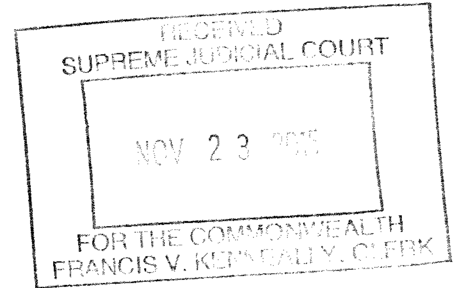

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, ss:

Docket No. SJC-11872

BURBANK APARTMENTS TENANTS ASSOCIATION, SATISHA CLECKLEY, EN CI GUAN, RICHARD WEBSTER, BYRON ALFORD, MASSACHUSETTS COALITION FOR THE HOMELESS, and FENWAY COMMUNITY DEVELOPMENT CORPORATION,

Plaintiffs-Appellants,

v.

WILLIAM M. KARGMAN, individually and in his capacity as principal of the Burbank Apartments Corporation and First Realty Management Corporation, ROBERT M. KARGMAN, individually and in his capacity as principal of Burbank Apartments Corporation, BURBANK APARTMENTS COMPANY, BURBANK APARTMENTS CORPORATION, as general partner of Burbank Apartments Company, and FIRST REALTY MANAGEMENT CORPORATION,

Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE BOSTON HOUSING COURT

BRIEF OF AMICI CURIAE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND LAWYERS' COMMITTEE OF CIVIL RIGHTS AND ECONOMIC JUSTICE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Massachusetts Supreme Judicial Court Rule 1: 21, *Amici Curiae* Lawyers' Committee for Civil Rights Under Law and the Lawyers' Committee for Civil Rights and Economic Justice make the following disclosures: They are nonprofit corporations with no parent corporations, with no stock, and therefore with no publicly held company owning 10% of more of their stock.

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IDENTITY AND INTERESTS OF *AMICI CURIAE*

This brief is submitted by the Lawyers' Committee for Civil Rights Under Law and the Lawyers' Committee of Civil Rights and Economic Justice, as *amici curiae* urging this Court not to exempt the actions of Appellees from disparate impact analysis under the Fair Housing Act.

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nonprofit civil rights organization founded in 1963 by the leaders of the American bar, at the request of President Kennedy, to help defend the civil rights of racial minorities and the poor. For over fifty years, the Lawyers' Committee has been at the forefront of many of the most significant cases involving race and national origin discrimination. The Lawyers' Committee and its affiliates have litigated numerous fair housing claims under the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, many of which have raised disparate impact claims. They have seen firsthand that disparate impact claims under the Fair Housing Act are essential to meeting its central goal of integrating our communities.

The Lawyers' Committee for Civil Rights and Economic Justice ("LCCREJ") is the Boston-based affiliate of the Lawyers' Committee. Founded in 1968, LCCREJ is a private, nonprofit, nonpartisan legal organization that provides *pro bono* legal representation to victims of discrimination based on race or national origin. LCCREJ handles major law reform cases as well as legal actions on behalf of individuals. Its work over the years has included numerous cases under the Fair Housing Act. LCCREJ thus has a strong interest in ensuring that the Fair Housing Act is correctly interpreted, in order to further the goal of residential integration and inclusion in Greater Boston and throughout Massachusetts.

INTRODUCTION

Fair housing is a bedrock civil rights protection, crucial to our nation's core value of equal opportunity for all. In the face of deeply entrenched patterns of residential segregation and exclusion, Congress enacted the Fair Housing Act ("FHA" or "Act") to effectuate "the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United

States." 42 U.S.C. § 3601; *see Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (noting the purpose of the Act to foster "truly integrated and balanced living patterns") (citation omitted).

Congress passed the FHA in April 1968, in the immediate aftermath of the assassination of Martin Luther King, Jr. Two years earlier, Dr. King had marched for fair housing in the hyper-segregated Chicago metropolitan area.[1] As one court noted, "widespread racial segregation threatened to rip civil society asunder."[2] Congress recognized that comprehensive legislation was needed to eliminate the entrenched racial segregation that existed. Congress intended that the FHA have a dual purpose - not just to eliminate discrimination, but also to eliminate segregation and promote integration. Adopted in 1968 against a background of severely segregated communities, this pro-integration mandate demonstrates Congressional intent that the FHA provide a remedy for

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[1] Arnold R. Hirsch, *Making the Second Ghetto: Race & Housing in Chicago, 1940-1960*, 264-65 (1998).

[2] *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 928 (2d Cir. 1988), *judgment aff'd in part*, 488 U.S. 15 (1988) (per curiam), *reh'g denied*, 488 U.S. 1023 (1989).

actions which perpetuate or exacerbate residential segregation.

