No. _____

In The
Supreme Court of the United States

TOWNSHIP OF MOUNT HOLLY, TOWNSHIP COUNCIL OF TOWNSHIP OF MOUNT HOLLY, KATHLEEN HOFFMAN, as Township Manager of the Township of Mount Holly, JULES THIESSEN, as Mayor of the Township of Mount Holly,

Petitioners,

v.

MT. HOLLY GARDENS CITIZENS IN ACTION, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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June 11, 2012

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QUESTIONS PRESENTED

The Fair Housing Act makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. §3604(a). Reversing the District Court's decision, the Third Circuit found that the Respondents presented a prima facie case under the Fair Housing Act because Petitioners sought to redevelop a blighted housing development that was disproportionately occupied by low and moderate income minorities and because the redevelopment sought to replace the blighted housing with new market rate housing which was unaffordable to the current residents within the blighted area. The Third Circuit found that a prima facie case had been made despite the fact that there was no evidence of discriminatory intent and no segregative effect.

The following are the questions presented, which include subparts:

1. Are disparate impact claims cognizable under the Fair Housing Act?

2. If such claims are cognizable, should they be analyzed under the burden shifting approach used by three circuits, under the balancing test used by four circuits, under a hybrid approach used by two circuits, or by some other test?

QUESTIONS PRESENTED – Continued

(a) What is the correct test for determining whether a prima facie case of disparate impact has been made?

(b) How should statistical evidence be evaluated?

(c) What is the correct test for determining when a Defendant has satisfied its burden in a disparate impact case?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Third Circuit:

The Petitioners here and Defendants-Appellees below are Township of Mount Holly, Township Council of Township of Mount Holly, Kathleen Hoffman, as Township Manager of the Township of Mount Holly, Jules Thiessen, as Mayor of the Township of Mount Holly.

The Respondents here and Plaintiffs-Appellants below are Mt. Holly Gardens Citizens in Action, Inc., a New Jersey non-profit corporation, Ana Arocho, Vivian Brooks, Bernice Cagle, George Chambers, Dorothy Chambers, Santos Cruz, Elida Echevaria, Norman Harris, Mattie Howell, Nancy Lopez, Dolores Nixon, Leonardo Pagan, James Potter, Henry Simons, Joyce Starling, Robert Tigar, Taisha Tirado, Radames Torres Burgos, Lillian Torres-Moreno, Dagmar Vicente, Alandia Warthen, Sheila Warthen, Charlie Mae Wilson And Leona Wright.

The Respondents here and Defendants-Appellees below are Keating Urban Partners, L.L.C., and Triad Associates, Inc.

The United States Department of Justice, Civil Rights Division, and the United States Department of Housing and Urban Development (HUD) filed an Amicus brief in the Third Circuit.

PARTIES TO THE PROCEEDING – Continued

Maria Arocho, Pedro Arocho, Reynaldo Arocho, Christine Barnes, Leon Calhoun, Vincent Munoz, Angelo Nieves, Elmira Nixon, Rosemary Roberts, William Roberts, Efraim Romero, Phyllis Singleton, Flavio Tobar, and Marlene Tobar were all named as plaintiffs in the Second Amended Complaint filed in the United States District Court for the District of New Jersey, but did not participate in the appeal to the Third Circuit.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

STATUTES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Township of Mount Holly, Township Council of Township of Mount Holly, Kathleen Hoffman, and Jules Thiessen, respectfully Petition for a Writ of Certiorari to review the opinion and judgment of the Third Circuit Court of Appeals.

OPINIONS BELOW

The Third Circuit's decision (Pet. App. 1a-29a) is reported at 658 F.3d 375. Petitioners' Motion for Rehearing En Banc was denied on April 13, 2012. (Pet. App. 62a-63a). The Third Circuit considered this matter on appeal from the U.S. District Court, District of New Jersey Opinion *Mount Holly Citizens in Action, et al. v. Tp. of Mount Holly, et al.*, reported at 2011 WL 9405. (Pet. App. 30a-61a).

JURISDICTION

The Judgment of the Third Circuit sought to be reviewed was entered on September 13, 2011 and the order denying the Township's Motion for Rehearing en banc was entered on April 13, 2012. This Petition is timely under 28 U.S.C. §2101(c) and Supreme Court Rule 13.1 and Rule 13.3, because it is being filed within 90 days of the entry of the Order denying rehearing en banc. This Court has jurisdiction to review the judgment of the Third Circuit pursuant to 28 U.S.C. §1254(1) and has jurisdiction to consider

a matter involving a federal statute (42 U.S.C. §3604(a)), pursuant to 28 U.S.C. §1291 and §1331.

STATUTORY CITATIONS INVOLVED

The relevant statutory provision involved is 42 U.S.C. §3604(a), as set forth below:

> 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.

STATEMENT OF THE CASE

I. Background.

This matter involves a challenge to a redevelopment plan, adopted to address blight conditions on property comprised of vacant land and a residential area of Mount Holly Township known as "the Gardens." The Gardens is a 30 acre area, containing 329 inexpensive, market rate units, which were predominately occupied by low and moderate income households. (Pet. App. 5a). As of 2000, 74.9% of the

Garden's residents were minority and 19.7% were White. (Pet. App. 6a).

Mount Holly Township is a small New Jersey municipality comprised of approximately 2.9 square miles, and is the county seat for Burlington County. In 2000, its population was 10,728, of which 66.19% were Non-Hispanic White alone. (Document #17-04, Ja103).[1] Its current population is 9,536, of which 60.1% are Non-Hispanic White alone. (Pet. App. 78a-79a).

A. The 2002 Redevelopment Designation.

The Gardens had been problematic for the Township of Mount Holly (hereinafter the "Township") for many years because of high crime, poor maintenance, a heavy concentration of rental units, overcrowding, code violations, and related problems. (Pet. App. 6a-7a). As explained in the 2002 Redevelopment Area Determination Report (hereinafter the "Determination Report"), as of 2002 "the Gardens area accounted for 28 percent of the Township's Part 1 crimes, even though it is only (sic) accounts for 1.5 percent of the Township's total land area." (Document #17-21, p.9,

[1] References to "Document #___" are to the documents filed in the District Court below in this case. The number refers to the document number generated by the electronic filing system. References to "Ja__" are to the Joint Appendix filed by the Parties in this action in the Third Circuit. The number following the "Ja" refers to the page of the Joint Appendix in which the exhibit can be found.

Ja781). The Determination Report further noted that the layout of the buildings contributed to this crime problem due to "paved alley[s] where activity can take place under cover." *Id.*

In the ten years preceding the redevelopment designation, Township Police employed several police initiatives to combat the crime problem in the Gardens. Between 1991 and 1997, approximately 419 arrests occurred within the Gardens because of police initiatives. (Document #76-3, ¶8, Ja1931-1932). In 1999 alone, there were 152 arrests in the Gardens. (Document #17-21, p.12, Ja784). Despite these efforts, there was still significant criminal activity in the Gardens in 2002.

Moreover, the Township cited properties for maintenance and other property code violations. Between 1996 and 2002, the 329 Gardens properties collectively generated 1,117 code violation citations. (Document #17-21, p.16 & 38-43, Ja788 & 810-815). In the late 1990's, several organizations attempted to rehabilitate some units within the Gardens, including a group organized with Township support called Mount Holly 2000 (Pet. App. 7a, and 49a, n.11). Despite these projects, the blight conditions were not corrected. *Id.*

Because it was evident that small scale attempts to correct the problem were not working, in 2002, the Township designated the Gardens as an area in need of redevelopment pursuant to The Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 et seq.

This designation under New Jersey law constitutes "blight" under the New Jersey Constitution.

B. The Redevelopment Plans.

In 2003 the Township adopted a Redevelopment Plan for the Gardens. (Document #17-23, Ja842-866). Immediately, the Gardens residents filed suit challenging both the designation and the redevelopment plan and alleging discrimination. (Pet. App. 11a-12a). Throughout the four years of litigation in State Court, all levels of the New Jersey Courts upheld the redevelopment or blight designation. (Document #17-31, p.1, Ja1114 and Document #17-32, Ja1133). In upholding the redevelopment designation, the New Jersey Courts found that the Gardens was a "dilapidated, overcrowded, poorly designed community" that was "detrimental to the safety, health, morals and welfare of the community." (Document #17-31, p.11-12, Ja1124-1125).

On December 16, 2004, the Township acquired 11.4 acres of vacant land immediately adjacent to the Gardens. Because the acquisition of this property presented an opportunity to formulate a more comprehensive plan for redevelopment, in 2005, the Township adopted an Amended Redevelopment Plan, called the "West Rancocas Redevelopment Plan," for the Gardens and the adjacent vacant acreage. (Pet. App. 8a). After adoption of the 2005 Redevelopment Plan, the Township selected Keating Urban Partners, LLC as Redeveloper pursuant to a public Request for

Proposals process ("RFP"). (Document #17-30, p.9, ¶23-25, Ja1101).

Again, in 2008, the Township amended the 2005 Redevelopment Plan to conform to specifications of the Redeveloper's project. (Pet. App. 58a). The 2008 Amended Redevelopment Plan called for acquisition and demolition of all the homes in the Gardens and the construction of 520 new residential units, as well as 54,000 square feet of commercial space and 4.33 acres of open space. (Document #37-2, p.12 & 34, Ja1587 & Ja1609). Of the 520 units, 464 will be market rate and 56 will be deed-restricted affordable housing units pursuant to New Jersey's affordable housing laws. (Document #37-2, p.26, Ja1601).

C. Implementing the Redevelopment Plans.

The Township believed the adoption of the 2008 Amended Redevelopment Plan was the only way to improve the quality of life for the Gardens residents and the citizens of Mount Holly in general. The District Court specifically recognized the Township was motivated by significant concern for the Gardens residents' welfare. (Pet. App. 56a-57a).

Because of their concerns for the impact of the Redevelopment Plan on the Gardens residents, the Township decided to implement the redevelopment plan by voluntarily buying houses and/or providing relocation benefits to residents who sought assistance from the Township for personal reasons, unrelated to redevelopment.

Over the last 10 years, the Township acquired and demolished over 237 of the 329 units in the area through *voluntary* sales and has not begun a single eminent domain proceeding.[2] (Pet. App. 10a-11a). Not a single Plaintiff nor any other resident has been evicted or ordered to vacate or move from their home. (Pet. App. 47a). Rather, the Township gave the Gardens residents a notice advising them ***not*** to move until they were directed to move by the Township. *Id.*

Many Gardens residents still chose to voluntarily sell their property because of the proposed redevelopment project and also because of personal reasons, including threatened foreclosure of their homes, new jobs, Section 8 issues, non-payment of rent, to attend a new school, overcrowding in the structure, N.J. District attorney seizure of their home, and death. (Document #76-1, ¶11.a, ¶12.b, ¶23a-b, ¶26.a-c & e-f, ¶27.b & d, and ¶29.b; Ja1850, Ja1852, Ja1863, Ja1865-1870 & Ja1874).

