IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE INCLUSIVE COMMUNITIES PROJECT, INC.,	§	
	§	
PLAINTIFF,	§	
	§	
V.	§	
	§	
THE TEXAS DEPARTMENT OF	§	
HOUSING AND COMMUNITY AFFAIRS, AND	§	
MICHAEL GERBER,	§	**CIVIL ACTION NO. 3:08-CV-0546-D**
LESLIE BINGHAM-ESCARENO	§	
TOMAS CARDENAS,	§	
C. KENT CONINE,	§	
DIONICIO VIDAL (SONNY) FLORES,	§	
JUAN SANCHEZ MUNOZ, AND	§	
GLORIA L. RAY,	§	
IN THEIR OFFICIAL CAPACITIES,	§	
	§	
DEFENDANTS.	§	

BRIEF AMICUS CURIAE OF FRAZIER REVITALIZATION INC. IN SUPPORT OF DEFENDANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

FEDERAL STATUTES AND CONSTITUTIONAL PROVISIONS **PAGE**

STATE STATUTES

OTHER AUTHORITIES

OTHER AUTHORITIES (CONT.) **PAGE**

INTEREST OF THE AMICUS CURIAE

Frazier Revitalization Inc. ("FRI") is a non-profit corporation formed under section 501(c)(3) of the Internal Revenue Code. Its objective is to support the comprehensive revitalization of the historic Frazier Courts neighborhood, which is located east of Fair Park in Southern Dallas. The area had fallen into disrepair through decades of discrimination and neglect. Beginning in 2003, the Dallas Housing Authority ("DHA") obtained millions of dollars in federal grants and loans and used the funds and other capital to replace Frazier Courts, a dilapidated public housing project, with new and affordable housing units. The DHA also hired an internationally known urban planner, Antonio DiMambro, to work with Frazier residents to produce a comprehensive land use plan for the entire neighborhood. The plan, completed in 2004, calls for more than $270 million in new development, including housing, retail, industrial, and healthcare facilities.

FRI was formed in 2005 with the support of the Dallas Housing Authority and the Foundation for Community Empowerment to help implement the Frazier Neighborhood Plan. From its inception, FRI's board of directors has included five Frazier community residents and five Dallas business leaders. Its role, like that performed by similar non-profits in other cities, is to facilitate comprehensive revitalization in keeping with the resident-driven plan. Its work includes acquiring critically located parcels of land, often with blighted structures and noxious uses, and passing them on to high-quality, responsible developers. FRI also works with residents to come up with community-based design standards and works with both residents and developers to see that these guidelines are followed. The goal is a

mixed-income neighborhood with ample fit and affordable housing for both current residents and newcomers, plus a full range of basic services.

FRI believes that its goal of a revitalized south Dallas, unified economically and culturally with the greater Dallas area, would be compromised were the Court to accept the proposal before it that tax incentives for investment must be distributed throughout the city rather than concentrated in the areas that need them most. This case brought by Inclusive Communities Project, Inc. ("ICP") against the Texas Department of Housing and Community Affairs ("TDHCA") and its board focuses on race to the exclusion of any other consideration. But low income housing tax credits ("LIHTCs") were created by Congress to address poverty, not issues of race. ICP essentially asks the Court to trade the opportunity of African-Americans to live in stable, higher-scoring units in African-American neighborhoods for the opportunity to live in lower quality units in Caucasian neighborhoods. The law does not require or even condone such an outcome.

Both FRI and ICP are interested in improving living conditions of the underprivileged. The issue is how to get there and, given scarce resources, how to prioritize limited funding. This is a complex policy question, not one whose answer is dictated by the Equal Protection Clause of the Fourteenth Amendment or the statutes intended to implement it.

ARGUMENT

No credible advocate could dispute the deplorable history of segregation in housing in Texas generally and in the Dallas area in particular. Nor could any observer reasonably disagree that this segregation was accomplished with the

active participation of the state and local governments. Moreover, FRI believes that the pernicious effects of segregation are varied, profound, and ongoing, and that federal law as well as elemental principles of morality and fairness demand that these effects continue to be remedied by government.

The methods that are legally and morally permissible to remedy the evils of segregation, and the effectiveness of proposed methods, however, are subject to fair and honest argument. As the Fifth Circuit recognized in *Walker v. City of Mesquite*, 169 F.3d 973 (5th Cir. 1999), as lamentable as social and governmental segregationist practices were, there are limits to the methods that government can use to reverse the consequences of these practices. And social scientists vigorously debate the effectiveness of integration as the primary tool, and as the measure of society's success, in combating the effects of prior segregation.