On June 25, 2015 the Supreme Court held that disparate impact claims are cognizable under the FHA and emphatically reaffirmed the central role of the FHA in combatting racial segregation in housing. The Court explained that "[m]uch progress remains to be made in our Nation's continuing struggle against racial isolation" and acknowledged "the Fair Housing Act's continuing role in moving the Nation toward a more integrated society." *Texas Dep't of Housing & Cmty. Affairs v. The Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2525 (2015). The *Inclusive Communities* decision confirms that the FHA bars policies that "perpetuat[e] segregation," as well as those that "creat[e] discriminatory effects."[3]

Appellants in this case allege that Appellees' refusal to continue accepting rent subsidies from tenants at the Burbank Apartments not only has a discriminatory impact on minority tenants but will also perpetuate and exacerbate residential segregation in the Fenway neighborhood, and that this conduct violates the FHA. *See* Amended Complaint ¶¶ 57-61,

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[3] *See* 135 S. Ct. at 2522.

102, 108. The trial court, however, dismissed this claim, with a finding that a disparate impact claim under the FHA challenging a landlord's refusal to continue accepting rent subsidies is not cognizable under the Act.

Exempting the actions of Appellees from disparate impact analysis, including whether the challenged actions perpetuate residential segregation, was error. We urge this Court to reverse this decision and to remand the case to the lower court to conduct such an analysis. As explained in Part I below, the harms that Congress intended to prevent though the FHA remain significant today: residential segregation continues to isolate residents of racially segregated neighborhoods from high-performing public schools, good jobs, safe streets, reliable public services, and a clean, healthy environment. Such isolation has intergenerational effects that continue to limit the opportunities available to emerging generations. *See infra* at pages 6-19.

As explained in Part II below, the *Inclusive Communities* decision reaffirms the central role that the FHA continues to play in preventing these harms and makes clear that courts must carefully examine the

language of the FHA - including its exemptions - in determining the law's reach and that they do not have authority to create new judge-made exemptions. *See infra* at pages 20-25. Moreover, contrary to the arguments of Appellees and their *amici*, the *Inclusive Communities* decision also does not impose any newly-heightened pleading requirement on FHA plaintiffs. Rather, the decision highlights how safeguards against excessive disparate impact liability have long been built into the burden-shifting framework of the Act. These safeguards, however, come into play when cases proceed to the merits, not at the pleading stage. *See infra* at pages 25-32.

ARGUMENT

I. THE PERSISTENCE OF RESIDENTIAL SEGREGATION AND ITS ATTENDANT HARMS

A. ALTHOUGH ATTITUDES ABOUT THE VALUE OF INTEGRATION HAVE IMPROVED, RESIDENTIAL SEGREGATION PERSISTS

Due in significant part to the Fair Housing Act, progress has been made since 1968 in fulfilling the national commitment to residential integration. Significant obstacles remain, however, and segregation continues to plague too many regions and communities.[4]

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[4] *See* John R. Logan & Brian J. Stults, *The Persistence of Segregation in the Metropolis: New Findings from*

Today, most Americans would prefer to live in racially integrated communities,[5] yet significant obstacles and persistent patterns continue to stand in the way of open and inclusive housing. Levels of segregation faced by African Americans remain high, the segregation levels faced by Latinos and Asian Americans have not improved since 1980, and, by some measures, racial isolation has increased.[6]

Racially isolated areas of concentrated poverty, in particular, remain prevalent and harmful. Nationwide, approximately half of all high-poverty census tracts are dominated by a single racial or ethnic group.[7] African Americans and Latinos represent 12.3% and 15.8% of the population, respectively, yet they make up only 7.2% and 10.7% of the residents in

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the 2010 Census 4 (Mar. 24, 2011), *available at* http://www.s4.brown.edu/us2010/Data/Report/report2.pdf

[5] Pew Social & Demographic Trends Survey, *Americans Say They Like Diverse Communities; Election, Census Trends Suggest Otherwise* (Dec. 2, 2008), *available at* http://www.pewsocialtrends.org/2008/12/02/americans-say-they-like-diverse-communities-election-census-trends-suggest-otherwise/.

[6] Logan & Stults, *supra*, at 2, 15, 19.

[7] Paul A. Jargowsky, Century Found. & Rutgers Ctr. for Urban Research & Educ., *Concentration of Poverty in the New Millennium: Changes in Prevalence, Composition, and Location of High-Poverty Neighborhoods* 5 (Dec. 17, 2013), *available at* http://tcf.org/assets/downloads/Concentration_of_Poverty_in_the_New_Millennium.pdf.

low-poverty census tracts.[8] This segregation affects all Americans, as it isolates people from opportunity that would enable their economic mobility and limits greater economic participation.[9] African Americans are more racially isolated than any other racial group, with 75% of African Americans nationwide residing in only 16% of census block groups.

B. RESIDENTIAL SEGREGATION LEADS TO INTERGENERATIONAL HARMS

An extensive body of research confirms the validity of Congress's concerns about racial isolation and unequal housing opportunity, as well as the continuing relevance of the Act. The effects of living in segregated neighborhoods with highly concentrated poverty are overwhelmingly adverse: restricting access to education, employment, and public services, and producing negative health impacts. Conversely, removing barriers to residential integration delivers broadly-felt social benefits.

