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 RESPONDENT

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QUESTION PRESENTED

Are disparate-impact claims cognizable under the Fair Housing Act?

PARTIES TO THE PROCEEDING

Petitioners Texas Department of Housing and Community Affairs, Michael Gerber, Leslie Bingham-Escareno, Tomas Cardenas, C. Kent Conine, Dionicio Vidal Flores, Juan Sanchez Munoz, and Gloria L. Ray were Defendants-Appellants in the court of appeals.

Respondent The Inclusive Communities Project, Inc., was a Plaintiff-Appellee in the court of appeals. Respondent Frazier Revitalization, Inc., was an Intervenor-Appellant in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

The Inclusive Communities Project, Inc. is a non-profit corporation formed under section 501(c)(3) of the Internal Revenue Code. It has no parent corporation and no publicly held corporation owns 10% or more of any stock in The Inclusive Communities Project, Inc.

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INTRODUCTION

The issue presented by the facts in this case is whether actions which have the unjustified effect of perpetuating housing segregation can violate 42 U.S.C. § 3604(a) and § 3605 absent a showing of intentional discrimination.

The Congressional purpose for the Fair Housing Act (FHA) to remedy existing effects of prior intentional segregation, the broad mandate of 42 U.S.C. § 3601 to provide fair housing as a matter of national policy, and the text of the FHA have convinced the federal courts of appeals and the U.S. Department of Housing and Urban Development (HUD) that disparate impact claims are cognizable. Texas Department of Housing and Community Affairs (TDHCA) has not provided any judicial or agency authority that actually discusses the FHA and supports its arguments against disparate impact liability.

The perpetuation of racial segregation in this case was the functional equivalent of intentional racial segregation. TDHCA segregated 92.29% of its Low Income Housing Tax Credit (LIHTC) units into the City of Dallas minority census tracts J.A. 152. This matched the impact achieved by the prior federal and local de jure segregation of Dallas public housing where de jure actions segregated 95% of Dallas public housing units into minority census tracts. *Walker v. City of Mesquite*, 169 F.3d 973, 976 n.4 (5th Cir. 1999), *cert. denied*, 528 U.S. 1131 (2000).

The race neutral remedy in this and other cases involving perpetuation of racial segregation claims focuses primarily on ending the practice causing the segregation and allowing the units to be provided outside of minority concentrated areas.

STATEMENT

A. Statutory background: Congressional purpose to remedy existing effects of pre-FHA governmental intentional racial segregation creating racial ghettos

The Congressional hearings and debates on the FHA began in 1966 and continued in 1967. The hearings and records established the case for housing equality and the FHA passed in the U.S. Senate on March 11, 1968. 114 CONG. REC. 5992 (1968). Rev. Martin Luther King, Jr. was assassinated on April 4, 1968. Against this backdrop, the U.S. House then took up the Senate version and passed it on April 10, 1968. President Johnson signed it into law on April 11, 1968. Pub. L. No. 90-284, Title VIII, § 801, 82 Stat. 81 (1968).[1] Throughout the consideration of the FHA, the existing effects of racial segregation by all

[1] The Congressional record on the 1968 proceedings is solely that of what happened on the floor of each house. While there was material from the 1966 and 1967 hearings introduced into the debate, there were no more committee or subcommittee hearings or reports in the 1968 proceedings. *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 147 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978).

levels of government were the Congressionally identified and specified targets for the remedy that was to be provided. *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 147, 147 n.30 (3d Cir. 1977), *cert. denied,* 435 U.S. 908 (1978).

Senator Mondale, principal Senate sponsor of the FHA, stated the elimination of the effects of past discrimination was the purpose of the FHA.

> It thus seems only fair, and is constitutional, that Congress should now pass a fair housing act to undo the effects of these past State and Federal unconstitutionally discriminatory actions. App. 36a-37a (Mondale).[2]

The U.S. Attorney General stated that the existence of the segregated housing patterns were the result of past illegal discrimination by government action.

> To support legislative jurisdiction under the 14th amendment, it was shown that today's discriminatory housing patterns are a direct outgrowth of past illegal Government action and that those patterns impede State and local government in their ability to provide equal protection of the law. App. 53a (U.S. Attorney General Ramsay Clark).

Federal, state, and local governments' intentional racial segregation of Blacks into ghettos marked by

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[2] Excerpts of the FHA Congressional record are in the Appendix to this brief.

slum and blight was the primary factual basis established in the Congressional record of hearings and debate for the FHA. App. 24a-25a, 35a-36a, 40a-41a, 59a.

> A sordid story of which all Americans should be ashamed developed by this country in the immediate post World War II era, during which the FHA, the VA, and other Federal agencies encouraged, assisted, and made easy the flight of white people from the central cities of white America, leaving behind only the Negroes and others unable to take advantage of these liberalized extensions of credits and credit guarantees.
>
> Traditionally the American Government has been more than neutral on this issue. The record of the U.S. Government in that period is one, at best, of covert collaborator in policies which established the present outrageous and heartbreaking racial living patterns which lie at the core of the tragedy of the American city and the alienation of good people from good people because of the utter irrelevancy of color. App. 17a (Mondale).

Senator Brooke, another sponsor of the FHA, described the actions of the federal government that caused racial segregation throughout the country:

> We make two general assertions: (1) that American cities and suburbs suffer from galloping segregation, a malady so widespread and so deeply imbedded in the national

> psyche that many Americans, Negroes as well as whites, have come to regard it as a natural condition; and (2) that the prime carrier of galloping segregation has been the Federal Government. First it built the ghettos; then it locked the gates; now it appears to be fumbling for the key. Nearly everything the Government touches turns to segregation, and the Government touches nearly everything. App. 19a (Brooke).

Keeping low income housing out of the suburbs kept Black families out of those areas. Senator Mondale stated:

> In part, this inability stems from a refusal by suburbs and other communities to accept low-income housing . . . An important factor contributing to exclusion of Negroes from such areas, moreover, has been the policies and practices of agencies of government at all levels. App. 16a (Mondale).

The Congressional record set out the evidence showing the federal government's intentional conduct creating and maintaining racial segregation in housing.

> Throughout this period, and even somewhat after the Supreme Court's 1948 ruling, the Federal Housing Administration actively encouraged the use of racially restrictive covenants, in most cases flatly refusing to grant its mortgage insurance or guarantees unless the covenants were included in the deeds concerned. This Federal discriminatory action

> had a substantial impact: FHA's espousal of the racial restrictive covenant helped spread it throughout the country. The private builder who had never thought of using it was obliged to adopt it as a condition for obtaining FHA Insurance.
>
> * * *
>
> FHA succeeded in modifying legal practice so that the common form of deed included the racial covenant. Builders everywhere became the conduits of bigotry.
>
> * * *
>
> At the same time, the Federal and State governments were cooperating to enforce segregation in public housing. App. 31a.

> While the FHA and VA have helped promote White dominance in the suburbs, public housing has helped enhance Negro dominance in the cities. App. 39a (Mondale).

Congress found that the federal government has exacerbated the effects of its own and other government intentional racial segregation by condoning rather than stopping racial segregation in federal programs. App. 11a-12a, 19a-21a, 25a, 26a, 29a-30a, 35a-36a. Senator Brooke described what the federal government was then doing to maintain racial segregation.

> The Federal mandate to stop segregation is perfectly clear and remarkably strong. . . . Rarely does HUD withhold funds or defer

action in the name of desegregation. In fact, if it were not for all the printed guidelines the housing agencies have issued since 1964, one would scarcely know a Civil Rights Act had been passed.

It is clear that HUD has determined to speak loudly and carry a small stick. The results of this policy have been a cynical subversion of title VI, along with a thumb-twiddling complacency that has permeated all major agencies. . . . App. 25a-26a (Brooke).

The road to segregation is paved with weak intentions – which is a reasonably accurate description of the Federal establishment today. Its sin is not bigotry (though there are still cases of bald discrimination by Federal officials) but blandness; not a lack of goodwill, but a lack of will.

* * *

What adds to the murk is officialdom's apparent belief in its own sincerity. 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.

* * *

> The upshot of all this is a Federal attitude of amiable apartheid, in which there are no villains, only "good guys"; a world in which everyone possesses "the truth" (in the files, on the walls), but nearly everyone seems to lack a sense of consequences. In such a milieu, the first steps toward a genuinely affirmative policy of desegregation in housing are endlessly delayed, because no one is prepared to admit they have not already been taken. App. 20a-21a (Brooke).

While the record showed that racial bias and bigotry existed, the Congressional record consistently stated the main non-government actors maintaining racial segregation were motivated by the economic constraints imposed by the continued existence of the racial ghettos, not bias or bigotry. App. 24a, 39a-40a, 43a-44a, 48a.

Statements by the supporters and the opponents of the FHA showed that appropriate proof of a violation would be the results of the action challenged, not the mental workings of the person accused. App. 11a, 39a-40a; *Civil Rights: Hearings On S. 3296, Amendment 561 To S. 3296, S. 1497, S. 1654, S. 2845, S. 2846, S. 2923, And S. 3170 Before The Subcomm. On Constitutional Rights Senate Comm. On The Judiciary Part 2*, 89th Cong., 2d Sess. 1172 (1966) (Attorney General Katzenbach). For example, during the 1968 debate about the exemption for single family homeowners, an issue arose over the difficulty of

proving the individual motivation of racial bias that was set out in a proposed amendment. Senator Percy opposed the amendment stating that:

> If I understand this amendment, it would require proof that a single homeowner had specified racial preference. I maintain that proof would be impossible to produce. 114 CONG. REC. 5216.

The amendment requiring proof of racial intent was rejected by the Senate. 114 CONG. REC. 5221 (1968); *Rizzo*, 564 F.2d at 147.

The Congressional record included the harm caused by the conditions in the ghetto as part of the evidence of the effects of government racial segregation. App. 53a and 57a (U.S. Attorney General Ramsey Clark); App. 12a-16a, 29a-30a, 34a. Senator Mondale described the harm:

> The impacted racial ghetto, with its segregated overcrowded living conditions, inherently unequal schools, unemployment and underemployment, appalling mortality and health statistics, inevitably gives rise to hopelessness, bitterness, and, yes, even open rebellion of those imprisoned within its confines. App. 11a-12a (Mondale).
>
> Outlawing discrimination in the sale or rental of housing will not free those trapped in ghetto squalor, but it is an absolutely essential first step which must be taken – and taken soon. For fair housing legislation is a basic keystone to any solution of our present

> urban crisis. Forced ghetto housing, which amounts to the confinement of minority group Americans to "ghetto jails" condemns to failure every single program designed to relieve the fantastic pressures on our cities. App. 14a (Mondale).

U.S. Attorney General Katzenbach described the harms from racial segregation in housing:

> Segregated housing is deeply corrosive both for the individual and for his community. It isolates racial minorities from the public life of the community. It means inferior public education, recreation, health, sanitation, and transportation services and facilities. It means denial of access to training and employment and business opportunities. It prevents the inhabitants of the ghettos from liberating themselves, and it prevents the Federal, State, and local governments and private groups and institutions from fulfilling their responsibilities and desire to help in this liberation. App. 48a (U.S. Attorney General Katzenbach).

Congress emphasized that the principal remedial element for the existing discriminatory effects would be requiring elimination of the barriers and obstacles to Black families exercising their freedom to choose otherwise available non-ghetto housing that was within their means. App. 10a, 11a, 14a, 17a-18a, 22a-23a, 32a-34a, 37a, 38a; 114 CONG. REC. 9563 (1968) (Celler). Senator Brooke stated:

> One clear first step to correct these injustices, Mr. President, is to enact the pending legislation so that Negroes are given the freedom which all other Americans now possess – to live in any neighborhood which their income permits. Today this is not possible for Negro Americans. App. 27a. (Brooke).

> Fair housing does not promise to end the ghetto; it promises only to demonstrate that the ghetto is not an immutable institution in America. It will scarcely lead to a mass dispersal of the ghetto population to the suburbs; but it will make it possible for those who have the resources to escape the stranglehold now suffocating the inner cities of America. App. 17a (Brooke).

> This measure, as we have said so often before, will not tear down the ghetto. It will merely unlock the door for those who are able and choose to leave. I cannot imagine a step so modest, yet so significant, as the proposal now before the Senate. App. 23a (Brooke).

Subsequent legislative events concerning the FHA confirm its focus on remedying the effects of discrimination. As the years passed, Congress was clearly aware of the unanimity of courts of appeals opinions on the cognizability of disparate impact claims under the FHA. Opponents of the disparate impact standard of proof continued trying to insert intent requirements into the FHA from 1980 through 1988 without success. HUD, *Implementation of the*

Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11467, Feb. 15, 2013.

Senator Kennedy, as a principal sponsor of the 1988 amendments, rebutted President Reagan's statement on the intent versus effect issue by showing that the 1988 amendments did not contradict the unanimous opinions of the U.S. Courts of Appeals considering the issue that the disparate impact standard of proof was available under the FHA. App. 77a-78a.

The FHA was amended in 1996 to give lenders a privileged self-testing process to determine and correct disparate impact violations. 42 U.S.C. § 3614-1.

B. Factual background

1. Racial segregation in Dallas caused by federal, state, and local government actions

The existence of federal, state, and local intentional racial segregation and its accompanying effects have formed the underlying patterns of racial segregation in City of Dallas housing and neighborhoods. As in other parts of the country, the effects of racially segregated housing permeate the other elements of community life based on where people live in Dallas. This history in Dallas and in Texas is contained in published legal opinions that show the effects of racial segregation not just in housing but also in governance, education, city planning, the provision of streets and services, flood protection, and elimination

of environmental hazards. *Walker v. HUD*, 734 F.Supp. 1289, 1291-1312 (N.D. Tex. 1989) (public housing segregation); *Williams v. City of Dallas*, 734 F.Supp. 1317, 1332-1340, 1403-1404 (N.D. Tex. 1990) (history of intentional creation and maintenance of racial segregation in City of Dallas neighborhoods); *Miller v. City of Dallas*, 2002 WL 230834, *4 (N.D. Tex. 2002) (modern conditions of slum and blight linked to intentional racial segregation by City of Dallas designations of "Negro District" in 1947). The same suburban exclusion of affordable and low income rental housing that Congress examined in the FHA debate continues to exist in the Dallas area. *Walker*, 169 F.3d at 976 (exclusion throughout metropolitan area); *Walker v. HUD*, 912 F.2d 819, 821-822 (5th Cir. 1990) (suburban refusal to allow Section 8 voucher families from Dallas); *Dews v. Town of Sunnyvale*, 109 F.Supp.2d 526, 569-573 (N.D. Tex. 2000) (suburban exclusion dating back to early 1950s). In 1978, when the suburbs refused to accept public housing, the City of Dallas reacted by also refusing to accept new public housing. *Walker*, 734 F.Supp. at 1301. As a result of the exclusionary practices, the percentage of the Black population living in the Dallas-Fort Worth area suburbs increased by only 2.7% from 1970 to 1980. App. 74a.

Texas has a long history of de jure racial segregation.

> There exist innumerable instances, covering virtually the entire gamut of human relationships, in which the State has adopted

> and maintained an official policy of racial discrimination against the Negro. *Graves v. Barnes*, 343 F. Supp. 704, 725, 725 n.15 (W.D. Tex. 1972), *aff'd sub nom. Archer v. Smith*, 409 U.S. 808 (1972) and *aff'd in part, rev'd in part sub nom. White v. Regester*, 412 U.S. 755 (1973).

Residential racial segregation was created and maintained pursuant to Texas state law. The law provided "An Act providing for the segregation * * * of the white and negro races and providing for the conferring of power and authority upon cities to pass suitable ordinance controlling the same and providing for fixing the penalty and declaring an emergency." Acts 1927, c. 103, *Tex.Rev.Civ.Stat.Ann*. art. 1015b (repealed 1969). Federal courts used the separate but equal doctrine to enforce segregation ordinances passed pursuant to state law. *Beal v. Holcombe*, 193 F.2d 384, 386, 386 n.1, 388 (5th Cir. 1951), *cert. denied*, 347 U.S. 974 (1954).

The Dallas City Charter expressly provided for the City's power to "provide for the use of separate blocks for residences, places of abode, places of public amusement, churches, schools and places of assembly by members of white and colored races." The City of Dallas admitted in 1988 that the State and City racial segregation laws established "racially segregated housing patterns [that] have not yet fully been eradicated." *Walker*, 734 F.Supp. at 1294.

De jure racially segregated public housing existed in Dallas before 1955 and remained in place even

after the entry of Executive Order 11063, the enactment of Title VI of the 1964 Civil Rights Act, and the 1968 passage of the FHA. As of 1994, nearly all of the family public housing units were in predominantly minority areas. The Fifth Circuit described the history of this pattern as "a sordid tale of overt and covert racial discrimination and segregation." *Walker*, 169 F.3d at 976, 976 n.4, 976 n.5. Dallas' public housing was still segregated into historically dangerous slums marked by lead contamination and besieged by drugs and crime. The Dallas area suburbs had refused permission for Black families to use vouchers for housing units in those suburbs. *Walker*, 912 F.2d at 821-822, 822 n.5. HUD, the City of Dallas and the Dallas Housing Authority were required to implement desegregation remedies for intentional racial segregation in the public housing and voucher programs. *Walker*, 169 F.3d at 975.

The LIHTC program began in 1987 before the court ordered public housing desegregation remedy became effective. Pub. L. No. 99-514, Title II, § 252(a), 100 Stat. 2189 (1986); *Walker*, 734 F.Supp. at 1234-1247. Over the next 20 years, TDHCA allocated LIHTC units in a racially segregated pattern that matched the racial segregation produced by the previous federal and local de jure and other overt discrimination in Dallas public housing. As of 1994, 95% of the 6,400 family public housing units were segregated in minority concentrated areas of Dallas. *Walker*, 169 F.3d at 976 n.4. By 2008, 17,409 or 92.29% of LIHTC family units in the City of Dallas

were located in census tracts with more than 50% minority residents. ICP Summary Judgment Appendix R USCA5 1338, admissibility J.A. 152 n.13. During this same period, the predominantly non-minority Dallas area suburbs experienced massive growth with little affordable housing.[3] 160 CONG. REC. E56 (2014).

TDHCA knew of the underlying racial segregation in Dallas area housing and the need for desegregated low income housing opportunities. From 1991-1993, TDHCA used whether a development would provide desegregated housing opportunities as an LIHTC selection criterion. In 1994, TDHCA eliminated this criterion despite the concern about segregation in Dallas housing widely noted at the time due to the contemporaneous Dallas housing desegregation case. J.A. 158. From 1995 to 2009, TDHCA did not allocate LIHTCs for any family units in White tracts in Dallas. ICP exhibits 22, 177, 353; TDHCA exhibit 280; admissibility J.A. 181 n.9. During this period, TDHCA allocated LIHTCs to units in locations marked by the same ghetto conditions that the FHA was passed to remedy. The minority area where Frazier Revitalization, Inc. (FRI) wants to place a LIHTC project is an example of a location currently marked by these conditions.

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[3] This brief uses the term non-minority to refer to the White, non-Hispanic racial group referred to as "White" in the Congressional record of the FHA.