The Township then demolished the Township owned properties because, as was specifically found by the New Jersey Courts, the vacant buildings posed a health and safety threat.[3] To date, only 70 of the original 329 units remain in private ownership and

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[2] In 2011, the Township began the appraisal and negotiation process that precedes eminent domain actions, which was stayed by the Third Circuit.

[3] Even Plaintiffs admit that the Township owned properties were posing health and safety hazards, namely infestation, fire hazards and mold. (Document #94, p.10, Ja1978).

nearly all 237 of the Township owned properties have been demolished. (Pet. App. 10a & 11a). Throughout this demolition process, despite Plaintiffs' numerous requests for injunctions, no Federal or State court has prevented the Township from demolishing Township-owned buildings.

In implementing the Redevelopment Plan, the Township took care to ensure that those who wanted to remain in Mount Holly would find appropriate replacement housing. The District Court specifically noted "[The Township] represent[s] and Plaintiffs do not dispute that none of these people who have relocated and wanted to remain in Mount Holly were unable to." (Pet. App. 55a, n.16).

To assist residents in finding an appropriate replacement home, the Township gave relocating residents double the relocation benefits required under State law. (Pet. App. 55a, n.16). Specifically, tenants were given $7,500 in relocation benefits, which was $3,500 above the statutory maximum of $4,000. (Compare Document #76-1, ¶5, Ja1844 with N.J.S.A. 20:4-5(a) and N.J.A.C. 5:11-3.7(a)). Similarly, homeowners were given $35,000 in relocation benefits in the form of $15,000 as the statutory maximum payment and a $20,000 no payment and no interest loan which need not be repaid until the new replacement home was sold. (Compare Document #76-1, ¶5, Ja1844 with N.J.S.A. 20:4-6(a) and N.J.A.C. 5:11-3.5(a)).

In addition, the Township provided a variety of social services to the relocating residents. (Document #94, p.14 n.7, Ja1982 and Document #76-1, Ja1844-1872). Over 139 families have relocated from the Gardens, including three former Plaintiffs and there is no evidence that *anyone* has been made homeless or could not find an appropriate replacement home as a result of the Township's actions.[4] In fact, many of the former residents' economic situations improved as a result of the relocation process. (Pet. App. 59a, n.16).

Despite the fact that the Gardens contained the Township's largest concentration of its Hispanic and African-American populations (Pet. App. 6a), the relocation of over 200 Gardens households has not resulted in any decrease in the Township's minority population. In fact, according to the 2010 Census of Population and Housing,[5] Mount Holly's minority population has actually grown since 2000 (compare 8.78% Hispanic and 20.08% African-American in 2000 to 12.7% Hispanic and 23.1% African-American in 2010). (Pet. App. 78a-79a & Document 17-04, p.48, Ja103).

As of May 2008 Mount Holly Township had spent $16 million in acquisitions, relocations, litigation

[4] The only exception is Alandia Warthen, who moved in 2005 as a result of her landlord's actions, not the Township's, and whose move predated the opening of the Township's relocation office. (Pet. App. 47a).

[5] The Court is permitted to take judicial notice of Census data. See *Fong Yue Ting v. U.S.*, 149 U.S. 698, 734 (1893).

expenses and other costs in furtherance of the Gardens redevelopment.

D. Federal Court Litigation.

After losing on appeal in all levels of the State Courts, Plaintiffs filed suit in Federal District Court. Plaintiffs claimed that the Township's actions were having a disparate impact on minorities based on two statistics. First, Plaintiffs claimed that 22.54% of African-American and 32.31% of Hispanic households as compared to 2.73% of White households in Mount Holly would be affected by the demolition of the Gardens properties. (Pet. App. 15a-16a). Second, Plaintiffs' expert claimed that the 2000 Census data showed that only 21% of the minority households in Burlington County, as compared to 79% of the White households could afford the new housing proposed under the redevelopment plan. *Id.*

In challenging these statistics, the Township pointed out that the first statistics, concerning the impact of the demolitions, did not consider appropriate comparable groups. The expert arrived at these numbers by comparing the percentage of Whites, Hispanics and African-American residents living in the Township with those living in the Gardens. (Compare Pet. App. 15a-16a with Document #17-4, p.49, Ja104). This statistic only shows that the minority population is overrepresented in the Gardens, as compared to the rest of Mount Holly. (Document #94, p.6-7, Ja1974-1975).

As to the second statistic, namely the minorities who cannot afford the new housing, Plaintiffs' statistics are not consistent with the record. Plaintiffs' expert opined that only households above 80% of the area median income can afford to move into the proposed Project. (Pet. App. 45a, n.9). According to the 2000 Census data, there are a total of 123,725 White households in Burlington County, and of those households, 36,185 have incomes under 80% of the Median Family Income, meaning 87,540 White households (70.7%) *can* afford the new housing. (Document #17-4, p.51, Ja106). By contrast, there are 24,806 minority households in Burlington County, and of those, 8,861 have incomes under 80% of the Median Family Income, meaning 15,945 minority households (64.2%) *can* afford the new housing. *Id.* This is contrary to Plaintiffs' statistics (21% versus 79%).

Plaintiffs also claimed that rehabilitation of existing units was a feasible option, citing to a "Biber Report" done in 1989 (hereinafter "1989 Report"). (Pet. App. 26a-27a). The 1989 Report concluded that to undertake rehabilitation, even with the use of public funding sources and resale income, there would be a significant financial gap of over $2.5 million in 1989 dollars. (Pet. App. 49a-50a).

II. Decisions of the District Court.

After Plaintiffs Complaint was filed on May 27, 2008, the Township filed a Motion to Dismiss, which

the District Court granted in part and denied in part on October 28, 2008. Upon Plaintiffs' filing of a Second Amended Complaint, the Township filed a second Motion to Dismiss, which the District Court converted to a summary judgment motion on October 23, 2009. On January 3, 2011, the District Court entered Summary Judgment in favor of the Township finding that: (1) Plaintiffs' failed to establish a prima facie case of disparate impact under the FHA; (2) even if they had, Plaintiffs failed to show there were less restrictive means available to the Township; and (3) Plaintiffs failed to establish intentional discrimination. (Pet. App. 38a, 43a & 55a).

III. Decision of the Third Circuit Court of Appeals.

Plaintiffs appealed the District Court's grant of summary judgment to the Third Circuit. The Third Circuit reversed the District Court as to Plaintiffs' FHA claim finding that Plaintiffs established a prima facie case of disparate impact sufficient to withstand summary judgment. (Pet. App. 15a-19a). The Third Circuit, however, affirmed the District Court's finding that there was no evidence of intentional discrimination, upholding the grant of Summary Judgment for claims based on intentional discrimination. (Pet. App. 28a). The Township then filed a request for a rehearing en banc. Decision on the rehearing was deferred at Petitioner's request pending this Court's consideration of *Magner v. Gallagher*, Case No.: 10-1032, which had been pending before the Court. Upon withdrawal

of the *Magner* appeal, the Third Circuit denied rehearing. (Pet. App. 63a-64a).

REASONS FOR GRANTING THE PETITION

I. THIS COURT HAS NOT YET DECIDED WHETHER DISPARATE IMPACT CLAIMS ARE COGNIZABLE UNDER THE FAIR HOUSING ACT.

Petition for Certiorari should be granted because this matter involves an important question concerning the Federal Fair Housing Act, 42 U.S.C. §3604 ("FHA"), which has not been, but should be, settled by this Court. Rule 10(c). To date, the Supreme Court has not decided whether disparate impact claims are cognizable under the FHA.[6] Thus, the issue of whether disparate impact claims are cognizable under the FHA has remained unresolved and ripe for review for over two decades.

The provision of the FHA at issue in this case is 42 U.S.C. §3604(a). The FHA makes it unlawful "to

[6] Although the Supreme Court has taken two disparate impact cases under FHA, it has never decided whether disparate impact claims are cognizable or what standard should be applied to such claims. See *Town of Huntington, N.Y. v. Huntington Branch, N.A.A.C.P.*, 488 U.S. 15, 18 (1988) (the parties conceded the applicability of the disparate impact theory and the Court did not reach the question about the appropriateness of the test used) and *City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 199-200 (2003) (vacating the FHA claim because it was abandoned on appeal).

refuse to sell or rent . . . , or otherwise make available or deny, a dwelling to any person because of race, color, religion, sex, familial status or national origin." 42 U.S.C. §3604(a). The District and Circuit Courts below have interpreted this language to encompass both disparate treatment and disparate impact theories of liability. (Pet. App. 13a-14a & 41a-42a). The Third Circuit found no evidence of discriminatory intent or disparate treatment, and upheld the District Court's grant of Summary Judgment to the Township on those claims, leaving only Plaintiffs' disparate impact claim under the FHA. (Pet. App. 18a-19a & 28a).

Before this Court can determine which test should be applied to a disparate impact claim, it must first consider the threshold question of whether disparate impact claims are cognizable under the Fair Housing Act. This antecedent question is critical in this case because if disparate impact claims are not cognizable under the FHA, there is no need to decide which test to apply.

Most Circuit Courts deciding this issue have concluded that disparate impact claims are cognizable under Title VIII, 42 U.S.C. §3601 et seq. because there are similarities between Title VII, 42 U.S.C. §2000e et seq. and Title VIII. However, the plain language and purpose of the FHA differs significantly from the plain language and purpose of Title VII, making disparate impact claims under the FHA inappropriate. Granting this Petition is essential to provide the Circuit Courts with definitive and necessary

guidance for determining when an FHA claim has been made.

A. The FHA's Plain Language Indicates the FHA did not Include Disparate Impact Claims.

Unlike Title VII, the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621, et seq. ("ADEA"), and the Americans with Disabilities Act of 1990, 42 U.S.C. §12101, et seq. ("ADA"), the FHA's statutory language does not include language addressing discriminatory effect. Previously, this Court noted the importance of considering "key textual differences" between statutory provisions when determining whether a disparate impact claim is cognizable under the ADEA. *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 236, n.6 (2005).

When undertaking statutory interpretation, the Supreme Court must "begin, as in any case of statutory interpretation, with the language of the statute." *CSX Transp., Inc. v. Alabama Dept. of Revenue*, 131 S. Ct. 1101, 1107 (2011). This is because "the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568 (2005). "'[W]hen the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.'" *Lamie v. U.S. Trustee*, 540 U.S. 526 (2004).

The ADA, ADEA, and Title VII by their express language each prohibit the "effect" or "impact" of certain actions by using the term "affect" when describing unlawful actions. *See* 42 U.S.C. §2000e-2(a)(2) (emphasis added) (unlawful to "otherwise adversely ***affect*** his status"); 42 U.S.C. §12112(b)(1) (emphasis added) (unlawful to take action "that adversely ***affects*** the opportunities or status of such applicant or employee"); and 29 U.S.C. §623(a)(1) (emphasis added) (unlawful to "otherwise adversely ***affect*** his status as an employee").