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[8] John R. Logan, Project US2010, *Separate and Unequal: The Neighborhood Gap for Blacks, Hispanics and Asians in Metropolitan America* 4, 6 (July 2011), *available at* http://www.s4.brown.edu/us2010/Data/Report/report0727.pdf.

[9] Jargowsky, *supra*, at 4-5.

1. Residential Segregation Limits Educational Integration and Its Benefits.

Equal housing opportunity is closely linked with educational diversity and achievement in ways the FHA was intended to address. "Public schools typically reflect their neighborhood demographics because most students are assigned to schools based on their residence."[10] Consequently, segregated neighborhoods often drive segregated educational settings.

School segregation significantly limits educational opportunities and outcomes for minority students.[11] Segregation in education impairs students' ability to learn, and integration can be a powerful

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[10] Roslyn Arlin Mickelson, *Exploring the School-Housing Nexus: A Synthesis of Social Science Evidence, in Finding Common Ground: Coordinating Housing and Education Policy to Promote Integration* 5 & n.1 (Philip Tegeler, ed., Poverty & Race Research Action Council & National Coalition on School Diversity, Oct. 2011), *available at* http://www.prrac.org/pdf/HousingEducationReport-October2011.pdf.

[11] Gary Orfield et al., The Civil Rights Project, *E Pluribus . . . Separation: Deepening Double Segregation for More Students* 6-10 (Sept. 2012, rev. Oct. 18, 2012), *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students/orfield_epluribus_revised_omplete_2012.pdf; Dennis J. Condron, *Social Class, School and Non-School Environments, and Black/White Inequalities in Children's Learning*, 74 Am. Soc. Rev. 683, 699 (2009).

force for improved learning.[12] High levels of segregation often result in resource disparities that lead to detrimental outcomes, including larger class sizes, lower funding, fewer teaching tools, more inexperienced teachers, insufficient facilities, lower per-pupil spending, and reduced access to services like counseling.[13] Racially segregated schools account for the majority of the nation's high schools with significantly elevated dropout rates, while integrated school environments are associated with lower dropout rates.[14]

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[12] Douglas Harris, Ctr. for Am. Progress, *Lost Learning, Forgotten Promises: A National Analysis of School Racial Segregation, Student Achievement, and "Controlled Choice" Plans* (Nov. 11, 2006), *available at* http://cdn.americanprogress.org/wp-content/uploads/issues/2006/11/pdf/lostlearning.pdf; Mark Berends & Roberto Peñaloza, *Increasing Racial Isolation and Test Score Gaps in Mathematics: A 30-year Perspective*, 112 Tchrs. C. Rec. 978 (2010).

[13] *See* Marguerite L. Spencer et al., Kirwan Inst. for the Study of Race & Ethnicity, *The Benefits of Racial and Economic Integration in Our Education System: Why This Matters for Our Democracy* 9 (Feb. 2009), *available at* http://www.racialequitytools.org/resourcefiles/spencer.pdf; Brief for 553 Social Scientists as *Amici Curiae* Supporting Respondents, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (Nos. 05-908, 05-915), 2006 WL 2927079, at *33a-34a.

[14] *See* Robert Balfanz & Nettie Legters, *Locating the Dropout Crisis: Which High Schools Produce the Nation's Dropouts? Where Are They Located? Who Attends Them?* in *Dropouts in America: Confronting the Graduation Rate Crisis* 57 (Gary Orfield, ed., 2004),

Conversely, compelling evidence demonstrates that attending integrated schools is associated with a host of positive educational and life outcomes.[15] Low-income, minority students perform better academically in diverse school settings, with improvements resulting from significant peer effects and the reduction of resource disparities. In addition, research has found that students of all racial backgrounds tend to perform better academically (measured by grades, test scores, and high school and college graduation rates) in racially integrated schools, compared to those who attend schools that are racially and socioeconomically isolated.[16] Racially and

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also available at http://files.eric.ed.gov/fulltext/ED484525.pdf; Jonathan Guryan, *Desegregation and Black Dropout Rates*, 94 Am. Econ. Rev. 919, 931-32 (2004).

[15] Rucker C. Johnson, *Long-Run Impacts of School Desegregation & School Quality on Adult Attainments*, National Bureau of Economic Research Working Paper 16664, 2-3 (Jan. 2011, rev. May 2014), *available at* http://www.nber.org/papers/w16664.

[16] Susan Eaton, *How the Racial and Socioeconomic Composition of Schools and Classrooms Contributes to Literacy, Behavioral Climate, Instructional Organization and High School Graduation Rates*, National Coalition on School Diversity Research Brief No. 2, 1 & n.1 (Oct. 2010, rev. Mar. 2011), *available at* http://school-diversity.org/pdf/DiversityResearchBriefNo2.pdf; Gary Orfield & Chunmei Lee, The Civil Rights Project, *Why Segregation Matters: Poverty and Educational Equality* 15 (Jan. 2005), *available at*

socioeconomically integrated schools also have higher rates of graduation than high-poverty, segregated schools.

