed to maintain their balance sheets and the integrity of the Nation's financial system." Nat'l Leased Housing Ass'n. Br. at 12.

These dire warnings, however, ignore the fact that we already live in a world where every circuit court that has addressed the issue has found that disparate impact liability exists under the FHA—and HUD, along with other federal agencies have also long recognized disparate impact liability without the calamitous results predicted by those amici. *See, e.g.,Township of Mount Holly*, 658 F.3d 375, 384; *see also* 78 Fed. Reg. 11462 (2013).

Furthermore, the mere existence of disparate impact liability does not create some sort of strict liability, as some amici have suggested. Where a plaintiff has made out a prima facie case under a disparate impact theory, the defendant can still avoid liability by demonstrating that the "challenged practice is necessary to achieve one or more of its substantial, legitimate, nondiscriminatory interests." Final Rule, 78 Fed. Reg. 11460-11482 (2013). The existence of disparate impact liability under the FHA does not interfere with legitimate nondiscriminatory interests, such as the assessment of risk in selling housing insurance or in lending practices.

II. THE FAIR HOUSING ACT AUTHORIZES DISPARATE IMPACT CLAIMS

Before the enactment of the FHA, this Court had addressed fair housing in several landmark cas-

es. *See*, *e.g.*, *Jones v. Alfred Mayer Co.*, 392 U.S. 409 (1968) (Thirteenth Amendment gives Congress the power to stop private acts of racial discrimination); *Reitman v. Mulkey,* 387 U.S. 369 (1967) (invalidating a facially-neutral state law that codified private sellers' "right to discriminate"). Most notably, in *Shelley v. Kraemer*, this Court prohibited the enforcement of racially restrictive housing covenants. 334 U.S. 1 (1948).

The FHA created a framework to tackle the problem of housing discrimination, both private and public at the federal, state and municipal levels. The Act sought to root out both plainly intentional discriminatory acts and seemingly "neutral" policies that allowed housing segregation to continue nationwide. *See*, *e.g.*, *The Future of Fair Housing: Report of the National Commission on Fair Housing and Equal Opportunity* ("*Cisneros / Kemp Report*") 8-9 (Dec. 2008), *available at* http://www.nationalfairhousing.org/Portals/33/reports/Future_of_Fair_Housing.PDF (discussing how, until the 1960s, federally-backed mortgages were rarely available to "transitional," racially mixed, or minority neighborhoods); Douglas Massey & Nancy Denton, *American Apartheid* 42-57 (1993) (discussing how, through the 1950s, African Americans were often displaced by federally-funded urban renewal projects and then relocated to public housing that was, by law or custom, segregated); *Kerner Report* 467-82 ("Until 1949, [the Federal Housing Administration's] official policy was to refuse to insure any unsegregated housing."). The Fair Housing Act was aimed at reversing this trend.

Senator Edward Brooke, a key drafter of the legislation alongside Senator Walter Mondale, undoubtedly saw the FHA as a means of addressing these institutionalized forms of segregation:

> Today's Federal housing official commonly inveighs against the evils of ghetto life even as he pushes buttons that ratify their triumph — even as he ok's public housing sites in the heart of Negro slums, releases planning and urban renewal funds to cities dead-set against integration, and approves the financing of suburban subdivisions from which Negroes will be barred. These and similar acts are committed daily by officials who say they are unalterably opposed to segregation, and have the memos to prove it. . . . But when you ask one of these gentlemen why, despite the 1962 fair housing Order, most public housing is still segregated, he invariably blames it on regional custom, local traditions, personal prejudices of municipal housing officials.