By contrast, the FHA does not contain comparable language regarding "effect" or the "affect" of certain actions. "Discriminatory housing practice" is defined in the FHA as "an act that is unlawful under section [sic] 3604, 3605, 3606, or 3617 of this title." 42 U.S.C. §3602(f). None of those sections include language addressing discriminatory effect. Section 3604(a), which is the particular section at issue here, does not use the word "effect" or "affect" at all:

> . . . 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.

42 U.S.C. §3604.

This Court has said, "'we ordinarily resist reading words or elements into a statute that do not

appear on its face.'" *Dean v. U.S.*, 556 U.S. 568, 572 (2009). Moreover, "considerations of policy divorced from the statute's text and purpose could not override its meaning." *U.S. v. Tohono O'Odham Nation*, 131 S. Ct. 1723, 1731 (2011). Since the FHA on its face does not discuss "affect" or "effect," this Court should not read those words into the FHA. Thus, the plain language of the FHA does not permit a disparate impact claim.

B. Congress never Amended the FHA to Include Disparate Impact Claims.

Congress's action in failing to amend the FHA to include disparate impact claims when it amended The Civil Rights Act of 1991 demonstrates Congress's intent to exclude such claims under the FHA. If Congress had intended the FHA to apply to disparate impact claims, it would have amended the FHA when it amended The Civil Rights Act of 1991 to specifically include claims for discriminatory effect, as it had done to Title VII.

This Court has said that it is inappropriate to "ignore Congress' decision to amend" Title VII where it did not make similar changes to similar laws because "[w]hen Congress amends one statutory provision but not another, it is presumed to have acted intentionally." *Gross v. FBL Fin. Services, Inc.*, 557 U.S. 167, 174 (2009). This was also one of the reasons why this Court chose to limit the scope of disparate impact claims under the ADEA. *Smith v.*

City of Jackson, supra, 544 U.S. at 240. In light of the lack of statutory reference to discriminatory effect, Congress's failure to amend the FHA indicates Congress's lack of intent to include disparate impact claims under the FHA.

C. Disparate Impact Claims are Unnecessary to Further the Purposes of the FHA.

While both Title VII and the FHA were designed to ameliorate the effects of discrimination, their purposes are very different. One of the main purposes of the FHA is to "replace the ghettos 'by truly integrated and balanced living patterns.'" *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972), declined to follow on other grounds by *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 869 (2011). The Department of Housing and Urban Development ("HUD") has also recognized the FHA was designed to address the "consequences of housing practices," namely the creation, perpetuation or the increasing of segregation. 76 FR 70922.

By contrast, Title VII's purpose was "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees" because certain practices, policies and procedures "operate to 'freeze' the status quo of prior discriminatory employment practices." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430 (1971). *See also Int'l*

Broth. of Teamsters v. U.S., 431 U.S. 324, 348-49 (1977). Discriminatory impact claims were permitted because certain practices operate as the functional equivalent of intentional discrimination. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988).

"Section 3604(a) is designed to ensure that no one is denied the right to live where they choose for discriminatory reasons." The FHA was designed to "provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. §3601. It was not meant to result in liability for actions that were taken for non-discriminatory purposes simply because they impact the availability of housing. As a result, not "every action which produces discriminatory effects is illegal." *Metro. Housing Dev. Corp. v. Vill. of Arlington Heights,* 558 F.2d 1283, 1290 (7th Cir. 1977). *See also Jersey Heights Neighborhood Ass'n v. Glendening,* 174 F.3d 180, 192 (4th Cir. 1999) (stating the Fair Housing Act does not reach every event "that might conceivably affect the availability of housing.").

The vast majority of disparate impact claims brought in the housing context are not the functional equivalent to intentional discrimination and result in the potential for liability for non-discriminatory actions. This is because disparate impacts in housing are often caused by a myriad of innocent causes unrelated to the actual housing policy being challenged.

For example, minorities might be overrepresented in a neighborhood due to voluntary housing patterns of the minority residents. In such a case, ***any*** policy that applies to such a neighborhood would have a disparate impact. *See City of Memphis v. Greene*, 451 U.S. 100, 128 (1981) (noting that "[b]ecause urban neighborhoods are so frequently characterized by a common ethnic or racial heritage, a regulation's adverse impact on a particular neighborhood will often have a disparate effect on an identifiable ethnic or racial group"). However, as has been recognized in the school segregation context, a governmental actor cannot be held liable for an effect caused by residential housing patterns over which it had no control. *Austin Indep. Sch. Dist. v. United States*, 429 U.S. 990, 994 (1976).

Similarly, housing may be unavailable because it is blighted, unsafe or unsanitary. Occasionally, high concentrations of minorities live in such buildings or neighborhoods. If a governmental entity exercises its police powers through enforcement of building/construction regulations, condemnation of unsafe buildings, or redevelopment of blighted areas, housing could be made unavailable. Such unavailability is due to the condition of the building or neighborhood, not the race of the occupant or owner of the house. Disparate impact on a minority group is simply an unavoidable consequence of such valid, legitimate governmental action needed to be taken for the public health and welfare.

Finally, housing can be unavailable because of the economic status of the household. Simply because minorities might be overrepresented among low-income households does not mean that a policy affecting low-income households is an action taken "because of race." This is because a mere statistical correlation between poverty and a particular race or ethnicity does not transform discrimination against poor people into racial discrimination. *Ybarra v. Town of Los Altos Hills*, 503 F.2d 250, 253 (9th Cir. 1974). Even the drafters of the FHA recognized that the law of economics impacts the availability of housing. *See* 114 Cong. Rec. 2279 ("Fair housing does not promise to end the ghetto . . . but it will make it possible for those who have the resources to escape. . . ."). Therefore, unless decisions regarding low-income housing is having a segregative effect by driving minorities out of the municipality or preventing minorities from moving in, the housing is not being made unavailable due to race.

Allowing disparate impact claims under the FHA would render illegal many legitimate governmental and private activities designed to promote the general welfare of the community. Limiting FHA claims to those showing proof of intentional discrimination, disparate treatment, and/or actual segregative effect will sufficiently advance the purposes of the FHA without unreasonably limiting valid activities. Thus, disparate impact claims are unnecessary.

II. THE CIRCUITS ARE SPLIT.

Petition for Certiorari should also be granted because this matter involves an important question concerning the FHA which has not been, but should be, settled by this Court, and over which the Circuit Courts have entered conflicting decisions. Rule 10(a) & (c). While this Court has addressed the appropriate standard for determining a prima facie case in Title VII employment discrimination cases, it has not done so for FHA cases involving disparate impact claims.[7]

This lack of guidance has resulted in the various Circuit Courts' development and application of differing standards for determining not only when a plaintiff has satisfied its prima facie case under the FHA, but as to when a FHA violation has been proven. Several of the Circuits have recognized this split. *See Graoch Assoc. #33, L.P. v. Louisville/ Jefferson County Metro Human Relations Comm'n*, 508 F.3d 366, 382-385 (6th Cir. 2007) (Merritt concurring) and *Keith v. Volpe*, 858 F.2d 467, 483 (9th Cir. 1988). In addition, some Circuits have not applied a consistent standard within their Circuits when evaluating disparate impact claims. Clear guidance from the Supreme Court is necessary to avoid haphazard application of an important federal statute and to give clear standards to potential

[7] As noted in Section I. above, the Supreme Court has taken two disparate impact cases under FHA, but has never addressed whether such claims are cognizable or what standard should be applied.

defendants as to when their conduct might potentially violate the FHA.

A. Circuits Applying a Burden Shifting Test.

The First, Second, Third, Fourth, Sixth, Eighth, and Ninth Circuits have applied a burden shifting test to determine whether a plaintiff has established a violation of the FHA.[8] Under the burden shifting test, a plaintiff can establish a prima facie case by showing disparate impact alone, through statistics, and then the burden shifts back to the defendant to establish a defense. However, there is great variation among these Circuits as to what each party must prove and as to when the burden shifts back to the plaintiff.

1. The Second & Third Circuits' Variations.

The variation applied by the Second and Third Circuit is the easiest standard for a plaintiff presenting a disparate impact claim. This standard was developed by the Third Circuit and adopted by the Second Circuit. *See Resident Advisory Bd. v. Rizzo,* 564 F.2d 126, 148-49 (3d Cir. 1977) and *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 302 (2d Cir. 1998).

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[8] As will be discussed later, the Second, Fourth, Sixth, and Ninth Circuits have also applied other tests as well.

Under this variation, once a plaintiff has made a prima facie showing of disparate impact, the burden shifts to the defendant to show: (1) that it has a legitimate reason for its actions; *and* (2) there is no less restrictive means. (App. A, 22a). Only after a defendant has shown both, would the burden shift back to a plaintiff. *Id.* This is the standard applied by the Third Circuit in this case.

However, the Second and Third Circuits diverge as to what is required to establish a prima facie case. In the Third Circuit, a plaintiff is simply required to present statistics, of any type, so long as it shows disproportionate impact in some "plausible way." (App. A, 14a). No specific standard applies for measuring disparate impact. *Id.* Any statistics will do.

By contrast, the Second Circuit requires proof of the following: "'(1) the occurrence of certain outwardly neutral practices, and (2) *a significantly adverse or disproportionate impact on persons of a particular type* produced by the defendant's facially neutral acts or practices[,]'" and (3) "a causal connection between the facially neutral policy and the alleged discriminatory effect."[9] *Tsombanidis v. W. Haven Fire Dept.*, 352 F.3d 565, 574-575 (2d Cir. 2003) (emphasis original).

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[9] Title VII cases impose a similar causation requirement by requiring a plaintiff to (1) identify the specific employment practice being challenged and (2) provide "statistical evidence of a kind and degree sufficient to show that the practice in

(Continued on following page)

2. The Sixth and Eighth Circuits' Variations.

The variation applied by the Eighth Circuit, and in at least one Sixth Circuit Court case, differs from the Third Circuit test by shifting the burden back to the plaintiff once the defendant has shown a legitimate business reason for its actions. *Gallagher v. Magner*, 619 F.3d 823, 837 (8th Cir. 2010) and *Graoch Assoc., supra*, 508 F.3d at 374. In other words, a plaintiff's prima facie case can be rebutted by a defendant solely by showing a legitimate business interest. Then, the burden shifts back to the plaintiff to show that the business reason is a pretext or that there is less discriminatory means. *Id.* This variation is essentially a variation of the *McDonnell Douglas* burden shifting framework applied in Title VII employment cases. *Graoch Assoc.* 508 F.3d at 374.