2. Residential Segregation Impedes Access to Economic Mobility and Resources.

The connection between housing opportunity and economic opportunity was of particular concern to the Act's drafters.[17] Today, segregation continues to impede access to employment and other resources, with the result that poverty remains entrenched and mobility out of reach for many people of color. "Segregation . . . isolates disadvantaged groups from access to public and private resources, from sources of human and cultural capital, and from the social networks that govern access to jobs, business connections, and political influence."[18]

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http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/why-segregation-matters-poverty-and-educational-inequality/orfield-why-segregation-matters-2005.pdf.

[17] *See, e.g.*, 114 Cong. Rec. 2276 (1968) (statement of Sen. Mondale) ("Unless [African Americans] are going to be able to move in the suburban communities through the elimination of housing discrimination and the provision of low- and moderate-cost housing, they are going to be deprived of many jobs because they will be unable to live in the central city and work in the suburbs. . . .").

[18] Elizabeth Anderson, *The Imperative of Integration* 2 (2010).

Housing opportunity is crucial to expanding access to jobs. In metropolitan areas characterized by higher job sprawl, residential segregation is an independent factor that contributes to African Americans' physical isolation from jobs.[19] This geographic mismatch often results in racial and ethnic differences in income due to the relocation of high-paying, low-skilled jobs away from areas where African Americans and other people of color traditionally have resided.[20] Where African Americans are most segregated from whites residentially, they also are likely to experience the greatest mismatch between their residences and available jobs.[21] Racial isolation constricts the social networks of minorities, which limits employment opportunities.[22]

3. Residential Segregation Is Associated with Adverse Health and Environmental Effects for People of Color.

Social science research also confirms Congress's concern that residential segregation has subjected

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[19] Michael A. Stoll, Brookings Inst. Metro. Policy Program, *Job Sprawl and the Spatial Mismatch between Blacks and Jobs* 7 (Feb. 2005), *available at* http://www.brookings.edu/~/media/Files/rc/reports/2005/02metropolitanpolicy_stoll/20050214_jobsprawl.pdf.
[20] *See generally id.*
[21] *Id.* at 8.
[22] Douglas S. Massey & Nancy A. Denton, *American Apartheid* 109, 161-62, 166 (1993).

people of color to "less healthy surroundings," 134 Cong. Rec. 19715, 19716-17 (1988) (statement of Sen. Specter) (quoting exhibit read into the record regarding a study of African Americans), while freedom from housing barriers "may give children the opportunity to grow up in a healthier atmosphere," 114 Cong. Rec. 2277 (1968) (statement of Sen. Mondale) (quoting Commission on Civil Rights Report for 1967 regarding African-Americans in segregated communities).

Racially or ethnically isolated communities are much more likely to experience environmental hazards and associated adverse health impacts than are integrated communities, making race a stronger corollary to environmental vulnerability than income.[23] The groundbreaking research finding, reached just prior to the 1988 amendments to the Act, "that race was consistently a more prominent factor in the location of commercial hazardous waste facilities than any other factor examined"[24] has been repeatedly

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[23] *See, e.g.*, U.S. Envtl. Prot. Agency, *Environmental Equity: Reducing Risk for All Communities* 15 (1992), *available at* http://infohouse.p2ric.org/ref/32/31476.pdf.

[24] United Church of Christ, Comm'n for Racial Justice, *Toxic Wastes and Race in the United States: A National*

analyzed and confirmed since that time.[25] Hazardous materials disposal sites, municipal waste facilities, power plants, and other sources of pollution are all disproportionately located in racially and ethnically identifiable communities of color,[26] in a way that neither housing preferences nor wealth gaps adequately explain. Grave public health impacts - including asthma,[27] cancer,[28] diabetes,[29] and infant mortality,[30]

Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites 15 (1987), *available at* http://www.ucc.org/about-us/archives/pdfs/toxwrace87.pdf.

[25] *See generally* Robert D. Bullard et al., *Toxic Wastes and Race at Twenty: 1987-2007*, 38-47 (2007), *available at* http://www.ucc.org/justice/advocacy_resources/pdfs/environmental-justice/toxic-wastes-and-race-at-twenty-1987-2007.pdf; U.S. Comm'n on Civil Rights, *Not in My Backyard: Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice* 16-19 (2003), *available at* http://www.usccr.gov/pubs/envjust/ej0104.pdf (same); *see also* Rachel D. Godsil, *Environmental Justice and the Integration Ideal*, 49 N.Y.L. Sch. L. Rev. 1109, 1115 (2005).

[26] *See* Robert D. Bullard, *Dumping in Dixie: Race, Class, and Environmental Quality* 98, n.12-17 (3d ed. 2000).

[27] *See, e.g.*, Joint Ctr. for Political & Econ. Studies, *Breathing Easier: Community-Based Strategies to Prevent Asthma* 2 (2004), *available at* http://policylink.info/pdfs/JointCenter-Asthma.pdf; Evalyn N. Grant et al., *The Relation of Socioeconomic Factors and Racial/Ethnic Differences in US Asthma Mortality*, 90 Am. J. Pub. Health 1923, 1925 (2000).