114 Cong. Rec. 2,281 (1968).

Forty years after the FHA's enactment, many of the public and private practices that so troubled its drafters still exist. *See, e.g.*, *Cisneros / Kemp Report* 8, 33 (describing the historical and continuing practices of "redlining," denying credit or insurance to certain geographic areas, and "reverse redlining," targeting areas for predatory lending); U.N. Comm. on the Elimination of Racial Discrimination, *Con-*

cluding Observations of the Committee on the Elimination of Racial Discrimination, U.N. Doc. CERD/C/USA/CO/6 (Feb. 2008), *available at* http://www2.ohchr.org/english/bodies/cerd/docs/co/CERD-C-USA-CO-6.pdf (finding that African Americans and Hispanics are disproportionately concentrated in poor areas characterized by limited employment opportunities and inferior schools); *Discrimination in Metropolitan Housing Markets: National Results from Phase 1, Phase 2, and Phase 3 of the Housing Discrimination Study* (Mar. 2005), *available at* http://www.huduser.org/portal/publications/hsgfin/hds.html (reporting on the results of HUD tests wherein African Americans and Hispanics were "steered" away from units that were available to whites). The FHA continues to be an important tool for combating these discriminatory practices. *See, e.g.*, *Greater New Orleans Fair Hous. Action Ctr., et al. v. HUD,* et al., No. 1:08-1938, Settlement (D.D.C. July 7, 2011), *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=RoadHomeSettlement.pdf (settling an FHA suit that challenged a HUD formula used to allocate grants to Louisiana homeowners that had a disparate impact on African Americans); *United States ex rel. Anti-Discrimination Ctr. v. Westchester County*, 668 F. Supp. 2d 548 (S.D.N.Y. 2009) (finding that the county had repeatedly falsely certified compliance with its affirmative obligation to integrate housing under the FHA); *Thompson v. HUD*, 348 F. Supp. 2d 398, 524 (D. Md. 2005) (finding that HUD violated the FHA by failing to ameliorate racial segregation in Baltimore); *Nat'l Fair Hous. Alliance, Inc. v. Prudential Ins. Co.*, 208 F. Supp. 2d 46 (D.D.C. 2002) (finding triable issues of fact as to whether defendants engaged in redlining that had a disparate im-

pact on African Americans and Hispanics); *Hargraves v. Capital City Mort. Corp.*, 140 F. Supp. 2d 7, 21-22 (D.D.C. 2000) (finding reverse redlining cognizable as an FHA disparate impact claim).

a. Disparate Impact Claims Further the Purposes of the Fair Housing Act

The FHA was designed to replace America's segregated neighborhoods with "truly integrated and balanced living patterns." 114 Cong. Rec. 3,422 (1968) (statement of Sen. Mondale) (quoted in *Trafficante*, 409 U.S. at 211). The Act's stated purpose is "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. It also mandates that "[a]ll executive departments and agencies shall administer their programs . . . in a manner affirmatively to further the purposes of this title." 42 U.S.C. § 3608(d).

Fostering *integration* in housing was the primary goal of the FHA—not solely the elimination of intentionally discriminatory practices. *See, e.g.*, *Otero v. NYC Hous. Auth.*, 484 F.2d 1122, 1133 (2d Cir. 1973) ("We agree with the parties and with the district court that the Authority is under an obligation to act affirmatively to achieve integration in housing."). The promotion of integration necessarily requires attention to the *results* of current and prior practices in housing, which in turn requires the assessment of disparate impacts:

> [T]here are two types of discriminatory effects which a facially neutral housing decision can have: The first occurs when that decision has a greater adverse impact on one racial group

> than on another. The second is the effect which the decision has on the community involved; if it perpetuates segregation and thereby prevents interracial association it will be considered invidious under the Fair Housing Act.

Graoch Associates # 33, L.P. v. Louisville / Jefferson County Metro Human Relations Comm'n, 508 F.3d 366, 378 (6th Cir. 2007) (citations and internal quotation marks omitted).