It is unclear as to what, if any, guidelines the Eighth Circuit utilizes for determining the sufficiency of statistics for a prima facie case of disparate impact because the Eighth Circuit has said, "[t]he elements of a prima facie case of discrimination will vary from case to case, depending on the allegations and the

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question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Watson*, *supra*, 487 *U.S.* at 994. These requirements are imposed "to avoid the 'result [of] employers being potentially liable for "the myriad of innocent causes that may lead to statistical imbalances."'" *Meacham v. Knolls Atomic Power Lab.*, 554 *U.S.* 84, 100 (2008).

circumstances." *U.S. v. Badgett*, 976 F.2d 1176, 1178 (8th Cir. 1992).

By contrast, the Sixth Circuit has indicated that a plaintiff's statistics of disparate impact must be measured by inquiring into the impact of the action upon minorities in the total group *to which the policy applied*.[10] *Graoch Assoc.*, 508 F.3d at 378 (emphasis added). Simply because minorities are disproportionately represented in group to which a policy applies, that alone is not sufficient to establish a prima facie case of disparate impact. *Id.* at 378-379.

3. The First Circuit's Variations.

The First Circuit burden shifting test differs from both the Third and Eighth Circuits because once a plaintiff establishes a prima facie case, a defendant can defeat an FHA claim by showing a "legitimate and substantial goal of the measure in question." *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 51 (1st Cir. 2000). In other words, when a defendant establishes a legitimate business reason for its action, a plaintiff's disparate impact claim fails. *Id.* Therefore,

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[10] In a Title VII case, this Court has also recognized that it may be appropriate to limit statistical evidence to the total group to which the policy applied. "When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Hazelwood Sch. Dist. v. U.S.*, 433 U.S. 299, 309 (1977). Accord, *Watson*, *supra*, 487 U.S. at 997.

unlike the Third and Eighth Circuits, there is no need or ability to show less restrictive means, by either a plaintiff or defendant.

Like the Third Circuit, no specific standard applies for measuring disparate impact, as any statistical analysis is sufficient. *Id.* at 50. However, in *Langlois*, the First Circuit did utilize the 4/5 test used in employment cases. *Id.*

4. The Fourth and Ninth Circuits' Variations.

Neither the Fourth nor Ninth Circuit has been very clear on which test they employ. Both Circuits have indicated that once a plaintiff has shown proof of discriminatory impact, it is appropriate to shift the burden back to the defendant to establish a legitimate business necessity. *See Betsey v. Turtle Creek Associates*, 736 F.2d 983, 988-89 (4th Cir. 1984) and *Ojo v. Farmers Group, Inc.*, 600 F.3d 1205, 1207 (9th Cir. 2010). The problem is that neither Circuit is clear as to whether they adopt the First, Third, or Eighth Circuit burden shifting tests. However, in at least one case, the Ninth Circuit did apply the Eighth Circuit burden shifting test to a disparate treatment claim. *Gamble v. City of Escondido*, 104 F.3d 300, 305 (9th Cir. 1997).

As for the establishment of a prima facie case of disparate impact, in the Fourth Circuit, the Court required that a plaintiff's statistics of disparate impact be measured by inquiring into the impact of

the action upon minorities in the total group *to which the policy applied*. *Betsey*, 736 F.2d at 988-89. It was insufficient to rely on absolute numbers. Simply because minorities are disproportionately represented in a group to which a policy applies, that alone is not sufficient to establish a prima facie case of disparate impact. *Id.*

However, in the Ninth Circuit, at least one case allowed a group of plaintiffs to establish disparate impact based on absolute numbers alone. *Keith, supra*, 858 F.2d at 484 (stating that because ⅔ of the group were minorities, disparate impact was shown).

B. The Multi-Factor Test.

The Fourth, Sixth, Seventh and Ninth Circuits have utilized a multi-factor test. Under the multi-factor test, a plaintiff's FHA claim is based on a number of factors. There is no shifting of the burden to a defendant. Therefore, these factors are required both for establishment of a prima facie case and for proving an FHA violation.

1. The Seventh Circuit's Variations.

In the Seventh Circuit, statistics alone are insufficient to establish a prima facie case. Rather, the Seventh Circuit requires proof of four factors:

> (1) how strong is the plaintiff's showing of discriminatory effect; (2) is there some evidence of discriminatory intent, though not

> enough to satisfy the constitutional standard of *Washington v. Davis*; (3) what is the defendant's interest in taking the action complained of; and (4) does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing.

Metropolitan Housing Development Corp., supra, 558 F.2d at 1290. Upon the weighing of these four factors, the evidence must tip in favor of the Plaintiffs. *Id.* at 1294.

The Seventh Circuit has also clarified that certain factors tip heavily either toward the plaintiff or the defendant. For example, "courts cannot be overly solicitous when the effect is to perpetuate segregated housing." *Id.* at 1293. By contrast, "if the defendant is a governmental body acting within the ambit of legitimately derived authority, we will less readily find that its action violates the Fair Housing Act." *Id.*

2. The Fourth, Sixth, and Ninth Circuits' Variations.

Some version of the Seventh Circuit Test has been used by the Fourth, Sixth and Ninth Circuits. *Smith v. Town of Clarkton, N.C.*, 682 F.2d 1055, 1065 (4th Cir. 1982); *Arthur v. City of Toledo, Ohio*, 782 F.2d 565 (6th Cir. 1986); and *Keith, supra*, 858 F.2d at 483 (applying both the 3rd/8th Circuit tests and the 4th/7th Circuit tests). While the Fourth and Ninth

Circuits have applied the test using all four factors, the Sixth Circuit has applied the test with only three of the four factors. Specifically, it did not require any showing of discriminatory intent (factor 2). *Arthur*, 782 F.2d at 575.

C. The Combination Test.

1. The Tenth Circuit's Variations.

The Tenth Circuit uses a combination test that combines the Eighth Circuit's burden shifting and the Seventh Circuit's factor tests. The Tenth Circuit has been very specific as to what is required of a plaintiff and a defendant in an FHA case.

In a disparate impact case, a prima facie case can be shown by plaintiff by statistical disparity. *Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev.*, 56 F.3d 1243, 1253 (10th Cir. 1995). However, the statistical analyses must "involve the appropriate comparables." *Id.* Additionally, some level of causation is required. *See Reinhart v. Lincoln County*, 482 F.3d 1225, 1230-31 (10th Cir. 2007) (stating "[i]t is not enough for the [plaintiffs] to show that (1) a regulation would increase housing costs and (2) members of a protected group tend to be less wealthy than others.)

Once a plaintiff has established their prima facie case, the burden shifts to the defendant who must "'produce evidence of a genuine business need for the challenged practice.'" *Reinhart*, 482 F.3d at 1229. In

other words, "the defendant must demonstrate that the discriminatory practice has a manifest relationship to the housing in question." *Mountain Side, supra*, 56 F.3d at 1254. A defendant's proofs are evaluated based on three of the four Seventh Circuit's Arlington Height's factors (excludes proof of discriminatory intent). *Reinhart*, 482 F.3d at 1229).

However, in evaluating these factors, the Tenth Circuit has said that if a defendant offers "valid non-pretextual reasons for the challenged practices, the courts should not be overzealous to find discrimination." *Mountain Side, supra*, 56 F.3d at 1253. Moreover, the Tenth Circuit has said "'courts ought to be more reluctant to grant relief when the plaintiff seeks to compel the defendant to construct integrated housing or take affirmative steps to ensure that integrated housing is built than when the plaintiff is attempting to build integrated housing on his own land and merely seeks to enjoin the defendant from interfering with that construction.'" *Id.*

If a defendant can satisfy this burden, then the burden again shifts back to the plaintiff to "'"show that other [policies], without a similarly undesirable . . . effect, would also serve the [defendant's] legitimate interest."'" *Mountain Side, supra,* 56 F.3d at 1254.

2. The Second Circuit's Variations.

The Second Circuit's standard is somewhat similar to the Tenth Circuit's standard in that it

applies a combination burden shifting and factor test. However, the Second Circuit combines the Seventh and Third Circuits' tests. While the Second Circuit has set forth very specific guidelines for how to evaluate a defendant's justification and as to the weighing of the interests, the Second Circuit has not provided much guidance on evaluating a prima facie case.

The Second Circuit has said that once a plaintiff presents a prima facie case of disparate impact, the burden shifts to the defendant to "avoid liability." *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 936 (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). In deciding whether a defendant has met its burden, the Second Circuit requires a showing of three factors taken from both the Third Circuit and Seventh Circuit tests. These three factors are "(1) whether the reasons are bona fide and legitimate; and (2) whether any less discriminatory alternative can serve those ends" and (3) "whether the plaintiff is suing to compel a governmental defendant to build housing or only to require a governmental defendant to eliminate some obstacle to housing that the plaintiff itself will build." *Id.* at 935-36 & 939.

Ultimately, "there must be a weighing of the adverse impact against the defendant's justification." *Id.* at 936. In undertaking this weighing, "the balance should be more readily struck in favor of the plaintiff when it is seeking only to enjoin a municipal

defendant from interfering with its own plans rather than attempting to compel the defendant itself to build housing." *Id.* at 940.

III. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH ONE OF THE LEGISLATIVE GOALS OF THE FHA.

The Third Circuit's decision conflicts with one of the goals of the FHA because it impedes the Township's ability to replace a minority predominated ghetto with an integrated mixed race, mixed income housing project. There are two concurrent goals of the FHA. The first goal is "that government protect the freedom of individuals to choose where they want to live." 114 Cong. Rec. 2525 (statement of Sen. Brooke). The second goal is the replacement of minority predominated ghettos with "truly integrated and balanced living patterns." *See* 114 Cong. Rec. 3422 (statement of Sen. Mondale).

Several Circuits have recognized these dual goals of the FHA: "the Act was intended to promote 'open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat.'" *Metro. Housing Dev. Corp., supra*, 558 F.2d at 1289.

The Fifth Circuit has stated, "[t]he provisions of 42 U.S.C. §3604 are to be given broad and liberal construction, in keeping with Congress' intent in passing the Fair Housing Act of replacing racially

segregated housing with 'truly integrated and balanced living patterns.'" *Woods-Drake v. Lundy*, 667 F.2d 1198, 1201 (5th Cir. 1982). The Second Circuit has gone so far as to say that the purpose of promoting integration is even more important than the policy of protecting a person's choice of where to live.

> Congress' desire in providing fair housing throughout the United States was to stem the spread of urban ghettos and to promote open, integrated housing, even though the effect in some instances might be to prevent some members of a racial minority from residing in publicly assisted housing in a particular location. The affirmative duty to consider the impact of publicly assisted housing programs on racial concentration and to act affirmatively to promote the policy of fair, integrated housing is not to be put aside whenever racial minorities are willing to accept segregated housing. The purpose of racial integration is to benefit the community as a whole, not just certain of its members.

