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BRIEF FOR THE NATIONAL BLACK LAW STUDENTS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

Deborah N. Archer

Erika L. Wood

NEW YORK LAW SCHOOL RACIAL JUSTICE PROJECT

IMPACT CENTER FOR PUBLIC INTEREST LAW

No. 13-1371

In the Supreme Court of the United States

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

v.

THE INCLUSIVE COMMUNITIES PROJECT, INC.,
Respondent.

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

BRIEF FOR THE NATIONAL BLACK LAW STUDENTS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

Deborah N. Archer
Counsel of Record
Erika L. Wood
NEW YORK LAW SCHOOL RACIAL JUSTICE PROJECT
IMPACT CENTER FOR PUBLIC INTEREST LAW
185 West Broadway
New York, NY 10013
(212) 431-2138
Deborah.Archer@nyls.edu

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INTEREST OF *AMICUS CURIAE*

The National Black Law Students Association ("NBLSA") submits this brief as *amicus curiae* in support of Respondents, urging this Court to affirm the ruling of the United States Court of Appeals for the Fifth Circuit upholding the recognition of disparate impact claims under the Fair Housing Act.[1] NBLSA is a membership organization formed in 1968 to promote the educational, professional, political, and social objectives of Black law students. Today, NBLSA is the largest student-run organization in the United States, with nearly 6,000 members, over 200 chapters in our nation's law schools, a growing pre-law division, and six international chapters or affiliates. NBLSA has an interest in this case because it is dedicated to advancing racial equality and challenging all forms of segregation.

SUMMARY OF ARGUMENT

After several years of failed attempts to pass fair housing legislation, in the wake of Dr. Martin Luther King Jr.'s assassination, Congress sought to provide "for fair housing throughout the United

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[1] Pursuant to Supreme Court Rule 37, this brief is filed with the written consent of all parties. The parties' consent letters are on file with the Court. This brief has not been authored, either in whole or in part, by counsel for any party, and no person or entity, other than *amicus curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief.

States" by enacting Title VIII of the Civil Rights Act of 1968, also known as the Fair Housing Act of 1968, 42 U.S.C. § 3601 (2006). While several Senators argued passionately for passage of the Fair Housing Act, Senator Edward Brooke, a co-author of the Act and the first Black person to be elected to the Senate by popular vote, spoke of his personal experience of returning from World War II and being unable to secure a home for his family because of his race. *See* 13 Cong. Rec. 21,628-30 (1967); *see also* Maurine Christopher, BLACK AMERICANS IN CONGRESS 232–33 (1976). The Fair Housing Act's other sponsor, Senator Walter Mondale, also spoke about the potential for a fair housing law to transform our communities:

> In the last few weeks, there has been talk of causes, cures, and civil rights. The proposed remedies are many. Their efficacy is uncertain. The truth is, it seems to me, that there is no one solution, but there are many solutions. Our cities are beset by a multitude of ills, which can be cured only by a multitude of remedies. But every solution and every plan for the multiple evils in our cities and their ghettos is drastically and seriously affected by racial segregation in housing. With high concentrations of low-income, poorly educated, and unemployed persons in our cities—and without dispersal or balance throughout our communities—our cities will never be able to solve the

> problems of de facto school segregation, slum housing, crime and violence, disease, blight, and pollution.

113 Cong. Rec. 22,841 (1967).

To address the many ills stemming from racial segregation, the Fair Housing Act's expansive mandate provides for a breadth of mechanisms to challenge discrimination in the housing market. Like other civil rights legislation of the 1960s, the Fair Housing Act seeks to eradicate the racial discrimination that motivates both blatantly discriminatory practices and policies that appear neutral on their face but operate to discriminate against racial minorities. *See* Olatunde C.A. Johnson, *The Agency Roots of Disparate Impact*, 49 Harv. C.R.-C.L. L. Rev. 125, 136 (2014) (arguing that "prevailing ideas of discrimination" include the disparate impact standard); Paul D. Moreno, *From Direct Action to Affirmative Action: Fair Employment Law and Policy in America 1933-1972*, 1 (1999). As this Court has long recognized, "a facially neutral practice, adopted without discriminatory intent, may have effects that are indistinguishable from intentionally discriminatory practices." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988). And if a facially neutral practice results in the same effects as a practice motivated by intentional discrimination, "it is difficult to see why [statutory] proscription[s] against discriminatory actions should not apply." *Id.* at 990–91.

ARGUMENT

I. The Fair Housing Act's Disparate Impact Standard is a Critical Tool to Achieving Integration and Combating the Systemic Racism and Implicit Biases that Continue to Infect the Housing Market.

Today, the United States remains a segregated country. Even in metropolitan regions with diverse populations, Americans live separated by race. This enduring segregation compels inequality; it contradicts every promise and principle embodied in the Civil Rights Act of 1968. The Fair Housing Act seeks to eradicate the discriminatory policies and practices that foster segregation in our country. Its expansive reach must remain intact in order to combat the intentional, systemic and implicit racial biases that continue to deny fair housing to all Americans.