FRI has chosen a small, previously de jure segregated, minority neighborhood with eight existing LIHTC projects for its project. The area is a crime hot spot as defined by the Dallas Police Department. There are heavy industrial uses interspersed throughout the area and adjacent to the FRI location and other LIHTC projects in the area. The demographic changes from 2000 to 2010 show:

- the poverty rate stayed above 40%;
- unemployment increased from 9% to 18%; and
- total population declined from 42,507 to 36,328 (-14.5%).

The neighborhood lacks the usual neighborhood retail and service amenities. The employment opportunities are limited to day labor operations. ICP Appendix in Support of ICP Brief in Opposition to FRI Motion to Intervene; J.A. 31 document no. 183, filed 5/12/12, pages 27, 28, 29, 31, 34, 39-41, 44. The LIHTC program provides housing units, not neighborhood revitalization funding. 26 U.S.C. § 42.

TDHCA's selection and allocation of LIHTC units in the City of Dallas was the functional equivalent of intentional racial segregation. Whether there was deliberate racial bias or not, TDHCA achieved the same segregated result as if there had been an explicit decision to engage in racial segregation. J.A. 151-153, 157-159. TDHCA has not just perpetuated but exacerbated the exact discriminatory effects of racial

segregation that Congress passed the FHA to remedy. App. 12a, 15a-27a, 31a-32a, 36a-37a, 53a, 59a.

2. Inclusive Communities Project, Inc.

ICP is a Dallas based non-profit organization that assists low-income persons in finding affordable housing and that seeks racial and socioeconomic integration in Dallas housing. In particular, ICP works with African-American families who are eligible for the Dallas Housing Authority's Housing Choice Voucher program. ICP assists voucher participants who want to move into non-minority areas in obtaining apartments in non-minority suburban neighborhoods by offering counseling, assisting in negotiations with landlords, and providing financial assistance (for example, security deposits). At times, ICP must provide "landlord incentive bonus payments" to landlords to secure housing for voucher families. J.A. 133-134. One of ICP's purposes is to assist families who want housing in areas with better schools. J.A. 133 n.3.

ICP administers part of the remedy in the *Walker* public housing desegregation case. The U.S. Court of Appeals for the Fifth Circuit approved a desegregation plan for the federal, City, and Dallas Housing Authority's intentional segregation of public housing and Section 8 vouchers. The plan included a race neutral voucher program. The Fifth Circuit insisted that this remedy include more vouchers and a vigorous mobility program that served the Black voucher

families wishing to move out of the segregated areas. The program needed to provide higher fair market rents, reach out to non-minority landlords, and combat illegal discrimination. *Walker*, 169 F.3d at 985, 987-988. In 2004, the *Walker* district court appointed ICP to be the administrator of the Walker Housing Fund and the housing mobility provider for the implementation of the desegregation remedy. Defendants' trial exhibit 151, admissibility J.A. 181 n.9.

The housing available for voucher families in Dallas is, like the racially segregated housing described in the 1966-1968 Congressional record of hearings and reports, still primarily located only in minority areas. Only 11.9% of the units in non-minority areas will accept housing voucher families. J.A. 143.

The conditions in which many of the existing LIHTCs are located are the same City of Dallas ghetto conditions described in the Congressional record of hearings and debates cited above. ICP Appendix in Support of ICP Brief in Opposition to FRI Motion to Intervene; J.A. 31 document no. 183, filed 5/12/12, pages 27-44.

Many Black families want the choice of a desegregated housing opportunity. Over 14,000 Black families signed up to use 1,000 vouchers made available for use in desegregated areas when the waiting

list for those vouchers opened in 2008. J.A. 21, Transcript Vol. 1, page 147, ICP exhibit 558; TDHCA exhibit 172; admissibility ruling J.A. 181 n.9.

LIHTC units cannot discriminate against voucher families, but TDHCA has made LIHTC units unavailable in the non-minority areas. J.A. 151-153, 203 n.23, 203-212. The non-LIHTC rental housing in the non-minority areas has been largely made unavailable by many of the landlords in those areas refusing to participate in the voucher program. J.A. 143. The Black families eligible for LIHTC units had their freedom to choose affordable rental units in middle income, low poverty areas, with good schools substantially eliminated by TDHCA's making LIHTC units unavailable in non-minority areas.

3. Low Income Housing Tax Credit Program

The LIHTC Program is the primary means of developing affordable rental housing. Developers of low-income rental housing use the tax credit to offset a portion of their federal tax liability in exchange for the production of affordable rental housing. A portion of the units must be available at rents within the means of lower income families. J.A. 135, 173-179; 26 U.S.C. § 42(g)(1).

Because the units are affordable, LIHTC units can provide the means for working families to avoid racially segregated minority areas marked by slum and blight that the Congressional record referred to

as ghettos. This is within the purpose of the FHA. App. 10a-11a, 17a-18a, 23a, 27a, 38a. Rather than assist in avoiding the ghetto, TDHCA instead disproportionately allocated its LIHTCs in minority concentrated areas marked by slum and blight thus making those affordable rental housing units unavailable in non-minority concentrated areas. J.A. 151-153.

4. TDHCA

TDHCA is the state entity responsible for administering the federal LIHTC program in Texas. J.A. 98. It allocates the LIHTCs by approving or denying applications by developers for specific developments to use the tax credits under either the 4% or 9% LIHTC program. TDHCA evaluates the applications following the rules set out in its Qualified Allocation Plan. J.A. 99. The rules provide for the exercise of TDHCA's discretion along with the eligibility rules for the 4% and 9% credits and the 9% selection criteria in approval decisions. J.A. 124, 135 n.6, 145, 176, 197, 202, 207, 210.

5. The effects of the prior intentional racial segregation continue to exist in metropolitan areas throughout the country

In 1985, seventeen years after the FHA became law, HUD low income housing throughout the country was still subject to segregation traceable to the de jure segregation of the 1940s, 1950s, and later. *Discrimination In Federally Assisted Housing Programs:*

Hearings Before The Subcomm. On Housing And Community Development Of The House Comm. On Banking, Finance And Urban Affairs Part 1, 99th Cong., 1st and 2d Sess. pages 4-5, 15-19, 77-78, and throughout (1985, 1986).

In 2008, forty years after the passage of the FHA, Congress again found that:

- the Federal government was failing to enforce the FHA against an outgrowth of persistent discrimination in housing, lending and insurance;
- most Americans continue to live in communities largely divided by race and ethnicity; and
- most children were attending increasingly segregated schools. 154 CONG. REC. H 2283 (2008).

Currently there are 3,800 census tracts in the nation where more than 40% of the population is below the poverty line and 3,000, or 78%, of these are also predominantly minority. These predominantly minority areas continue to be marked by awful conditions of slum and blight. HUD, *Affirmatively Furthering Fair Housing, Proposed Rule*, 78 Fed. Reg. 43710, 43714, July 19, 2013.

C. Procedural background: summary judgment, liability findings, and TDHCA's request for deference under *Chevron* to the HUD rule 24 C.F.R. § 100.500 on appeal

ICP brought claims against TDHCA for violations of 42 U.S.C. §§ 1982 and 1983, the Fourteenth Amendment, and the FHA. It sought an injunction including relief to end TDHCA's practice of disproportionately allocating LIHTC units in minority concentrated areas of slum, blight, high crime, and environmental hazards thus perpetuating racial segregation. *See* Complaint ¶¶ 1, 13, 15-16; J.A. 75, 81-83.

The district court denied TDHCA's motion to dismiss and found that ICP had alleged facts adequate to maintain standing under the FHA and its other claims. J.A. 107-115.

ICP moved for partial summary judgment on its standing and on the existence of a prima facie case. J.A. 132-133. ICP presented uncontested summary judgment evidence that TDHCA's perpetuation of racial segregation caused a specific and quantifiable drain on ICP's financial resources. ICP had to expend more money, time, and effort to find available non-LIHTC units that would even accept vouchers. The district court found this constituted injury in fact. J.A. 142-143.

ICP presented uncontested summary judgment evidence that TDHCA used its LIHTC allocation process to perpetuate racial segregation. ICP's uncontested

evidence took into account the pool of all eligible tax credit applications because TDHCA admitted, "all applications submitted would support the awarding of tax credits, ..." ICP trial exhibit 52, page 13, admissibility J.A. 181 n.9. The disparate impact caused in the City of Dallas by TDHCA's allocation practice was the racial segregation of 92.29% of all family LIHTC units into minority census tracts. ICP's evidence included TDHCA's own records, a report of the House Committee on Urban Affairs Texas House of Representatives, and HUD studies and databases of all LIHTC housing. Each evidence source showed TDHCA perpetuating racial segregation. J.A. 151-153. The district court held that the uncontested evidence established a prima facie case that TDHCA's discriminatory housing practice had perpetuated racial segregation in violation of the FHA. The district court granted ICP's motion for partial summary judgment on the FHA violation. J.A. 153-154.

The district court found on uncontested evidence that TDHCA, in allocating LIHTCs among these eligible applications, disproportionately approved tax credit applications for family LIHTC units in minority neighborhoods and, conversely, TDHCA disproportionately denied tax credits for family units in predominantly non-minority non-Hispanic neighborhoods. As an example, the district court cited the uncontested evidence from TDHCA's own records that state wide TDHCA approved 49.7% of family units in 90% or greater minority census tracts. By comparison, TDHCA approved 37.4% of all family units in

90% or greater White tracts. J.A. 151-154. But even when units were approved in White areas, it was for locations where the likely tenants were also more likely to be White. Of the overall 1,149 units approved in 90% or greater White census tracts, 664 LIHTC units, 57% of those, were in towns that were at least 90% or greater White. ICP Summary Judgment Appendix R USCA5 1348, admissibility J.A. 152 n.13; ICP trial exhibit 27, admissibility J.A. 181 n.9. This is part of the summary judgment evidence ICP presented showing TDHCA was more likely to approve tax credit housing in White neighborhoods if the likely tenants of the housing were White. J.A. 157-158.

ICP presented uncontested summary judgment evidence that TDHCA's actions perpetuating racial segregation were intentional racial discrimination. Additional evidence of intentional racial segregation included TDHCA's refusal to continue a selection criterion for providing desegregated housing opportunities despite the concerns about segregation in Dallas housing due to the contemporaneous Dallas public housing desegregation case, *Walker v. HUD*. J.A. 157-158. There was also evidence of a TDHCA board member calling attention to the continued concentration of tax credit units in minority neighborhoods. J.A. 158-159. The uncontested evidence gave rise to an inference of intent. J.A. 159.

TDHCA presented no summary judgment evidence that the discriminatory housing practice was caused by differences in the applications or other

race-neutral factors. Instead, they assumed the existence of a prima facie showing of disparate impact, and sought summary judgment on the basis of their asserted justifications for their practices. The district court rejected TDHCA's assertion that federal LIHTC law required LIHTC units to be placed in high-percentage minority areas. J.A. 161-163.

TDHCA's defense to the summary judgment evidence of intentional discrimination was its assertion that the bonus tax credits for units in very low income areas under federal LIHTC law were the reason for the racial segregation. ICP presented uncontested evidence that only a very small incentive was given for these locations, one point out of over 200. J.A. 168. In addition, only 34% of the TDHCA units were in these bonus tracts and of those only 39.8% received the bonus allocation. The district court found that ICP met its burden to raise a genuine issue of fact that the asserted reason was a pretext. J.A. 168-169.

At trial, TDHCA claimed its practices served a different legitimate interest from the interest asserted at summary judgment. The new interest was that of "awarding of tax credits in an objective, transparent, predictable, and race-neutral manner."[4] J.A. 195. The

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[4] TDHCA's brief does not mention this interest which it asserted at trial. The argument from the interest asserted in the TDHCA brief – federal law requires LIHTCs to be placed in minority areas – was made and lost at the summary judgment stage and subsequently abandoned. J.A. 161-163, 180.

district court assumed TDHCA's proffered interest was bona fide and legitimate for its disparate impact analysis. TDHCA failed to prove that this interest, or any legitimate interest, was served by the discriminatory housing practice. J.A. 201-202. TDHCA did not present evidence on the less discriminatory alternative issue but chose to argue that there was no alternative available with less discriminatory impact. J.A. 201. The district court did not use TDHCA's failure to produce evidence or argument on the less discriminatory alternatives as the basis for its liability decision. Despite TDHCA's refusal to produce it, ICP introduced evidence of less discriminatory alternatives. J.A. 201-212. The district court found this evidence included less discriminatory alternatives of adding points or set-asides that would significantly improve the prospects for locating LIHTC projects in high-opportunity, low-poverty areas and using discretionary forward commitment of tax credits from a subsequent year for projects in high-opportunity, low-poverty areas. The Housing and Urban Affairs Committee Texas House of Representatives had presented these less discriminatory alternatives of additional points and set-asides to TDHCA in 2006. J.A. 203 n.23.

The district court issued an opinion and order finding that ICP had proved its perpetuation of racial segregation disparate impact claim under 42 U.S.C. §§ 3604 and 3605 but finding in favor of TDHCA on the intentional discrimination claim. J.A. 172. The district court ordered TDHCA to submit a remedial plan to bring their allocation decisions into

compliance with the FHA. J.A. 216. TDHCA subsequently proposed a multi-faceted remedial plan. J.A. 320-350. The district court adopted most of the elements TDHCA proposed. J.A. 252-272. Although the remedy is restricted to only the Dallas metropolitan area, TDHCA voluntarily applied the elements in the proposed remedial plan on a statewide basis and continues to do so. J.A. 326; 10 TAC § 11.9(c)(4) Opportunity Index (2015 QAP). TDHCA's LIHTC units are racially segregated throughout the major urban areas of Texas. ICP exhibit 1, Talton Report, evidence admissibility J.A. 181 n.9; J.A. 152, 359.

FRI intervened into the case six months after trial and one month after the district court ordered TDHCA to submit a remedial plan. J.A. 218-224.

The remedial plan, as proposed and as adopted, contained no racially explicit goals, targets, or quotas. While TDHCA will increase the points available for higher income, lower poverty census tracts with good schools, it will also provide equal points for locations in minority areas where legitimate revitalization efforts are occurring. The remedial plan makes ineligible sites that are located adjacent to or near hazardous and nuisance conditions such as high crime, industrial uses, landfills, and environmentally hazardous areas. This is a less discriminatory alternative because the sites made ineligible are in minority areas and disqualifying the sites will encourage developments in non-minority areas. J.A. 312.

After the district court ruled and while the case was on appeal, HUD issued regulations that discriminatory effect without proof of intent is a valid basis of liability under the FHA, defining actionable discriminatory effects, and setting forth the standards for proving such claims. 78 Fed. Reg. 11461-11463; 24 C.F.R. § 100.500.

TDHCA urged the Fifth Circuit to adopt the HUD regulation's burden-shifting test for disparate-impact claims. Noting that "Congress has given HUD authority to issue regulations interpreting the FHA," and that the HUD regulation had been "subject to notice and comment," TDHCA argued that the regulation's burden-shifting standards were entitled to deference under *Chevron, U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). J.A. 52, Brief of Appellant in the Fifth Circuit, at 29. TDHCA argued that "Title VII (which authorizes disparate impact liability)", and the FHA "are similarly worded in their prohibition of discrimination," and that it therefore "makes sense to continue to interpret the two statutory schemes similarly." *Id.* at 30. The court of appeals reached "only one issue: whether the district court correctly found that [ICP] proved a claim of violation of the Fair Housing Act based on disparate impact." J.A. 362. In stating that disparate impact was a valid basis for liability under the FHA, the Fifth Circuit cited its own prior precedent, that of other circuits, and the HUD regulation. J.A. 362-364, 362 n.4.

With respect to the regulation, the Fifth Circuit noted that Congress had given HUD authority to

administer the FHA and issue regulations to carry it out, and that "[t]he regulations recognize, as we have, that 'Liability may be established under the Fair Housing Act based on a practice's discriminatory effect, as defined in paragraph (a) of this section, even if the practice was not motivated by discriminatory intent.'" J.A. 365 (quoting 24 C.F.R. § 100.500). The Fifth Circuit also quoted the regulation's definition of an actionable discriminatory effect: "[a] practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin." J.A. 365 (quoting 24 C.F.R. § 100.500(a)). The court of appeals adopted the burden-shifting standards in the HUD regulation as TDHCA had urged. J.A. 366-367. The court then reversed the judgment and, recognizing the district court's demonstrated expertise with the complex and fact intensive record, remanded "for the district court to apply this legal standard [the regulation] to the facts in the first instance." J.A. 368. The remedial order was also vacated when the judgment was vacated. J.A. 373.

SUMMARY OF ARGUMENT

The perpetuation of racial segregation which is the functional equivalent of intentional discrimination is a disparate impact claim that is cognizable under the Fair Housing Act. The courts and the HUD

regulation frame the question as whether discriminatory effects – disparate adverse impact or perpetuation of racial segregation – FHA liability can be imposed absent a finding of discriminatory intent.

Congress enacted the FHA to remedy the effects of past intentional government racial segregation and the effects of past housing industry non-intentional actions that were also perpetuating racial segregation. The FHA includes the 42 U.S.C. § 3601 mandate that controls and requires construction of the FHA provisions in a broad manner that furthers rather than constrains judicial remedies for the elimination of discrimination in housing. The plain meaning of the prohibition against "otherwise make unavailable" units because of race in 42 U.S.C. § 3604(a) is consistent with the Congressional directive to remedy the current effects of past government and other institutional racial segregation by focusing on the effects of the action rather than the intent of the actor. Similarly, the plain meaning of the obligation not to discriminate in "making available" financial assistance in 42 U.S.C. § 3605(a) is consistent with that Congressional directive. Importing an intent requirement into these provisions would ignore the 42 U.S.C. § 3601 mandate, the Congressional purpose to remedy effects, the decades of unanimous judicial decisions against bringing intent into the statute, and the deference due the HUD interpretation of the statute.

The Congressional directive to remedy the effects of past governmental segregation was based on the

Congressional findings that the prevailing structure of the housing market in this country remained distorted by those effects and enduring discrimination without regard to motivation by bias. 42 U.S.C. § 3601 has been applied by this Court to make broad interpretations of the FHA standing requirements and to make narrow interpretations of exemptions from FHA coverage.

HUD's regulation 24 C.F.R. § 100.500 setting out disparate impact and discriminatory liability is entitled to deference under *Chevron.* TDHCA admitted that the regulation was entitled to *Chevron* deference when it asked the court of appeals to defer and adopt the standards set out in the regulation. TDHCA's brief in the Fifth Circuit pages 28-30.

ARGUMENT

I. Each element of the statutory construction of the FHA supports the cognizability of disparate impact claims

A. The disparate impact proof standard includes perpetuation of racial segregation, the primary focus of Congress in passing the FHA

Congress enacted the FHA to remedy the perpetuation of racial segregation that denies minority families the freedom to choose dwellings within their means but outside the intentionally created racial ghettos. App. 17a, 27a. The elimination of that

freedom of choice was the result of TDHCA's perpetuation of racial segregation for which it was found liable in this case. J.A. 153, 172. From 1995 through 2009, TDHCA did not allocate LIHTCs to any family units in Dallas White tracts. ICP exhibits 22, 177, 353; TDHCA exhibit 280, admissibility J.A. 181 n.9. Rather, TDHCA exacerbated the existing racial segregation by placing 17,409 family LIHTC units in Dallas minority concentrated areas. ICP Summary Judgment Appendix R USCA5 1338, admissibility J.A. 152 n.13. This was 92.29% of the LIHTC family units in the city of Dallas. J.A. 150-153. This matched the percentage of de jure segregated public housing in minority areas, 95%, 6,100 of 6,400. TDHCA more than matched the number of segregated public housing units by a multiple of almost three, 17,409 LIHTC units to 6,100 public housing units. J.A 150-153; ICP Summary Judgment Appendix R USCA5 1338, admissibility J.A. 152 n.13; *Walker*, 169 F.3d at 976 n.4. Congress enacted the FHA to remedy government actions such as TDHCA's that perpetuate existing racial segregation even if those actions were not proven to be motivated by intent. Senator Brooke referred to the officials engaged in such conduct as not lacking good will to remedy the segregation but as having a lack of will to do so. App. 20a-21a.