Otero v. New York City Hous. Auth., 484 F.2d 1122, 1134 (2d Cir. 1973). This is probably why several Circuit Courts have recognized that not "every action which produces discriminatory effects is illegal." *Metro. Housing Dev. Corp., supra*, 558 F.2d at 1290; *Jersey Heights, supra*, 174 F.3d at 192.

Depending on the circumstance, disparate impact cases can create a conflict between the dual goals of the FHA. The most prominent example is when housing must be condemned, demolished and/or

redeveloped. In this case, Plaintiffs' FHA claim causes a conflict between the dual goals of the FHA. The Township seeks to redevelop a blighted residential area which is predominately occupied by low and moderate income minority households and redevelop it into a mixed income neighborhood. The declaration of blight has been upheld by every level of New Jersey State Courts. The area is blighted and 80% of the area's occupants are poor minorities. (Pet. App. 5a, 23a & 50a-51a, n.12-13). In its place, the Township's plan seeks to construct up to 464 market rate houses (in the form of townhouses and apartments), and 56 deed restricted affordable housing units in accordance with New Jersey law. (Pet. App. 45a, n.7). In short, the Township's plan would replace this segregated urban ghetto with a truly integrated housing pattern that is available to any household regardless of race.[11]

Plaintiffs demand that the area be redeveloped through rehabilitation only, and be undertaken in stages so that all of the existing residents who have successfully been relocated would move back to the neighborhood. (Pet. App. 26a). In short, they are

[11] The District Court also found that "the record shows that other Garden residents whose homes have been acquired by the Township and have been relocated are pleased with both their compensation and place of relocation. In fact, the evidence demonstrates that many residents now have significantly improved living conditions and are in better circumstances financially." (Pet. App. 55a, n.16). These facts are irrelevant in the Third Circuit disparate impact variation.

seeking to force the Township to perpetuate the segregated living conditions in the Gardens and spend millions of taxpayer dollars to do so. (*See* Pet. App. 49a-50a stating Plaintiffs' proposed rehabilitation plan fails to account for a $2.5 million funding gap).

This Court has recognized that "Congress has made a strong national commitment to promote integrated housing." *Linmark Assoc., Inc. v. Willingboro Twp.*, 431 U.S. 85, 95 (1977). It is inconceivable that the drafters of the FHA would have intended that the FHA could be used to force governmental entities to continue or perpetuate segregation.

Yet, the Third Circuit's decision allows just that. The Third Circuit's decision places the Township between a rock and a hard place. Obviously, the Township's redevelopment of the blighted area has resulted in Plaintiffs' allegations of a FHA violation. But because there are a greater number of minorities living in the blighted area, a prima facie case is made under the Third Circuit's variation. To the contrary, as the District Court noted "the ironic observation that if the Township had allowed the Gardens to continue to deteriorate as it had over the years, that it might then be fairly characterized as having a discriminatory intent towards its minority, low income residents." (Pet. App. 58a, n.18).

This Court should grant certiorari to clarify the standard applicable in cases where the dual goals of the FHA are in conflict.

IV. THIS CASE PROVIDES THE IDEAL OPPORTUNITY TO RESOLVE IMPORTANT ISSUES REGARDING THE SCOPE OF THE FHA.

On November 7, 2011, this Court granted certiorari in *Magner, supra*, Case No.: 10-1032 to consider whether disparate impact claims are cognizable under the FHA and if so, what test should be applied. However, *Magner* was withdrawn by the parties before this Court could issue a decision on the merits. The within case presents exactly the same issues to be considered on certiorari as were presented in *Magner*. This Court should grant certiorari to clarify this important issue as it has once again come before this Court.

Because Third Circuit precedent has clearly established the cognizability of disparate impact claims under the FHA, any attempt by the Township to raise this challenge below would have been futile. Because the Township was unable to raise this challenge below, this argument was not waived. *See Medimmune, Inc. v. Genentech, Inc.,* 549 U.S. 118, 125 (2007) (failure to raise arguments was counsel's sound assessment that the argument would be futile, not waiver). Although the Township may not have directly challenged the cognizability of disparate impact claims under the FHA, it did challenge the scope of the application of FHA in the redevelopment context, arguing that a redevelopment plan should not violate Title VIII unless it has a segregative effect. (Pet. App. 23a).

It is appropriate for this Court to hear this case because it presents a pure question of law, namely whether a disparate impact claim is cognizable under the FHA. While consideration of the facts below are relevant to determining whether any applicable test has been met, they are immaterial to the determination of whether disparate impact claims are cognizable and if so, which test should be applied. This Court has previously recognized that purely legal questions are appropriate for certiorari even if the question was not addressed by the lower court. *See Nixon v. Fitzgerald,* 457 U.S. 731, 743 n.23 (1982); and *Mitchell v. Forsyth,* 472 U.S. 511, 530 (1985).

Finally, a claim not raised by the petitioner below can be considered by the Court when "the interests of justice require its consideration," *Anderson v. U.S.*, 417 U.S. 211, 223 (1974), or "where the question (1) is in 'a state of evolving definition and uncertainty,' and (2) is 'one of importance to the administration of federal law,'" *Virginia Bankshares, Inc. v. Sandberg,* 501 U.S. 1083, 1099 n.8 (1991). *See also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 37-38 (1991), Stevens dissenting, recognizing that "[o]nly this Term, the Court has on at least two occasions decided cases on grounds not argued in any of the courts below or in the petitions for certiorari" in *Arcadia v. Ohio Power Co.,* 498 U.S. 73 (1990) and *McCleskey v. Zant,* 499 U.S. 467 (1991). The interests of justice dictate that this Court provide clear

guidance as to when a plaintiff has established an FHA claim.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11-1159

MT. HOLLY GARDENS CITIZENS IN ACTION, INC., a New Jersey non-profit corporation; PEDRO AROCHO; REYNALDO AROCHO; ANA AROCHO; CHRISTINE BARNES; BERNICE CAGLE; LEON CALHOUN; GEORGE CHAMBERS; DOROTHY CHAMBERS; SANTOS CRUZ; ELIDA ECHEVARIA; NORMAN HARRIS; MATTIE HOWELL; NANCY LOPEZ; VINCENT MUNOZ; ELMIRA NIXON; LEONARDO PAGAN; ROSEMARY ROBERTS; WILLIAM ROBERTS; EFRAIM ROMERO; HENRY SIMONS; JOYCE STARLING; TAISHA TIRADO; VIVIAN BROOKS; ANGELO NIEVES; DOLORES NIXON; ROBERT TIGAR; JAMES POTTER; RADAMES TORRES-BURGOS; LILLIAN TORRES-MORENO; DAGMAR VICENTE; CHARLIE MAE WILSON; LEONA WRIGHT; MARIA AROCHO; PHYLLIS SINGLETON; FLAVIO TOBAR; MARLENE TOBAR; SHEILA WARTHEN; ALADIA WARTHEN,
Appellants,

v.

TOWNSHIP OF MOUNT HOLLY, a municipal corporation of the State of New Jersey; TOWNSHIP

COUNCIL OF TOWNSHIP OF MOUNT HOLLY, as governing body of the Township of Mount Holly; KATHLEEN HOFFMAN, as Township Manager of the Township of Mount Holly; KEATING URBAN PARTNERS L.L.C., a company doing business in New Jersey; TRIAD ASSOCIATES, INC., a corporation doing business in New Jersey; JULES K. THIESSEN, as Mayor of the Township of Mount Holly.

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 1:08-02584)
District Judge: The Honorable Noel L. Hillman

Argued July 14, 2011

Before: SLOVITER, FUENTES,
and FISHER, *Circuit Judges*

(Opinion Filed: September 13, 2011)

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OPINION OF THE COURT

FUENTES, *Circuit Judge.*

Mount Holly Township (the "Township") has proposed a redevelopment plan that would eliminate the existing homes in its Gardens neighborhood, occupied predominantly by low-income residents, and replace them with significantly more expensive housing units. Appellants, an association of Gardens residents organized under the name Mt. Holly Gardens Citizens in Action, and 23 current and former residents of the neighborhood (collectively the "Residents") filed suit against the Township alleging violations of various anti-discrimination laws.

Before the Township filed an Answer or discovery on these allegations had taken place, the District Court granted summary judgment to the Township. Because the District Court misapplied the standard for deciding whether the Residents could establish a

prima facie case under Title VIII and because it did not draw all reasonable inferences in the Residents' favor, we will reverse.

I.[1]

The homes in this dispute are located in a 30-acre neighborhood called the Gardens in the Township of Mount Holly in Burlington County, New Jersey. The Gardens is the only neighborhood in the Township comprised predominantly of African-American and Hispanic residents. It is poor – almost all of its residents earn less than 80% of the area's median income; with most earning much less.

The 329[2] homes in the Gardens are predominantly two-story buildings made out of solid brick. Built in the 1950s, the homes are attached in rows of 8 to 10 and are set back from the curving streets to allow for front and back yards, with alleys running behind each housing block. Two major commercial districts abut opposite sides of the neighborhood, which is only a mile away from the major downtown business district. Until 2004, the neighborhood was also home to a playground and a community center.

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[1] Because this is an appeal from a motion granting summary judgment, we examine the record evidence in the light most favorable to the non-moving parties, here the Residents, while resolving all reasonable inferences in their favor. *Wishkin v. Potter,* 476 F.3d 180, 184 (3d Cir. 2007).

[2] The record inconsistently describes the number of homes as 327 or 329. (JA 61, 776, 1114).

The 2000 census provides a snapshot of the neighborhood.[3] According to that data, the Gardens neighborhood was split evenly between rental properties (with a median rental price of $705 per month) and homeowners (the median cost of homeownership was $969 per month). Eighty-one percent of the homeowners had lived in their homes for at least 9 years; 72% of renters had lived there for at least five years. Of the 1,031[4] residents living in the neighborhood, 203, or 19.7%, were non-Hispanic Whites; 475, or 46.1% were African-Americans; and 297, or 28.8% were Hispanic, the highest concentration of minority residents within Mt. Holly. Almost all of these residents were classified as "low income"; indeed, most were classified as having "very low" or "extremely low" incomes.

The neighborhood was not perfect. For one, it was crowded. This created a parking shortage, which led residents to pave their backyards for use as driveways, which, in turn, led to drainage problems.

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[3] The parties dispute the utility of data from the 2000 census. However, none of the parties has briefed or even asked the question of *when* precisely the violations at issue in this case began. This issue is important because the redevelopment process began in 2002 and, as a result, the demographics of the township have changed. Disputes over which census numbers to use thus create a moving target; however, the 2000 census data appears to provide the most accurate demographic data at the inception of the redevelopment process.

[4] This is an approximate number provided by the Residents' expert. Elsewhere in the record, the neighborhood is described as home to 1,605 people. (JA 1114).