[28] *See, e.g.*, U.S. Dep't of Health & Human Servs., *Healthy People 2010: Understanding and Improving*

as well as psychosocial phenomena like violent crime and post-traumatic stress disorder[31] - are now widely viewed as environmentally mediated consequences of residential segregation.[32]

4. Residential Integration Provides Widespread Social Benefits.

In enacting the FHA, Congress recognized that ensuring residential integration would have many societal benefits. 114 Cong. Rec. 2985 (1968) (statement of Sen. Proxmire) ("The benefits of an open

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Health 12 (2d ed. Nov. 2000), *available at* http://www.healthypeople.gov/2010/document/pdf/uih/2010uih.pdf?visit=1.

[29] *See id.*

[30] *See id.; see also* Rachel Morello-Frosch & Russ Lopez, *The Riskscape and the Color Line: Examining the Role of Segregation in Environmental Health Disparities*, 102 Envtl. Res. 181, 190-91 (2006).

[31] *See, e.g.*, Magdalena Cerdá et al., *Addressing Population Health and Health Inequalities: The Role of Fundamental Causes*, 104 Am. J. Pub. Health S609, S610 (2014), *available at* http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2014.302055.

[32] *See, e.g.*, David R. Williams & Chiquita Collins, *Racial Residential Segregation: A Fundamental Cause of Racial Disparities in Health*, 116 Pub. Health Reps. 404, 409 (2001), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1497358/pdf/12042604.pdf; Gilbert C. Gee & Devon C. Payne-Sturges, *Environmental Health Disparities: A Framework Integrating Psychosocial and Environmental Concepts*, 112 Envtl. Health Persp. 1645, 1646-47 (2004), *available at* http://infohouse.p2ric.org/ref/52/51434.pdf.

housing policy are numerous."). Social science has confirmed those myriad benefits.

a. Residential Integration Increases Interracial Contact.

In addition to the benefits detailed above, equal housing opportunity and residential integration provide opportunities for sustained, meaningful interracial contact that promotes, as the U.S. Supreme Court has noted, inter-group understanding and dismantling negative stereotypes.[33]

Meaningful contact between members of different races significantly reduces prejudice among racial groups. A frequently cited review of more than 500 studies found that this phenomenon, known as "contact theory," is overwhelmingly supported by the data, and that inter-group contact typically reduces prejudice even toward groups not included in the study.[34] By facilitating exposure to other cultures and contact among diverse individuals, racial integration can

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[33] *See Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (noting that diversity "helps to break down racial stereotypes") (citation omitted).

[34] Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. Personality & Soc. Psychol. 751 (2006), *available at* http://blogs.law.columbia.edu/genderandsexualitylawblog/files/2012/04/A-Meta-Analytic-Test-of-Intergroup-Contact-Theory.pdf.

dispel harmful stereotypes and dismantle the discriminatory cycles that perpetuate racial distrust.[35]

b. Access to Integrated Neighborhoods Benefits Families Moving from Segregated Neighborhoods.

The life chances of families moving from racially segregated neighborhoods to low-poverty, high opportunity, more integrated neighborhoods improve by increasing access to stronger institutional resources, such as higher quality schools, among other positive outcomes.[36]

Recent research demonstrates the critical effect that access to higher opportunity neighborhoods has on

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[35] Pettigrew & Tropp, *supra*; Genevieve Siegel-Hawley, *How Non-Minority Students Also Benefit from Racially Diverse Schools*, National Coalition on School Diversity Research Brief No. 8, 2-3 (Oct. 2012), *available at* www.school-diversity.org/pdf/DiversityResearchBriefNo8.pdf.

[36] *See* John Goering, *Expanding Housing Choice and Integrating Neighborhoods: The MTO Experiment*, in *The Geography of Opportunity: Race and Housing Choice in Metropolitan America* 127, 142-43 (Xavier de Souza Briggs, ed., 2005); Margery Austin Turner & Dolores Acevedo-Garcia, *The Benefits of Housing Mobility: A Review of the Research Evidence*, in *Keeping the Promise: Preserving and Enhancing Housing Mobility in the Section 8 Housing Choice Voucher Program: Conference Report of the Third National Conference on Housing Mobility* 9-23 (Philip Tegeler et al., eds., Poverty & Race Research Action Council, Dec. 2005), *available at* http://www.prrac.org/pdf/KeepingPromise.pdf.

children's long-term outcomes.[37] By examining the outcomes of children into early adulthood, the study found that those who had moved to an area of higher opportunity at a young age (prior to the age of 13) did significantly better than those whose move was delayed. These adults earned a higher income by one-third, attended better colleges, had higher college attendance rates, and experienced lower rates of single parenthood. These positive outcomes were directly dependent on, and correlated with, the number of childhood years spent in high opportunity neighborhoods.