In *United States v. City of Black Jack*, the United States Court of Appeals for the Eighth Circuit was the first court to explicitly recognize that the Fair Housing Act prohibited practices that had a racially disparate impact, in addition to instances of intentional discrimination. 508 F.2d 1179, 1182 (8th Cir. 1974). The court found that the Fair Housing Act was "designed to prohibit 'all forms of discrimination, sophisticated as well as simple-minded,'" *id.* at 1184 (quoting *Williams v. Matthews Co.*, 499 F.2d 819, 826 (8th Cir. 1974)), and that these "sophisticated" forms must include discrimination resulting from a disparate impact regardless of motivation. *Id.* Modeling its disparate

impact test on the standard under Title VII of the Civil Rights Act, the court found that "just as Congress requires 'the removal of artificial, arbitrary, and unnecessary barriers to employment on the basis of racial or other impermissible classification,' such barriers must also give way in the field of housing" particularly when the "clear result" is the perpetuation of segregation. *Id.* at 1184.

Among the United States Courts of Appeal that have considered the issue, there is unanimous support for the inclusion of disparate impact claims under the Fair Housing Act. *See 2922 Sherman Ave. Tenant's Ass'n v. District of Columbia*, 444 F.3d 673, 679 (D.C. Cir. 2006); *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49 (1st Cir. 2000); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 935–36 (2d Cir. 1988); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 146 (3d Cir. 1977); *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); *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977); *United States v. City of Black Jack*, 508 F.2d 1179, 1184–85 (8th Cir. 1974); *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1311–12 (9th Cir. 1982); *Mountain Side Mobile Estates P'ship v. Secretary of Hous. & Urban Dev.*, 56 F.3d 1243, 1251 (10th Cir. 1995); *United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1559 n.20 (11th Cir. 1984).

In 2013, by administrative action, the Department of Housing and Urban Development

(HUD) formally adopted the use of disparate impact under the Fair Housing Act, issuing a rule providing that "[l]iability may be established under the Fair Housing Act based on a practice's discriminatory effect . . . even if that practice was not motivated by a discriminatory intent." Implementation of the Fair Housing Act's Discriminatory Effect Standard, 78 Fed. Reg. 11,460, 11,482 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100) [hereinafter "Final Rule"]. Consistent with the Fair Housing Act's "broad and remedial intent," *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982), HUD has long interpreted the Fair Housing Act to prohibit practices that have a discriminatory effect, regardless of the intent behind those practices. In its preamble to the Final Rule, HUD explained that for the past twenty years it has "consistently concluded that the Act is violated by facially neutral practices that have an unjustified discriminatory effect." *See* 78 Fed. Reg. at 11,461 (Feb. 15, 2013) (citing a series of Administrative Law Judge opinions dating back to 1992). In addition to its administrative decisions, over the past two decades HUD has regularly issued guidance to its staff and the public that recognizes the discriminatory effects standard. *See id.* at 11,462. According to HUD, its Final Rule "embodies law that has been in place for almost four decades and that has consistently been applied . . . by HUD, the Justice Department and nine other federal agencies . . . ." *Id.*

Vigorous enforcement of the Fair Housing Act has effectively combatted most explicitly discriminatory housing practices, yet pervasive discrimination persists. *See infra* Part I.A.

Protection of the disparate impact cause of action is necessary to challenge this persistent discrimination and remedy the intentional, systemic and implicit biases that continue to motivate housing discrimination and foster residential segregation. Indeed, the disparate impact standard is the most effective tool to address today's most prevalent forms of racial discrimination. Modern racism is less often overt and explicit; it has evolved in light of new social norms and political realities. *See* discussion *infra* Part I.D. *See also* John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. Miami L. Rev. 1067, 1073–80 (1998); Deborah N. Archer, *There is No Santa Claus: The Challenge of Teaching the Next Generation of Civil Rights Lawyers in a "Post Racial" Society*, 4 Colum. J. of Race & L. 55, 56–57 (2013); Barbara J. Flagg, *"And Grace Will Lead Me Home": The Case for Judicial Race Activism*, 4 Ala. C.R. & C.L.L. Rev. 103, 105 (2013); William M. Wiecek & Judy L. Hamilton, *Beyond the Civil Rights Act of 1964: Confronting Structural Racism in the Workplace*, 74 La. L. Rev. 1095, 1101–03 (2014). The Fair Housing Act, designed to promote racial integration and to root out widespread discrimination in housing, should be interpreted in a manner that makes it possible to address all forms of discrimination. Under a solely intent-oriented approach, the most invidious housing practices are bound to evade its reach.

A. There Is Substantial Evidence that Systemic Racial Bias Illegally Results in the Denial of Fair Housing in Communities Throughout the Country.