Just as the Court found in *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971), with regard to Title VII of the Civil Rights Act of 1964, and in S*mith v. City of Jackson*, 544 U.S. 228 (2005), with regard to the ADEA, Congress passed the FHA to attack not just intentional discrimination but segregation in all forms—even segregation that is the result of seemingly neutral policies. The ability to pursue disparate impact claims is therefore essential to meeting this congressional mandate and promoting fair housing. And, indeed, the interpretation of federal agencies and the legislative history of the Act reflects that very concern.

b. HUD's Final Rule is Entitled to Chevron Deference

On February 15, 2013, HUD issued a final rule concerning the FHA's discriminatory effects standard (the "Final Rule"). In doing so, HUD interpreted the Act to prohibit conduct that has discriminatory effects regardless of evidence of intent. See Implementation of the Fair Housing Act's Discriminatory Effects Standard: Final Rule, 78 Fed. Reg. 11460-11482 (Feb. 15, 2013), 24 C.F.R Part 100. This Court

has repeatedly held that final rules issued by agencies pursuant to authority granted by Congress are entitled to broad deference under the principles articulated in *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984).

Under the Department of Housing and Urban Development Act, HUD has general rulemaking authority to enact such rules and regulations as may be necessary to carry out its functions, powers, and duties. *See* 42 U.S.C. 3535(d).[7] In addition, Section 815 of the Act provides that the Secretary may make rules to carry out the Fair Housing Act. 42 U.S.C. 3614a.

The Final Rule makes clear that HUD "has long interpreted the Act to prohibit housing practices with a discriminatory effect, even where there has been no intent to discriminate." *Implementation of the Fair Housing Act's Discriminatory Effects Standard: Final Rule*, 78 Fed. Reg. 11460-11482 (Feb. 15, 2013), 24 C.F.R Part 100. The Final Rule recognizes the validity of disparate impact claims in FHA cases and reinforces HUD's long-established reasonable interpretation of the FHA as covering all actions with discriminatory effect, regardless of intent. *See* Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Dis-*

[7] Contrary to the arguments set forth in the amicus briefs of APA Watch (APA Watch Br. at 9-13) and The National Leased Housing Association, et al. (Nat. Leased Hosuing Assn. Br. at 25-28), HUD is well within its enabled powers to establish uniform standards for determining when a housing practice with discriminatory effect violates the Fair Housing Act. HUD is not creating a new right of action but rather clarifying the preexisting right already spelled out in the statute. 24 C.F.R. § 100.500(c)(3)).8.

parate Impact Claims under the Fair Housing Act , 63 AM. U. L. REV. at 65 (forthcoming Dec. 2013). As "HUD emphasizes in its preamble to the final rule, "HUD is not proposing new law in this area."" *Id.* at 52 (citing to 78 Fed. Reg. 11462 (2013)). Rather, "this final rule embodies law that has been in place for almost four decades and that has consistently been applied, with minor variations, by HUD, the Justice Department and nine other federal agencies, and federal courts." 78 Fed. Reg. 11462 (2013). *See also HUD v. Mountain Side Mobile Estates P'ship*, Nos. 08-92-0010-108-92-0011-1, 1993 WL 307069, at *5 (HUDALJ July 19, 1993), *aff'd in relevant part*, 56 F.3d 1243, 1250 (10th Cir. 1995)(noting that administrative courts have consistently found FHA liability under a disparate impact theory); *HUD v. Pfaff*, No. 10-93-0084-8, 1994 WL 592199, at *7-9 (HUD ALJ Oct. 27, 1994), *rev'd on other grounds*, 88 F.3d 739 (9th Cir. 1996) (same). These cases are also significant because *Chevron* deference can extend not only to final rules, but also to ALJ decisions—even where the agency has not gone through the formal rulemaking procedures.[8] *See, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 230 & n.12 (2001) ("[A]s significant as notice and comment is in pointing to *Chevron*

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[8] For example, HUD previously issued a memorandum to its field offices discussing the applicability of disparate-claims for female victims of domestic violence who are evicted due to "zero-tolerance" policies, under which the entire household is evicted for the criminal activity of one household member. Because the overwhelming majority of domestic violence victims are women, it is women who are disproportionately affected by such policies. *See* Memorandum from Sarah Pratt, HUD Deputy Assistant Secretary for Enforcement and Programs, to Fair Housing and Equal Opportunity Regional Directors 5-6 (Feb. 9, 2011), *available at* http://www.hud.gov/offices/fheo/library/11-domestic-violencememo-with-attachment.pdf.

authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded."). And, in 1994, as a precursor to HUD's adopting the final rule in 2013, HUD joined with other federal agencies to adopt the "Interagency Policy Statement on Discrimination in Lending," which recognized disparate impact liability under the FHA. 59 Fed. Reg. 18,266, 18,269-70 (Apr. 15 1994).