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[37] Raj Chetty, Nathaniel Hendren and Lawrence Katz, Harvard University, *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment* (Aug. 2015), available at http://www.equality-of-opportunity.org/images/mto_paper.pdf; Raj Chetty and Nathaniel Hendren, Harvard University, *The Effects of Neighborhoods on Intergenerational Mobility: Childhood Exposure Effects and County Level Estimates* (May 2015), available at http://www.equality-of-opportunity.org/images/nbhds_paper.pdf.

II. THE *INCLUSIVE COMMUNITIES* DECISION BOLSTERS APPELLANTS' POSITION THAT THE TRIAL COURT ERRED IN DISMISSING THEIR COMPLAINT AT THE PLEADING STAGE.

A. THE *INCLUSIVE COMMUNITIES* DECISION REAFFIRMS THE CENTRAL ROLE OF THE FHA IN COMBATTING RACIAL SEGREGATION IN HOUSING.

While some commentators had thought that the Supreme Court might use the *Inclusive Communities* case as a vehicle to abolish FHA disparate impact claims,[38] the Court instead ended up not only preserving disparate impact claims but providing a ringing endorsement of the continuing need for the FHA. The decision reaffirms the central role of the FHA in combatting racial segregation in housing and highlights its broad remedial purpose.

The Court begins its disparate impact analysis by outlining the critical role that the FHA has played - and continues to play - in combatting racial segregation in residential housing. The Court highlights the FHA's broad "central purpose" to break down continuing patterns of residential segregation

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[38] *See, e.g.*, The Washington Post, January 21, 2015, *The Supreme Court May Soon Disarm The Single Best Weapon For Desegregating U.S. Housing*, available at https://www.washingtonpost.com/news/wonk/wp/2015/01/21/the-supreme-court-may-soon-disarm-the-single-best-weapon-for-desegregating-u-s-housing/ (last visited Nov. 10, 2015).

"within a sector of our Nation's economy." *Id.* at 2521. The Court situates this far-reaching remedial purpose within the context of an even broader nationwide goal: "our historic commitment to creating an integrated society…." *Id.* at 2525 (citation omitted). Moreover, the Court explicitly recognizes how far we remain from that goal, with the trenchant observation that while *de jure* residential segregation "was declared unconstitutional almost a century ago, . . . its vestiges remain today, intertwined with the country's economic and social life." *Id.* at 2515; *see also id.* at 2525 ("Much progress remains to be made in our Nation's continuing struggle against racial isolation.").

The *Inclusive Communities* decision thus stands as an important reminder that any FHA analysis must start with the Act's broad remedial purpose and its continuing centrality in today's world. The trial court here failed to do so. The court instead started with the assumption that the laws governing project-based Section 8 trump the FHA. It characterized the former to be "specific" and the latter to be "general." *See* Decision at 19 ("the specific governs the general"). This formulation is

at odds with the *Inclusive Communities* decision, which makes clear that the FHA is an overarching anti-discrimination mandate. Indeed, many broad remedial laws, including both the FHA and the Equal Protection Clause, could be termed "general." But that does not mean that they cannot be applied in contexts regulated by other laws. To the contrary, as the *Inclusive Communities* Court notes, the FHA has been, and continues to be, used to break down patterns of residential segregation in a wide variety of specific and highly-regulated contexts. *See* 135 S.Ct. at 2521-22 (citing FHA cases involving zoning laws, housing restrictions, and ordinances).

B. THE *INCLUSIVE COMMUNITIES* DECISION HIGHLIGHTS THE NEED FOR COURTS TO EXAMINE CLOSELY THE ACT'S STATUTORY LANGUAGE TO EFFECTUATE CONGRESSIONAL INTENT

As the Supreme Court makes clear in *Inclusive Communities,* courts analyzing the FHA's applicability should not only be mindful of the law's broad remedial purpose and its continuing vitality, but should also scrutinize closely the language of the law itself. The FHA has been on the books for nearly half a century and was substantially amended in 1988, which

afforded Congress ample opportunity to ensure that the language of the Act effectuates congressional intent.

For this reason, in analyzing in *Inclusive Communities* whether disparate impact claims are viable under the FHA, the Supreme Court paid particular attention to the law's text. The decision notes that Congress created three exemptions from disparate impact liability in the 1988 amendments to the Act, *see id.* at 2520-21,[39] and finds that Congress's inclusion of these exemptions bolsters the conclusion that the FHA allows disparate impact claims; why write specific exemptions into the law if no such claims are possible in the first place? *Id.* at 2520-21.

A similar logic applies in this case. Here, the fact that the FHA includes specific exemptions to liability undercuts the trial court's conclusion that an additional unwritten one - a categorical exemption shielding non-renewal of Section 8 subsidies from disparate impact scrutiny - should be implied. *See Powerex Corp. v. Reliant Energy Savings, Inc.*, 551

[39] The three exemptions are: an exemption for appraisals, an exemption for conduct against a person because the person has been convicted of manufacture or distribution of a controlled substance, and an exemption for reasonable restrictions on maximum occupancy rates. *Id.* (citing 42 U.S.C. §§ 3605(c), 3607(b)(4), 3607(b)(1)).