Implicit in Petitioners' and their *amici*'s position is the notion that the United States has graduated from its discriminatory past to become a "post-racial" society, and therefore the most powerful tools furnished by civil rights legislation are no longer necessary. *See* Petr. Br. at 43 (discussing the "mandates" of colorblindness). This theme has also run through previous challenges to the Fair Housing Act's disparate impact protections. *See* Petitioner's Opening Brief at 39–42, *Twp. of Mount Holly, N.J. v. Mt. Holly Gardens Citizens in Action, Inc.*, 133 S. Ct. 2824 (2013) (No. 11-1507); Brief for Judicial Watch, Inc. as *Amicus Curiae* Supporting Petitioners at 10–12, *Twp. of Mount Holly, N.J. v. Mt. Holly Gardens Citizens in Action, Inc.*, 133 S. Ct. 2824 (2013) (No. 11-1507); Brief for Pacific Legal Foundation et al. as *Amici Curiae* Supporting Petitioners at 20–28, *Magner v. Gallagher*, 132 S. Ct. 1306 (2011) (No. 10-1032), 2011 WL 6949342. However, the concept of colorblindness, while laudable as a moral aspiration, fails to account for today's social realities.

Systemic racial bias continues to influence housing policies and practices in communities throughout the country. The consequences are far-reaching and long-lasting, negatively impacting communities' access to employment, education, transportation, environmental sustainability and health care for decades. Although our country has made progress, and the most blatant "door-slamming" forms of discrimination have declined, the discrimination that persists today raises the cost of housing and restricts housing opportunities for racial minorities throughout the country. *See* U.S. Dep't of Housing and Urban Dev., *Housing*

Discrimination against Racial and Ethnic Minorities 2012, xi (June 2013) [hereinafter HUD 2012 Report].

Throughout most of the twentieth century, discrimination by private real estate agents, rental property owners and lending institutions helped establish and sustain stark patterns of racial and ethnic segregation in neighborhoods across the country. *See* HUD 2012 Report at 1. When the Fair Housing Act was passed, Black families "were routinely—and explicitly—denied homes and apartments in [W]hite neighborhoods." *Id.* In 1977, HUD launched its first national "paired testing" study which found high levels of discrimination against Blacks, in both rental and sales markets. *Id.* The next study, in 1989, again found high levels of discriminatory treatment in both rental and sales markets. *Id.* That second study concluded that, "overall levels of discrimination against [B]lack homeseekers had not changed significantly since 1977, although its forms were changing to become more subtle and less easily detectable." *Id.* A third study in 2000 found that discrimination in housing sales had declined in the 1990s, but that trend "masked underlying changes in the patterns of discrimination." *Id.* at 2.

The fourth, and most recent study in 2012, confirms this trend. *Id.* at xi. Although racial minorities are less likely to face overt discrimination in the housing market than in previous decades, minority customers were shown fewer available units than Whites with similar qualifications. *Id.* According to the 2012 study, when differences in treatment occur, "[W]hite homeseekers are more

likely to be favored than minorities" and "minority homeseekers are told about and shown fewer homes and apartments than [W]hites." *Id.* Taken together, the findings of the 2012 study strongly suggest that "less easily detectable forms of discrimination persist, limiting the information and options offered to minority homeseekers." *Id.* at 68. As HUD Secretary Shaun Donovan explained, "just because [discrimination] has taken on a hidden form doesn't make it any less harmful." Shaila Dewan, *Discrimination in Housing against Nonwhites Persists Quietly, U.S. Study Finds*, N.Y. Times, June 12, 2013, at B3.

The disparate impact standard must remain a viable form of liability in order to allow the Fair Housing Act to continue to fulfill its "broad and remedial intent." *Havens Realty Corp.*, 455 U.S. at 380. HUD's Final Rule is particularly necessary to maintain protection against the less overt, but no less harmful, systemic bias that forms the basis of much of housing discrimination as it exists today. As noted in the Preamble to the Final Rule, "the effects standard gives HUD and fair housing advocates the tools to reveal the effects of racism, poverty, disability discrimination, and adverse environmental conditions on the health and well-being of individuals protected by the law." 78 Fed. Reg. at 11,465; *see also* Michael G. Allen, Jamie L. Crook, & John P. Relman, *Assessing HUD's Disparate Impact Rule: A Practitioner's Perspective*, 49 Harv. C.R.-C.L. L. Rev. 155, 156–57 (2014) (noting that over the Fair Housing Act's forty-five year history, courts have applied the disparate impact standard to a wide range of discriminatory

practices, including exclusionary zoning ordinances, the administration of Section 8 vouchers, lending practices, mortgage insurance policies, landlord and housing provider reference policies, occupancy restrictions, and the demolition and siting of subsidized housing).

B. The Fair Housing Act's Goal of Racial Integration Cannot Be Fully Realized Without Utilizing Disparate Impact Claims to Challenge Systemic Racial Discrimination.

Today's housing discrimination exacerbates racial segregation, the very social ill that the Fair Housing Act was intended to eliminate. Despite public awareness of its harms, "residential segregation remains a key feature of America's urban landscape." Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 Am. Soc. Rev. 629, 629 (2010). Disparate impact is an valuable tool for achieving racial integration because it moves beyond discrete incidents of intentional housing discrimination to address racially discriminatory policies and practices embedded in our current housing market.