There are two ways to prove a prima facie case of discrimination under the FHA without showing intent. The first is to show a greater adverse impact on one racial group than on another. The second is to show the perpetuation of racial segregation which

harms the entire community. *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977), *cert. denied,* 434 U.S. 1025 (1978); 24 C.F.R. § 100.500(a). The district court in this case found TDHCA liable for disproportionate harm to African-Americans and for perpetuation of racial segregation disparate impact claim based on uncontested evidence. The district court found that the disproportionate harm and perpetuation of racial segregation caused by TDHCA's allocation practice and the absence of justification for the practice made TDHCA liable under the FHA. J.A. 150-153, 216.

Restricting affordable housing choices to already racially segregated minority neighborhoods perpetuates the existing racial segregation created and maintained by intentional government action and private accommodation to that government action. App. 16a, 19a, 39a. Congress targeted practices such as zoning and affordable housing site selection that were continuing to perpetuate the effect of the separation of the races in an already segregated housing market for remedy under the FHA. App. 35a, 59a.

For example, this Court affirmed a holding that the disparate impact of perpetuation of racial segregation was proven in a case involving a town's zoning code that prohibited private construction of subsidized multifamily housing outside the minority concentrated urban renewal zone. The zoning ordinance perpetuated racial segregation because:

- the disproportionately high percentage of households that used and that would be eligible for the subsidized rental units were minorities, and

- the ordinance restricted private construction of low-income housing to the largely minority urban renewal area. *Town of Huntington, N.Y. v. Huntington Branch, N.A.A.C.P.*, 488 U.S. 15, 18 (1988). The Court did not rule on the issue whether disparate impact was applicable to zoning under the Fair Housing Act since the applicability of the disparate impact standard of proof had been conceded by the Town. *Id*.

Practices found by courts of appeals to perpetuate racial segregation include:

- Site selection decisions for affordable housing units that segregated the units into predominantly Black areas and avoided placing the units in non-minority areas, *Rizzo*, 564 F.2d at 149; *Jackson v. Okaloosa Cnty., Fla.*, 21 F.3d 1531, 1543 (11th Cir. 1994);

- zoning decisions excluding or steering affordable housing away from non-minority areas, *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 937-938 (2d Cir. 1988), *aff'd in part sub nom.*, *Town of Huntington, N.Y. v. Huntington Branch, N.A.A.C.P.*, 488 U.S. 15 (1988); *Arlington Heights*, 558 F.2d at 1291; *United States v. City of*

Parma, Ohio, 661 F.2d 562, 576 (6th Cir. 1981), *cert. denied,* 456 U.S. 926 (1982) (zoning decisions with discriminatory effect); and

- tenant selection and assignment practices that place Black tenants in separate and concentrated minority locations within an apartment complex. *United States v. Mitchell*, 580 F.2d 789, 791 (5th Cir. 1978).

These governmental actions exclude new rental housing affordable to moderate and low income tenants from predominantly non-minority areas – cities, towns, neighborhoods or specific portions of apartment complexes. New affordable housing is either made completely unavailable or is restricted to predominantly minority areas, usually in a central city, where the existing affordable housing is already located. Since the actions take place in an already racially segregated community, they freeze in the effects of the past de jure and other intentional governmental decisions that created the racial segregation. The affordable units that could otherwise offer Black families the freedom to choose units outside of predominantly minority areas are thus made unavailable in non-minority areas.

Even without proof of motivation, actions perpetuating segregation are the functional equivalent of intentional racial segregation. *Reinhart v. Lincoln Cnty.*, 482 F.3d 1225, 1228 (10th Cir. 2007); *Mountain Side Mobile Estates P'ship v. Secretary of Hous. &*

Urban Dev., 56 F.3d 1243, 1251 (10th Cir. 1995). Even when no intent to segregate is shown, perpetuation of segregation achieves the same harmful effects as if an actor intentionally created or maintained the racial segregation.

Perpetuation of racial segregation is achieved by defendants with the capacity to cause such an effect. *Reinhart*, 482 F.3d at 1228; *Mountain Side*, 56 F.3d at 1251. For example, TDHCA was the only agency in the state that could allocate LIHTCs. J.A. 98, 144. Individual single family owners are unlikely to be defendants in these cases. 42 U.S.C. § 3603(b)(1).

The courts of appeals and HUD impose discriminatory effect liability if the practice causing the disparate impact of perpetuation of segregation is not justified by a legitimate interest. Even if justified, the practice may still be illegal if the interest could be served by a less discriminatory alternative practice. Cases collected at 78 Fed. Reg. 11462, 11462 nn.30-33; 24 C.F.R. § 100.500(b)(1)(ii). Some litigants have sought the blanket interdiction of all actions with a discriminatory effect. This is untenable and beyond the intent of Congress. *Arlington Heights*, 558 F.2d at 1290. There is no authority for excluding the justification defense to a prima facie case. The justification defense is structured on the compelling governmental purpose defense for equal protection violations and the business necessity defense for disparate impact under Title VII. These defenses are appropriate to determine whether the distinctions being challenged serve the valid purposes of the act, policy, or law at

issue. *McLaughlin v. State of Fla.*, 379 U.S. 184, 196 (1964); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). The justification defense for the FHA serves the same purpose – giving due deference to decision making and using classifications by administrators and executives. *Rizzo*, 564 F.2d at 148.

A "discriminatory housing practice" under the FHA is any violation of 42 U.S.C. §§ 3604, 3605, 3606, or 3617. 42 U.S.C. § 3602(f). There is no discriminatory effect violation of those provisions based on perpetuation of racial segregation unless the practice causing the segregation is not justified, or if justified, the practice can be replaced by a less discriminatory alternative. 24 C.F.R. § 100.500(a), (b).

Liability for perpetuation of racial segregation is based on the harm that racial segregation inflicts on the entire community, minorities and non-minorities. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1973). Racial segregation harms minorities when it confines them to the conditions of slum and blight in predominantly minority areas. The same racial segregation harms non-minorities and the entire community. Non-minorities lose the benefits of interracial association and suffer the consequences and costs of living in a racially divided community. Both non-minorities and minorities have standing under the FHA to contest the perpetuation of segregation in their communities. *Id.* at 210-211; *Huntington Branch*, 844 F.2d at 937.

The remedies for perpetuating racial segregation are usually simple, direct, and without racial goals, quotas, parity requirements, or similar elements. Courts typically order the defendant to end the action perpetuating racial segregation. *Huntington Branch*, 844 F.2d at 942; *Arlington Heights*, 558 F.2d at 1295; *Rizzo*, 564 F.2d at 153. The remedy is race neutral as is the remedy in this case. J.A. 315-348.

The district court directed TDHCA to propose a remedy. TDHCA structured its remedial plan to "achieve the objectives of race neutral dispersion of LIHTC assisted developments within the remedial plan area [Dallas metropolitan area]. . . ." J.A. 321.

There is no racial parity, no racial goal, no racial quota, no racial target, and no racial incentive in the remedial plan that was submitted by the State, adopted by the Court, and voluntarily applied by TDHCA to its LIHTC program in the rest of the state. J.A. 326; 10 TAC § 11.9(c)(4) Opportunity Index. The court approved plan is based on less discriminatory alternatives that were to be in place for five years. J.A. 316-317. The relevant features of the plan include:

- eligibility requirements that preclude locations adjacent or near hazardous or noxious uses including high crime areas,

- selection criteria that give points for locations in higher income, lower poverty areas with good schools,

- a potential increase in LIHTCs for units in the higher income, lower poverty areas with good schools to match the potential LIHTC increase for units in very low income, high poverty areas,
- a fair housing notice given to every potential tenant informing the tenant that there may be locations with access to better neighborhoods, schools, and services and a website that may provide information about these options, and
- annual analysis of the effectiveness of the plan and possible modifications to enhance the policy of avoiding over-concentration of low income housing units. J.A. 316-317.

No person or group of persons is given any form of racial or ethnic preference. There is no preference for ICP's clients or for voucher participants. LIHTCs will continue to be allocated to units in minority areas. No geographical area is ineligible for LIHTCs because of race, ethnicity, income levels, poverty rates, or school quality. J.A. 316-317, 320-348. TDHCA will also provide additional selection criteria points for projects that can be shown to contribute to concerted community revitalization plans funded and administered by cities. This is not part of the court approved plan but the district court approved TDHCA's use of this element along with the plan. J.A. 311, 317.

Even if the plan is completely successful, the existing concentration of more than 17,000 LIHTC family units in predominantly minority areas of Dallas will continue to exceed by far the number of LIHTC family units in non-minority areas. Given the extent of the LIHTC racial segregation since 1987 and the continued allocation of LIHTC units in minority areas, this is inevitable. However, the disproportionate allocation process will end and some indefinite number of LIHTC units will be made available in non-minority areas for eligible tenants without regard to their race or ethnicity. J.A. 271-272.

B. The Fifth and Fourteenth Amendments authorize Congress to enact the FHA as remedial legislation focused on eliminating the effects of racial discrimination

Congress has the constitutional power to impose discriminatory effects liability for racial segregation that has been created and maintained by the federal, state, and local governments and remains largely in place. Congress passed the FHA under the power granted by Section 5 of the Fourteenth Amendment and a corollary power under the Fifth Amendment. Congress did so in order to remedy the discriminatory effects of past government racial segregation. 114 CONG. REC. 2273 (1968) (Mondale); 114 CONG. REC. 2534-2535 (1968) (Justice Department Presentation on Constitutionality of FHA). Judicial power to enforce the Fourteenth Amendment is limited to conduct that violates the Amendment. Congressional

power to legislate is not so limited. Congress used Section 5 of the Fourteenth Amendment as authority for the FHA because that Section gives Congress the power to correct the effects of past violations by the government. App. 59a-62a. Congress clearly had the power to prohibit actions which, without intent, carried on the effects of past racial segregation. *Katzenbach v. Morgan*, 384 U.S. 641, 649-650 (1966). The Congressional record shows Congress was using that power.

The injuries from racial segregation by federal, state, and local governments have not faded. There is no basis for a re-examination of the need for the FHA. Congress has periodically reviewed the facts and determined that the need for the FHA continues. App. 64a, 67a, 71a; 154 CONG. REC. H 2283 (2008). The justification for the effects standard has not vanished. It is still needed to accomplish the original "purpose or 'end'" of the Act. App. 32a; *Cf. Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2627-2628 (2013).

C. The unique legal context and structure of the FHA show that a perpetuation of segregation, disparate impact violation of 42 U.S.C. § 3604(a) or 42 U.S.C. § 3605 is cognizable without proof of intent

The unique legal context and structure of the FHA provide the basis for determination of the methods of proof to be used in establishing violations of the Act. The legal context for the FHA was the need to

provide remedies for the existing effects of the governments' past intentional racial segregation of this country's cities and suburbs. The U.S. Attorney General's 1968 brief for Congress on the constitutional basis for the FHA was explicitly premised on the need to provide remedies for the current effects of past governmental racial segregation. The brief states:

> 2. Federal legislation under the Equal Protection Clause may be based on a desire to correct the evil effects of past unconstitutionally discriminatory government action
>
> * * *
>
> It follows that if the States in the past denied to persons within their jurisdictions the equal protection of the laws, and if the effects of their denials are still present, Congress possesses the power to correct those effects. By similar reasoning, the Fifth Amendment, which imposes equal protection obligations on the Federal Government similar to those which the Fourteenth Amendment imposes on the States, grants Congress the power to correct the enduring effects of any past denials of equal protection by the Federal Government.
>
> Such denials of equal protection by the States, and by the Federal Government, were in fact numerous, and their effects in housing are still with us. App. 29a-30a.

Senator Mondale, a principal Senate sponsor of the FHA, was explicit that the effects of past government

discrimination were the remedial target of the statute.

> It thus seems only fair, and is constitutional, that Congress should now pass a fair housing act to undo the effects of these past State and Federal unconstitutionally discriminatory actions. App. 36a-37a.

The need to remedy the effects of past government segregation and to provide freedom of choice by making units available in non-minority areas was repeated throughout the 1966, 1967, and 1968 Congressional debates and hearings on the FHA. App. 10a, 27a.

The unique structural choice Congress made was to state in the first section of the FHA that, "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. This meant, as the Court has found, that "the reach of the proposed law was to replace the ghettos 'by truly integrated and balanced living patterns.'" *Trafficante*, 409 U.S. at 211 (quoting Senator Mondale). The Congressional sponsors of the FHA meant to set a broad remedial purpose for the Act. 114 CONG. REC. 9563 (1968) (Celler).

> The purpose, or "end" of the fair housing law is to remove the walls of discrimination which enclose minority groups in ghettoes, so that they may live wherever their means permit and be better able to secure the equal

> benefits of government and other rewards of life. 114 CONG. REC. 2699 (1968) (Mondale).

No other civil rights statute has a provision with the broad scope of 42 U.S.C. § 3601. *See, e.g.*, 42 U.S.C. § 2000d, *et seq*.; 42 U.S.C. § 2000e, *et seq*. The statutory construction of the entire FHA is covered by the provision. The judge-made prudential limitations on standing that, but for 42 U.S.C. § 3601, would have limited plaintiff standing under the FHA, are not applicable. *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 109 (1979). This Court relied on 42 U.S.C. § 3601 to read the FHA exemption in 42 U.S.C. § 3607(b)(1) narrowly and therefore to hold that an ordinance that had the effect of excluding a group home for the disabled – an ordinance defining "family" – was subject to the FHA. *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 730-732 (1995). Similarly, the reach of 42 U.S.C. § 3601 is one reason the term "because of" in the FHA does not eliminate disparate impact liability. *Arlington Heights*, 558 F.2d at 1289.

The broad and generous construction required by 42 U.S.C. § 3601 also applies to the "otherwise make unavailable" term in 42 U.S.C. § 3604(a). Congress included this term to focus on the effects of the prior governmental racial segregation. App. 29a-32a. The purpose of the FHA was to make available units outside the ghetto as one remedy for the effects of the intentional racial segregation that made those units unavailable to minority families. There were a wide

variety of methods by which units could be otherwise made unavailable. For example:

> The theoretical availability to all citizens, regardless of their race, of a new FHA-aided housing project may be of no practical effect when the project is hidden away in a large section of a city or a large suburban area which is *otherwise unavailable* to nonwhites. App. 61a. (Attorney General Ramsey Clark.) (Emphasis added).

The broad construction of the FHA to include non-intentional discrimination is justified by Congressional findings that the discrimination making units unavailable was not just discrimination based on personal prejudice. The Congressional record consistently pointed out that those in the housing business were frequently acting not from bias and bigotry but from a lack of will to address the racial segregation or for business and economic reasons. App. 20a, 40a, 43a, 56a. Congress meant for the FHA to address this non-intentional discrimination by its choice of the prohibitions against otherwise making unavailable units or by not making financial assistance available. 42 U.S.C. § 3604(a), § 3605(a).

The ordinary meaning of the words "otherwise make unavailable" supports the inclusion of non-intentional discrimination as proof of FHA liability. The meaning of "available" when Congress was considering the FHA included "readily obtainable; accessible." *Random House Dictionary of the English Language* 102 (1967). This is a characteristic of a

condition, not a state of mind. The meaning fits the Congressional context to address the effects of racial segregation by making available units in non-minority areas. A unit is available if it is readily obtainable or accessible. If the unit is not readily available or accessible for whatever reason, it is unavailable. *Id*. at 1538. Congress found that racial segregation was making units in non-minority areas unavailable. App. 42a, 47a, 49a, 51a, 61a. "Make" means cause or bring about. *Random House Dictionary* at 866. "Otherwise" means in another manner, differently. *Id*. at 1019. The words "otherwise make unavailable" focus on the act and the status of the units and not on the motive of the actor. 42 U.S.C. § 3601 and the Congressional emphasis on remedying the effects of intentional segregation do not allow a construction inserting an intent requirement into the ordinary meaning of the phrase "otherwise make unavailable."

42 U.S.C. § 3605(a) also contains a provision based on "making available" financial assistance for residential units. This provision was added by Congress in 1988. The debate and the House Report on the amendment made it clear that Congress intended the liability provision to be subject to the discriminatory impact business necessity defense. App. 76a; H.R. REP. No. 711, 100th Cong., 2d Sess. 1988, *reprinted in* 1988 U.S.C.C.A.N. 2173. The meaning of the words plus the Congressional statement do not allow for an intent only construction of the statute.

D. The text of the FHA does not explicitly require proof of intent in order to establish most discriminatory housing practices and such a requirement should not be construed into the text

42 U.S.C. § 3604(a) and 42 U.S.C. § 3605(a), (b) do not include the words intent, purpose, or motive. The canons of statutory construction do not support imposing intent into these provisions where it has not been placed by Congress. *Lamie v. United States Trustee*, 540 U.S. 526, 537 (2004); *Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 176-177 (1994). The broad purpose set for the FHA in 42 U.S.C. § 3601 forestalls adding an intent requirement to the FHA as a matter of statutory construction. *See Oxford House, Inc*., 514 U.S. at 730-732.

The canons also recommend against adding absent words particularly if the words are those that Congress clearly knows how to use but has not. *Lamie*, 540 U.S. at 537; *Central Bank*, 511 U.S. at 176-177. Congress clearly knew how to explicitly impose a proof of intent requirement into the FHA. Although it did not do so in 42 U.S.C. § 3604(a) or 42 U.S.C. § 3605(a) and 42 U.S.C. § 3605(b), Congress did add intent in other provisions. 42 U.S.C. § 3604(c) uses the word "intention" as part of a violation. 42 U.S.C. § 3604(c) makes illegal the making, printing, or publishing of any notice, statement, or advertisement that indicates "an intention to make" a preference, limitation, or discrimination based on race,

color, religion, sex, handicap, familial status, or national origin.

There is another provision that, by its text, makes only intentional conduct illegal even though it does not use the word "intent." 42 U.S.C. § 3605(c) expressly allows appraisers to take into consideration any factor other than race, color, religion, national origin, sex, handicap, or familial status. An appraisal can thus consider any factor without regard to adverse racial impact. This provision applies only to persons engaged in the business of appraisals and was added in 1988.[5] Pub. L. No. 100-430, 102 Stat. 1619, Secs. 6, 805 (1988). Congress was aware of and relying on the unanimous judicial holdings that intent was not required to prove a FHA violation. App. 65a-66a, 77a.

The only other explicit Congressional mention of intent is in the determination whether housing is actually intended for older persons. Upon a finding of intent to house only older persons, the dwelling units made unavailable by that intent are not subject to the prohibition against discrimination based on familial status. 42 U.S.C. § 3607(b)(2)(B), (C).