The Final Rule and the longstanding, consistent interpretation that it embodies are clearly entitled to *Chevron* deference. "In *Chevron*, this Court held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (citing *Chevron*, 467 U.S. 837 at 842-845). Under *Chevron*, "the Court ordinarily defers to an administering agency's reasonable statutory interpretation," *Meyer v. Holley*, 537 U.S. 280, 287-88 (2003); *see also Smith*, 544 U.S. at 243-47 (Scalia, J. concurring in part and in the judgment). The Final Rule was adopted through the regulatory comment and rule making process; and, almost by definition it is a reasonable interpretation of the statute since it is in accordance with the vast majority of federal courts that have considered the issue and with HUD's own longstanding understanding of the FHA. It is therefore entitled to the broad deference described in *Chevron.*

c. The Legislative History of the Fair Housing Act Support the Existence of Disparate Impact Claims.

Floor statements by numerous lawmakers surrounding the enactment of the FHA also indicate congressional intent that the Act would address discriminatory effects as well as intentional discrimination.[9] Senator Walter Mondale, the Act's principal sponsor, noted that, despite prohibitions already in place against certain explicit segregation, "local ordinances *with the same effect*, although operating more deviously to avoid the Court's prohibition, were still being enacted . . . . [I]t seems only fair, and is constitutional, that Congress should now pass a fair housing act to *undo the effects*" of government-sanctioned discrimination. 114 Cong. Rec. 2,699 (1968) (emphasis added). Another supporter of the Act, Senator Edward Brooke, added that merely requiring race-neutral housing practices is inadequate because African Americans in particular were "surrounded by a pattern of discrimination based on individual prejudice, often institutionalized by business and industry, and Government practices." *Id.* at 2,526. The emphasis on remedying longstanding and pervasive residential segregation and its effects on minority groups strongly implies that Congress intended to cure those ills by including disparate impact liability in the Fair Housing Act.

The Senate's rejection of the Baker amendment similarly reinforces congressional intent to rec-

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[9] Senator Mondale described ways in which the Act would remedy the discriminatory effects of facially race-neutral ordinances and policies. The fact that Senators Mondale and Brooke, key sponsors of the FHA, promoted the Act as a means of preventing intentional discrimination does not imply that this was the Act's only function. Rather, their additional statements reveal that the Act is broad enough to cover *both* disparate treatment and disparate impact claims.

ognize disparate impact claims. The Baker amendment would have exempted from liability any homeowner hiring a real estate agent "without indicating any preference, limitation or discrimination based on race . . . or an intention to make any such preference, limitation, or discrimination." *Id.* at 5,214. Senator Percy was among the many FHA supporters who objected to the amendment, pointing out that it would require proof of a seller's specific racial preference, and that such proof "would be impossible to produce." *Id.* at 5,216. The Baker amendment was ultimately defeated, illustrating the sentiment that requiring proof of discriminatory intent would be inconsistent with the broad scope of the FHA and its goal of advancing housing integration.

d. The 1988 Amendments

In the twenty years following the passage of the Fair Housing Act, every federal appeals court to consider the question of the availability of disparate impact liability has held that such claims are cognizable under the Act. *See, e.g., Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934-36 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 146-48 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982); *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Arthur v. City of Toledo*, 782 F.2d 565, 574-75 (6th Cir. 1986); *Arlington Heights*, 558 F.2d at 1290; *United States v. City of Black Jack* ("*Black Jack*"), 508 F.2d 1179, 1184-85 (8th Cir. 1974), *cert. denied*, 422 U.S. 1043 (1975); *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1311 (9th Cir. 1982); *United States v. Marengo County Comm'n*, 731 F.2d

1546, 1559 n.20 (11th Cir.), *cert. denied*, 469 U.S. 976 (1984).