It may well be true, as ICP alleges, that the TDHCA awarded a disproportionately higher number of LIHTCs to projects located in minority neighborhoods than to projects in "high opportunity," predominantly Caucasian neighborhoods. ICP's allegation that this distribution resulted from the TDHCA's intent to discriminate against African-Americans by approving projects that would keep "them" in "their" neighborhoods is less plausible, and is contradicted by probative evidence before the Court. ICP's argument that the disproportionate allocation of LIHTCs should and may be remedied by arbitrarily distributing the credits equally between projects in minority neighborhoods and Caucasian neighborhoods is even more suspect. FRI submits that legitimate and even compelling reasons support the TDHCA's manner of distributing LIHTCs, and that

requiring that these credits be distributed by quota would be impermissible as a matter of law and undesirable as a matter of social policy. FRI urges the Court to deny ICP the relief that it seeks in its complaint.

I. NEITHER THE FEDERAL STATUTES INVOKED BY ICP NOR THE FOURTEENTH AMENDMENT REQUIRES OR PERMITS THE DISTRIBUTION OF LOW INCOME HOUSING TAX CREDITS EQUALLY BETWEEN MINORITY AND CAUCASIAN NEIGHBORHOODS.

A. THE TDHCA DID NOT VIOLATE THE FAIR HOUSING ACT IN DISPROPORTIONATELY AWARDING LOW INCOME HOUSING TAX CREDITS TO PROJECTS IN MINORITY NEIGHBORHOODS.

ICP argues that the TDHCA's distribution of a high percentage of LIHTCs to affordable housing projects in minority areas had a disparate, adverse effect on African-Americans and thus violates the Fair Housing Act (FHA), 42 U.S.C. § 3601 et seq. ICP also claims that the TDHCA intended to award LIHTCs in a racially discriminatory manner, and that this disparate treatment is an FHA violation warranting corrective action by the Court.

The issue of whether proof that a practice or act has a disproportionate effect on a racial minority, without evidence of an intent to discriminate, establishes a prima facie violation of the Fair Housing Act is unsettled and controversial. *See, e.g.*, Lindsey E. Sacher, *Through the Looking Glass and Beyond: The Future of Disparate Impact Claims Under Title VIII*, 61 CASE W. RES. L. REV. 603, 604 (2010) (assuming that a constitutional challenge to the validity of disparate impact claims "is inevitable"); *Ricci v. DeStefano*, 557 U.S. 557, ___, 129 S. Ct. 2658, 2683 (2009) (Scalia, J., concurring) ("[T]he war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on

what terms—to make peace between them."); Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 782 (2006) ("there is no widespread public support for defining equality or discrimination in terms of results or achievements"). As the parties in this case notified the Court, in November of last year the United States Supreme Court granted certiorari to decide the question, "Are disparate impact claims cognizable under the Fair Housing Act." *Magner v. Gallagher*, No. 10-1032, 2011 WL 531692 (*cert. granted*, Nov. 7, 2011). *Magner* was scheduled for argument on February 29, 2012, but the City of St. Paul withdrew its petition for certiorari with the consent of the respondents. Kevin Diaz, *St. Paul Yanks Housing Fight from High Court*, STAR TRIBUNE (Minneapolis, Minnesota) Feb. 10, 2012, available at http://www.startribune.com/politics/national/139138084.html. But the withdrawal of the petition in *Magner* does not eliminate the uncertainty concerning the continued viability of disparate impact claims under the Fair Housing Act. ICP's confidence in the disparate impact approach notwithstanding, it would be entirely reasonable for this Court to conclude that the absence of evidence that TDHCA acted with racial animus in awarding low income tax credits is fatal to ICP's claim under the FHA.

Even if proof of disparate impact alone makes a prima facie case of an FHA violation, such a violation will not be found if the defendant establishes a compelling government interest for its action. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). In this case, the TDHCA has identified at least two compelling government interests supporting its race-neutral method for allocating housing credits: (1) the need to maximize affordable housing available to needy families

without regard to race as required by the statute authorizing LIHTCs, 26 U.S.C. § 42 and by the Texas statute setting the priorities for determining need, TEX. GOV'T CODE ch. 2306; and (2) the need to allocate credits in an open, transparent, predictable, and race-neutral manner according to published criteria. Defendants Initial Post-Trial Proposed Findings of Fact and Conclusions of Law, Doc. No. 162 (filed Nov. 9, 2011), at 18-21. By definition, neither of these interests could be served by adopting the strict quota system for distributing tax credits that ICP advocates. Thus, even if ICP made a prima facie case under its disparate impact theory, it should not prevail on the merits.