In addition, the fact that the homes were owned in fee simple meant there was no one with a vested interest in maintaining common spaces, such as the alleys. Some of the owners were nothing more than absentee landlords, renting to individuals with little interest in maintaining the properties. Over the years, many of the properties fell into disrepair. Vacant properties were boarded up, some yards filled with rubbish, and parts of the area became blighted. Because the houses were connected to one another, the dilapidation of one house could and sometimes did lead to the decay of the adjoining houses. Finally, the dense population, narrow streets, and vacant properties facilitated crime. In 1999, 28% of crimes in the Township occurred in the Gardens, even though that neighborhood covers only 1.5% of the Township's land area.

These many problems were not ignored. Local community activists and business leaders worked to revitalize the Gardens through a private initiative that eventually came to be known as "Mt. Holly 2000." This community endeavor sought to reverse the neighborhood's decline by rehabilitating properties and increasing social services. Despite sporadic achievements – ten homes were renovated and a community policing center was established – the neighborhood's problems continued.

In the year 2000, the Township commissioned a study to determine whether the Gardens should be designated as an "area in need of redevelopment" under New Jersey's redevelopment laws. The resulting report, issued on November 8, 2000 concluded

that the area offered a "significant opportunity for redevelopment" because of blight, excess land coverage, poor land use, and excess crime. (JA 699). That same year, the Township began to acquire properties in the Gardens. Those properties were left vacant.

A series of redevelopment plans followed. In 2003, the Township issued the Gardens Area Redevelopment Plan ("GARP"). This plan called for the demolition of all of the homes in the neighborhood and the permanent or temporary relocation of all of its residents. In their place, the plan provided for the construction of 180 new market-rate housing units, thirty of which would be available only to senior citizens. The plan was changed in 2005 to include a parcel of land immediately north of the Gardens. This plan, the West Rancocas Redevelopment Plan, also called for the destruction of most of the original Gardens homes, to be replaced with 228 new residential units composed of two-family dwellings and townhouses. Unlike the GARP, the West Rancocas plan provided for the optional rehabilitation of some of the original Gardens homes and allowed for the residents of those rehabilitated units to be temporarily relocated in phases so that they could remain in the neighborhood. The West Rancocas plan also contemplated that 10% of the 228 units would be designated as affordable housing. Finally, in 2008, the plan was changed again. This time, the Revised West Rancocas Redevelopment Plan called for construction of up to 520 houses, 75% of which could be townhouses and 50% of which could be apartments. The

revised plan called for only 56 deed-restricted affordable housing units, 11 of which would be offered on a priority basis to existing Gardens residents. This revised plan did not include any rehabilitation of existing units.

At each stage of the process, many Gardens residents objected to the redevelopment, complaining about the destruction of their neighborhood and expressing fear that they would not be able to afford to live anywhere else in the Township. One resident complained that the house next to hers was torn down and that a bulldozer had hit her home, tearing the wall, cracking the ceiling, and shifting her roof. (JA 577-78, 1001). Another resident, a 70-year-old disabled homeowner, told the Township's Planning Board that, were he displaced, he would be unable to work and unable to afford a new home. (JA 1002). At one meeting in 2005, a planning expert testified that the West Rancocas plan was deficient because it only allowed rehabilitation as an option, without requiring or even encouraging it. He also said that 90% of the Gardens' existing residents would not be able to afford the newly-constructed homes and complained that the plan did not provide an estimate of affordable housing in the existing market for displaced residents. (JA 990, 1117).

Despite these complaints, work on the development continued. In February 2006 Keating Urban Partners, LLC, was chosen as the plan developer. Keating, in turn, hired Triad to develop a relocation plan. That plan, the Workable Relocation Assistance

Plan ("WRAP"), was submitted to the New Jersey Department of Community Affairs on September 28, 2006 and provided that all residents living in the Gardens on August 1, 2006 would receive relocation assistance. Qualified homeowners would receive $15,000 and a $20,000 no-interest loan to assist in the purchase of a replacement home. The Township offered to buy homes for between $32,000 and $49,000.[5] The estimated cost of a new home in the development was between $200,000 and $275,000, well outside the range of affordability for a significant portion of the African-American and Hispanic residents of the Township.

Renters were authorized to receive up to $7,500 of relocation assistance, but were not eligible for relocation funds to return to the Gardens. In any case, the vast majority of those renters would be unable to afford the proposed market-rate rent of $1,230 per month. Eventually, the Township paid to relocate 62 families, 42 of which moved outside of Mt. Holly Township. Renters who moved often had to pay more in rent at their new homes.

Although the redevelopment plan called for building in phases, the Township began to acquire and demolish all of the homes in the Gardens, thereby displacing many residents and creating conditions that encouraged the remaining residents to leave. By August 2008, 75 homes had been destroyed and 148

[5] One home sold for $64,000 and another sold for $81,000.

homes had been acquired and left vacant. Later that fall, the Township demolished 60 more homes. And, in the summer of 2009, 50 more homes were knocked down. Residents living amongst the destruction were forced to cope with noise, vibration, dust, and debris. Worse, the interconnected nature of the houses triggered a cascading array of problems. Uninsulated interior walls were exposed to the outside and covered with unsightly stucco or tar. But these coatings did not extend below grade, allowing moisture to seep into subterranean crawl spaces, creating an environment for mold problems. Above, the demolitions opened the roofs of adjoining homes. Those openings were patched with plywood, which was insufficient to stop water leaks. Around the neighborhood, homes bore the scars of demolition: hanging wires and telephone boxes, ragged brick corners, open masonry joints, rough surfaces, irregular plywood patches, and damaged porches, floors and railings. Destruction of the sidewalks outside demolished homes further contributed to the disarray by making it difficult to navigate through the neighborhood. By June 2011, only 70 homes remained under private ownership and the Township was in the process of demolishing 52 properties that it had acquired. These conditions discouraged any attempt at rehabilitating the neighborhood and encouraged existing residents to sell their homes for less than they otherwise might have been worth.

In October 2003, Citizens in Action filed a suit in state court alleging violations of New Jersey's

redevelopment laws and procedures, and various anti-discrimination laws. Ultimately, the New Jersey Superior Court dismissed some counts and granted summary judgment to the Township on the others, concluding that there was no violation of New Jersey law, that the area was blighted, and that the antidiscrimination claims were not ripe because the plan had not yet been implemented. The Appellate Division affirmed, and the New Jersey Supreme Court denied a petition for certiorari.

The Residents filed suit in the District Court on May 27, 2008, raising the anti-discrimination claims that had not been ripe in their state suit. The federal complaint alleged, among other things, violations of the Fair Housing Act (the "FHA"), Title VIII of the Civil Rights Act of 1968; the Civil Rights Act of 1866, as codified at 42 U.S.C. § 1982[6]; and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[7] The Residents asked for declaratory and injunctive relief to stop the redevelopment plan, as well as damages or compensation that would allow Gardens residents to obtain housing in the Township. The Residents' motion for a

[6] 42 U.S.C. § 1982 provides that "[a]ll 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."

[7] Section 1 of the Fourteenth Amendment provides in pertinent part that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

preliminary injunction was denied. After they filed an Amended Complaint, the Township, along with the other named defendants, filed motions to dismiss. The District Court converted these into motions for summary judgment and, after allowing the parties time to brief the motions, granted summary judgment to the Township defendants. The District Court ruled that there was no *prima facie* case of discrimination under the FHA and that, even if there was, the Residents had not shown how an alternative course of action would have had a lesser impact.

The Residents filed a timely appeal and we granted the Residents' motion to stay redevelopment pending this appeal. We have jurisdiction under 28 U.S.C. § 1291.

II.

We exercise plenary review over a District Court's ruling on summary judgment. *See Disabled in Action of Pennsylvania v. Se. Pennsylvania Transp. Auth.,* 635 F.3d 87, 92 (3d Cir. 2011). "Summary judgment is appropriate only where, drawing all reasonable inferences in favor of the nonmoving party, there is no genuine issue as to any material fact . . . and the moving party is entitled to judgment as a matter of law." *Id.* (quoting *Melrose, Inc. v. City of Pittsburgh,* 613 F.3d 380, 387 (3d Cir. 2010)).

The FHA makes it unlawful to "refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion,

sex, familial status, or national origin." 42 U.S.C. § 3604(a). A dwelling can be made otherwise unavailable by, among other things, action that limits the availability of affordable housing. *See, e.g., Huntington Branch, NAACP v. Town of Huntington,* 844 F.2d 926, 928-29, 938-39 (2d Cir. 1988); *Smith v. Town of Clarkton,* 682 F.2d 1055, 1059, 1062-64 (4th Cir. 1982); *Resident Advisory Bd. v. Rizzo,* 564 F.2d 126, 130 (3d Cir. 1977). The FHA can be violated by either intentional discrimination or if a practice has a disparate impact on a protected class. *Cmty. Serv., Inc. v. Wind Gap Mun. Auth.,* 421 F.3d 170, 176 (3d Cir. 2005).

Disparate impact claims, which do not require proof of discriminatory intent, *see Rizzo,* 564 F.2d at 147-48, permit federal law to reach "[c]onduct that has the necessary and foreseeable consequence of perpetuating segregation[, which] can be as deleterious as purposefully discriminatory conduct in frustrating the national commitment to replace the ghettos by truly integrated and balanced living patterns." *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights,* 558 F.2d 1283, 1289-90 (7th Cir. 1977). In order to determine whether action of this sort was "because of race" we look to see if it had a "racially discriminatory effect," i.e., whether it disproportionately burdened a particular racial group so as to cause a disparate impact. *Rizzo,* 564 F.2d at 146-48; *see also Lapid-Laurel, LLC v. Zoning Bd. of Adjustment of Twp. of South Plains,* 284 F.3d 442, 466-67 (3d Cir. 2002) (featuring claims of a disparate impact

on handicapped persons in violation of 42 U.S.C. § 3604(f)). This is called a *prima facie* case of discrimination. *Rizzo,* 564 F.2d at 148 & n.31. If such a case is established, then we look to see whether the defendant has a legitimate, non-discriminatory reason for its actions. *Id.* at 148. If it does, the defendant must then also establish that "no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact." *Id.* at 149. Finally, if the defendant makes this showing, the burden once again shifts to those challenging the action, who must demonstrate that there is a less discriminatory way to advance the defendant's legitimate interest. *Id.* at 149 n.37.

A.

When viewed in the light most favorable to the Residents, the evidence submitted by the Residents was sufficient to establish a *prima facie* case. "[N]o single test controls in measuring disparate impact," but the Residents must offer proof of disproportionate impact, measured in a plausible way. *Hallmark Developers, Inc. v. Fulton Cnty.,* 466 F.3d 1276, 1286 (11th Cir. 2006). Typically, "a disparate impact is demonstrated by statistics," *id.* at 1286, and a *prima facie* case may be established where "gross statistical disparities can be shown." *Hazelton Sch. Dist. v. United States,* 433 U.S. 299, 307-08 (1977). According to the data in the 2000 census conducted before the redevelopment plan began, 22.54% of African-American households and 32.31% of Hispanic

households in Mount Holly will be affected by the demolition of the Gardens. The same is true for only 2.73% of White households. In short, the Residents' statistical expert has calculated that African-Americans would be 8 times more likely to be affected by the project than Whites, and Hispanics would be 11 times more likely to be affected. Furthermore, the 2000 data showed that only 21% of African-American and Hispanic households in Burlington County would be able to afford new market-rate housing in the Gardens, compared to 79% of White households.