All courts of appeals hold that the text of the FHA is consistent with proving the perpetuation of racial

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[5] There are other exclusions or exemptions in the FHA that support the conclusion that the Act includes liability for disparate impact. 78 Fed. Reg. 11466.

segregation and other disparate impact without showing intent. 78 Fed. Reg. 11462, 11462 n.28.

E. The text of and Congressional record of hearings on 42 U.S.C. § 3605 and 42 U.S.C. § 3614-1 support the rule that perpetuation of segregation claims are cognizable under 42 U.S.C. § 3605.

The District Court held that TDHCA also violated the 42 U.S.C. § 3605(a) prohibition on the racially discriminatory provision of financial assistance. J.A. 172, 314. The text, other provisions of the FHA, and the Congressional purpose for the FHA support the cognizability of perpetuation of racial segregation claims under this provision without proof of intent.

The 1968 version of 42 U.S.C. § 3605 stated that it was unlawful for banks or other entities in the business of making commercial real estate loans to deny a loan or other financial assistance or discriminate in the terms or conditions of a loan because of race. Pub. L. No. 90-284, Title VIII, § 805, 82 Stat. 83 (1968). In 1967, the American Bankers Association explained that this proposed language in the FHA exposed lenders to liability simply because of good business practices without intent.

> If through the application of a prudent lending practice and not because of the reasons stated in Section 5, a lender declines an application it would expose itself, under the bill as drawn, to a possible costly legal defense of its actions. Furthermore, a defense might

> also be necessary if a loan should be granted under terms and conditions which reflect the true credit risk to the lender. . . . In effect, every loan decision made by any lender would be subject to legal action by complaining parties. . . . App. 63a. (Statement submitted by the American Bankers Association).

Congress passed the FHA despite this objection.

Congress amended 42 U.S.C. § 3605 in 1988. The Congressional record for the amended provision states it was to widen the scope of lending entities covered by the Act. The Congressional record made it clear that this prohibition was subject to the disparate impact business necessity defense.

> Mr. SASSER.
>
> It is my understanding that this amendment will not preclude those purchasing mortgage loans from taking into consideration factors justified by business necessity, including requirements of Federal law, that relate to the financial security of the transaction or the protection against default or diminution in value of the security. Federal or State statutes and regulations, as well as sound business practices, require protection from risks arising from defective title, casualty losses, and the borrower's default.
>
> Mr. KENNEDY.
>
> The Senator is correct. This provision is fully consistent with the concerns you have raised. The amendment will in no way prevent

> consideration of factors justified by business necessity, including requirements of Federal law, relating to a transaction's financial security or protecting against default or reduction of the security's value. App. 76a.

The relevant House Report stated:

> The Committee does not intend that those purchasing mortgage loans be precluded from taking into consideration factors justified by business necessity (including requirements of Federal law) which relate to the financial security of the transaction or the protection against default or diminution in value of the security. H.R. REP. No. 711, 100th Cong., 2nd Sess. [1988], *reprinted at* 1988 U.S.C.C.A.N. 2173.

Business necessity is a defense to disparate impact liability under the FHA but not to liability for intentional acts. *Mountain Side*, 56 F.3d at 1254. Unless disparate impact liability applied, there was no reason for the Congressional statements.

In 1996, Congress amended the FHA to provide a safe harbor for finding and correcting disparate impacts caused by real estate financing practices. Congress asked the General Accounting Office to review the fair lending laws including 42 U.S.C. § 3605. GAO, *Fair Lending Federal Oversight and Enforcement Improved but Some Challenges Remain*, August 1996, GAO/GGD-96-145, page 2. According to the GAO:

> there currently exists under the fair lending laws a disparate impact (effects) test for discrimination. Under this test a lender commits lending discrimination if the lender maintains a neutral policy or practice that has a disproportionate, adverse effect on members of a protected group and which cannot be justified by "business necessity," or for which a less discriminatory alternative is shown to exist. The application of disparate impact analysis to some common practices inherent to the financial services industry, however, could prove to be problematic. For example, some legal experts have questioned whether and how the disparate impact test would affect the use of differential and tiered pricing systems based on perceived credit risk. Also, others have indicated that the disparate impact test could pose compliance problems for banks that employ computerized underwriting systems. Some bankers are uncertain whether such standardized systems using uniform criteria would pass a disparate impact test, given the relative socioeconomic status of some protected groups.

Id. at 9.

To cure the problem posed by the lenders, GAO recommended that Congress remove or diminish the legal risks of self-testing when conducted in good faith by lenders. *Id*. at 10. Congress followed the GAO recommendation and passed 42 U.S.C. § 3614-1. GAO, *Large Bank Mergers, Fair Lending Review Could be Enhanced With Better Coordination*, November, 1999, GAO/GGD-99, page 32. This provision

of the FHA provides a privilege and other protection for lenders who engage in good faith self-tests to determine if their lending practices constitute disparate impact under the FHA. A representative of the lending industry supported the legislation because it would lead to the elimination of intentional and unintentional discrimination. App. 82a. (Statement submitted on behalf of America's Community Bankers). The GAO and Congressional actions were taken explicitly because of the existence of the disparate impact standard violation under 42 U.S.C. § 3605.

F. The Congressional decision to target the FHA on the effects of past governmental discrimination made proof of intent irrelevant for many violations

The remedial targets of the FHA were the ongoing discriminatory effects primarily caused by the prior intentional racial segregation of federal, state, and local governments. *Rizzo*, 564 F.2d at 147, 147 n. 30. Senator Mondale, a principal Senate sponsor of the FHA, introduced the evidence of the federal, state, and local government's past violations of equal protection that confined Black families to ghettos and made housing in non-minority areas unavailable to those families. He drew attention to the present effects of those denials of equal protection by every level of government. He then stated the end and the purpose of the FHA was to undo those present effects, the existing racial segregation. App. 37a.

The U.S. Attorney General's brief for Congress on the constitutional basis for the FHA was explicitly premised on the need to provide remedies for the current effects of past government racial segregation. App. 29a-32a.

The Congressional record shows that Congress intended to prevent and remedy current government actions perpetuating racial segregation. These actions were being caused not by bigotry but by a lack of any will. The government employees and officials perpetuating segregation had the memos to prove they were not intentionally segregating federal housing programs. Nevertheless, Congress passed the FHA to stop this unintentional segregation. App. 20a-21a.

Similarly, the Congressional record consistently stated the main non-government actors maintaining racial segregation were motivated not by bias or bigotry but by the economic constraints imposed by the continued existence of the racial ghettos. App. 24a, 39a-40a, 43a-44a, 48a, 53a-54a; *Civil Rights: Hearings Part 2*, 89th Cong., 2d Sess. 1172 (1966) (Attorney General Katzenbach). An intent requirement would have left these effects caused by non-government actors unaddressed. There is no indication that Congress meant to do so by imposing an intent requirement.

In addition to the irrelevance of intent in order to remedy the effects of segregation, Congress was aware of the proof problems inherent in establishing racial intent. During the debate about the extent of

the exemption for single family homeowners, an issue arose over the difficulty of proving individual motivation. The sponsor of an amendment widening the exemption conditioned it on a racial intent requirement. Senator Percy opposed the amendment, stating that:

> If I understand this amendment, it would require proof that a single homeowner had specified racial preference. I maintain that proof would be impossible to produce. 114 CONG. REC. 5216.

The amendment was rejected by the Senate. 114 CONG. REC. 5221 (1968); *Rizzo*, 564 F.2d at 147; *Resident Advisory Bd. v. Rizzo*, 425 F.Supp. 987, 1022 (E.D. Pa. 1976), *modified*, 564 F.2d 126 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978).

Current intent was irrelevant to the Congressional remedy for the existing effects of the past intentional and unintentional actions creating racial segregation.

G. There are sound policy reasons supporting Congressional decisions to avoid intent requirements

Congress has made the decision to avoid the harsh consequences of intent findings in other civil rights statutes. The legislative record of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973(b) set out some reasons for that choice that would also apply to the FHA. Inquiry into the motives of elected officials can be both difficult and undesirable. Such inquiry

should be avoided when possible. The judicial and executive authorities charged with enforcing the laws may be reluctant to attribute racial intent to violate those laws on the part of state and local officials if they can avoid that unseemly task and still reach a just result. Charges of intentional discrimination can have a divisive impact on local communities. Proving intent can be time-consuming, costly, and unnecessary. *United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1557-1558 (11th Cir. 1984).

The disparate impact standard is met by the perpetuation of racial segregation or other discriminatory effects that are the functional equivalent of intentional or purposeful discrimination. If the practices causing the racial segregation are not legitimate or there are less discriminatory alternatives to the practices, then the functional equivalent of intentional segregation has been proven. *Reinhart*, 482 F.3d at 1228; *Mountain Side*, 56 F.3d at 1251. Given the perpetuation of segregation along with the absence of policies and interests justifying that segregation, the Congressional choice to avoid the unnecessarily divisive and costly consequences of adding an intent requirement is reasonable.

II. The unanimous courts of appeals recognizing disparate impact proof of liability found support in Griggs and in each element of statutory construction

A. The *Griggs* Title VII opinion supports disparate impact liability under the FHA

The opinion in the Title VII case, *Griggs*, 401 U.S. at 435-436, does not foreclose disparate impact liability under the FHA but rather supports it. *Griggs* specifically rejected the argument that 42 U.S.C. § 2000e-2(h) required a showing of intent to discriminate before a professionally developed ability test should be held to have violated the statute. *Griggs*, 401 U.S. at 435-436. This provision specifically includes both the word "intended" and the phrase "because of race." 42 U.S.C. § 2000e-2(h). The courts of appeals opinions discussing *Griggs* followed *Griggs* in this argument and rejected the construction that the phrase "because of race" as used in Title VII imports an intent requirement into the FHA. *Arlington Heights*, 558 F.2d at 1288; *Rizzo*, 564 F.2d at 146-148; *Huntington Branch*, 844 F.2d at 934-935.

Another part of the *Griggs* opinion supports the existence of the disparate impact liability standard in the FHA. 42 U.S.C. § 2000e-2(a)(2) was at issue in *Griggs*, 401 U.S. at 426 n.1. This provision prohibits actions that would "otherwise adversely affect" status as an employee because of race. The Court held that the text of this statute and the relevant Congressional record meant that practices, procedures, or tests

neutral in terms of intent were illegal "if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Id*. at 430. The text of the FHA parallels the text of Title VII. Actions that "otherwise make unavailable" dwellings because of race violate 42 U.S.C. § 3604(a). The Congressional purpose was to remedy prior intentional governmental discriminatory practices and procedures causing racial segregation. Intent is no more an element of "otherwise make unavailable" than it is an element of "otherwise adversely affect." Both phrases focus on consequences, not intent. To "otherwise make unavailable" a unit is one way to adversely affect the housing choices of a person seeking to rent or buy a dwelling.

B. The early and precedent setting courts of appeals opinions discussed *Griggs* but adopted disparate impact based on the legislative mandate and Congressional purpose for the FHA

The unanimous courts of appeals' decisions upholding a perpetuation of racial segregation or other disparate impact standard for proving FHA liability were based on consideration of various elements of the FHA. The elements considered included the text and the structure of the FHA and in particular the mandate of 42 U.S.C. § 3601. The courts of appeals also considered the Congressional record of hearings and debates setting out the need to remedy the effects of past government discrimination. *Arlington Heights,*

558 F.2d at 1289-1290; *Rizzo*, 564 F.2d at 147. The courts paid particular attention to the guidance of this Court on the difference between the need for intent in equal protection cases compared to the availability of disparate impact under some statutes. The courts were careful and prudential because of the major change in the Court's rulings on the proof necessary to show equal protection violations after 1968 when the FHA passed and the mid-1970s when FHA cases were reaching the courts of appeals. *Rizzo*, 564 F.2d at 146. When Congress passed the FHA, the law did not require separate standards for proving intentional and non-intentional racial discrimination. The cases requiring intent for equal protection violations were *Washington v. Davis*, 426 U.S. 229 (1976) and *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977).

Three frequently cited FHA perpetuation of segregation cases taking into account Congressional purpose and 42 U.S.C. § 3601 are *Arlington Heights,* 558 F.2d at 1289; *Rizzo*, 564 F.2d at 147; and *Huntington Branch*, 844 F.2d at 934. These cases all discuss the *Griggs* disparate impact employment standard as it provided support for a disparate impact housing standard in addition to the support provided by 42 U.S.C. § 3601, the Congressional record, and the FHA text.

For example, *Arlington Heights* cites *Griggs* for the proposition that the Court had not always interpreted "because of race" to require proof of intent. *Arlington Heights*, 558 F.2d at 1289. *Rizzo* noted that

the Court had construed both Title VII and Title VIII broadly, citing *Griggs* for Title VII and *Trafficante* for the FHA. *Rizzo* declined to follow *Griggs* on the business necessity defense standard. *Rizzo*, 564 F.2d at 147, 148. *Rizzo* adopted the disparate impact standard because of the legislative history of the FHA supporting an effect standard and the persuasiveness of the *Arlington Heights* opinion. *Rizzo*, 564 F.2d at 146-148. *Huntington* adopted the disparate impact standard based on all of these considerations. *Huntington Branch*, 844 F.2d at 934-937. The Congressional mandate in 42 U.S.C. § 3601 and the Congressional record were the conclusive factors in these FHA disparate impact opinions.

C. The opinions in *Smith v. City of Jackson* do not affect the statutory context, Congressional record, or text of the FHA and do not eliminate FHA disparate impact liability

The plurality opinion in *Smith v. City of Jackson* examined the usual elements of statutory construction, including the Congressional purpose, text of the statute, and the relevant agency interpretations. *Smith v. City of Jackson*, 544 U.S. 228, 233-234, 239 (2005). The plurality opinion held that these elements supported the holding that disparate impact liability applied to some employment practices under 29 U.S.C. § 623(a)(2). *Smith*, 544 U.S. at 240. TDHCA's argument that *Smith* changes the construction of the FHA does not take into account the differences

between the Congressional purposes, statutory texts, and relevant agency and judicial interpretations for 29 U.S.C. § 623(a)(2) and the FHA. The post-*Smith* courts of appeals decisions have not changed FHA disparate impact liability. *Graoch Associates # 33, L.P. v. Louisville/Jefferson Cnty. Metro. Human Relations Comm'n*, 508 F.3d 366, 392 (6th Cir. 2007) (*Smith* discussed); *Reinhart*, 482 F.3d at 1229; *Affordable Hous. Dev. Corp. v. City of Fresno*, 433 F.3d 1182, 1194 (9th Cir. 2006); *Hallmark Developers, Inc. v. Fulton County*, 466 F.3d 1276, 1286 (11th Cir. 2006).

The elements supporting the existence of disparate impact liability under the FHA remain intact. The broad mandate of 42 U.S.C. § 3601, the Congressional record showing the Congressional purpose to remedy the existing effects of governments' past intentional housing segregation, and the unique language focusing on the availability of housing or its unavailability have been the common elements supporting the cognizability of disparate impact claims under the FHA. *Arlington Heights*, 558 F.2d at 1289-1290; *Huntington Branch,* 844 F.2d at 928, 936; *Rizzo*, 564 F.2d at 146-148. These elements of the FHA are the basis for the statutory construction of the FHA. *Trafficante*, 409 U.S. at 211; *Gladstone*, 441 U.S. at 109; *Oxford House, Inc.*, 514 U.S. at 730-732. *Smith* does not change the interpretation of these elements of the FHA.

III. States must avoid violations of the FHA, work towards the goal of open, integrated residential housing patterns, and prevent the increase of segregation by their administration of federally funded housing programs.

A. Government consideration of race to avoid perpetuating racial segregation is not unconstitutional.

TDHCA argues that consideration of race as part of a voluntary compliance effort is unconstitutional or leads to unconstitutional actions. This is not the law. The use of racial considerations as part of a voluntary compliance effort is not unconstitutional. *Ricci v. DeStefano,* 557 U.S. 557, 581-584 (2009). The consideration of racial effects as part of the voluntary compliance process under the FHA is explicitly authorized by the FHA. 42 U.S.C. § 3614-1. Any participant in an FHA covered real estate related financial transaction can engage in the privileged consideration of the racial effects of their practices and policies. This consideration remains privileged even if unlawful discrimination is found during the self-testing so long as remedial actions are taken. 42 U.S.C. § 3614-1(a)(1)(B).

B. FRI's position in favor of racial segregation is not supported by the legal authority it cites or the Enterprise Foundation affidavit it filed in district court

FRI wants to add another LIHTC project to a previously de jure segregated neighborhood that already has eight LIHTC projects with 1,148 units. J.A. 31 Document 183. The issue is not whether the additional LIHTC units harm the minority neighborhoods in which the LIHTC units are concentrated. The issue is whether the racial segregation of the LIHTC units into those neighborhoods destroys the freedom to choose available units outside of those areas as required by the FHA. App. 10a, 27a, 73a.

The remedy does not eliminate the use of LIHTCs to contribute to concerted community revitalization plans for low income minority areas. TDHCA will continue to provide additional selection criteria points for projects that can be shown to contribute to concerted community revitalization plans funded and administered by cities. J.A. 311, 317. The seven points for community revitalization are equal to the seven points for opportunity index areas under TDHCA's selection criteria. J.A. 328, 334.

Contrary to the State's and FRI's arguments, there is no general federal LIHTC statutory preference for LIHTCs in low income areas, only for applications that would contribute to a concerted community revitalization plan in low income areas.

26 U.S.C. § 42(m)(1)(B)(ii)(III). The district court also found that TDHCA does not provide this preference in the manner specified in the statute. J.A. 243-252.

FRI filed an Enterprise Foundation affidavit in support of its opposition to the remedial plan. That affidavit supports giving low income families the choice of LIHTC units in both high income and lower income communities. J.A. 32 Document 191, attachment page 4; Document 192. The case cited by FRI in its brief holds that LIHTC opportunities are required in both minority and non-minority neighborhoods. *In re Adoption of the 2003 Low Income Housing Tax Credit Qualified Allocation Plan*, 848 A.2d 1, 13-14, 26-27 (N.J. Super. Ct.), *certif. denied*, 861 A.2d 846 (N.J. 2004). The disparate impact liability and remedy in this case is consistent with these authorities cited by FRI.

C. States must affirmatively further fair housing and avoid disparate impacts in the administration of federally funded neighborhood improvement grants

TDHCA asserts that the disparate impact standard under the FHA may prevent governments from implementing federally funded remedial programs to improve conditions in low income areas if those areas are predominantly minority in population. Governments voluntarily choose to accept federal funding for the remedial programs to improve conditions

in low income areas. In order to ensure that the federal government no longer participated in the use of federal funding to perpetuate racial segregation, Congress passed 42 U.S.C. §§ 3608(d), 3608(e)(5), and similar provisions governing specific federal programs. 42 U.S.C. §§ 5304(b)(2), 5306(d)(7)(B), 12705(b)(15), 1437c-1(d)(16). Governments voluntarily assume these obligations when they choose to accept the federal funds. The obligations include affirmatively furthering fair housing in all of its housing and urban development activities. *N.A.A.C.P. v. Secretary of Hous. and Urban Dev.*, 817 F.2d 149, 155 (1st Cir. 1987). The regulations also contain a disparate impact standard as well as other obligations under the statutes. 24 C.F.R. § 570.904(a)(2); 24 C.F.R. § 570.601; 24 C.F.R. § 570.487. HUD does not interpret these affirmatively furthering obligations to prevent improvements in minority areas. 78 Fed. Reg. at 43716.