In the only reported decision addressing on the merits claims similar to those advanced by ICP here, an intermediate appellate court in New Jersey rejected claims that the state housing agency's distribution of LIHTCs disproportionally to projects in minority neighborhoods violated the FHA, federal and state civil rights statutes, and the Fourteenth Amendment. *In re Adoption of the 2003 Low Income Housing Tax Credit Qualified Allocation Plan*, 848 A.2d 1 (N.J. Super. Ct.), *certif. denied*, 861 A.2d 846 (N.J. 2004) ("*In re Adoption*"). There the court found that the "overriding mission" of New Jersey's analog to the TDHCA, the New Jersey Housing Mortgage Finance Agency (HMFA), "is to foster, through its financing and other powers, the construction and rehabilitation of housing, particularly affordable housing." *Id.* at 24-25. The court observed, as TDHCA argues here, that to comply with the mandate in section 42 of the Tax Code, "the agency's QAP must focus primarily on the economic status of the tenants, housing needs, and sponsor qualifications, not racial composition of the area or proposed project." *Id.* at 25. The court further

recognized that achievement of the goal of maximizing affordable housing "by focusing primarily on the racial composition of a relevant housing locale . . . may compromise HMFA's fundamental mission." Moreover, consideration of race-based criteria "may be constitutionally vulnerable, and may run counter to [the agency's] statutory duty to '[a]ssist in the revitalization of the State's urban areas.'" *Id.* at 29 (quoting N.J.S.A. 55:14K-2(e)(4)). Ultimately, the court concluded,

> The promotion of racial integration may be a desirable by-product of HMFA's exercise of [its] duties. Indeed, we have no doubt that, in order to advance the goals of Title VIII, the agency should foster racial integration in the manner by which it administers its programs. However, HMFA's central mission and statutory purposes should not be ignored or compromised in achieving that goal.

848 A.2d at 25.

The Connecticut Supreme Court was also presented with a case involving allegations similar to those advanced by ICP here, but dismissed the case based on lack of standing. *See Asylum Hill Problem Solving Revitalization Ass'n v. King*, 890 A.2d 522 (Conn. 2006). Given the results of these two cases, one fair housing advocate has noted that attempts to obtain court orders requiring race-based low income housing support are "fraught with difficulty," both because of "the amorphous nature of the statutory [FHA] requirement" and the varying "willingness and competence of courts to decide between conflicting goals for federal spending (such as integration versus affordable housing development)." Olatunde C.A. Johnson, *Stimulus and Civil Rights*, 111 COLUM. L. REV. 197 (2011).

ICP's "disparate treatment" theory should also fail. Its argument that the TDHCA engaged in intentional discrimination against African-Americans is based largely on its evidence of disparate impact, which, as is explained above, has a

perfectly legitimate, compelling non-racial explanation. Its evidence that one board member expressed frustration that credits were more frequently awarded to developments in minority census tracts is not a statement of the board itself, is anecdotal, does not itself assert or imply racial animus, and at most is merely an accusation, not a conclusive fact. And although it is true that more projects in minority areas were awarded credits than projects in "high opportunity" areas, far more applications for projects in minority areas were received. In fact, the TDHCA approved a slightly higher percentage of LIHTCs for projects in Caucasian areas than in non-Caucasian areas. Tr. II 164-165 (Whiteside).

Allocation of housing credits "cannot be deemed to have a discriminatory impact if … projects in suburban areas are more likely to receive tax credits than are projects in urban areas." *In re Adoption*, 848 A.2d at 33-34. As in the New Jersey case, "[t]here is no support for appellants' claim that [the agency's] policy to allocate tax credits to areas of greatest need, irrespective of the probable racial makeup of the project being funded or the impact on the racial composition of the neighborhood, demonstrates an intention to discriminate." *Id.* at 41.

B. THE TDHCA'S RACE-NEUTRAL DISTRIBUTION OF LIHTCS DOES NOT VIOLATE 42 U.S.C. § 1982 OR THE FOURTEENTH AMENDMENT (ACTIONABLE UNDER 42 U.S.C. § 1983), BOTH OF WHICH REQUIRE PROOF OF AN INTENT TO DISCRIMINATE.