The District Court's first error was in rejecting the Residents' statistical submissions, which should have been taken in the light most favorable to them at this stage in the proceedings. These statistics, like those presented in *Rizzo* and other prominent housing discrimination cases, show a disparate impact. In *Rizzo,* the plaintiffs presented evidence that, of the 14,000-15,000 people on a waiting list for public housing, 85% were black and 95% were of a minority background. 564 F.2d at 142. Under these circumstances, we concluded that the cancellation of a public housing project had a "racially disproportionate effect, adverse to Blacks and other minorities in Philadelphia." *Id.* Similarly, the plaintiffs in the Second Circuit case of *Huntington Branch* used statistics showing that while only 7% of the residents in a town required subsidized affordable housing, 24% of that town's Black residents required such housing, which meant that Black residents were three times more likely to be affected by a shortage of

affordable housing. 844 F.2d at 929. And in *Keith v. Volpe,* the Ninth Circuit concluded that the FHA was violated where a blocked housing project had twice the adverse impact on minorities. 858 F.2d 467, 484 (9th Cir. 1988). The disparate impact here, while not as extreme as the impact in *Rizzo,* is similar to or greater than the disparate impact found sufficient to establish a *prima facie* case elsewhere. Under these circumstances, the District Court erred in granting summary judgment to the Township.

Further, the District Court's challenge to these statistics in a footnote did not make the appropriate inferences. (JA 15-16 n.9). Instead, the District Court challenged the statistical analysis underlying the 21% figure of Burlington County minority residents who could afford units the redeveloped Gardens as both too broad, because it took account of the entire population of Burlington County, and too narrow because it failed to consider minorities *outside* the county who might move in.

In addition, the District Court said the 21% figure did not take into account the fact that 56 of the units in the Revised West Rancocas Plan would be designated as affordable housing. But the District Court's analysis failed to take into account the Residents' evidence that these units, although labeled "affordable," would be out of reach for almost all of the Gardens residents.

The District Court also said that the statistics failed to take into account non-minority purchasers

who might rent to minorities. But, unless those purchasers offered below-market rents, this would not affect the inference that the project had a disproportionate effect on Blacks and Hispanics who would be unable to afford market-rate units.

As to the District Court's concern that the statistics did not take into account minorities who might move elsewhere in Mount Holly, the Residents' expert opined that affordable housing in the Township was scarce, and that most Gardens residents would not be able to afford market-rate units elsewhere in the Township.

Lastly, the District Court erred when it rejected a reasonable inference in favor of the Residents by looking at the *absolute* number of African-American and Hispanic households in Burlington County that could afford homes. Instead, the District Court should have looked to see whether the African-American and Hispanic residents were *disproportionately* affected by the redevelopment plan. *See Huntington,* 844 F.2d at 938 ("By relying on absolute numbers rather than on proportional statistics, the district court significantly underestimated the disproportionate impact of the Town's policy."); *Hallmark Developers,* 466 F.3d at 1286 ("[I]t may be inappropriate to rely on absolute

numbers rather than on proportional statistics.") (quoting *Huntington,* 844 F.2d at 928.).[8]

There is another problem. The District Court's most troubling error is its conflation of the concept of disparate treatment with disparate impact. The District Court essentially agreed with the Township that because 100% of minorities in the Gardens will be treated the same as 100% of non-minorities in the Gardens, the Residents failed to prove there is a greater adverse impact on minorities. This was in error. We need not simply ask whether the White residents at the Gardens are *treated* the same as the minority residents at the Gardens. The logic behind the FHA is more perceptive than that. It looks beyond such specious concepts of equality to determine whether a person is being deprived of his lawful rights because of his race. Rather, a disparate impact inquiry requires us to ask whether minorities are disproportionately *affected* by the redevelopment plan. Thus the Residents can establish a *prima facie* case of disparate impact by showing that minorities are disproportionately burdened by the redevelopment plan or that the redevelopment plan "[falls] more harshly" on minorities. *Doe v. City of Butler,* 892 F.2d 315, 323 (3d Cir. 1989).

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[8] The Department of Justice filed an *amicus curiae* brief agreeing that the District Court erred in its disparate impact *prima facie* case analysis.

The Township asserts that a disparate impact approach would result in the unintended consequence of halting the redevelopment of minority neighborhoods and that it is foreclosed by the Supreme Court's decision in *City of Memphis v. Greene,* which states that

> [b]ecause urban neighborhoods are so frequently characterized by a common ethnic or racial heritage, a regulation's adverse impact on a particular neighborhood will often have a disparate effect on an identifiable ethnic or racial group. To regard an inevitable consequence of that kind as a form of stigma so severe as to violate the Thirteenth Amendment would trivialize the great purpose of that charter of freedom.

451 U.S. 100, 128 (1981).

There are three problems with the Township's position. First, *City of Memphis* was concerned with the standard for establishing a violation of the Thirteenth Amendment's ban on the "badges and incidents of slavery in the United States." *Id.* at 125-26. Whatever that standard might be – a question left open by the Supreme Court's ruling in that case, *see id.* at 130 (White, J., concurring) – *City of Memphis* did not consider the FHA. All of the courts of appeals that have considered the matter, including this one, have concluded that plaintiffs can show the FHA has been violated through policies that have a disparate impact on a minority group. *See Greater New Orleans Fair Housing Action Center v. HUD,* 639 F.3d 1078,

1085 (D.C. Cir. 2011) (acknowledging the majority view but declining to take a position on the matters); *Simms v. First Gibraltar Bank,* 83 F.3d 1546, 1555 (5th Cir. 1996); *Mountain Side Mobile Estates P'ship v. HUD,* 56 F.3d 1243, 1250-51 (10th Cir. 1995); *Jackson v. Okaloosa County,* 21 F.3d 1531, 1543 (11th Cir. 1994); *Casa Marie, Inc. v. Superior Court of Puerto Rico,* 988 F.2d 252, 269 n.20 (1st Cir. 1993); *Keith,* 858 F.2d at 482-84; *United States v. Starrett City Assocs.,* 840 F.2d 1096, 1100 (2d Cir. 1988); *Arthur v. City of Toledo,* 782 F.2d 565, 574-75 (6th Cir. 1986); *Smith,* 682 F.2d at 1065; *United States v. Mitchell,* 580 F.2d 789, 791-92 (5th Cir. 1978); *Rizzo,* 564 F.2d at 147-48; *Metro. Hous. Dev. Corp.,* 558 F.2d at 1290; *United States v. City of Black Jack,* 508 F.2d 1179, 1184 (8th Cir. 1974).

Second, the Township's approach urges us to conclude that the FHA is violated only when a policy treats each individual minority resident differently from each individual White resident. Under our precedent, a plaintiff may establish a *prima facie* case of discrimination by demonstrating that the policy disproportionately affects or impacts one *group* more than another – facially disparate treatment need not be shown. For instance, in *Rizzo,* the waiting list for public housing comprised 85% African-Americans and 95% minorities, meaning that 5% were White. 564 F.2d at 142. The White residents on the list were treated the same as the minority residents on the list – each was hurt by Philadelphia's decision to block a public housing project – but we nevertheless found a

violation of the FHA because cancelling the project had a "racially disproportionate effect" on African-Americans. *Id.* at 149 ("Nor can there be any doubt that the impact of the governmental defendants' termination of the project was felt primarily by blacks, who make up a substantial *proportion* of those who would be eligible to reside there.") (emphasis added).

The Township may be correct that a disparate impact analysis will often allow plaintiffs to make out a *prima facie* case when a segregated neighborhood is redeveloped in circumstances where there is a shortage of alternative affordable housing. But this is a feature of the FHA's programming, not a bug. The FHA is a broadly remedial statute designed to prevent and remedy invidious discrimination on the basis of race, *see Havens Realty Corp. v. Coleman,* 455 U.S. 363, 380 (1982), that facilitates its antidiscrimination agenda by encouraging a searching inquiry into the motives behind a contested policy to ensure that it is not improper. *See* Christine Jolls, *Antidiscrimination and Accommodation,* 115 Harv. L. Rev. 642, 652 (2001) (remarking that a "leading gloss" on the Supreme Court's decision in *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971), is that "disparate impact functions as a means of smoking out subtle or underlying forms of intentional discrimination on the basis of group membership."). We need not be concerned that this approach is too expansive because the establishment of a *prima facie* case, by itself, is not enough to establish liability under the FHA. It simply

results in a more searching inquiry into the defendant's motivations – precisely the sort of inquiry required to ensure that the government does not deprive people of housing "because of race."

Finally, the Township seems to argue that its redevelopment plan does not violate Title VIII unless the statistics show that it increases segregation in the Township. (Twp. Br. at 18.). Showing that a policy has a segregative effect is one way to establish a violation of Title VIII, but it is not the only way. *See Huntington Branch,* 844 F.2d at 937 (observing that a policy often discriminates in one of two ways: having a disparate impact or perpetuating segregation). The Township is free to argue that its plan is less discriminatory than all of the available alternatives because it does the best job of integrating the neighborhood. However, those arguments are properly considered in the context of the last steps of the Title VIII analysis, not as a requirement of the *prima facie* case.

In reality, the District Court's decision was based on a valid and practical concern, which appears to drive its reasoning throughout the opinion. It feared that finding a disparate impact here would render the Township powerless to rehabilitate its blighted neighborhoods. This underlying rationale distorts the focus and analysis of disparate impact cases under the FHA. In disparate impact cases, "[e]ffect, not motivation, is the touchstone because a thoughtless housing practice can be as unfair to minority rights as a willful scheme." *Smith v. Anchor Bldg. Corp.,* 536 F.2d 231, 233 (8th Cir. 1977). Once the Residents

established a *prima facie* case of disparate impact, the District Court's inquiry must continue to determine whether a person is being deprived of his lawful rights because of his race. It must ask whether that Township's legitimate objectives could have been achieved in a less discriminatory way.

B.