IV. HUD's determination that perpetuation of racial segregation claims may be proven without evidence of discriminatory intent is an authoritative interpretation entitled to *Chevron* deference

The FHA gives HUD broad authority to promulgate rules implementing and construing the FHA. 42 U.S.C. § 3614a; 42 U.S.C. § 3608(a); *see also* 42 U.S.C. § 3535(d). Congress also established a HUD administrative adjudication process for claims filed under the

FHA. 42 U.S.C. § 3610, 42 U.S.C. § 3611, 42 U.S.C. § 3612.

Pursuant to this Congressional authority, HUD issued a regulation reaffirming that the FHA, including 42 U.S.C. § 3604(a) and 42 U.S.C. § 3605, authorize disparate impact claims without proof of intent. 24 C.F.R. § 100.500. The discriminatory effect of a practice includes the creation, increase, reinforcement, or perpetuation of racially segregated housing patterns. 24 C.F.R. § 100.500(a). In formal adjudications, HUD has interpreted the FHA to encompass disparate impact claims. 78 Fed. Reg. 11461, 11561 n.12. The burden of proof and justification elements of the HUD regulation are also necessary for and justified by the HUD administrative adjudication process. *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 423-425 (1999); *NLRB v. Bell Aerospace*, 416 U.S. 267 (1974); 24 C.F.R. § 100.500.

The text of the FHA does not address how a private plaintiff or HUD should prove a housing discrimination claim. TDHCA has admitted that Congress gave HUD the authority to regulate on these issues, that the HUD regulation is a reasonable interpretation of the statute, and that the regulation is entitled to deference under *Chevron*.

> Congress has given HUD authority to issue regulations interpreting the FHA. 42 U.S.C. §§ 3608(a), 3614a. Because HUD's regulations were subject to notice and comment, they deserve deference unless Congress has clearly spoken on the issue or the regulations

> are not based on a permissible construction of the statute. *Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844-45 (1984).
>
> As evidenced by the range of courts of appeals decisions, Congress has not spoken clearly on the burden-of-proof issue in disparate-impact claims under the FHA. . . . HUD's regulations are a reasonable interpretation of the burden of proof and should be applied in this case. J.A. 52 Brief of TDHCA, pages 28-30.

This argument is as sound and compelling now as it was when TDHCA made it on appeal to the United States Court of Appeals for the Fifth Circuit. HUD rules promulgated pursuant to either the general rule making authority or the administrative adjudication authority are entitled to deference under *Chevron,* 467 U.S. at 842-844.

Each of the elements necessary for *Chevron* deference are present. The text of the FHA does not itself set out the evidence necessary to prove a claim although the courts of appeals precedent is and has been unanimous for decades that disparate impact claims are cognizable under the text of the FHA. There is no authority from the courts of appeals or this Court holding that the text of the FHA precludes disparate impact claims. 78 Fed. Reg. 11462, 11462 n.28. The judicial authority establishes that the HUD regulation is both a reasonable and permissible construction of the statute. *Id*. The best, and therefore a reasonable and permissible, construction of the

FHA is one that is consistent with the clear Congressional purpose to provide a remedy for the existing effects of prior intentional governmental racial segregation. App. 36a. Congress gave HUD the rule making powers needed to implement the FHA. The regulation promulgated pursuant to the authority is entitled to deference. *Chevron,* 467 U.S. at 842-844.

CONCLUSION

ICP respectfully requests the Court to affirm the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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42 U.S.C.A. § 3601

Declaration of policy

It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

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42 U.S.C.A. § 3604

Discrimination in the sale or rental of housing and other prohibited practices

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful –

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race,

color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

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42 U.S.C.A. § 3605

Discrimination in residential real estate-related transactions

(a) In general

It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.

(b) "Residential real estate-related transaction" defined

As used in this section, the term "residential real estate-related transaction" means any of the following:

(1) The making or purchasing of loans or providing other financial assistance –

(A) for purchasing, constructing, improving, repairing, or maintaining a dwelling; or

(B) secured by residential real estate.

(2) The selling, brokering, or appraising of residential real property.

(c) Appraisal exemption

Nothing in this subchapter prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status.

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42 U.S.C.A. § 3607

Religious organization or private club exemption

(b)(1) Nothing in this subchapter limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling. Nor does any provision in this subchapter regarding familial status apply with respect to housing for older persons.

(2) As used in this section, "housing for older persons" means housing –

(A) provided under any State or Federal program that the Secretary determines is specifically designed and operated to assist elderly persons (as defined in the State or Federal program); or

(B) intended for, and solely occupied by, persons 62 years of age or older; or

(C) intended and operated for occupancy by persons 55 years of age or older, and –

(i) at least 80 percent of the occupied units are occupied by at least one person who is 55 years of age or older;

(ii) the housing facility or community publishes and adheres to policies and procedures that demonstrate the intent required under this subparagraph; and

(iii) the housing facility or community complies with rules issued by the Secretary for verification of occupancy, which shall –

(I) provide for verification by reliable surveys and affidavits; and

(II) include examples of the types of policies and procedures relevant to a determination of compliance with the requirement of clause (ii). Such surveys and affidavits shall be admissible in administrative and judicial proceedings for the purposes of such verification.

(3) Housing shall not fail to meet the requirements for housing for older persons by reason of:

(A) persons residing in such housing as of September 13, 1988, who do not meet the age requirements of subsections (2)(B) or (C): Provided, That new occupants of such housing meet the age requirements of subsections (2)(B) or (C); or

(B) unoccupied units: Provided, That such units are reserved for occupancy by persons who meet the age requirements of subsections (2)(B) or (C).

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42 U.S.C.A. § 3614-1

Incentives for self-testing and self-correction

(a) Privileged information

(1) Conditions for privilege

A report or result of a self-test (as that term is defined by regulation of the Secretary) shall be considered to be privileged under paragraph (2) if any person –

(A) conducts, or authorizes an independent third party to conduct, a self-test of any aspect of a residential real estate related lending transaction of that person, or any part of that transaction, in order to determine the level or effectiveness of compliance with this subchapter by that person; and

(B) has identified any possible violation of this subchapter by that person and has taken, or is taking, appropriate corrective action to address any such possible violation.

(2) Privileged self-test

If a person meets the conditions specified in subparagraphs (A) and (B) of paragraph (1) with respect to a self-test described in that paragraph, any report or results of that self-test –

(A) shall be privileged; and

(B) may not be obtained or used by any applicant, department, or agency in any –

(i) proceeding or civil action in which one or more violations of this subchapter are alleged; or

(ii) examination or investigation relating to compliance with this subchapter.

(b) Results of self-testing

(1) In general

No provision of this section may be construed to prevent an aggrieved person, complainant, department, or agency from obtaining or using a report or results of any self-test in any proceeding or civil action in which a violation of this subchapter is alleged, or in any examination or investigation of compliance with this subchapter if –

(A) the person to whom the self-test relates or any person with lawful access to the report or the results –

(i) voluntarily releases or discloses all, or any part of, the report or results to the aggrieved person, complainant, department, or agency, or to the general public; or

(ii) refers to or describes the report or results as a defense to charges of violations of this subchapter against the person to whom the self-test relates; or

(B) the report or results are sought in conjunction with an adjudication or admission of a violation of this subchapter for the sole

purpose of determining an appropriate penalty or remedy.

(2) Disclosure for determination of penalty or remedy

Any report or results of a self-test that are disclosed for the purpose specified in paragraph (1)(B) –

(A) shall be used only for the particular proceeding in which the adjudication or admission referred to in paragraph (1)(B) is made; and

(B) may not be used in any other action or proceeding.

(c) Adjudication

An aggrieved person, complainant, department, or agency that challenges a privilege asserted under this section may seek a determination of the existence and application of that privilege in –

(1) a court of competent jurisdiction; or

(2) an administrative law proceeding with appropriate jurisdiction.

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24 C.F.R. § 100.500

Discriminatory effect prohibited.

Liability may be established under the Fair Housing Act based on a practice's discriminatory effect, as defined in paragraph (a) of this section, even if the

practice was not motivated by a discriminatory intent. The practice may still be lawful if supported by a legally sufficient justification, as defined in paragraph (b) of this section. The burdens of proof for establishing a violation under this subpart are set forth in paragraph (c) of this section.

(a) Discriminatory effect. A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.

(b) Legally sufficient justification.

(1) A legally sufficient justification exists where the challenged practice:

(i) Is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent, with respect to claims brought under 42 U.S.C. 3612, or defendant, with respect to claims brought under 42 U.S.C. 3613 or 3614; and

(ii) Those interests could not be served by another practice that has a less discriminatory effect.

(2) A legally sufficient justification must be supported by evidence and may not be hypothetical or speculative. The burdens of proof for establishing each of the two elements of a legally sufficient justification are set forth in paragraphs (c)(2) and (c)(3) of this section.

(c) Burdens of proof in discriminatory effects cases.

(1) The charging party, with respect to a claim brought under 42 U.S.C. 3612, or the plaintiff, with respect to a claim brought under 42 U.S.C. 3613 or 3614, has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect.

(2) Once the charging party or plaintiff satisfies the burden of proof set forth in paragraph (c)(1) of this section, the respondent or defendant has the burden of proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant.

(3) If the respondent or defendant satisfies the burden of proof set forth in paragraph (c)(2) of this section, the charging party or plaintiff may still prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.

(d) Relationship to discriminatory intent. A demonstration that a practice is supported by a legally sufficient justification, as defined in paragraph (b) of this section, may not be used as a defense against a claim of intentional discrimination.

113 CONG. REC. (1967)

[20921] Mr. MONDALE. Segregation in housing not only continues to exist, but statistics indicate it is increasing. More Negroes and other minority groups are being forced to live or remain living in ghettos every year. And the conditions, within the ghettos are also getting worse. By almost every social indicator we have now – crime, comparative employment rates, illegitimacy, family income, and school segregation – our urban ghettos are worse now than they were 5 years ago.

* * *

This bill will not put every Negro in the ghetto in a white suburb tomorrow. The normal laws of economics will prevent that from happening. But it will offer hope and opportunity – if not for the adults in the ghettos, at least for their children – that they will be able to escape the ghetto pressure cooker.

* * *

[20937] STATEMENT OF WALTER F. MONDALE

* * *

We must set up priorities. Fair housing legislation must be first. We must have the means available to break up the ghettos; we must provide all citizens with the freedom to live where they choose.

* * *

Moderate income families in the ghetto may have the economic capacity to meet monthly mortgage payments, and move to a neightborhood of older but sound and comfortable single-family dwellings. But the chances are great that such a family will be denied credit. The family will probably believe that racial discrimination is the reason. Lending institutions may say it is because older areas are high risk areas.

Whatever the response, the effect is the same. The family is denied adequate housing at a reasonable cost. The neighborhood goes down. Decline is inevitable when there is no money to fix-up and to preserve the single-family character of a neighborhood.

* * *

[22842] [Mr. MONDALE.] This legislation alone will not bring an end to the ghetto – but it will provide the opportunity for those persons economically able to escape the ghetto to do so, and to take their families with them. It will assure them free choice in the selection of their housing.

* * *

[22844] Mr. CASE. There can be no doubt that unequal housing, resulting from discriminatory and closed housing policies, contributes to the intolerable conditions of life in many of this Nation's greatest urban areas. The Impacted racial ghetto, with its segregated overcrowded living conditions, inherently

unequal schools, unemployment and underemployment, appalling mortality and health statistics, inevitably gives rise to hopelessness, bitterness, and, yes, even open rebellion of those imprisoned within its confines. Surrounded by affluent suburbia, is it any wonder the ghettos of our cities seethe with explosive discontent, racial alienation, and tension?

It is an ironic and bitter fact that the Federal Government has helped to build our urban ghettos, both directly and indirectly.

In some cases, Federal financing of public housing, coupled with non-enforcement of Executive Order No. 11063, has brought increased segregation in so-called vertical slums.

* * *

[24412] Mr. MONDALE. Mr. President, one of the most disturbing results of racial discrimination in housing is the loss of job opportunities for minorities. For a variety of reasons, many industries have been moving from the central city to the suburbs in the last decade. These are the industries that hire the unskilled or the semiskilled.

These industries offer great opportunities for the unemployed or the underemployed in the center city, but the jobs are out of the reach of the center city poor. The poor cannot find the transportation to the jobs nor can they find homes in the neighborhood of the new jobs.

* * *

Inequality is the only way to describe this situation. The whites are allowed complete freedom of choice as to where they wish to reside and are, therefore, free to apply for any job for which they are qualified. The Negro, on the other hand, must look for jobs only in certain areas, or be ready to commute many miles, if needed transportation is not available.

*   *   *

This is a situation that the Federal housing law could help to correct. It would permit the minority group member to seek employment where there are opportunities and then obtain living quarters near the job. Without fair housing the situation will only get worse: more and more jobs in the suburbs, and more and more unemployed in the ghetto.

*   *   *

[24419] STATEMENT OF GEORGE MEANY

*   *   *

Mr. Chairman, it would be an exaggeration to say that I was shocked by Mr. Daly's letter, but I was certainly saddened by it.

I freely acknowledge that the *Washington Post* long ago began rejecting real estate advertising labelled "whites only" or – conversely – "colored". By the moral standards of the publishing industry it took an advanced position.

But the display advertisements in the *Washington Post's* real estate sections drip with discrimination.

What is meant by a phrase like “a private community”? Or “conventional mortgages only”? Or by “with club membership you become eligible to buy”? Any sophisticated reader can understand all this, and we think Mr. Daly and his colleagues are sophisticated. They know the people whose money they are taking.

*   *   *

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114 CONG. REC. (1968)

[2274] Mr. MONDALE. Outlawing discrimination in the sale or rental of housing will not free those trapped in ghetto squalor, but it is an absolutely essential first step which must be taken – and taken soon. For fair housing legislation is a basic keystone to any solution of our present urban crisis. Forced ghetto housing, which amounts to the confinement of minority group Americans to “ghetto jails” condemns to failure every single program designed to relieve the fantastic pressures on our cities. No amount of education aid will repair the inherent weakness of segregated schools, whether de jure or de facto. No amount of money spent on manpower training or jobs will eliminate ghetto unemployment when the jobs are moving to the suburbs. Declining tax base, poor sanitation, loss of jobs, inadequate educational opportunity, and urban squalor will persist as long as discrimination forces millions to live in the rotting cores of central cities.

*   *   *

[2276] [Mr. MONDALE.] George Meany testified that it is not an exaggeration to say that open housing is absolutely essential to the realistic achievement of such accepted goals as desegregated schools and equal opportunity. Schools are the most obvious example that much of the statutory civil rights progress of recent years will be little more than theoretical until open housing becomes a reality. The typical public grammar schools and neighborhood operation, the composition of the study body, is therefore determined by that of the residents. In the long run the soundest way to attack segregated education is to attack the segregated neighborhood.

The U.S. Commission on Civil Rights has recently published a study entitled "Racial Isolation in the Public Schools." This report demonstrated that there is a relationship between the confinement of Negroes to central city ghettos and inferior educational opportunity. For this reason, since housing discrimination produces inequality of educational opportunity, the Commission recommended in that report a Federal fair housing law in order to minimize the impact of housing segregation on education.

* * *

[2277] [Mr. MONDALE.] There is no longer any economic, political, moral, or other justification for segregated housing.

* * *

In the Commission on Civil Rights Report for 1967, on page 60, these remarks are found:

*   *   *

The opportunity to move outside the ghetto also may mean the opportunity to send children to better schools. And it may bring one closer to job opportunities; the flight of jobs from central cities would not present a barrier to employment opportunity for Negroes if they were able to live in the areas where the jobs were being relocated.

Negroes who live in slum ghettos, however, have been unable to move to suburban communities and other exclusively white areas.

In part, this inability stems from a refusal by suburbs and other communities to accept low-income housing. Even Negroes who can afford the housing available in these areas, however, have been excluded by the racially discriminatory practices not only of property owners themselves, but also of real estate brokers, builders and the home finance industry. An important factor contributing to exclusion of Negroes from such areas, moreover, has been the policies and practices of agencies of government at all levels.

*   *   *

We had several witnesses before our subcommittee who were Negro, who testified that they had the financial ability to buy decent housing in all-white neighborhoods, but despite repeated good-faith attempts, were unable to do so. The pattern of frustration, the pattern of misleading statements, the lies and deceits were found in each of their experiences. Never, or rarely, was race given as a reason, but

always it was absolutely obvious that no other good reason could be given.

* * *

[2278] [Mr. MONDALE.] A sordid story of which all Americans should be ashamed developed by this country in the immediate post World War II era, during which the FHA, the VA, and other Federal agencies encouraged, assisted, and made easy the flight of white people from the central cities of white America, leaving behind only the Negroes and others unable to take advantage of these liberalized extensions of credits and credit guarantees.

Traditionally the American Government has been more than neutral on this issue. The record of the U.S. Government in that period is one, at best, of covert collaborator in policies which established the present outrageous and heartbreaking racial living patterns which lie at the core of the tragedy of the American city and the alienation of good people from good people because of the utter irrellevancy of color.

* * *

[2279] Mr. BROOKE. Fair housing does not promise to end the ghetto; it promises only to demonstrate that the ghetto is not an immutable institution in America. It will scarcely lead to a mass dispersal of the ghetto population to the suburbs; but it will make it possible for those who have the resources to escape the stranglehold now suffocating the inner cities of

America. It will make possible renewed hope for ghetto residents who have begun to believe that escape from their demeaning circumstance is impossible.

* * *

[2280] [Mr. BROOKE.] We cannot immediately recreate adequate services in the central city, but we must move toward that goal. At the same time we can and should make it possible for those who can to move to where the better schools and services, the decent homes and jobs are most plentiful. That is the simple purpose of this bill.

* * *

A recent exhaustive study of such segregation reveals its presence to a very high degree in every single large city in America. Minor variations exist between North and South, suburbs and central cities, and cities with large and small Negro populations. But in every case Negroes are highly segregated, more so than Puerto Ricans, orientals, Mexican Americans, or any specific nationality group. In fact, Negroes are by far the most residentially segregated group in recent American history.

* * *

Mr. President, I now refer to a statement concerning the Fair Housing Act of 1967, in the hearings before the Subcommittee on Housing and Urban Affairs of the Committee on Banking and Currency, U.S. Senate, 90th Congress, first session, under the

paragraph heading "The Ghetto and the Master Builder."

The words are these:

> We make two general assertions: (1) that American cities and suburbs suffer from galloping segregation, a malady so widespread and so deeply imbedded in the national psyche that many Americans, Negroes as well as whites, have come to regard it as a natural condition; and (2) that the prime carrier of galloping segregation has been the Federal Government. First it built the ghettos; then it locked the gates; now it appears to be fumbling for the key.
>
> Nearly everything the Government touches turns to segregation, and the Government touches nearly everything. The billions of dollars it spends on housing, highways, hospitals **[2281]** [Mr. BROOKE.] and other community facilities are dollars that buy ghettos. Ditto for the billions the Government has given to American cities and suburbs in the name of community planning – money which made it simple for planners to draw their two-color maps and to plot the precise locations of Watts, Hough, Hunter's Point and ten-thousand other ghettos across the land.
>
> * * *
>
> At present the Federal example is murky; it has an Alice-in-Wonderland quality that defies easy summation. On the one

hand, the Government is officially committed to fighting segregation on all relevant fronts; on the other, it seems temperamentally committed to doing business as usual – which, given our current social climate, means more segregation. It hires many intergroup relations specialists – HUD has forty-seven – but deprives them of the power and prestige to achieve meaningful integration. Similarly, it cranks out hundreds of inter-office memoranda on how best to promote open occupancy, but it fails to develop follow-up procedures tough enough to persuade bureaucrats to take these missives seriously. The Federal files are bulging with such memoranda – and our racial ghettos are expanding almost as quickly.