Racial segregation in housing has shown only modest declines in each decanal census from 1970 to 2010. Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act's "Affirmatively Further" Mandate*, 100 Ky. L. J. 125, 131 (2011–12) [hereinafter *Overcoming Structural Barriers to*

Integrated Housing]. Indeed, racial segregation of neighborhoods has been intensifying in recent years. *See* Patrick Sharkey, *Stuck in Place: Urban Neighborhoods and the End of Progress toward Racial Equality* (illustrated ed. 2013). Black people remain the most racially segregated population in the nation. *See* john a. powell, *Reflections on the Past, Looking to the Future: The Fair Housing Act at 40*, 41 Ind. L. Rev. 605, 609 (2008). Nationally, 65 percent of the metropolitan Black population would have to relocate in order for them to become fully integrated in metropolitan regions. *Id.* And, in 2010, the typical White person lived in a neighborhood that was 75 percent White, 8 percent Black, 11 percent Latino, and 5 percent Asian. John R. Logan and Brian J. Stults, *The Persistence of Segregation in the Metropolis: New Findings From the 2010 Census* at 2–3 (2011), *available at* http://www.s4.brown.edu/us2010/Data/Report/report2.pdf. And, although an increasing number of minorities have moved to the suburbs, many are "simply re-segregated in separate communities within the suburbs." *Overcoming Structural Barriers to Integrated Housing*, *supra*, at 132 (quoting William H. Frey, Brookings Inst., Melting Pot Suburbs: A Census 2000 Study of Suburban Diversity 13 (2001)).

The long-term effects of residential segregation are layered and complex. Access to social and economic opportunity depends heavily on where one lives. powell, *supra*, at 609. "Housing location . . . has major implications for employment, education, democratic participation, transportation and child care." *Id.* Neighborhoods of concentrated

poverty disproportionately house minorities and offer few quality services and amenities. *Id.*

The direst consequences fall on the children growing up in these segregated neighborhoods. *See* Richard Rothstein, *Modern Segregation* 3 (Econ. Pol'y Inst. Mar. 6, 2014). Nationwide, low-income Black children have become increasingly isolated in segregated neighborhoods. *Id.* at 2. The percentage of Black students attending schools that are more than 90 percent minority has *grown* in the last twenty years, from about 34 percent to 40 percent. *Id.* at 3. Twenty years ago, Black students attended schools in which about 40 percent of their fellow students were low-income; today that number is about 60 percent. *Id.* As health, housing, and educational disadvantages accumulate, "lower social class children inevitably have lower average achievement than middle class children . . . . When a school's proportion of students at risk of failure grows, the consequences of disadvantage are exacerbated." *Id.* at 2. This continued isolation becomes a self-perpetuating cycle, making segregation an enduring social problem.

In sponsoring the Fair Housing Act, Senator Brooke understood the role of institutional and systemic racism in perpetuating 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.

114 Cong. Rec. 2281 (1968) (quoting Statement Concerning the Fair Housing Act of 1967, S. Comm. on Hous. and Urban Affairs, 90th Cong.). Later, Senator Brooks continued, "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, [and] personal prejudices of municipal housing officials." *Id.* at 2527-28. Congress clearly recognized that residential segregation was the root of many racial inequalities and fostered harmful effects. *See e.g.*, *id.* at 2529 (statement of Sen. Tydings) ("Racial discrimination in housing . . . is not conducive to good health, educational advancement, cultural development, or to improvement of general standards of living.").

This Court too has long recognized that the Fair Housing Act's prohibition of discrimination is "broad and inclusive," promoting integration as much as it prohibits discrimination. *See Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972); *see also Otero v. N.Y. City Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973) ("Action must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the

increase of segregation . . . ."); 42 U.S.C. §§ 3601, 3603. In reaching this conclusion, this Court noted that it is not just "[t]he person on the landlord's blacklist" that is the victim of discriminatory housing practices, but "the whole community." *Trafficante*, 409 U.S. at 211 (quoting 114 Cong. Rec. 2706 (Statement of Sen. Jacob K. Javits)). The Court has also recognized the harms of segregation to both minority victims of discrimination and White residents. *See Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 111 (1979) (recognizing the impact of housing discrimination on property values, education and professional opportunities).

Banning intentional racial discrimination alone will not achieve meaningful integration. The sponsors of the Fair Housing Act knew that segregation is born of both individual and systemic discrimination. Individual choice and intentional discrimination do contribute to residential segregation; but, the reality of institutional and systemic discrimination means that even facially race neutral policies or those without any evidence of intent can perpetuate racial segregation.

C. Disparate Impact Liability is a Necessary Tool to Combat Discrimination Disguised as Race Neutral Policies and Practices.

While many formal barriers to equal access to housing have been eliminated, invidious discrimination still infests the housing market. In *City of Black Jack*, the court found that "[e]ffect, and not motivation, is the touchstone [of the Fair

Housing Act], in part because clever men may easily conceal their motivations." 508 F.2d at 1185. While people may disguise their discriminatory animus, its existence is felt by minorities who still suffer the harms of the discrimination.