Section 1982, originally enacted as part of the Civil Rights Act of 1866, provides that "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982. Section 1 of the Fourteenth Amendment to the United States Constitution guarantees to all

persons "equal protection of the laws." U.S. CONST. AMEND. XIV, § 1. Both provisions prohibit purposeful discrimination in government-assisted housing. As this Court has pointed out, to "prove claims under § 1982 and the Equal Protection Clause, ICP must demonstrate discriminatory intent, not merely discriminatory effect." *Inclusive Communities Project, Inc. v. Texas Dep't of Hous. & Cmty. Affairs*, 749 F. Supp.2d 486, 501 (N.D. Tex. 2010).

For the reasons stated above, ICP did not present persuasive evidence that, more likely than not, the TDHCA intended to discriminate against African-Americans by disproportionally denying LIHTCs to projects located in Caucasian areas and granting them to projects located in predominantly African-American areas. The TDHCA granted a higher percentage of applications for projects in Caucasian areas than in minority areas. The statements cited by ICP as evidence of intent to discriminate are in fact complaints about effect, not intent, and certainly do not establish intentional discrimination by a preponderance of the evidence. The court should reject ICP's claims under § 1982 and the Equal Protection Clause.

C. EVEN IF THE TDHCA IS LEGALLY REQUIRED TO TAKE RACE INTO ACCOUNT IN ALLOCATING LIHTCS, THE STRICT QUOTA SYSTEM PROPOSED BY ICP IS NOT NARROWLY TAILORED AND IS IMPERMISSIBLE.

ICP's proposed remedy for the TDHCA's alleged violations in awarding LIHTCs—simply an equal distribution of LIHTCs in African-American and Caucasian areas—is not narrowly tailored to remedy the violations in question. "Race-conscious remedies must be narrowly tailored to eliminate the effects of past discrimination as well as bar like discrimination in the future." *Walker v. City of Mesquite,* 169 F.3d 973, 982 (5th Cir. 1999). "Racial classifications are simply too

pernicious to permit any but the most exact connection between justification and classification." *Id.* (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 229 (1995)). The strict quota system proposed by ICP is not a narrowly tailored remedy.

The Supreme Court has condemned the use of mathematical quotas to remedy the effects of racial discrimination in other contexts. *See Gratz v. Bollinger*, 539 U.S. 244, 271 (2003) (rejecting the University of Michigan's admissions policy as not "narrowly tailored" to the state's interest in educational diversity because it did not provide "individual consideration" but "automatically distributes 20 points to every single applicant from an 'unrepresented minority' as defined by the university"); *Grutter v. Bollinger*, 539 U.S. 306, 336 (2003) (upholding a different admissions policy of the law school of the same university because its consideration of race during individual review of candidates did "not transform a flexible admissions system into a rigid quota"); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499 (1989) ("While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia."); *see also United States v. Starrett City Assocs.*, 840 F.2d 1096, 1103 (2d Cir. 1988) ("Title VIII does not allow appellants to use rigid racial quotas of indefinite duration to maintain a fixed level of integration at Starrett City by restricting minority access to scarce and desirable rental accommodations otherwise available to them.").

Consistent with *Walker* and the cited Supreme Court precedent, the Court should not attempt to remedy the violations alleged by ICP by imposing an arbitrary,

inflexible mathematical ratio of credits to be awarded to projects in African-American and Caucasian neighborhoods. At most, the Court should order the TDHCA to take into account the racial composition of the neighborhoods of the projects applying for tax credits as one of many factors considered in its allocation decisions. Although the TDHCA does not explicitly take race into account in awarding tax credits, it does already consider a factor typically implicating race in making its scoring decisions: its allocation of extra credit to developments in "high opportunity," low poverty neighborhoods. 2009 QAP D, Ex. 15 (pp. 18, 19) § 49.6 (h); Tr. I 217-19 (McIver); Tr. IV 26-32 (Conine). FRI submits that any more explicit consideration of race would detract from the other compelling interests that the TDCHA is obligated to promote and would not be "narrowly tailored" to promote the goal of fair housing.

II. THE RELIEF SOUGHT BY PLAINTIFF WOULD IMPAIR DESIRABLE URBAN RENEWAL EFFORTS ALREADY UNDERWAY, WOULD INVITE AWARDS TO UNDESERVING PROJECTS, AND WOULD DIMINISH RATHER THAN EXPAND THE AVAILABILITY OF AFFORDABLE HOUSING TO THOSE IN NEED.