The road to segregation is paved with weak intentions – which is a reasonably accurate description of the Federal establishment today. Its sin is not bigotry (though there are still cases of bald discrimination by Federal officials) but blandness; not a lack of goodwill, but a lack of will. The Federal failure to come to grips with segregation manifests itself in all kinds of oversights. For example, a recent FHA pamphlet for housebuyers includes an italicized explanation of Federal antidiscrimination rules and regulations. Good. It also includes a photograph of a house in a suburban subdivision which had won an FHA "Award of Merit" for community development. Bad – because the subdivision was all-white, and its builders, according to a state human relations official, "discouraged

Negro families from buying." Nobody checked this out before publishing the pamphlet because nobody cared enough to ask the right questions.

What adds to the murk is officialdom's apparent belief in its own sincerity. 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.

* * *

The upshot of all this is a Federal attitude of amiable apartheid, in which there are no villains, only "good guys"; a world in which everyone possesses "the truth" (in the files, on the walls), but nearly everyone seems to lack a sense of consequences. In such a milieu, the first steps toward a genuinely affirmative policy of desegregation in housing are endlessly delayed, because no one is prepared to admit they have not already been taken.

"The rule is," said the Queen to Alice, "jam tomorrow, and jam yesterday – but never jam today."

In other words, our Government, unfortunately, has been sanctioning discrimiation in housing throughout this Nation. The purpose of this bill, as well stated by my able colleague from Minnesota, is not to force Negroes upon whites. It is to give black Americans an opportunity to live in decent housing in this country.

* * *

[2283] [Mr. BROOKE.] As people are educated and have the opportunity and the wherewithal to move, they ought to be able to move. That is all that the amendment would provide.

* * *

[2525] [Mr. BROOKE.] That future does not require imposed residential and social integration; it does require the elimination of compulsory segregation in housing, education, and employment.

It does not require that government dictate some master plan for massive resettlement of our population; it does require that government meet its responsibilities to assure equal opportunity for all citizens to acquire the goods and necessities of life.

It does not require that government interfere with the legitimate personal preferences of individuals; it does require that government protect the freedom of individuals to choose where they wish to live.

It does not require government to provide some special advantage to a privileged minority; it requires only that government insure that no minority be forever condemned against its will to live apart in a status inferior to that of their fellow citizens.

This measure, as we have said so often before, will not tear down the ghetto. It will merely unlock the door for those who are able and choose to leave. I cannot imagine a step so modest, yet so significant, as the proposal now before the Senate.

* * *

Mr. President, I read from a study prepared by the Legislative Reference Service, to which I referred before, the section entitled "Negro Housing Problems":

* * *

[2526] [Mr. BROOKE.] But a 1963 study by the U.S. Housing and Home Finance Agency found that there has been a "spectacular rise" in the incomes of Negroes in urban areas and a corresponding growth in the demand for middle-income housing – such as is available in the suburbs.

* * *

On the basis of the investigation HHFA concluded that:

> While the study cites a number of related factors inhibiting home ownership among non-whites, it points particularly to racial

> restrictions as an important deterrent to the availability for new housing for this group.

It would appear then that the configuration of black central cities encircled by white suburbs is not a "natural" phenomenon;

* * *

What are the forces behind this discrimination? The Commission on Civil Rights attempted an answer in its 1961 report:

> They begin with the prejudice of private persons, but they involve large segments of the organized business world. In addition, Government on all levels bears a measure of responsibility – for it supports and indeed to a great extent it created the machinery through which housing discrimination operates.

First, discrimination is sometimes practiced by the owner of a house who refuses to sell or rent to a person of another race.

* * *

Second, lenders often discriminate against Negroes, using the argument that a homogeneous neighborhood makes a loan economically more sound.

* * *

The third discriminatory factor mentioned by the Commission in 1961 was the Government – especially the Federal Government. The major cause for such an indictment is that FHA actively encouraged racial

discrimination during the years 1934-1950. Its Underwriting Manual of 1938 suggested that properties "continue to be occupied by the same social and racial groups." The Shelley against Kraemer decision had an effect on FHA policy, however, and it withdrew its support for racially exclusive policies. President Kennedy's Executive Order 11063 of 1962 required FHA and other Federal agencies to pursue affirmative policies with respect to equal opportunity in housing.

But the Civil Rights Commission's criticism of the Government is also based on the fact that most financial institutions are dependent to a great extent on Federal regulation and sponsorship.

* * *

[2527] [Mr. BROOKE.] The Federal mandate to stop segregation is perfectly clear and remarkably strong. Historically, it rests on the Bill of Rights, the 13th and 14th amendments and the Nation's first fair housing law, passed in 1866, which guarantees:

> All citizens of the United States shall have the *same* right in every State and Territory as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold and convey real and personal property.

In recent years the Federal obligation to guarantee freedom of housing to all citizens has been twice reaffirmed: first by the 1962 Executive Housing Order and then by Congress in 1964. The Executive

order barring discrimination in all federally assisted housing was a major breakthrough – the fruits of a 10-year campaign launched and piloted by NCDH.

Two years later Congress passed a civil rights bill and included the following stipulation under title VI:

> No 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 programs or activity receiving Federal financial assistance.

* * *

Nothing remotely resembling this modest success has occurred in housing. Rarely does HUD withhold funds or defer **[2528]** [Mr. BROOKE.] action in the name of desegregation. In fact, if it were not for all the printed guidelines the housing agencies have issued since 1964, one would scarcely know a Civil Rights Act had been passed.

It is clear that HUD has determined to speak loudly and carry a small stick. The results of this policy have been a cynical subversion of title VI, along with a thumb-twiddling complacency that has permeated all major agencies – the Housing Assistance Administration – public housing – Renewal Assistance Administration and FHA. Here is a brief summary of their practices.

* * *

In any case, it is safe to say that an overwhelming proportion of public housing – the only kind of housing in the United States directly built, financed and supervised by the Federal Government – is racially segregated.

* * *

Mr. TYDINGS. Negroes in this country need freedom to move out of their racial ghettos and live closer to available jobs. Negroes in this country must have freedom to live where they can afford to live, irrespective of race. The proven fact that housing of nonwhite families is consistently of poorer quality than that of white households in the same income levels is due, in large part, to the related fact that the nonwhite families in this Nation do not have freedom of choice in the selection of their homes.

* * *

One clear first step to correct these injustices, Mr. President, is to enact the pending legislation so that Negroes are given the freedom which all other Americans now possess – to live in any neighborhood which their income permits. Today this is not possible for Negro Americans.

* * *

[2529] Mr. ELLENDER. According to what the Senator has just stated, there seem to be similar differences in various parts of the country concerning how the Negro is treated in contrast to the white.

Mr. TYDINGS. There is no question about that insofar as the availability of housing is concerned.

* * *

Housing discrimination deprives hundreds of thousands of nonwhites of employment opportunities in suburban communities which are generally unavailable to them as places for them to live themselves.

* * *

[2530] Mr. TYDINGS. Housing discrimination deprives hundreds of thousands of nonwhites of employment opportunities in suburban communities which are generally unavailable to them as places for them to reside themselves. And within our large, sprawling cities, a similar deprivation occurs within the city limits when nonwhites are excluded from many residential areas. The fact is that most new jobs are springing up in the suburbs. Between 1960 and 1965 from one-half to two-thirds of all new factories, stores, and other mercantile buildings in all sections of the country, except the South, were located outside the central cities of metropolitan areas.

Since 80 percent of the nonwhite population of the nonwhite population in metropolitan areas in 1967 lived in central cities, the handicaps of nonwhite jobseekers are apparent. Unless nonwhites are able to move into suburban communities by the elimination of housing discrimination, and the provision of low- and moderate-cost housing in these areas, they are going to continue to be deprived of jobs, no matter how extensive our efforts to employ them.

* * *

[2534] Mr. TYDINGS. The Attorney General continued:

* * *

> It will eliminate widespread forced housing where racial minorites are barred from residential areas and confined to the ghetto and other segregated areas.

* * *

Mr. President, I ask unanimous consent to have printed at this point in the RECORD a summary brief by the Department of Justice which I believe conclusively establishes the constitutionality of the pending amendment.

* * *

JUSTICE DEPARTMENT PRESENTATION REGARDING CONSTITUTIONALITY OF PROPOSED FAIR HOUSING ACT

* * *

[2535] 2. Federal legislation under the Equal Protection Clause may also be based on a desire to correct the evil effects of past unconstitutionally discriminatory government action

There is a second basis under the Fourteenth Amendment to support fair housing legislation, which the Court did not need to consider in its decision upholding the Voting Rights Act of 1965. Section 5 of the Amendment authorizes Congress to enforce its provisions, one of which is the Equal Protection

Clause. Enforcement, in the legal sense, traditionally includes both the prevention or violations and the punishment and the correction of the effects of past violations. It follows that if the States in the past denied to persons within their jurisdictions the equal protection of the laws, and if the effects of their denials are still present, Congress possesses the power to correct those effects. By similar reasoning, the Fifth Amendment, which imposes equal-protection obligations on the Federal Government similar to those which the Fourteenth Amendment imposes on the States, grants Congress the power to correct the enduring effects of any past denials of equal protection by the Federal Government.

Such denials of equal protection by the States, and by the Federal Government, were in fact numerous, and their effects in housing are still with us. The States and their local subdivisions enacted zoning laws denying Negroes and other minority groups the right to live in white neighborhoods until the Supreme Court put a stop to the practice in 1917. Local ordinances with the same effect, although operating more deviously in an attempt to avoid the Supreme Court's prohibition, were still being enacted and struck down by the courts as late as 1930. During these years there also came into use privately drawn racially restrictive covenants in deeds, which "ran with the land" and bound successive owners irrespective of their personal inclinations. Such covenants quickly became the major weapon for keeping minorities out of good housing, and they were fully honored

by State and lower Federal courts until the Supreme Court ruled in 1948 that they could not constitutionally be enforced by injunction and in 1953 that they could not be enforced by awards of damages either.

Throughout this period, and even somewhat after the Supreme Court's 1948 ruling, the Federal Housing Administration actively encouraged the use of racially restrictive covenants, in most cases flatly refusing to grant its mortgage insurance or guarantees unless the covenants were included in the deeds concerned. This Federal discriminatory action had a substantial impact:

> "FHA's espousal of the racial restrictive covenant helped spread it throughout the country. The private builder who had never thought of using it was obliged to adopt it as a condition for obtaining FHA insurance. * * *
>
> "FHA succeeded in modifying legal practice so that the common form of deed included the racial covenant. Builders everywhere became the conduits of bigotry. * * *
>
> "The evil that FHA did was of peculiarly enduring character. Thousands of racially segregated neighborhoods were built, millions of people re-assorted on the basis of race, color, or class, the differences built in, in neighborhoods from coast to coast."

At the same time, the Federal and State governments were cooperating to enforce segregation in public housing. Lower federal courts approved such

efforts as late as 1941, and although thereafter the courts, when they had the opportunity, invalidated them, efforts to keep public housing segregated were continuing in the North until at least 1955 and in Kentucky, Missouri and Tennessee until at least 1961.

These efforts to place Negroes in separate neighborhoods were especially successful because they occurred during the period of the greatest Negro migration out of the South into Northern cities. Whereas only 10 per cent of the Nation's Negroes lived outside the South in 1910, 32 percent did so by 1950 and 40 percent by 1960.

Throughout these years the Federal and State governments were also active in promoting segregation in areas other than housing, such as schools and the armed forces. That activity, too, contributed to housing segregation, because it educated the white public to the myth that any kind of close association with Negroes was debasing and to be avoided.

* * *

[2536] The purpose, or "end," of the Federal Fair Housing Act is to remove the walls of discrimination which enclose minority groups in ghettoes, so that they may live wherever their means permit and be better able to secure the equal benefits of government and the other rewards of life.

* * *

[2694] [Mr. Mondale, placing Laurenti in record]

Two factors in the nonwhite segment of the housing market distinguish it from the white segment: an artificial restriction of supply and a lower-centered distribution of income among buyers. The very existence of market segments creates an artificial restriction of supply for nonwhites: they cannot satisfy their demand for housing anywhere it is available, but must confine their search to areas already penetrated by nonwhites

* * *

But there is also a high demand among nonwhites for decent low-density housing accessible to middle-income consumers. An increasing number of nonwhites are skilled workers, businessmen, and professionals capable of purchasing moderate-priced homes and just as eager as whites to maintain decent housing standards. Their total number is much smaller than the number of whites who can afford the same level of housing but, because the supply of such housing available to nonwhites is so small, the intensity of demand among nonwhites is much greater. Thus when a given area of middle-price housing shifts from the white segment of the market to the nonwhite segment, the intensity of demand for it is likely to increase. This tends to raise prices relative to similar housing still in the white market segment.

* * *

[2698] [Mr. MONDALE.] Discrimination in housing forces its victims to live in segregated areas – ghettos – and the benefits of government are less available in such areas. Children raised in ghettos are more likely to go to inferior public schools. Their parents are more likely to lack adequate public transportation facilities to commute to and from work, and so will miss employment opportunities. Local building and housing codes are often not effectively enforced in ghettos. Federal subsidies for private housing bypass the ghettos and go instead to the predominantly white suburbs.

* * *

[2699] [Mr. MONDALE.] There is an additional basis under the Fourteenth Amendment to support fair housing legislation. Section 5 of the Amendment authorizes Congress to *enforce* the Amendment's provision – one of which is the Equal Protection Clause. Enforcement, in the legal sense, traditionally includes both the prevention of violations and the punishment and correction of the effects of past violations. It follows that if the States in the past denied to persons within their jurisdictions the equal protection of laws, and if the effects of their denials are still present, Congress possesses the power to correct those effects. Similarly, the Fifth Amendment, which has been interpreted as imposing equal protection obligations on the Federal Government, *Bolling* v. *Sharp,* 347 U.S. 497 (1954) grants Congress the power to correct the enduring effects of past denials of equal protection by the Federal Government.

Such denials, state and Federal, were in fact numerous, and their effects in housing are still present. The States and their local subdivisions enacted zoning laws denying Negroes and other minorities the right to live in white neighborhoods until the Supreme Court put a stop to the practice in 1917. *Buchanan* v. *Warley,* 245 U.S. 60. Local ordinances with the same effect, although operating more deviously in an attempt to avoid the Court's prohibition, were still being enacted and struck down by the courts as late as 1930. *Harmon* v. *Tyler,* 273 U.S. 668; *City of Richmond* v. *Deans,* 281 U.S. 704 (1930). During these years there also came into use privately drawn racially restrictive covenants in deeds, which "ran with the land" and bound successive owners irrespective of their personal inclinations. Such covenants quickly became the major weapon for keeping minorities out of good housing, and they were fully honored by State and lower Federal courts (See 3 A.L.R. 2d 466, 474 77 (1949) until the Supreme Court ruled in 1948 that they could not constitutionally be enforced. *Shelley* v. *Kraemer,* 334 U.S. 1; *Hurd* v. *Hodge,* 334 U.S. 24; *Barrows* v. *Jackson,* 346 U.S. 249.

* * *

Throughout this period and even somewhat after the Supreme Court's historic ruling in *Shelley* v. *Kraemer,* the Federal Housing Administration actively encouraged the use of racially restrictive covenants, in most cases flatly refusing to grant its mortgage insurance or guarantees unless such covenants were

included in the deeds concerned. FHA went so far as to recommend language for a model restrictive covenant to be used in deeds for mortgage property insured by the agency.

At the same time, the Federal and State governments were cooperating to enforce segregation in public housing. Lower federal courts approved such efforts as late as 1941, and although courts more recently have, when they had the opportunity, invalidated them, efforts to keep public housing segregated were continuing in the North until at least 1955 (See *Detroit Housing Commission* v. *Lewis,* 226 F. 2d 180) and in Kentucky, Missouri and Tennessee until at least 1961.

These efforts to place Negroes in separate neighborhoods were especially successful because they occurred during the period of the greatest Negro migration out of the South into Northern cities. Whereas only 10 per cent of the Nation's Negroes lived outside the South in 1910, 40 per cent did so by 1960.

Throughout these years, the Federal and state governments were also active in promoting segregation in areas other than housing, such as schools and the armed forces. That activity also contributed to housing segregation, because it educated the white public to the myth that any kind of close association with Negroes was debasing and to be avoided.

It thus seems only fair, and is constitutional, that Congress should now pass a fair housing act to undo

the effects of these past State and Federal unconstitutionally discriminatory actions.

* * *

> The purpose, or "end" of the fair housing law is to remove the walls of discrimination which enclose minority groups in ghettoes, so that they may live wherever their means permit and be better able to secure the equal benefits of government and other rewards of life. Prohibiting private as well as government acts of discrimination in housing is undoubtedly a "means which [is] appropriate" and "plainly adapted to that end."

* * *

[2984] Mr. PROXMIRE. The whites have escaped their responsibility by fleeing to the suburbs, taking with them the central city's tax base and source of civic leadership. In the process of moving to the suburbs, the whites have been careful to exclude Negroes. The so-called suburban white noose exerts a strangle hold around our large central cities, and the noose is slowly choking those cities to death.

* * *

Today, almost 13 million nonwhites are jammed into our central cities, and one-third of them are living below the poverty level. Moreover, the evidence suggests that Negro poverty in the ghetto is getting worse, not better. A recent census in the Watts area of Los Angeles showed that Negro median family income dropped 8 percent from 1959 to 1965. That was a

period when the country as a whole enjoyed remarkable prosperity, tremendous expansion, and a great increase in incomes generally; but the average family income of Negroes living in this ghetto section of Los Angeles fell 8 percent during that period of time.

* * *

Jobs, and particularly semiskilled and low skilled jobs, are moving to the suburbs and the outlying **[2985]** [Mr. PROXMIRE.] portions of our central cities. And yet a considerable fraction of the potential supply of labor to fill these jobs has been left behind in the central city ghettos.

* * *

A third approach might be termed a policy of dispersal through open housing. This approach would look to the eventual dissolution of the ghetto and the construction of low and moderate income housing in the suburbs and outlying portions of central cities. It would be aimed at providing ghetto residents with access to better housing, to improved job opportunities, to better education, and to a sounder environment in the suburbs. Such a policy would be in harmony with basic economic trends and would clearly be the cheapest of the three alternatives. But it does imply an end to the practice of racial discrimination, which has heretofore kept our suburbs virtually 100-percent white.

The benefits of an open housing policy are numerous. For example, it is doubtful that Negro education can ever be brought on a par with white

education when Negroes are concentrated in all black central city schools. Thus, continued residential segregation will perpetuate the transmission of frustration and despair from one generation to the next. This vicious cycle can be broken by giving the Negro child the same educational opportunity which white children receive.