Disparate impact claims are a powerful tool for challenging and unmasking covert discrimination. They are a "prophylactic measure," necessary when deliberate discrimination is difficult to prove. *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 Harv. L. Rev. 493, 520 (2003); *see also* Cheryl I. Harris & Kimberly West-Faulcon, *Reading* Ricci*: Whitening Discrimination, Racing Test Fairness*, 58 U.C.L.A. L. Rev. 73, 114 (2010) (noting that "both defenders and detractors of disparate impact doctrine have characterized disparate impact as a mechanism for smoking out intentional discrimination that is cloaked in race-neutral selection processes."). As with employers under Title VII of the Civil Rights Act, landlords, sellers, banks and brokers should be presumed to "have intended the systematic results of [their] practice, so that a pattern of disparate impact raises a presumption of discriminatory intent sufficient to justify imposing liability." *See* Primus, *supra*, at 520. By "look[ing] beyond the form of a transaction," the disparate impact standard reaches "practices which actually or predictively result in racial discrimination." *Matthews Co.*, 499 F.2d at 826. This Court should not render the Fair Housing Act impotent against covert discrimination.

D. The Disparate Impact Standard Is Necessary to Challenge Implicit

Racial Bias Which Often Motivates Discrimination.

While the causes of persistent segregation are complex, the 2012 HUD study makes clear that implicit racial bias is a significant factor. *See, e.g.*, HUD 2012 Report at 55. In *City of Black Jack*, the court stated that "'whatever our law was once, . . . we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and public interests as the perversity of a willful scheme.'" 508 F.2d at 1185 (quoting *Hobson v. Hansen*, 269 F. Supp. 401, 497 (D.D.C. 1967)). The "thoughtless" discrimination the *City of Black Jack* court spoke of is akin to the implicit bias we see today. A great deal of contemporary racial discrimination is subconscious, or implicit. *See* Ralph R. Banks & Richard T. Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 Emory L. J. 1053, 1057 (2009) (noting that "[m]ost participants [in the Implicit Association Test] are found to have an implicit bias against African Americans. The overt racism of the Jim Crow era, the psychological research suggests, has given way to racial bias that is predominantly unconscious."); Primus, *supra*, at 532 (discussing subconscious racism in the context of employment discrimination); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161, 1164 (1995) (discussing subconscious racism in the context of employment discrimination); Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism infra*, 39 Stan. L. Rev. 317, 324-

26 (1987) (examining subconscious discrimination). As applied to the housing industry, some of the most pervasive discriminatory effects result from implicit racial biases. *See* Stacy E. Seicshnaydre, *The Fair Housing Choice Myth*, 33 Cardozo L. Rev. 967, 969, 997 (2012) (contesting the myth that "people of color simply prefer to live in highly segregated neighborhoods" and discussing how facially neutral zoning laws deprive minorities of meaningful housing options); Nancy A. Denton, *Segregation and Discrimination in Housing*, *in* A RIGHT TO HOUSING: FOUNDATION FOR A NEW SOCIAL AGENDA 77 (Rachel Bratt et al. eds., 2006) ("Contemporary housing choices do not reflect preferences so much as they reflect a structural system that was built on racism."); Joe R. Feagin, RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS 174 (3d ed., Routledge 2014) ("[B]lack families often do try to improve housing situations and services by seeking an apartment or home in predominantly white or racially integrated areas, yet frequently run into subtle or covert white opposition."). The Fair Housing Act should not be read to exclude this most prevalent form of racial bias.

Over the past several decades, cognitive science has successfully proven that racial bias is an organizing principle that takes little to no effort on the perceiver's part to manifest itself. *See* Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. Rev. 465, 520 (2010) (concluding that scientific evidence of implicit bias should "force us to see through the facile assumptions of colorblindness"); Timothy D. Wilson & Elizabeth W. Dunn, *Self-*

Knowledge: Its Limits, Value, and Potential for Improvement, 55 Ann. Rev. Psychol. 493, 494 (2004) (noting "several reasons why people are not an open book to themselves"). "Implicit biases are discriminatory biases based on implicit attitudes or implicit stereotypes. Implicit biases are . . . especially problematic[] because they can produce behavior that diverges from a person's avowed or endorsed beliefs or principles." Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 Cal. L. Rev. 945, 951 (2006). Among the implicit biases most often harbored by individuals are those related to race. *See generally* Malcolm Gladwell, *Blink: The Power of Thinking Without Thinking* (Little, Brown and Company, 1st ed. 2005). Indeed, a continually growing body of scientific research demonstrates that even the most well-intentioned advocates of facially neutral policies can nonetheless unconsciously fall prey to racially discriminatory biases. *See* Robert G. Schwemm, *Why Do Landlords Still Discriminate (and What Can Be Done About It)?*, 40 J. Marshall L. Rev. 455, 503 (2007) ("[P]sychological studies suggest that, even among people who do not consider themselves racially prejudiced, biased reactions are not unusual."). In short, subconscious biases can and do influence the decisionmaking of even the most well-intentioned people. Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 Ala. L. Rev. 741, 743 (2005) ("[c]ontemporary sociological and psychological research reveals that discriminatory biases and stereotypes are pervasive, even among well-meaning people.").