It is beyond reasonable dispute that LIHTCs are a limited resource, the primary purpose of which is to provide decent affordable housing to those in need. As with any limited resource—such as a job, a promotion, or a spot in a law school's entering class—the granting of the benefit to one applicant necessarily results in the denial of the benefit to another. According to the TDHCA's website, the Department has received 387 applications seeking $473 million in tax credits in the 2012 allocation cycle, but has only an estimated $44 million in tax credits to allocate. See Texas Department of Housing and Community Affairs Website ("TDHCA website"),

http://www.tdhca.state.tx.us/ppa/press/index.htm. Thus, the TDHCA will be able to satisfy less then ten percent of the applications for LIHTCs this year. The scarcity of this resource is even more acute in North Texas; the TDHCA has received applications for more than $102 million in tax credits but estimates that it will distribute only $5.6 million in credits, meaning that almost 95 percent of the requests will go unsatisfied. TDHCA website, http:www.tdhca.state.tx.us/ multifamily/htc/index.htm, then follow "2012 Competitive HTC Pre Application Submission Log (XLS-updated 2/13/12).

Acceptance of ICP's proposal that half of these credits be automatically and inflexibly set aside for projects in Caucasian neighborhoods would likely have devastating unintended consequences. First, it is uncertain that a sufficient number of such projects would even qualify for LIHTCs based on the criteria in the Texas QAP. And even if a sufficient number of projects met the minimum standards, it is not only likely but absolutely certain that these projects would be less worthy than those awarded under a race-blind system, in that the higher scoring projects in the Caucasian neighborhoods would be granted credits in either event. In one sense, then, ICP is trading the opportunity of African-Americans to live in stable, higher scoring units in African-American neighborhoods for the opportunity to live in a lower quality units in Caucasian neighborhoods. It is implausible that in today's Dallas, this result is required by the FHA or the Constitution.

Another unfortunate by-product of ICP's proposed remedy is that desperately needed assets for ongoing, successful community redevelopment projects will be diverted to projects simply to satisfy ICP's arbitrary racial quota.

Revitalization efforts are largely dependent on public subsidies; conventional private financing for such projects is rarely, if ever, available. In 1968, one commentator observed that "mortgage financing for investment in low-income housing in slum areas is extremely difficult to obtain from conventional lending institutions " and that "[m]oney for new construction is virtually unobtainable." Note, *Government Programs To Encourage Private Investment in Low-Income Housing*, 81 HARV. L. REV. 1295, 1296 (1968). Almost forty years later, nothing has changed; "[H]igh development costs and low rents make unsubsidized construction and operation of low housing a marginal investment." Paulette J. Williams, *The Continuing Crisis in Affordable Housing: Systemic Issues Requiring Systemic Solutions*, 31 FORDHAM URB. L. J. 413, 451 (2004). The competition for scarce resources is even more intense in times of economic downturn and in the early stages of recovery. Arbitrary allocation of tax credits to projects in predominantly Caucasian neighborhoods—where private financing is often available—will contribute to an inevitability that neighborhoods like Frazier will remain ghettos forever.

FRI's own Hatcher Square Project provides an excellent example of the casualties likely to occur from imposition of a racial quota to distribute low income housing credits tax credits. Hatcher Square, located in the Frazier neighborhood of South Dallas, is a mixed-use transit oriented development, with a 136-unit apartment project (the only one of its kind in the Frazier area) as the first phase. It will include retail, office, and restaurant uses, and is located immediately across from a new DART light rail station. Hatcher Square is not a "one-off" project (i.e., it is not an isolated development), but is the southern anchor of a comprehensive

revitalization of one of Dallas's historically located neighborhoods. Conventional financing is not available in this neighborhood, which is in transition from recent blighted conditions to a neighborhood with safe, fit, and affordable housing, good schools, parks, community centers, and other amenities (such as Fair Park and Baylor Medical Center) nearby.

Despite scoring exceptionally well based on the TDHCA's scoring criteria, the TDHCA denied Hatcher's application for a forward commitment for a tax credit, while granting a credit for a competing project called Copperridge. Copperridge received a lower score than Hatcher and failed to satisfy at least three other criteria for eligibility for an LIHTC, but is located near the intersection of Maple Avenue and Inwood Road in North Dallas, which is designated as a "high opportunity" area. The agency's decision sparked a public outcry,[1] and the TDHCA subsequently denied Copperridge a waiver from the eligibility requirements, effectively denying Copperridge the tax credit. But the scenario demonstrates that a proposed remedy for past discrimination promising to benefit the aggrieved community can also have the opposite effect.