* * *

Millions of the Negroes who migrated from rural areas to central cities in recent decades are trapped in racial ghettos from which they cannot escape because housing is not freely available on equal terms to all Americans

* * *

[2989] [Mr. Brooke, reading from Eunice and George Grier]

The differences between the two programs thus reinforce each other in their effects upon patterns of residence. While the FHA and VA have helped promote white dominance in the suburbs, public housing has helped enhance Negro dominance in the cities.

* * *

Combined with rapid population growth in the metropolitan areas, the interacting effects of federal policies and practices in the postwar era did much to produce the present segregated patterns. But they were not the only factors. Clear discrimination by private individuals and groups – including the mortgage,

real-estate, and home-building industries – has also played its part.

*   *   *

[2991] Mr. MONDALE. I think that most real estate brokers, tract developers, and owners and operators of apartment houses have no strong personal prejudice. Today the great majority of them feel compelled by business pressures to maintain the existing patterns of race and color in housing, no matter what they may personally believe. They think – in my opinion, wrongly – that to break the pattern would be to risk financial loss or ruin.

*   *   *

[3122] Mr. CASE. It has been pointed out many times that housing is the only commodity that is not available in the open market according to a man's ability to pay. Yet housing is a basic necessity, a commodity which no family can do without. And it bears importantly on all major aspects of living – health, education, employment, and recreation among them.

Restricted access to the whole housing market because of race has been a major cause of the concentration of nonwhite population in our cities. In 1910, it is estimated that 73 percent of the Negro population lived in rural areas. Today that same percentage, 73 percent, lives in urban areas, mostly in ghettos. To

our shame, the Federal Government has helped to build these ghettos.

The Federal responsibility here appears to be little known. But it is great, as the National Committee Against Housing Discrimination showed in its report, "How the Federal Government Builds Ghettos." A powerful indictment of Federal policies and practices in the housing field, the report, issued in February 1967, warned:

> The ghetto system, nurtured both directly and indirectly by Federal power, has created racial alienation and tensions so explosive that the crisis in our cities now borders on catastrophe.

* * *

The report points out that from the time the Government entered the housing field in the late thirties, it has shunned any real responsibility for affirmative action to assure equal housing opportunity. In its earliest days, the Federal Housing Administration actually urged use of restrictive covenants to keep out "inharmonious racial groups." Up until a few years ago the Federal Home Loan Bank and the Home Owners Loan Corporation recommended racial segregation in residential neighborhoods as a means of protecting the stability and values of the area. And all along the line, the financing agencies have, again and again, protested their powerlessness to take positive action to root out the evil of racial discrimination.

One result has been, according to the NCDH, that while the FHA and the Veterans' Administration have together financed more than $120 billion worth of new housing since World War II, less than 2 percent of this has been available to nonwhite families, and much of that only on a strictly segregated basis.

I know from personal experience the apathy and lack of interest within the agencies to establish, much less promote, programs to open the housing market to all citizens on an equal basis. For example, some years ago I sought executive action against a builder who stated publicly that he would not sell to Negroes in a burgeoning subdivision in southern New Jersey. But the HHFA insisted that it was unable to halt the flow of Federal assistance which enabled him to continue with construction of the development.

* * *

[3134] [Mr. MONDALE.] Open housing is absolutely essential to the realistic achievement of such accepted goals as desegregated schools and equal opportunity. Much of the statutory civil rights progress of recent years will be little more than theoretical until open housing becomes a reality. Because the composition of the student body is determined by the composition of the residents of the area in which this school is located, the soundest way to attack segregated education and the quality of the schools resulting from it is to attack the segregated neighborhood. Testimony at the hearings on the Fair Housing Act brought out that it is virtually impossible to provide

high quality education to disadvantaged minorities as long as they are restricted to living in older congested sections of cities. The opportunity to go to school with members of other racial and ethnic and economic groups tends to improve the educational achievement of disadvantaged children, according to findings of educational research including the Coleman report.

* * *

[3421] [Mr. MONDALE.] Old habits have perpetuated themselves into frozen rules to the extent that the opponents of fair housing legislation, by some obscure process of reasoning, can label it "forced" housing. This bill forces no one to sell – it simply removes from an economic transaction an irrelevant test based on color.

I believe, and testimony before the Housing Subcommittee of the Banking and Currency Committee reinforced this belief, that the great majority of real estate brokers, tract developers, and owners and operators of apartment houses feel compelled by business pressure to maintain the existing patterns of race and color in housing, no matter what they may personally believe.

* * *

[3422] [Mr. MONDALE.] The frustration to those of us who support this open occupancy legislation is that much of the housing discrimination is caused by

the bigotry of fearful ignorance, and not by the bigotry of racial hatred.

* * *

I believe the same will be true when we pass this measure. There will not be a great influx of all the Negroes in the ghettos into the suburbs – in fact, the laws of supply and demand will take care of who moves into what house in which neighborhood. There will, however, be the knowledge by Negroes that they are free – if they have the money and the desire – to move where they will; and there will be the knowledge by whites that the rapid, block-by-block expansion of the ghetto will be slowed and replaced by truly integrated and balanced living patterns.

* * *

[4975] Mr. MONDALE. The statement to which the Senator from California makes reference reads as follows:

> It is the policy of the United States to provide for fair housing throughout the United States.

Obviously, this is to be read in context with the entire bill, the objective being to eliminate discrimination in the sale or rental of housing, for the housing described and under the circumstances provided in the Dirksen substitute.

Mr. MURPHY. Is there not a possibility of misconception of what word "provide" means?

Mr. MONDALE. Not at all.

Mr. MURPHY. Based on my experience in the short space of 3 years that I have been here, I would think there could be a great chance that the word "provide" could be read to mean almost anything, including "give."

Mr. MONDALE. This is a declaration of purpose. The phrase to be construed includes the words "to provide for." I see no possibility of confusion on that point at all.

Mr. MURPHY. If the Senator will forgive me, it says "provide fair housing." Does that mean to give the housing, to make it available?

Mr. MONDALE. Without doubt, it means to provide for what is provided in the bill. It means the elimination of discrimination in the sale or rental of housing. That is all it could possibly mean.

* * *

Civil Rights: Hearing On Miscellaneous Proposals Regarding The Civil Rights Of Persons Within The Jurisdiction Of The United States Before Subcomm. No. 5 On The House of Representatives Comm. On the Judiciary, 89th Cong., 2nd Sess. 1061, 1067, 1068, 1069, 1070 (1966)

STATEMENT OF ATTORNEY GENERAL NICHOLAS deB. KATZEN-BACH

* * *

The ending of compulsory residential segregation has become a national necessity.

This is the purpose of title IV.

Residential segregation strikes at dignity and freedom in a manner often more subtle and less resounding than acts of terror, exclusion from the polling booth, or barricades at the school door. Yet the isolations and tensions produced by housing segregation are serious ruptures in our national life and undercut all the other efforts toward human and economic betterment. Law must lead and law must protect in this vital area as it has in voting, public accommodations, school and employment.

Freedom in the choice of housing is a large principle of modern civilized society which cannot be reduced now to the technicalities of administrative improvisations or judicial interpretation.

* * *

Yet today, 100 years after the Civil Rights Act and 17 years after the Housing Act, we find, in the words of the U.S. Commission on Civil Rights, that –

> housing . . . seems to be the one commodity in the American market that is not freely available on equal terms to everyone who can afford to pay.

Title IV of the President's bill is designed to help achieve equality in the marketplace.

The past 20 years have provided the country with millions upon millions of new dwelling units and have vastly changed the character of our urban residential areas. Suburbia has come into being around the boundaries of our cities and continues to spread.

Except for our Negro citizens, virtually all Americans have had an equal opportunity to share in these developments in our national life. The Negro's choice in housing, unlike that of his fellow citizens, is not limited merely by this means.

It is limited by his color. By and large, desirable new housing in our cities and suburbs is foreclosed to him, and, ironically, because of its scarcity, what housing is left available to him frequently costs him more, judged by any fair standard, than comparable housing open to whites.

The result is apparent to all: impacted Negro ghettos that are surrounded and contained by white suburbia. The problem has arisen in metropolitan communities everywhere in the country.

Segregated housing is deeply corrosive both for the individual and for his community. It isolates racial minorities from the public life of the community. It means inferior public education, recreation, health, sanitation, and transportation services and facilities.

It means denial of access to training and employment and business opportunities. It prevents the inhabitants of the ghettos from liberating themselves, and it prevents the Federal, State, and local governments and private groups and institutions from fulfilling their responsibilities and desire to help in this liberation.

* * *

The extent to which the decisions of individual homeowners reduce the availability of housing to racial minorities is hard to estimate. But I believe it is accurate to say that individual homeowners do not control the pattern of housing in communities of any size. The main components of the housing industry are builders, landlords, real estate brokers, and those who provide mortgage money. These are the groups which maintain housing patterns based on race.

I do not mean to suggest that the enforcement of segregation in housing is necessarily motivated by racial bias. More often the conduct of those in the housing business reflects the misconception that neighborhoods must remain racially separate to maintain real estate values.

* * *

At present a particular builder or landlord who resists selling or renting to a Negro most often does so not out of personal bigotry but out of fear that his prospective white tenants or purchasers will move to housing limited to whites and that, because similar housing is unavailable to Negroes, what he has to offer will attract only Negroes.

* * *

Title IV is based primarily on the commerce clause of the Constitution and on the 14th amendment. I have no doubts whatsoever as to its constitutionality.

As one of the Justices of the Supreme Court said in the very recent *Guest* case – to which I shall return shortly – the 14th amendment includes "positive grant of legislative power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens."

I have pointed out already how segregated living is both a source and an enforcer of involuntary second-class citizenship. To the extent that this blight, on our democracy impedes States and localities from carrying out their obligations under the 14th amendment to promote equal access and equal opportunity in all public aspects of community life, the 14th amendment, authorizes removal of this impediment.

That there is official and governmental involvement in the real estate and construction industries needs little demonstration. Apart from zoning and

building codes, there are the obvious facts of regulations covering credit, mortgages, interest rates, and banking practices, and there is the universal licensing of real estate agents.

* * *

Congress can and must determine that the enforcement of involuntary segregation through discriminatory housing practices is inconsistent with the words, spirit, and purpose of the 14th amendment.

* * *

Civil Rights: Hearings on S. 3296, Amendment 561 to S. 3296, S. 149, S. 1654, S. 2845, S. 2923, S. 2923, and S. 3170 Before the Subcomm. On Constitutional Rights of the Senate Comm. On the Judiciary, 89th Cong., 2nd Sess. 552 (1966)

Senator KENNEDY. Public housing has encouraged the continuation or the perpetuation of segregation in many instances. Would you not also agree, that it has been through FHA and VA loans that suburban housing has really been built up and established in recent years?

Mr. WILKINS. Oh, indeed so.

Senator KENNEDY. In suburban areas?

Mr. WILKINS. Indeed so.

Senator KENNEDY. So actually, the interest of the Federal Government in this is very real?

Mr. WILKINS. It is very real.

Senator KENNEDY. That is right.

Mr. WILKINS. In terms of not only millions of dollars, but providing living space for our people and therefore the Government has, it seems to me, a right to make the housing developments available to all of its people without distinctions between them on the basis of race.

Why should the Government spend hundreds of millions of dollars building up suburbs, desirable locations, underwriting builders and guaranteeing

mortgages to provide an opportunity for families to escape from the central cities, but shall say to the black families that, want to escape, "You cannot do it because this would be a bad national policy"?

* * *

Civil Rights: Hearings on S. 1026, S. 1318, S. 1359, S. 1362, S. 1462, H.R. 2516, H.R. 10805 Before the Subcomm. On Constitutional Rights of the Senate Comm. On the Judiciary, 90th Cong., 1st Sess. 79, 80, 101, 206, 207, 208, 417 (1967)

STATEMENT OF HON. RAMSEY CLARK, ATTORNEY GENERAL

*   *   *

Life in an urban ghetto means inequality and consequent lack of opportunity for millions of Americans. As a direct result of housing segregation, there is more school segregation today than ever before in our history.

*   *   *

To support legislative jurisdiction under the 14th amendment, it was shown that today's discriminatory housing patterns are a direct outgrowth of past illegal Government action and that those patterns impede State and local government in their ability to provide equal protection of the law.

*   *   *

Senator ERVIN. Well, if that is so, you have put your finger on the objection I have to this bill and the objection I have to all civil rights legislation. They are all based upon what a man thinks on the inside of his head, aren't they?

Attorney General CLARK. No, sir; they are not. This is based upon what an individual does, and the way you prove it is by what he has done over a period

of time, as a practical matter. If you have the evidence that he excluded somebody from jury service because of race or because of, well, under that statute, because of race, you don't obtain that. You have to show the whole pattern of his conduct before you will have a case that will stand up.

* * *

STATEMENT OF WILLIAM L. TAYLOR, STAFF DIRECTOR, U.S. COMMISSION ON CIVIL RIGHTS

* * *

During the last generation alone, a period of unprecedented growth and expansion of our metropolitan areas, almost without exception, housing patterns have developed along lines of rigid racial segregation.

These patterns have not developed through the accumulation of independent choices by individual homeseekers, nor can they be explained entirely by differentials in the income levels for whites and Negroes. To a large extent, the pattern has been imposed upon homeseekers – white and nonwhite – without regard to individual choice and without regard to ability to pay. For example, at its recent hearing in the San Francisco Bay area, the Commission heard testimony that the builder of a huge tract just outside the city of San Francisco, which ultimately will house 20,000 persons, has refused to sell home to Negroes. Recently the New York Times reported that an effort by 76 prominent residents of wealthy

Chicago suburbs – including industrialists, lawyers, professors, and insurance brokers – who called at 75 real estate offices to seek housing for Negroes, had turned up only 38 open listings among the 2,000 homes for sale in the area.

The Federal Government has played an important role in the development of patterns of residential segregation in metropolitan areas. Much of the suburban expansion over the past three decades would not have been possible without the financial support of the Federal Government through FHA mortgage insurance programs and later through the VA program of loan guarantees. Until 1947, discrimination against Negroes was a condition of FHA assistance. Prior to 1962, when President Kennedy issued the Executive order on equal opportunity in housing, none of the Federal agencies concerned with the extension of housing and mortgage credit had taken significant action to assure that the institutions they assisted – builders, mortgage lenders, and realtors – made their services available to all persons on equal terms.

Housing discrimination, permitted and even encouraged by the Federal Government, has had effects that extend beyond the denial of free housing choice to individual families, to the denial of equal opportunity in other areas. Jobs – private and public – increasingly are being dispersed from large urban centers to smaller cities and suburban areas. Negroes, barred from obtaining housing in many of

these areas, also are effectively excluded from obtaining access to these jobs.

* * *

Housing discrimination also produces inequality of educational opportunity. In the Commission's recent study, "Racial Isolation in the Public Schools," a relationship between the confinement of Negroes to central city ghettos and inferior educational opportunities was demonstrated. For this reason, several of the Commission's recommendations in the report were addressed to measures – including a Federal fair law – aimed at achieving an open-housing market.

* * *

Time and again the Commission has been told by builders, real estate brokers, and apartment house owners that their discriminatory actions have been motivated by business reasons, not personal prejudice.

* * *

STATEMENT OF WHITNEY M. YOUNG, JR., EXECUTIVE DIRECTOR, NATIONAL URBAN LEAGUE

* * *

Despite these historical expressions of concern on the Federal level, it is also a historical fact that the Federal Government bears a heavy responsibility for patterns of housing discrimination, both North and South.

Early legislation governing FHA mortgages required "homogeneous neighborhoods," and from 1935 to 1950 public housing law required only that public housing be "equitably" distributed among the races. Both of these stipulations served to intensify housing segregation in the South, and the FHA's insistence upon homogeneous neighborhoods actually created widespread segregation in housing in the North in areas where it had never existed before.

This is the historical record despite the fact that the Negro's access to decent housing is the vortex around which his other vital rights revolve. Unless he can live where he chooses, his right to desegregated schools is meaningless, and his right to a job located outside his immediate community is impaired. Ghetto housing isolates racial minorities from the public life of the community in which they live. It means inferior public services in health, education, transportation, and sanitation.

*   *   *

Fair Housing Act of 1967: Hearings on S. 1358, S. 2114, and S. 2280 Before the Subcomm. On Housing and Urban Affairs of the Senate Comm. on Banking and Currency, 19th Cong., 1st Sess. 8, 10, 11, 12, 15, 35, 484 (1967)

Attorney General CLARK. We will provide a brief on both of those constitutional provisions.

The CHAIRMAN. Very well.

(The material referred to follows:)

CONSTITUTIONALITY OF FEDERAL FAIR HOUSING LEGISLATION UNDER THE FOURTEENTH AMENDMENT AND THE COMMERCE CLAUSE

* * *

2. *Federal legislation under the Equal Protection Clause may be based on a desire to correct the evil effects of past unconstitutionally discriminatory government action*

There is a second basis under the Fourteenth Amendment to support fair housing legislation, which the Court did not need to consider in its decision upholding the Voting Rights Act of 1965. Section 5 of the Amendment authorizes Congress to enforce its provisions, one of which is the Equal Protection Clause. Enforcement, in the legal sense, traditionally includes both the prevention of violations and the punishment and the correction of the effects of past violations. It follows that if the States in the past denied to persons within their jurisdictions the equal protection of the laws, and if the effects of their denials are still present, Congress possesses the

power to correct those effects. By similar reasoning, the Fifth Amendment, which imposes equal-protection obligations on the Federal Government similar to those which the Fourteenth Amendment imposes on the States, grants Congress the power to correct the enduring effects of any past denials of equal protection by the Federal Government.

Such denials of equal protection by the States, and by the Federal Government, were in fact numerous, and their effects in housing are still with us. The States and their local subdivisions enacted zoning laws denying Negroes and other minority groups the right to live in white neighborhoods until the Supreme Court put a stop to the practice in 1917. Local ordinances with the same effect, although operating more deviously in an attempt to avoid the Supreme Court's prohibition, were still being enacted and struck down by the courts as late as 1930. During these years there also came into use privately drawn racially restrictive covenants in deeds, which "ran with the land" and bound successive owners irrespective of their personal inclinations. Such covenants quickly became the major weapon for keeping minorities out of good housing, and they were fully honored by State and lower Federal courts until the Supreme Court ruled in 1948 that they could not constitutionally be enforced by injunction and in 1953 that they could not be enforced by awards of damages either.

Throughout this period, and even somewhat after the Supreme Court's 1948 ruling, the Federal Housing Administration actively encouraged the use of

racially restrictive covenants, in most cases flatly refusing to grant its mortgage insurance or guarantees unless the covenants were included in the deeds concerned. This Federal discriminatory action had a substantial impact:

> FHA's espousal of the racial restrictive covenant helped spread it throughout the country. The private builder who had never thought of using it was obliged to adopt it as a condition for obtaining FHA insurance. * * *
>
> FHA succeeded in modifying legal practice so that the common form of deed included the racial covenant. Builders everywhere became the conduits of bigotry. * * *
>
> The evil that FHA did was of peculiarly enduring character. Thousands of racially segregated neighborhoods were built, millions of people re-assorted on the basis of race, color, or class, the differences built in, in neighborhoods from coast to coast.