U.S. 224, 237-38 (2007) (where express exemptions exist, courts should not imply additional exemptions); *Thurdin v. SEI Boston, LLC*, 452 Mass. 436, 444 (2008) (same). Indeed, both HUD and appellate courts have made this exact point in this context. *See* 78 Fed. Reg. 11460, 11477 (Feb 15, 2013) (HUD regulations) ("Congress created various exemptions from liability in the text of the Act, and . . . in light of this and the Act's important remedial purposes, additional exemptions would be contrary to Congressional intent."); *Graoch Assocs. #33, L.P. v. Louisville/Jefferson Cty. Metro Human Relations Comm'n*, 508 F.3d 366, 375 (6th Cir. 2007) ("Nothing in the text of the FHA instructs us to create practice-specific exceptions. Absent such instruction, we lack the authority to evaluate the pros and cons of allowing disparate impact claims challenging a particular housing practice and to prohibit claims that we believe to be unwise as a matter of policy.").

As in *Inclusive Communities*, the existence of explicit exemptions from disparate impact liability provides "[f]urther and convincing confirmation" that there is not, as Appellees urge, an additional implied

exemption for Section 8 non-renewal decisions. *Inclusive Communities*, 135 S. Ct. at 2520.

C. THE "SAFEGUARDS" OUTLINED IN *INCLUSIVE COMMUNITIES* SUPPORT THE CONCLUSION THAT THIS CASE SHOULD NOT HAVE BEEN DISMISSED AT THE PLEADING STAGE.

In the *Inclusive Communities* decision, the Supreme Court also outlines how disparate impact liability under the FHA "has always been properly limited," and notes that a number of safeguards exist within the Act to ensure against reflexive racial balancing or interference with valid, nondiscriminatory policy choices. *Id.* at 2522. Contrary to the assertions of Appellees and their *amici*, however, these longstanding safeguards support Appellants' argument, not Appellees'. The Act affords numerous safeguards against overreach - but these are safeguards that arise on the merits, not at the pleading stage.

Thus, for example, the *Inclusive Communities* decision notes that liability cannot be "imposed based solely on a showing of a statistical disparity." *Id.* at 2522. Similarly, a plaintiff must be able to show causation, *i.e.*, that the statistical disparity was caused by the practice in question. *Id.* at 2523. As

the Court emphasizes, this type of safeguard avoids leading governmental or private defendants to use quotas or other forms of racial balancing. *See id.* Moreover, even if the plaintiff is able to make out a *prima facie* case (statistical disparity and causation), the defendant may still prevail if it shows that the challenged practice is "necessary to achieve a valid interest . . . ." *Id.* at 2523. At that point, the burden shifts back to the plaintiff to prove a less discriminatory alternative. *Id.* at 2515. This burden-shifting framework means that valid policy choices, even if they result in racial disparity, are allowed to stand, if the defendant shows they are necessary to its legitimate interests and the plaintiff cannot show a less discriminatory alternative.

The Court's language in outlining these standards emphasizes that the analysis of whether parties have made their required showings under the burden-shifting framework requires factual development. For example, the Court instructs courts to "examine with care" whether a plaintiff has made out a *prima facie* case of disparate impact - *i.e.*, shown both statistical disparity and causation. *Id.* at 2523. This type of

careful examination presupposes factual development on the merits.[40] Similarly, the Court notes that FHA defendants must be given "leeway to state and explain the valid interest [served by] their policies." *Id.* at 2512. Again, inviting this type of in-depth explanation from defendants points to an inquiry conducted on a full factual record.

When the Court *does* specifically discuss what a plaintiff must allege at the pleading stage, it makes clear that the question at that early stage of litigation is not whether the plaintiff can prove his or her case, but rather whether all of the necessary elements have been alleged. Thus, the Court states - consistent with the law on pleading standards generally - that a FHA plaintiff must "allege facts . . . or produce statistical evidence demonstrating a causal connection" between the challenged practice and the statistical disparity. *Id.* at 2523. Plaintiffs

[40] Indeed, the Supreme Court has specifically held in the Title VII context (from which the FHA's standards are borrowed) that analysis of whether a plaintiff has established a *prima facie* case occurs after the pleading stage. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002) ("under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case"); *see also Rodríguez-Reyes v. Molina-Rodríguez,* 711 F.3d 49, 51 (1st Cir.2013) ("The prima facie case is an evidentiary model, not a pleading standard.").

here have done that in their Amended Complaint, as even the trial court recognized. *See* Amended Complaint, ¶¶ 45-61, 99-110; Decision at 15-16.[41] In *Inclusive Communities*, the Supreme Court identified problems of proof that a hypothetical FHA plaintiff may have down the road - *e.g.*, in *proving* a policy or *establishing* causation - but nothing in the Court's decision suggests that these factual inquiries are properly resolved at the pleading stage. *See, e.g.*, 135 S. Ct. at 2523-24.