Beginning in the late 1980s, legal scholars and psychological researchers began to outline the foundations of implicit racial bias. For instance, in his seminal 1987 article *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, Professor Charles R. Lawrence posited that:

> Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional—in the sense that certain outcomes are self-consciously sought—nor unintentional—in the sense that the outcomes are random, fortuitous, and uninfluenced by the decisionmaker's beliefs, desires, and wishes.

Lawrence, *supra*, at 322.

Constrained as we are by the limits inherent to our own cultural experiences, "[t]here will be no evidence of self-conscious racism where the actors have internalized the relatively new American cultural morality which holds racism wrong or have learned racist attitudes and beliefs through tacit rather than explicit lessons." Lawrence, *supra*, at 343–44. Accordingly, "[t]he actor himself will be unaware that his actions, or the racially neutral feelings and ideas that accompany them, have racist origins." *Id.* at 344; *see also* Schwemm, *supra*, at 503 ("Because Americans' tendencies to hold prejudiced views toward racial minorities are often based on cultural sources of which we are unaware, it seems

inevitable that we will make race-based choices, particularly in spontaneous situations, for reasons we are not fully conscious of.").

In the nearly three decades since legal and social scholars began describing implicit bias, a robust body of scientific research has established the pervasive reality of this phenomenon. In fact, notwithstanding the substantial strides toward racial equality that America has made in the decades since enactment of the Fair Housing Act, "studies measuring implicit attitudes . . . have demonstrated that Americans harbor more negative attitudes toward racial minorities than we realize or are comfortable with," and that "implicit bias against [B]lacks and other minorities remains widespread, even as Americans profess to hold ever more benign attitudes on racial issues." Schwemm, *supra*, at 500; *see also* Equal Justice Society et al., *Lessons from Mt. Holly: Leading Scholars Demonstrate Need for Disparate Impact Standard to Combat Implicit Bias*, 11 Hastings Race & Poverty L. J. 241, 244 (2014) ("Contemporary social science research reveals that much [racial] discrimination is not intentional or even conscious."); Greenwald & Krieger, *supra*, at 966 ("[A] substantial and actively accumulating body of research evidence establishes that implicit race bias is pervasive and is associated with discrimination against African Americans.").

The existence of implicit racial bias helps explain why "[c]ases that involve overtly discriminatory policies or direct statements evidencing discrimination by a decision maker have declined in frequency during the past few decades,"

and why "[m]ost claims of discrimination concern concealed bias, where the plaintiff must prove discrimination by inference." Banks & Ford, *supra*, at 1073. Implicit bias accounts for the fact that,

> Racism in America is much more complex than either the conscious conspiracy of a power elite or the simple delusion of a few ignorant bigots. It is a part of our common historical experience and, therefore, a part of our culture. It arises from the assumptions we have learned to make about the world, ourselves, and others as well as from the patterns of our fundamental social activities.

Lawrence, *supra*, at 330.

Because decisionmakers are often "unaware that [their] actions, or the racially neutral feelings and ideas that accompany them, have racist origins," restricting legal recourse to injuries for which intent can be established substantially limits the extent to which present racial inequality can be redressed. *Id.* at 349. This is especially important in the context of the Fair Housing Act because "[s]tudies show that proving subjective intent is fundamentally incompatible with the way biases actually manifest physiologically—even in well-meaning people—and that subconscious biases drastically impact decision-making in a way that harms minority groups, including in housing." Equal Justice Society et al., *supra*, at 243. Housing discrimination is particularly troubling because it is "hard to detect, hard to prove,

and hard to prosecute." Ta-Nehisi Coates, *This Town Needs a Better Class of Racist*, The Atlantic, (May 1, 2014). Disparate impact is necessary to locate instances of implicit discrimination in the housing market, and to finally eliminate the segregation and racial inequality that still exist in many communities throughout the country.

If this Court concludes that requiring a finding of discriminatory intent will adequately address housing discrimination, "the problem of subconscious stereotypes and prejudices w[ill] remain" as a barrier to residential integration and equal housing opportunity. *Watson*, 487 U.S. at 990. "[A]ntidiscrimination laws that make deliberate intent a necessary element for imposing liability will systematically fail to reach the problem because there may be no conscious discriminatory intent to discover." Primus, *supra*, at 532–33 (discussing various perspectives on disparate impact's ability to address subconscious discrimination); *see also In re Employment Discrimination Litig. Against Ala.*, 198 F.3d 1305, 1321 (11th Cir. 1999) (explaining how disparate impact can reveal subconscious discrimination).

II. The Department of Housing and Urban Development Properly Recognized Disparate Impact Liability to Fulfill the Fair Housing Act's "Broad and Remedial" Purpose and to Respond to Implicit Biases and Systemic Housing Discrimination.

The disparate impact standard of liability has been a fundamental principle of anti-discrimination law since the Civil Rights Acts became law fifty years ago. Long before the disparate impact standard was formally adopted by this Court, the agencies responsible for implementing and enforcing the anti-discrimination laws consistently employed the standard to address discriminatory practices that resulted in a disproportionate impact on protected groups and individuals. Through both their formal role as designated by statute, and their functional role as the body most informed about the practical realities of how discrimination operates in communities across the country, agencies have played a critical role in developing and implementing disparate impact liability for decades. *See* Johnson, *supra*, at 133. In promulgating its Final Rule, HUD properly acknowledged the indispensable role disparate impact continues to play in realizing the goals of federal civil rights laws, and responded effectively to current discriminatory conditions that threaten fair housing across the country.