III. RECENT SOCIAL SCIENCE RESEARCH HAS CALLED INTO QUESTION THE PROPOSITION THAT CONTRIVED INTEGRATION AT THE EXPENSE OF COMMUNITY DEVELOPMENT BETTER PROMOTES FAIR HOUSING AND EQUAL PROTECTION OF THE LAWS FOR AFRICAN-AMERICANS.

All parties to the litigation share the ultimate goal envisioned by ICP – equality of access for all Dallas residents to housing, education, employment and

[1] *See* Editorial, *Extreme Makeover: Housing Board Reverses Bad Decision on Project*, DALLAS MORNING NEWS (Jan. 18, 2012) at 12A.

health. The way there, however, is uncharted. The single map upon which ICP relies has in fact led to a great deal of *desegregation* in the city. But that desegregation has not, and may never, clear a path to *equality* in housing, education, employment and health for all our residents. If the Court is to make the public policy determinations asked of it by ICP, then there is more to consider than a bookkeeper's ledger of LIHTC awards. After more than 40 years, many scholars and researchers are questioning whether the dismantling of African-American neighborhoods by exporting affordable housing to white suburbs is the best route to the "promised land" spoken of by Dr. King in 1968, just eight days before the Fair Housing Act became law. Desegregated housing and "fair" housing may not always be one in the same.

With regard to the issue of desegregation in Dallas, despite ICP's views on the issue, there is no question that the city has been far more successful than most. A very recent report on integration from the Manhattan Institute incorporates the 2010 census data. Edward Glaeser & Jacob Vigdor, *The End of the Segregated Century: Racial Separation in America's Neighborhoods, 1890–2010*, MANHATTAN INSTITUTE CIVIC REPORT 66 (Jan. 2012). In that report, the researchers found that of the nation's ten largest metropolitan areas, only one tops Dallas in terms of integration, regardless of the formula by which strides in desegregation are measured. *Id*. at 5, Table I. In the forty years from 1970 to 2010, Dallas moved from number sixteen to number nine on the list of cities with the largest African-American population. *Id*. at 8, Table 5. In the same time, Dallas has steadily become more integrated, using either of the two most popular indices for measuring

integration – moving from 86.9 to 47.5 on the Dissimilarity scale and from 75.5 to 23.4 on the Isolation scale.[2] Amicus would be among the first to question the Manhattan Institute's characterization of the 2010 census data as signaling "the end of segregation." *Id*. at Executive Summary. But the 2010 census numbers do demonstrate convincingly that the City of Dallas is in large part an integrated one, particularly in comparison to other large cities with large African-American populations.

And yet, the City of Dallas still is not a place where all residents have equal access to housing, education, employment and health. As noted in the Manhattan Institute's Report: "Only a few decades ago, conventional wisdom held that segregation was the driving force behind socioeconomic inequality. The persistence of inequality, even as segregation has receded, suggests that inequality is a far more complex phenomenon." *Id*. at Executive Summary. This "persistence of inequality" has led many scholars, researchers and community leaders to question whether continued integration at any price[3] is the only, or even the best, path to racial equality.

Among the best known for his research in the area is Robert D. Putnam, author of *E Pluribus Unum: Diversity and Community in the Twenty-first Century*, 30 SCANDINAVIAN POL. STUD. 137 (2007). Professor Putnam has spent years studying the

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[2] The dissimilarity scale measures the percentage of a group's population that would have to move to another neighborhood to make each neighborhood have the same percentage of that group as the metropolitan area has overall. The isolation index measures the extent to which minority residents are exposed only to one another in their neighborhoods.

[3] And there is a price. In this case, for example, Low Income Housing Tax Credits that are earmarked for developments in primarily white areas of Dallas reduce the amount of resources available to build healthy neighborhoods in areas prime for revitalization.

impact of integration on social connections. Many among fair housing advocates and the population generally have long believed that diversity fosters interethnic tolerance, trust and social solidarity. But Professor Putnam's findings have revealed that this basic premise is misguided, at least in the short term. Based on extensive research using data from the 2000 census, Putnam and his team discovered that people who live in ethnically diverse settings retreat inward, trusting neither those different from, nor those alike, themselves. 30 SCANDINAVIAN POL. STUD. at 149. In addition, people who live in areas of greater diversity experience the following:

- less confidence in local leaders, local government and local news media
- less confidence in their own political influence
- lower voter registration rates, but higher participation in protest marches and social reform groups
- lower likelihood of participating in community endeavors
- lower rates of volunteerism and charitable giving
- fewer close friends
- less happiness
- lower perceived quality of life
- more time spent watching television as the most important form of entertainment.