Congress passed the FHAA in 1988 to add new prohibitions against familial status discrimination and disability; however, the operative language of the FHA remained the same. *See* Pub. L. No. 100-430, § 6(a)-(b) (1988); amended § 3604. Under such circumstances, Congress is "presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978); *see also Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2494 n.11 (2009) ("When Congress amended [the relevant legislation] without altering the text of [the relevant provision], it implicitly adopted [this Court's] construction" of that provision.). Just as in *Lorillard*, Congress was aware in 1988 that "every court to consider the issue" of whether disparate impact claims exist under the FHA had held that they do. *Lorillard*, 434 U.S. at 580. Thus, by passing the 1988 amendments without substantial change to the language, Congress ratified the existence of disparate impact liability in fair housing cases.[10]

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[10] In 1980, during an earlier attempt to amend the FHA to add similar provisions as the FHAA, Senator Orin Hatch described the lack of an explicit intent requirement in both the original Act and the proposed amendment as a "major concern" and insisted that the government be required to "make some showing that the practice was adopted or continued or rejected for an unlawful purpose." 126 Cong. Rec. 31,171 (1980). However, sponsors of the amendment rejected the addition of an intent requirement that "would make a radical change in the standard of proof in title VIII cases." *Id.* at 31,164 (statement of Sen. Birch Bayh). Although the 1980 amendment failed, these dis-

The legislative history of the FHAA further supports the idea that Congress intended to preserve disparate impact claims. The House Judiciary Committee's Report on the FHAA discusses the "racially discriminatory effects" on minorities resulting from race-neutral adults-only housing ordinances as a source of liability, H.R. Rep. No. 100- 711, at 21 (1988),[11] and also discusses the Second Circuit's decision in *Huntington*, which upheld disparate impact claims. *See id.* at 90. In addition, the House Judiciary Committee rejected an amendment that would have imposed an explicit intent requirement to challenge a zoning decision. *See id.* at 89. Committee reports in the Senate similarly discussed the "strong consensus" in the Circuit Courts in recognizing disparate impact liability under the FHA before approving the 1988 amendments. *Fair Housing Amendments Act of 1987: Hearings on S. 558 Before the Subcomm. on the Constitution of the Sen. Comm. on the Judiciary* 529 (1987) (testimony and statement of Robert Schwemm); *see also id.* at 532-558. Thus, as in *Lorillard*, Congress "exhibited both a detailed knowledge of [the provisions of the 1968 Act] and their judicial interpretation and a willingness to depart from those provisions [was] regarded as undesirable." 434 U.S. at 581.

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cussions illustrate congressional awareness that some circuits had held that the Act included disparate impact claims.

[11] In its discussion of section 3604(f)'s ban on discrimination against disabled persons, which is substantially similar to section 3604(a), the Committee noted that the ban was "not limited to blatant intentional acts of discrimination" because acts "that have the effect of causing discrimination can be just as devastating as intentional discrimination" H.R. Rep. No. 100-711, at 25 (1988).

The legislative history of the FHA and the 1988 amendments demonstrate that the FHA encompasses disparate impact liability.

CONCLUSION

For the foregoing reasons, amici respectfully request that this Court defer to HUD's Final Rule and affirm the judgment of the court of appeals.

Respectfully submitted,

MICHAEL B. DE LEEUW
Counsel of Record
ALLY HACK
TAMAR WISE
COZEN O'CONNOR
45 Broadway
New York, NY 10006
(212) 908-1331
mdeleeuw@cozen.com

MORGAN WILLIAMS
NATIONAL FAIR HOUSING ALLIANCE
1101 Vermont Ave. NW
Suite 710
Washington, D.C. 20005
(202) 898-1661