A. Administrative Agencies Have Long Relied on the Disparate Impact Standard to Implement and Enforce Anti-Discrimination Laws.

The Civil Rights Acts of 1964, 1965 and 1968 broadly prohibit discrimination in public accommodations, employment, voting, and housing. Yet the meaning of "discrimination" has always been left to the courts and administrative agencies to determine. Since they were first charged with

enforcing the Civil Rights Acts, various federal agencies have interpreted "discrimination" broadly to include effects and results under a disparate impact theory of liability. *See* Johnson, *supra*, at 136–37.

Title VI of the Civil Rights Act of 1964 provides, "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (2006). In enacting Title VI, Congress gave federal agencies the authority to determine whether recipients of federal funds were engaging in discrimination. *See* 42 U.S.C. § 2000d-1 (2006). Specifically, Title VI directed each federal department and agency responsible for extending federal financial assistance to programs or activities to "effectuate the provisions" of section 2000d. *Id.* In 1964, the first regulations promulgated under Title VI included an "effects" standard:

> A recipient . . . may not, directly or through contractual or other arrangements, utilize criteria or methods of administration *which have the effect of* subjecting individuals to discrimination because of their race, color, or national origin, or *have the effect of* defeating or substantially impairing accomplishment of the objectives of the program as respect

> individuals of a particular race, color, or national origin.

45 C.F.R. § 80.3(b)(2) (1965) (emphasis added). Professor Johnson explains that this regulation was first developed for the Department of Health, Education, and Welfare by a task force consisting of the White House, the Bureau of Budget, and the Civil Rights Commission. Johnson, *supra*, at 139. This regulation then served as a model for other federal agencies as they promulgated their own regulations to implement Title VI. *Id.* This "effects" standard remains in effect today as set forth in the Department of Health and Human Services Title VI regulations. *See* 45 C.F.R. § 80.3(b)(2) (2005).

Similarly, a theory of disparate impact liability was developed early in the design and implementation of Title VII, well before it was officially adopted by this Court in *Griggs v. Duke Power*, 401 U.S. 424 (1971). *See* Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 Fla. L. Rev. 251, 286–87 (Jan. 2011) (explaining that in the early 1960s, "[t]he idea that both invidious and neutral employment practices could cause discrimination was familiar to both public officials and activists seeking solutions to structural racial subordination."); *see also* Johnson, *supra*, at 134 ("The EEOC's interpretive actions stemmed from early recognition that interpreting [Title VII] as limited to intentional discrimination would make it ineffectual against a range of southern practices that had been adopted in wake of the 1964 Civil Rights Act.").

In the earliest days of its formation, the Equal Employment Opportunity Commission (EEOC) incorporated disparate impact liability into its enforcement regulations and guidance under Title VII. *See* Carle, *supra*, at 288–89, 294. For example, a 1966 EEOC administrative opinion explained, "where . . . the educational and testing criteria have the effect of discriminating and are not related to job performance, there is reasonable cause to believe that respondent, by utilizing such devices, thereby violates Title VII." *See id.* at 294 n.257 (citing Alfred W. Blumrosen, *Black Employment and the Law* 32 (1971)); *see also Griggs*, 401 U.S. at 433 n.9 (citing EEOC Guidelines on Employment Testing Procedures issued August 24, 1966). Similarly, a 1967 EEOC chair's statement recognized that "the true situation today is that discrimination is often not a specific incident, but . . . the result of a system" and nondiscrimination "means the difficult process" of "challenging the system, of undoing its discriminatory effects . . . ." Carle, *supra*, at 294 n.257 (citing Blumrosen, *supra*, at 33 n.51).

B. Administrative Agencies Are Uniquely Positioned to Identify Theories of Liability Necessary to Assure Compliance with the Anti-Discrimination Laws They Are Responsible for Enforcing.

This Court has long recognized the special expertise and experience that administrative agencies develop in their particular area of legal enforcement and implementation. *See, e.g.*, *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944)

("But the Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case."); *United States v. Mead Corp.*, 533 U.S. 218, 220 (2001) (recognizing the continued relevance of *Skidmore*'s holding, and that an administrative agency "can bring the benefit of specialized experience to bear" on legal questions). This cultivated expertise and experience is especially pertinent with regard to agencies that enforce the federal anti-discrimination laws. These agencies, particularly the EEOC and HUD, conduct investigations and research, process administrative complaints, hold hearings, subpoena records, and seek comments from the public to inform their rules and policies. These administrative responsibilities provide the agencies with data and research, as well as a specialized knowledge of current trends and practices. They possess a deep understanding of the demographics of discrimination, and the realities of how discrimination continues to permeate industries and communities across the country.