The way in which Appellees attempt to use *Inclusive Communities* to support their position is particularly telling. In order to make their argument appear supported by the case, Appellees cite it in the following manner:

> [T]he basis for Appellees' decision at issue here justifies as a matter of law the "prompt resolution" of this case "at the pleading stage" in order to "protect … [Appellees] against abusive disparate-impact claims…" that cannot succeed. 135 S.Ct. at 2524.

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[41] Appellants' allegations in fact go into much greater detail as to how Appellees' practice causes statistical disparity and perpetuates residential segregation than would ordinarily be needed to survive a motion to dismiss. *See* Amended Complaint ¶¶ 45-61, 99-110.

Appellees' Brf. at 30. In reality, however, these quotes are drawn from three different sentences spanning three paragraphs of the *Inclusive Communities* opinion. As noted above, when the Court discusses what must occur "at the pleading stage," it simply says that "[a] plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact." 135 S. Ct. at 2523. This is an unremarkable statement of the well-established principle that a plaintiff must allege facts at the pleading stage that would establish liability if found to be true. That is precisely what Appellants have done here. *See supra* at page 28.

The Court's statement about protection from "abusive disparate-impact claims," on the other hand, is made two paragraphs later, following the Court's extended discussion of the full burden-shifting framework. 135 S. Ct. at 2524. Appellees' implicit presentation of these far-flung quotes as within one sentence simply highlights the flaw in their argument. That is, what the *Inclusive Communities* decision actually says is that the FHA's safeguards are designed to play out through a careful merits

examination of each prong of the burden-shifting framework.

The *amicus* brief of the Greater Boston Real Estate Board ("GBREB") in particular appears to misunderstand the procedural posture of this case – *i.e.*, that it comes to this Court on a motion to dismiss, not on the merits. For example, GBREB begins its argument by stating that "imposing liability against appellees would have a chilling effect" on future developments. Brief of *Amici Curiae* The Greater Boston Real Estate Board et al. ("GBREB Brf.") at 13. However, there is no liability being imposed at this point; rather, the question on appeal is whether there is a categorical exemption that shields from FHA scrutiny any and all decisions not to renew Section 8 subsidies. Similarly, GBREB leapfrogs over liability to remedy in arguing that Appellants are asking this Court "to make Section 8 contract renewal mandatory." *Id.* at 17. To the contrary, Appellants are simply asking to be allowed to make their FHA claim in the first instance.

Nor is GBREB correct in stating that *Inclusive Communities* imposes an "enhanced threshold" on FHA plaintiffs. *Id.* at 25. As explained above, the

decision does no such thing. To be sure, the Court highlights the limits that have always existed in disparate-impact law in order to prevent liability from extending to legitimate, non-discriminatory practices. And the Court cautions that, under basic pleading law, all of the elements of disparate impact - a practice, statistical disparity, and causation - must be adequately pled at the outset. But plaintiffs have done that here, and that is all that *Inclusive Communities* requires at the pleading stage. *See supra* at pages 27-28.

If this case is allowed to proceed - as it should be - the trial court will surely need to heed the admonitions from the Supreme Court in the *Inclusive Communities* case. This will mean carefully scrutinizing whether Appellants have met their burden of demonstrating that Appellees' practice causes a disparate impact - and then whether Appellees have met their burden of demonstrating that their practice is necessary to serve one of their valid interests. However, there is nothing in the *Inclusive Communities* opinion that suggests that Appellees should be cut off at the outset from making such a claim. The trial court's decision to the contrary is erroneous and

should be reversed, and Appellants should be given their day in court.

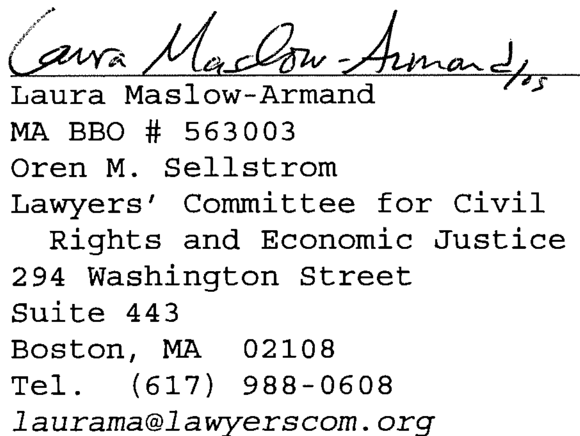
CONCLUSION

For the foregoing reasons, Amici Curiae respectfully request that this Court reverse the decision of the trial court and remand the matter to the trial court for further proceedings on the merits.

November 23, 2015

Respectfully submitted on behalf of *amici* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW and LAWYERS' COMMITTEE OF CIVIL RIGHTS AND ECONOMIC JUSTICE,

By their attorneys,



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RULE 16(k) CERTIFICATE OF COMPLIANCE WITH RULES OF APPELLATE PROCEDURE

I, Laura Maslow-Armand, attorney for *amici*, certify that the foregoing brief of *amici curiae* complies with the Massachusetts Rules of Court regarding the form and submission of appellate briefs. I have caused 17 copies and one original of the brief to be filed with the Court.

Laura Maslow-Armand