Id. at 149-50. "In the short to medium run," concludes Putnam, "… immigration and ethnic diversity challenge social solidarity and inhibit social capital." *Id*. at 137.

Professor Putnam has been vilified by liberal fair housing advocates and championed by political conservatives.[4] But the gist of Putnam's research was *not* that Americans should go back to their own ethnic corners or turn their backs on diversity.[5] Indeed, Putnam states plainly that increased diversity, and society's comfort with it, are desirable over the long run, culturally and economically. Putnam, *supra*, 30 SCANDINAVIAN POL. STUD. at 137, 138, 163-65. None of this, however, changes the results of Putnam's research. Integrated communities, as they currently exist in America, have succeeded neither in creating an open and cooperative society, nor in bringing equality for African Americans. Instead, people living in integrated communities have less trust for everyone.

Putnam's research presents a challenge that was unanticipated and unwelcome by the professor himself. James A. Kushner, *Urban Neighborhood Regeneration and the Phases of Community Evolution After World War II in the United States*, 41 IND. L. REV. 575, 599 (2008)("[H]e was reluctant to release [his study] given testing results he was unhappy to find. . .."). But that is no reason to ignore the research. Believing that the earth is flat does not make it so. As Putnam himself observed: "It would be unfortunate if a politically correct progressivism were to deny the reality of the challenge to social solidarity posed by diversity. It would be

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[4] *See* Albert Ruesga, *Notes on Robert Putnam's "E Pluribus Unum: Diversity and Community in the Twenty-First Century*", STANFORD SOCIAL INNOVATION REVIEW, Blog (Aug. 20, 2007), found at http://www.ssireview.org/blog/entry/notes_on_robert_putnams_diversity_and_community_in_the_twenty_first_century.

[5] Some scholars, for example, have unfairly characterized Putnam's research as suggesting that we can never be comfortable in an ethnically diverse society, and requiring the abandonment of our laws and Constitution. *See, e.g.*, Elizabeth K. Julian, *Fair Housing and Community Development: Time to Come Together*, 41 IND. L. REV. 555, 562 (2008).

equally unfortunate if an ahistorical and ethnocentric conservatism were to deny that addressing that challenge is both feasible and desirable." *Id*. at 165.

Even scholars who are still very much committed to traditional fair housing have begun to admit openly that those approaches have not and will not work to end segregation. *See* Sheryll D. Cashin, *Middle-Class Black Suburbs and the State of Integration: A Post-Integrationist Vision for Metropolitan America*, 86 CORNELL L. REV. 729 (2001). When this regrettable fact is faced head-on, rather than ignored, individual communities can begin to work toward meaningful redress for those who will continue to live in underserved, minority neighborhoods:

> A vision of a "post-integrationist" America is one which seriously calls on itself to account for the often extreme inequalities that flow from the seemingly inevitable segregation of the races and classes. Fragmentation of local governance in metropolitan areas creates regional inequities--a concentration of wealth, jobs and public infrastructure investments in high-growth suburbs and a concentration of social service demands and disinvestment in central cities and older suburbs. African Americans, particularly those who are poor and relegated to isolated central city neighborhoods, bear the brunt of these inequities. Full residential integration of people of color and the poor into all the localities of the metropolis would substantially reduce, if not eliminate such regional disparities. But this is not a realistic vision, given the public and private choices fueling racial and socioeconomic segregation in the United States.

86 CORNELL L. REV. at 772 (footnotes omitted).

Other fair housing advocates believe it is time "to declare that the effort was ineffective"[6] and forge ahead with new solutions that address racial inequality in the

[6] "This Author was honored to participate in the celebrations of the twentieth and thirtieth anniversaries of that enactment. Having advocated the use of Title VIII to achieve the dream of an integrated and colorblind society, including more than twenty years maintaining a treatise on fair housing and volunteering as an activist in the fair housing movement, the Author of this Article is unfortunately ready to declare that the effort was ineffective. It appears that housing discrimination and racial segregation are continuing and largely unabating. Despite statistical reductions in separation between whites and certain non-white groups, economic, racial, ethnic, and social segregation is still the

inter-related contexts of environmental, economic and social sustainability. Kushner, *supra*, 41 IND. L. REV. at 595-96. Professor Kushner proposes that the nation turn its efforts to "Smart Growth" that creates urban design for pedestrians rather than cars and connects communities through public transport. *Id*. at 597-98. Smart Growth might dovetail with "New Urbanism," in which developers create market-driven higher density communities at the inner city core, which communities feature mixed-use, mixed occupancy and mixed-income. *Id*. at 601. According to Kushner: "Linking destinations through public transit, increasing density, improving accessibility, and choices in the size and cost of homes would stimulate racial and ethnic diversity." *Id*. at 599.