This expertise also makes agencies best positioned to formulate remedies and best practices to respond to a variety of discriminatory tactics and practices. *See* Johnson, *supra*, at 142–43. For example, in 2005, the EEOC established the Systemic Task Force, charged with recommending new strategies for combating "systemic discrimination" defined as "pattern or practice, policy and/or class cases where the alleged [employment] discrimination has a broad impact on

an industry, profession, company, or geographic location." Equal Employment Opportunity Commission, *Systemic Task Force Report* (Mar. 2006). Through interviews, review of demographics and other data, focus groups and surveys of EEOC staff and external stakeholders, the Task Force gathered information and ideas regarding how to best address systemic employment discrimination. *Id.* The result was a decision by the EEOC to change its focus from individual cases and assign new priority to litigating systemic discrimination cases, resulting in organizational, structural and staffing changes throughout the agency. *Id.*

In addition, in 2012 the EEOC recognized that skyrocketing incarceration rates over previous decades resulted in significant increases in the number of people who had contact with the criminal justice system, which was adversely affecting their ability to find and keep employment. *See* Equal Employment Opportunity Commission, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (Apr. 25, 2012). The EEOC found that by 2007, over three percent of adults in the United States were under some form of correctional supervision, with a disproportionate impact on Black and Latino men. *Id.* As a result, the Commission issued a new Enforcement Guidance limiting when and how employers can consider criminal records in hiring. *Id.*

Similarly, in its most recent Strategic Plan, HUD identified addressing systemic discrimination as one of its top Fair Housing priorities. U.S. Dep't of Housing and Urban Development, *Strategic Plan 2014-1028*, 30 (April 2014), available at http://www.huduser.org/portal/publications/pdf/HUD-564.pdf. Recently, the disparate impact standard has been critical to provide recourse to victims of discrimination in lending. Neutral policies have had the effect of denying credit access and have resulted in an enormously disparate impact on racial and ethnic minorities. Discriminatory practices by the banking sector have had devastating consequences for minority communities, forcing families into foreclosure and increasing segregation in cities and towns across the country. *See* Richard Rothstein, *Racial Segregation and Black Student Achievement*, *in* EDUCATION, JUSTICE AND DEMOCRACY 187 (Danielle Allen & Rob Reich eds., Univ. of Chi. Press 2013). During the housing bubble from the late 1990s through 2007, banks charged Black homebuyers and homeowners higher interest rates than similarly situated Whites, and lured them into subprime loans, often misleading them about their terms and costs. *Id.* By 2002, 25 percent of all subprime loans had been made to Blacks; Blacks were three times as likely to have a subprime loan than similarly qualified Whites. *Id*. at 188. By 2008, 55 percent of Black mortgage holders nationwide had subprime loans, compared with 17 percent of White mortgage holders. *Id.* at 189. The result of these facially neutral policies has been massive foreclosures and home loss in minority—predominantly Black—communities. *Id.* at 187. The victims of these predatory and discriminatory

policies have relied on disparate impact to find recourse for their devastating losses. *See, e.g.*, *Adkins v. Morgan Stanley*, No. 12 CV 7667(HB), 2013 WL 3835198 at *8–9 (S.D.N.Y. July 25, 2013) (recognizing a disparate impact claim for racial discrimination under the FHA where plaintiffs were victims of defendant's practice of purchasing and financing predatory mortgages, which were later bundled into mortgage-backed securities); *see also* Complaint, *Consumer Fin. Prot. Bureau v. Nat'l City Bank*, No. 2:13-cv-01817-CB (W.D. Pa. Dec. 13, 2013); Complaint, *United States v. Wells Fargo Bank,* No. 1:12-cv-01150 (D.D.C. July 12, 2012); Complaint, *United States v. Countrywide Fin. Corp.*, No. Cv-11-10540 (C.D. Ca. Dec. 21, 2011); Complaint, *Mayor of Balt. v. Wells Fargo Bank, N.A.*, No. JFM-08-62 (D. Md. Apr. 22, 2011).

And there is no doubt that the disparate impact standard will remain critical to realizing the Fair Housing Act's "broad and remedial" intent in future decades. *Havens Realty Corp.*, 455 U.S. at 380. The flexibility built into HUD's Final Rule will ensure the rule's relevancy in these future years, as fair housing advocates seek to address new types of housing practices that result in discrimination against members of statutorily protected groups. *See* Allen et al., *supra*, at 190–93 (describing a potential challenge to the discriminatory effects of the growing use of criminal background checks by landlords); *see also id.* at 194–95 (discussing *Briggs v. Borough of Norristown*, a lawsuit pending in the Eastern District of Pennsylvania that relies on the disparate impact standard to challenge the discriminatory effects of "disorderly conduct"

ordinances that subject landlords to criminal fines based on "disorderly behavior" by their tenants).

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit should be affirmed.

Respectfully Submitted,

/s/
Deborah N. Archer
Counsel of Record
Erika L. Wood
NEW YORK LAW SCHOOL RACIAL JUSTICE PROJECT
IMPACT CENTER FOR PUBLIC INTEREST LAW
185 West Broadway
New York, NY 10013
(212) 431-2138
Deborah.Archer@nyls.edu

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