At the same time, the Federal and State governments were cooperating to enforce segregation in public housing. Lower federal courts approved such efforts as late as 1941, and although thereafter the courts, when they had the opportunity, invalidated them, efforts to keep public housing segregated were continuing in the North until at least 1955 and in Kentucky, Missouri and Tennessee until at least 1961.

* * *

The purpose, or "end," of the Federal Fair Housing Act is to remove the walls of discrimination which enclose minority groups in ghettoes, so that they may live wherever their means permit and be better able to secure the equal benefits of government and the other rewards of life.

* * *

Attorney General CLARK. That is right. I would certainly hope for much of the same, particularly among project developments, big builders, and lenders. I think that among them there is not only a willingness but a desire to have an open housing law enacted. Many of them are inhibited by State and local practices and laws, and by competition that makes it difficult, economically, for them to voluntarily follow a policy of nondiscrimination.

* * *

Even more serious practical problems arise from the uneven application of our present requirements as among different builders, different neighborhoods, and different sections of metropolitan areas. The theoretical availability to all citizens, regardless of their race, of a new FHA-aided housing project may be of no practical effect when the project is hidden away in a large section of a city or a large suburban area which is otherwise unavailable to nonwhites.

But if the project does attract a few Negro families, the very fact that it is the only project in the area

open without regard to race may result in its attracting many more Negroes, while prospective white tenants or purchasers find housing elsewhere.

The particular landlord or homebuilder who resists renting or selling to a nonwhite family may often do so not out of personal bigotry, but out of fear that his project will, because he is among the first not to discriminate, attract only one segment of the market.

The fears of landlords and builders in this respect are not entirely unfounded under a system which provides open occupancy in selected projects while maintaining barriers in most others. It is the very pressure of segregation that often directs disproportionate numbers of nonwhite families to those housing projects and to those neighborhoods which do accept them.

* * *

THE AMERICAN BANKERS ASSOCIATION

* * *

The American Bankers Association takes this opportunity to offer certain comments concerning Section 5 of S. 1358 because we believe this section as presently worded will have serious consequences for all lenders.

* * *

For the great majority of lenders actual lending practices are based upon a number of important

considerations such as economic conditions, nature of the community, demand for various types of loans, character and amount of funds available and competitive practices. The lender, of course, is most interested in the ability of a borrower to repay according to an agreed upon repayment schedule and the assurance that the security is adequate to provide safety in the event the borrower cannot repay. In many instances a lending officer must be guided by a policy manual which establishes for him the types of loans to be granted, credit characteristics, property conditions and terms of loans. This is particularly true when loans are being originated for the account of institutional lenders. Prudent banking practice dictates that it is essential to establish a policy which takes full account of the risks involved on each loan.

If through the application of prudent lending practice and not because of the reasons stated in Section 5, a lender declines an application it would expose itself, under the bill as drawn, to a possible costly legal defense of its actions. Furthermore, a defense might also be necessary if a loan should be granted under terms and conditions which reflect the true credit risk involved to the lender. We feel that since no two real estate loans have the same terms and conditions this legislation would place an undue burden upon lenders. In effect, every loan decision made by any lender would be subject to possible legal action by complaining parties.

* * *

Fair Housing Amendments Act of 1987: Hearings on S. 558 Before the Subcomm. On Constitution of the Senate Comm. On the Judiciary, 100th Cong., 1st Sess. 2, 3, 5, 529 (1987)

ARLEN SPECTER

* * *

The chairman has already outlined some of the statistics, but I think they are worth repeating, where blacks face more than a 40-percent chance of encountering discrimination when they are seeking to buy. Blacks encounter more than a 70-percent likelihood of discrimination when they are seeking to rent;

* * *

EDWARD M. KENNEDY

* * *

Housing discrimination isolates racial and ethnic minorities and perpetuates the ignorance that is the core of bigotry. Discrimination in housing hampers progress to achieve equality in other vital areas as well.

Residential segregation is the primary obstacle to meaningful school integration, and as businesses move away from the urban core, housing discrimination prevents its victims from following jobs to the suburbs, impeding efforts to reduce minority unemployment.

* * *

ORRIN G. HATCH

* * *

We had a major battle in the earlier part of this decade on the fair housing law and we came very close to passing a major bill at that time. It bogged down because of the battle over the intent test versus the effects test.

As of today, I think 9 of the 12 circuit courts of appeals have basically endorsed an effects test, but the resolution of that conflict has never been decided by the Supreme Court, and I suspect that it will be some time in the future.

* * *

But on the issue of intent versus effect – I am afraid that is going to have to be decided by the Supreme Court. If it becomes an issue in this matter, it may be a monumental issue. Thus far, it has not been because the bill, as I understand it, does not really go one way or the other and the sponsors rely very much on the nine circuits that have basically upheld the position that they feel is right – the ability to prove discrimination through an effects or results test.

* * *

ROBERT SCHWEMM

* * *

My name is Robert Schwemm, and I am a professor of law at the University of Kentucky. I have

devoted almost my entire professional life to the subject of housing discrimination law, first as a trial lawyer in Chicago and more recently as a law professor doing research in this area. In the last year,

* * *

The decisions of the Federal Courts of Appeals on this subject are the principal source of authority. They reflect the strong consensus, now approaching unanimity, that title VIII should be construed to prohibit discriminatory effects, at least under some circumstances. By my count, of the 12 Federal Courts of Appeals, 9 have reviewed this issue, and they have all agreed with that proposition; three have not yet passed on it; and none at this moment objects to that interpretation.

* * *

Fair Housing Amendments Act of 1987: Hearings on S. 558 Before the Subcomm. On Civil and Constitutional Rights of the House of Representatives of the Judiciary, 100th Cong., 1st Sess. 43, 849, 851, 852, 856 (1987)

PETER W. RODINO, JR.
CHAIRMAN
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

* * *

Despite the present law, discrimination persists and highly segregated housing patterns still exist across the Nation.

* * *

87-626 E

CRS REPORT FOR CONGRESS

COMPARATIVE QUALITY OF RENTAL HOUSING OBTAINED BY WHITES, BLACKS, AND HISPANICS

* * *

Like the results obtained from a similar study published in 1966 based on the 1960 Census of Housing, this study finds that the proportion of poor quality units in housing obtained by blacks, and now also Hispanics, is considerably higher than that in housing obtained by white households, when they pay the same rent for units of the same size. There is some indication, however, that the sharp pattern of greater inequality between white and black households at higher rent levels than at lower no longer prevails.

* * *

Twenty years after the passage of the Civil Rights Act, including Title VIII, which prohibits discrimination in the housing market against ethnic and racial groups, it is evident that segregated housing patterns continue. Although there has been movement of minority households into new areas of central cities and into suburban areas, it is not clear to what extent such movement is to non-segregated housing rather than simply an extension of segregated areas. In recent years, most studies of minority housing have been concerned with this issue. Not as much

research attention has been paid as in the 1950s and 1960s to differences in the quality of housing available to minorities compared to non-Hispanic whites that may be associated with discriminatory or racially or ethnically segregated housing markets.

Discrimination, as used in this report and in reference to housing markets generally, refers to the existence of differences in pricing and quality of housing services across groups. Such discrimination, when observed, by itself permits no inferences as to underlying reasons or motivations for those differences.

* * *

Existing data show that, despite any decrease in segregated housing patterns which may have occurred, a higher proportion of the housing occupied by minorities than by whites continues to be structurally inadequate.

* * *

He reported two major findings: First, that black households were not trading quality for space. When blacks in metropolitan areas paid the same rent for the same amount of space, they obtained lower quality housing. And second, that while the incidence of substandard housing was lower for both whites and blacks the higher the rent paid, the incidence among whites decreased much more, so that differences between the races were greater at higher rent levels than at lower. In effect, the study found that in the housing market, the gap between what was bought

per dollar of rent by blacks and whites increased the higher the rent payments.

*   *   *

As in many other aspects of race relations in our society, this study finds that while some progress seems to have been made, discrimination continues with respect to the quality of housing obtained by black and Hispanic households, compared to white.

*   *   *

Upwardly mobile blacks and Hispanics, that is, those able and willing to spend more money to acquire better housing, face the same, but at least no greater, discrimination as those with lower incomes or lesser aspirations in the housing market.

*   *   *

Issues Relating to Fair Housing: Hearings, Before the Subcomm. On Housing and Community Development of the Banking, Finance and Urban Affairs Comm. On the House of Representatives, 100th Cong., 2nd Sess. 11, 12, 13, 14, 15, 17, 134, 140, 144, 245, 246, 301 (1988)

STATEMENT OF DOUGLAS S. MASSEY, DIRECTOR, POPULATION RESEARCH CENTER, UNIVERSITY OF CHICAGO

* * *

This research was supported by a grant from the National Institute of Child Health and Human Development, through the Demographic and Behavioral Sciences Branch of the Center for Population Research.

* * *

Our results indicate that blacks remain the most residentially segregated minority group in America.

* * *

In the Nation's largest urban black concentrations, segregation remained very high through 1980. Among the 15 largest black settlements, the average segregation index was 84 in 1970 and 78 in 1980.

* * *

In other words, black segregation is unique and exceptional not only because of its extreme unevenness, but also because of its multifaceted nature. Segregation on multiple dimensions is characteristic of no other minority group in the metropolitan areas we examined.

*   *   *

Unless residents of these ghettos work in the mainstream economy – remember that nearly a quarter of central city black men are unemployed – they will be very unlikely to come into contact with anyone other than another black ghetto dweller.

*   *   *

To a large degree, then, suburbs appear to be substantially closed to black settlement.

Not only are blacks much less likely than other groups to achieve suburban residence, but once within suburbs, they are subject to much higher levels of segregation.

*   *   *

Our results, therefore, indicate that black segregation in American urban areas is blocked at three successive junctures: blacks are unable to achieve integration within central cities; they are less able than other groups to attain suburban residence; and once in suburbs, they are still highly segregated.

*   *   *

We found that the level of black segregation remained high across all levels of socioeconomic status, whether measured in terms of education, income, or occupation.

In contrast, the Hispanics and Asians, black segregation showed a very limited tendency to fall with rising socioeconomic status. In the 60 metropolitan

areas we examined, the segregation score of black laborers was 73, while that for black professionals was 63, both in the higher range. But the Hispanic segregation score fell from 63 among laborers to 44 among professionals, and the Asian score drooped from 77 to 53.

* * *

Compared to middle income whites, blacks of similar status face a distinctly disadvantaged residential environment, similar in quality to areas that only the poorest of whites inhabit.

Given the constraints imposed by persistent segregation and widespread segregation, middle class blacks are subject to higher rates of crime, a less health environment, and more dilapidated surroundings than their white counterparts. They must also live with people of markedly lower social class, and send their children to inferior schools, attended by children from much more disadvantaged families.

* * *

In other words, because residential segregation continued to limit the freedom of black families to live wherever they might want, race remains a fundamental cleavage in American society, denying aspiring black families access to the full range of opportunities in our society.

* * *

TRENDS IN THE RESIDENTIAL SEGREGATION OF BLACKS, HISPANICS, AND ASIANS: 1970-1980 [Excerpted]

DOUGLAS S. MASSEY NANCY A. DENTON

	Group's Probability of Contact with:							
	Anglos		Blacks		Hispanics		Asians	
Metropolitan Area and Group	1970	1980	1970	1980	1970	1980	1970	1980
Dallas-Fort Worth								
Anglo	.908	.866	.033	.050	.055	.068	.006	.016
Black	.189	.272	.760	.646	.049	.074	.003	.009
Hispanic	.700	.619	.107	.124	.186	.240	.009	.018
Asian	.818	.796	.069	.078	.098	.101	.017	.026
Average								
Anglo	.883	.849	.040	.053	.068	.077	.010	.023
Black	.333	.376	.553	.491	.103	.110	.014	.026
Hispanic	.709	.642	.106	.131	.173	.201	.014	.028
Asian	.760	.749	.104	.099	.108	.107	.032	.047

	Proportion of Group Living in Suburbs:								
	Blacks			Hispanics			Asians		
Metropolitan Area	1970	1980	Change	1970	1980	Change	1970	1980	Change
Dallas-Fort Worth	.126	.153	.027	.310	.353	.043	.362	.550	.188
All SMSAs	.206	.282	.076	.461	.482	.021	.431	.530	.099

The Effect of Residential Segregation on Black Social and Economic Well-Being

DOUGLAS S. MASSEY, *University of Pennsylvania*
GRETCHEN A. CONDRAN, *University of Pennsylvania*
NANCY A. DENTON, *University of Pennsylvania*

Abstract

This paper investigates some of the consequences of black residential segregation using specially compiled data for Philadelphia in 1980. Blacks, like whites, attempt to improve their neighborhood characteristics with rising social status, but unlike whites, they face strong barriers to residential mobility. As a result, high status blacks must live in neighborhoods with fewer resources and amenities than whites of similar background. Specifically, they live in poorer, more dilapidated areas characterized by higher rates of poverty, dependency, crime, and mortality and they must send their children to public schools populated by low income students who score badly on standardized tests. These findings suggest that racial segregation remains an important basis for stratification in U.S. society.

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100 CONG. REC. (1988)

* * *

[S10549] Mr. SASSER. Under section 6(c) of the bill, the antidiscrimination provisions to purchasers of mortgage loans in the secondary mortgage market, in addition to the originating lenders in the primary market.

It is my understanding that this amendment will not preclude those purchasing mortgage loans from taking into consideration factors justified by business necessity, including requirements of Federal law, that relate to the financial security of the transaction or the protection against default or diminution in value of the security. Federal or State statutes and regulations, as well as sound business practices, require protection from risks arising from defective title, casualty losses, and the borrower's default.

The makers and purchasers of mortgages must be sufficently protected against default or diminishment of the security property to assure the safety and soundness of the lending or investment decision.

Mr. KENNEDY. The Senator is correct. This provision is fully consistent with the concerns you have raised. The amendment will in no way prevent consideration of factors justified by business necessity, including requirements of Federal law, relating to a transaction's financial security or Protecting against default or reduction of the security's value.

* * *

134 CONG. REC. (1988)

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[23711] Mr. KENNEDY. Unfortunately, President Reagan used that historic occasion to announce an interpretation of the act that this flatly inconsistent with Congress's understanding of the law. The President suggested that the act should be read as requiring proof of discriminatory intent in order to establish a violation of the fair housing law.

*   *   *

As the principal Senate sponsor of the 1988 act, I can state unequivocally that Congress contemplated no such intent requirement. The act did not materially alter the 1968 Fair Housing Act provisions defining what is required to prove a discriminatory housing practice. All of the Federal courts of appeals that have considered the question have concluded that title VIII should be construed, at least in some instances, to prohibit acts that have discriminatory effects, and that there is no need to prove discriminatory intent.

*   *   *

Just last week, I had the opportunity to discuss this subject with Douglas Kmiec, the Acting Assistant Attorney General in charge of the Office of Legal Counsel in the Department of Justice. At his confirmation hearing, on September 8, 1988, Mr. Kmiec agreed with my view. As he testified:

> To the extent that a signing statement would be used to thwart the express terms of [a] statute or was not giving due consideration to the legislative history that gave rise to the words of the statute, it would not be a proper use of that statement.

I then indicated my own view, that

> [W]hen the Congress passes a law, it intends it to mean what it says. And the President, obviously, if he has a differing view, has the opportunity to veto it and send it back for reconsideration. But if he does not, the congressional interpretation would be the guiding force in terms of interpretation.

Mr. Kmiec responded, "I do not disagree, Senator."

* * *

Fair Housing: Hearing, Before the Subcomm. On Civil and Constitutional Rights of the House of Representatives on the Judiciary, 100th Cong., 2nd Sess. 5, 6, 121, 164 (1988)

TESTIMONY OF ALEXANDER POLIKOFF, EXECUTIVE DIRECTOR, BUSINESS AND PROFESSIONAL PEOPLE FOR THE PUBLIC INTEREST, CHICAGO, IL

* * *

I want to emphasize that this technique of affirmative marketing is a race-conscious technique – as it has been espoused by HUD since 1972. It specifically, in HUD's regulations and implementing handbooks, tells housing providers to consider a factor of race; to look at the housing patterns in their new subdivision, their rental complex, or whatever we're talking about, to determine which racial or ethnic group is least likely to apply. And then, in addition to their normal market, to make special efforts to attract that least likely to apply, racially speaking, group.

* * *

Now, there's probably no one better known in our country than former head of the Civil Rights Division of the Justice Department, Assistant Attorney General William Bradford Reynolds, for looking carefully at race-conscious techniques to make sure that they don't involve discrimination.

So what does Mr. Reynolds say about the race-conscious technique of affirmative marketing? I quote, he says:

"We have no opposition to affirmative marketing efforts in order to reach out and encourage more minorities to move into communities where they aren't, and to encourage whites to move into minority communities."

And in an interview published just this year, earlier this year, in the New York Times, Mr. Reynolds was asked this question:

"Is there a way under the Fair Housing Act to take race into account to foster integration and yet not run afoul of the law?"

And here's Mr. Reynolds' answer:

"I think the Fair Housing Act quite clearly allows you to employ a whole host of affirmative action kinds of measures that are designed to encourage people of all races to move into the complex, and to live side by side. And certainly any of those measures, such as going out and seeking out people, recruiting them to come to the complex, encouraging them to live there – they work."

* * *

TESTIMONY OF ROBERT D. BUTTERS, DEPUTY GENERAL COUNSEL, NATIONAL ASSOCIATION OF REALTORS, CHICAGO, IL

* * *

I think that was the essence of the court's holding, that discriminatory effects are just as illegal under current jurisprudence as discriminatory intent, and that the effect of the quota in that particular case was clearly to deny housing opportunities to minorities, that without the quota there would have been more opportunity, so it had an effect of reducing –

* * *

But the difficulty the Second Circuit had with it – and, indeed, so did the District Court – was that, as noble as that ambition may be, the means that was adopted in that particular complex to bring it about had the effect, as was stipulated in the record, of burdening or indeed denying housing opportunities to blacks, and the Second Circuit at least seemed to say that in a choice such as that between this other noble purpose of integration as opposed to segregation and the choice of burdening housing opportunities for blacks, as we read the legislative history of Title VIII, we think burdening housing opportunities for blacks is the wrong choice and is therefore illegal.

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The Economic Growth and Regulatory Paperwork Reduction Act: Hearings on S. 650 Before the Subcomm. On Financial Institutions and Regulatory Relief Of the Senate Comm. on Banking, Housing, and Urban Affairs, 104th Cong., 1st Sess. 327 (1995)

PREPARED STATEMENT OF BILLY DON ANDERSON

PRESIDENT & CEO, VALLEY FEDERAL SAVINGS BANK, SHEFFIELD, AL ON BEHALF OF AMERICA'S COMMUNITY BANKERS

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Given the flexible definitions of what constitutes a violation of the Equal Credit Opportunity Act or the Fair Housing Act (FHAct), ACB believes that self-testing programs should be encouraged to eliminate practices that may lead to intentional or unintentional discrimination. Because these programs are often costly, legislative encouragement is needed to promote full use of such programs by the lending community. ACB supports provisions to encourage institutions to analyze their practices for intentional and unintentional discrimination. (S.650, Section 302.) To encourage the widest use of self-testing programs, the provision can be improved by protecting from disclosure in civil litigation evidence of discrimination that was obtained from self-testing.

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