In departing from an approach he had advocated for forty years, Professor Kushner assimilated the findings of Professor Putnam, rather than closing his mind to them. *Id*. at 599-600. In addition, Kushner was persuaded by research demonstrating that African Americans themselves prefer not to live in integrated communities. *Id*. at 600. Indeed, Kushner cited one study in which African Americans were found willing to pay a premium of nearly $100 per month to live in a neighborhood with ten percent more black households. *Id*.[7] "The questions of

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pervasive geographical pattern, often masked by vague definitions of race such as characterizing ethnic minorities as white for census purposes. In addition to discrimination in sales and rentals, African Americans are denied mortgages and home improvement loans at twice the rate of whites. After forty years Title VIII, although a useful tool for the occasional victim or agency willing to battle the isolated housing provider, never received administrative and enforcement leadership or adequate funding and is unfortunately a relic of Phase II community development in the United States." Kushner, *supra*, 41 IND. L. REV. at 595-97 (footnotes omitted).

[7] Other scholars also have noted the preference of African-Americans to live in African-American neighborhoods. *See, e.g.*, Cashin, *supra*, 86 CORNELL L. REV. at 737 ("While blacks have consistently stated a preference for living in an integrated neighborhood, their conception of integration no longer appears to mean 'half-black, half-white.' Instead, blacks, like whites, now appear to prefer an integrated neighborhood in which their own group is in the majority.")(footnotes omitted).

racial and ethnic cohesion, integration, and assimilation," Kushner observed, "require a very different analysis from the simplistic segregation-integration dichotomy of the twentieth century." *Id*.

In Kushner's view, "higher density, mixed tenure of home occupancy, and income [are] the more attractive strategy to generate increased class and ethnic integration." *Id.* "Walkable and diverse urban neighborhoods are popular with a wide array of income, age, and ethnic groups suggesting that New Urbanism as a choice for community design will be popular." *Id.* at 601. In urging the nation to embark on a "fifth post-World War II phase of community evolution," Kushner concluded: "Communities segregated by income result in unsustainable and unstable districts housing the poor and prevent stability, economic growth, and regeneration. The antidote may be mixed-income neighborhoods." *Id*.

In considering the application of Kushner's vision to the City of Dallas, cynics might suggest that Smart Growth and New Urbanism have no place in a largely suburban venue with endless freeways and bedroom communities. But the opposite is true. Amicus Frazier Revitalization Inc. seeks to develop exactly the sort of Smart Growth-New Urbanism embraced by James Kushner, one of the pioneers in fair housing. The purpose of Frazier is to bring to fruition the Frazier Neighborhood Plan, which calls for more than $270 million in new development in the historic Frazier Courts neighborhood east of Fair Park in Southern Dallas. The plan, formally adopted by the Dallas City Council in 2006 as part of the city's ForwardDallas! comprehensive plan, is not for a series of isolated affordable housing complexes. Instead, the Frazier Neighborhood Plan calls for an entire mixed-use neighborhood

whose related elements work in synergy. The plan will create a mixed income neighborhood with affordable housing that is within walking distance to DART rail, retail, industrial and healthcare facilities.[8] The Frazier Neighborhood Plan is the very "antidote" to segregation and racial inequality urged by Professor Kushner.

CONCLUSION

The path forward to equality in housing, education, employment, and health for all residents is unclear. What is clear is that the Court should not mandate a formula that prioritizes race above all other factors, that siphons scarce resources from existing and successful community redevelopment efforts, and that threatens to reduce available decent affordable housing to the residents it purports to benefit. Such a solution is neither required nor permitted by the federal statutes invoked by ICP and the Fourteenth Amendment. FRI urges the Court to deny ICP the relief it seeks in its complaint.

Respectfully submitted,

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[8] *See* http://www.fridallas.org/History%20of%20Frazier%20Revitalization.html.

CERTIFICATE OF SERVICE

I certify that on February 17, 2012, I electronically submitted the foregoing document for filing with the United States District Court for the Northern District of Texas using the electronic case filing system of the Court, and that all counsel of record will be provided a "Notice of Electronic Filing" and access to this document.

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