Once the plaintiffs establish a *prima facie* case, the defendants must offer a legitimate reason for their actions. In this case, everyone agrees that alleviating blight is a legitimate interest. The core of the dispute between the parties is over the next step of the FHA's burden-shifting analysis: whether the defendants have shown that there is no less discriminatory alternative. *Rizzo,* 564 F.2d at 149. Only when the defendants make this showing does the burden shift back to the plaintiffs – where it ultimately remains – to provide evidence of such an alternative. *Id.* at 149 n.37. The test for whether there is no alternative is "similar to the test of whether the defendant has demonstrated that the requested accommodation is 'unreasonable' for the purposes of rebutting a claim under § 3604(f)(3)(B)." *Lapid-Laurel,* 284 F.3d at 468. Section 2604(f)(3)(B) of the FHA requires that reasonable housing accommodations be made for individuals with disabilities. In other words, the defendant must show that the alternatives impose an undue hardship under the circumstances of this specific case. *See U.S. Airways v. Barnett,* 535 U.S. 391, 401-02 (2002) (discussing

the term "unreasonable accommodation" under the Americans with Disabilities Act).

The District Court characterized the Residents' proposed alternative as follows:

> [E]ffectively, plaintiffs are seeking to remain living in the blighted and unsafe conditions until they are awarded money damages for their claims and sufficient compensation to secure housing in the local housing market. Although couched at times like an effort to have the development go up around them, like a highway built around a protected tree, or to have their units rehabilitated, this makes little if no practical sense after years of litigation, approved redevelopment plans, and the expenditure of significant public resources. At this late stage, the only real practical remedy is for plaintiffs to receive the fair value for their home as well as proper and non-discriminatory relocation procedures and benefits. . . . The relief they are seeking is inconsistent with proving the fourth element of their FHA claim-namely, that an alternative course of action to eminent domain and relocation is viable.

(JA 17 n.12) (ellipsis in original).

The Residents' evidence is susceptible to more favorable inferences. The Residents are not asking for permission to continue to live in "blighted and unsafe" conditions. Instead, they argue that there is a feasible plan that meets the Township's goals and entails more substantial rehabilitation. Taking the

evidence in the light most favorable to the Residents, one could credit the report of the Residents' planning expert, which stated that the "blighted and unsafe" conditions could be remedied in a far less heavy-handed manner that would not entail the wholesale destruction and rebuilding of the neighborhood.

The Residents' expert pointed out that, although the Revised West Rancocas Plan called for development in stages, the Township began the development by aggressively acquiring houses, which it left vacant and then destroyed. He opined that a more gradual redevelopment plan would have allowed existing residents to move elsewhere in the neighborhood during one part of the redevelopment, and then move back once the redevelopment was completed. The Residents' expert further noted that the Township had not performed a comparative cost analysis showing that total demolition, relocation, and new construction was less feasible than an alternative focused on rehabilitation. Indeed, the expert went on to propose an alternative redevelopment plan that would rely on the targeted acquisition and rehabilitation of some of the existing Gardens homes, the combination of some houses to make larger homes, an initiative to make the houses more attractive through the use of landscaping and added amenities such as decks and porches, and selective demolition and new construction, including the construction of more affordable units. The Residents' expert also provided examples of previous alternatives – including one developed as early as 1989 – to show that the

complete demolition of the neighborhood was not the only possible solution to blight in the Gardens.[9] Finally, he provided a non-exhaustive list of state and federal funding programs that would support such a redevelopment plan and observed that the Township had failed to make an active effort to locate a developer with experience in neighborhood rehabilitation.

The Township provided the contrasting statements of its Township manager, who argued that a rehabilitation program was not economically feasible. In support, she cited the fact that one alternative, the Mt. Holly 2000 program, demonstrated that rehabilitation of each unit would be extremely costly. She also challenged the availability of sources of funding for a rehabilitation. Lastly, she emphasized the many problems that led the Township to declare the Gardens an area in need of redevelopment and asserted the belief of the Township Council and its planning board that demolition and replacement is the most effective and efficient approach to solving the neighborhood's problems.

These contrasting statements, as well as the parties' continued arguments on appeal as to the cost and feasibility of an alternative relying on rehabilitation, create genuine issues of material fact that

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[9] The 1989 plan was not provided as *the* alternative but only to show that less discriminatory alternatives had been considered in the past and could serve as the basis for an updated approach that would lessen the redevelopment's impact on minority residents of the Township.

require further investigation. Once the record on alternatives has been more fully developed, the District Court may entertain renewed motions for summary judgment, taking into account the Township's initial burden of showing that there are no less discriminatory alternatives, as well as the standard advanced in *Lapid-Laurel* for ultimately determining whether an alternative is unreasonable.[10]

III.

The Residents are also seeking to recover under the theory that the Township intentionally discriminated against its minority residents when it adopted the redevelopment plan. The District Court saw no evidence of intentional discrimination and granted the Township's motion for summary judgment. After carefully considering the matter, we discern no error in the District Court's decision and will thus affirm that ruling.

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[10] Triad asserts that the portion of the District Court's order relating to its involvement should be affirmed because the Residents, on appeal, have waived their claims against it. We disagree. In their brief, the Residents argue that the redevelopers, which include Triad, provided inadequate relocation assistance, allowed residents to be improperly pressured to leave, and that the redevelopment plan essentially pushes minority residents out of Mount Holly. For all of the reasons stated in this opinion, these are genuine issues of material fact that must be resolved through further discovery on remand.

IV.

The Township has broad discretion to implement the policies it believes will improve its residents' quality of life. But that discretion is bounded by laws like the FHA and by the Constitution, which prevent policies that discriminate on the basis of race. For this reason, "the federal courts must stand prepared to provide 'such remedies as are necessary to make effective the congressional purpose.'" *Rizzo,* 564 F.2d at 149 (quoting *J.I. Case Co. v. Borak,* 377 U.S. 426, 433 (1964)). A more developed factual record will assist the District Court in crafting appropriate remedies, if necessary. For all of the foregoing reasons, the District Court's order granting summary judgment is vacated and the case is remanded for further proceedings.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11-1159

MT. HOLLY GARDENS CITIZENS IN ACTION, INC., a New Jersey non-profit corporation; PEDRO AROCHO; REYNALDO AROCHO; ANA AROCHO; CHRISTINE BARNES; BERNICE CAGLE; LEON CALHOUN; GEORGE CHAMBERS; DOROTHY CHAMBERS; SANTOS CRUZ; ELIDA ECHEVARIA; NORMAN HARRIS; MATTIE HOWELL; NANCY LOPEZ; VINCENT MUNOZ; ELMIRA NIXON; LEONARDO PAGAN; ROSEMARY ROBERTS; WILLIAM ROBERTS; EFRAIM ROMERO; HENRY SIMONS; JOYCE STARLING; TAISHA TIRADO; VIVIAN BROOKS; ANGELO NIEVES; DOLORES NIXON; ROBERT TIGAR; JAMES POTTER; RADAMES TORRES-BURGOS; LILLIAN TORRES-MORENO; DAGMAR VICENTE; CHARLIE MAE WILSON; LEONA WRIGHT; MARIA AROCHO; PHYLLIS SINGLETON; FLAVIO TOBAR; MARLENE TOBAR; SHEILA WARTHEN; ALADIA WARTHEN,
Appellants,

v.

TOWNSHIP OF MOUNT HOLLY, a municipal corporation of the State of New Jersey; TOWNSHIP COUNCIL OF TOWNSHIP OF MOUNT HOLLY,

as governing body of the Township of Mount Holly; KATHLEEN HOFFMAN, as Township Manager of the Township of Mount Holly; KEATING URBAN PARTNERS L.L.C., a company doing business in New Jersey; TRIAD ASSOCIATES, INC., a corporation doing business in New Jersey; JULES K. THIESSEN, as Mayor of the Township of Mount Holly.

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 1:08-02584)
District Judge: The Honorable Noel L. Hillman

Argued July 14, 2011

Before: SLOVITER, FUENTES,
and FISHER, *Circuit Judges*

JUDGMENT

(Filed Sep. 13, 2011)

This cause came to be heard on the record from the United States District Court for the District of New Jersey and was argued on July 14, 2011.

On consideration whereof, it is now hereby ORDERED and ADJUDGED by this Court that the Order of the District Court entered on January 3, 2011 be, and the same is, hereby REVERSED AND

REMANDED. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron

Clerk

Dated: September 13, 2011

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MT HOLLY CITIZENS IN ACTION, INC., et al., Plaintiffs, v. TOWNSHIP OF MOUNT HOLLY, et al., Defendants.	Civil Action No. **08-2584 (NLH) (JS)** **OPINION** (Filed Jan. 3, 2011)

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HILLMAN, District Judge.

This case involves the redevelopment of the Mount Holly Gardens neighborhood (the "Gardens") in Mount Holly, New Jersey. Plaintiffs are low-income, African-American, Hispanic and "white" residents of the Gardens, who object to the plan because they claim they are being forcibly removed from their homes, which are being replaced in large part with new, much higher-priced market rate homes.

Currently before this Court are defendants' motions for summary judgment, which had been

converted from motions to dismiss on four of plaintiffs' claims.[1] The Court provided the plaintiffs with additional time to respond to the converted motions, and then allowed defendants to file reply briefs. The supplemental briefing is completed, and the remaining claims that are now ready for final resolution are plaintiffs' claims for violations of Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act or FHA), 42 U.S.C. § 3601 et seq. (Count One against all defendants); the Civil Rights Act of 1866, 42 U.S.C. § 1982 (Count Two against the Township); the Equal Protection Clause of the U.S. Constitution, brought pursuant to 42 U.S.C. § 1983 (Count Three against the Township); and Equal Protection Clause of the New Jersey State Constitution (Count Five against the Township), as well a claim for punitive damages.

As this Court previously expressed on several occasions, we recognize that the Gardens redevelopment has had an effect on low-income families, and, correspondingly, minority families. The Court also recognizes that being forced from one's home is a difficult and emotional issue, compounded by the fear

[1] The other five counts were dismissed. Since this case was filed over two years ago, it has been extensively litigated with several hearings, the denial of a TRO and preliminary injunction, the filing of a second amended complaint, and the issuance of numerous written Opinions. Litigation over the Gardens redevelopment also precedes this case in New Jersey state court. Overall, the concerns of several Gardens residents have caused the dispute over the blighted neighborhood's redevelopment plan to spend ten years in the courts.

of being unable to afford a comparable place to live. However, as the Court has also expressed previously, plaintiffs have failed to demonstrate that the Township, or the entities assisting the Township in the redevelopment and relocation services, has implemented a plan that has a disparate impact on the Gardens residents as the law defines it. Nor have they shown that the defendants have not been proceeding pursuant to a legitimate governmental interest in the least restrictive way, or have otherwise acted with discriminatory intent. Consequently, as explained more fully below, defendants' motions will be granted, and the case will be closed.

DISCUSSION[2]

A. Standard for Summary Judgment

Summary judgment is appropriate where the Court is satisfied that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett,* 477 U.S. 317, 330 (1986); Fed. R. Civ. P. 56(c).

An issue is "genuine" if it is supported by evidence such that a reasonable jury could return a

[2] Because the background and procedural history have been laid out in the Court's previous Opinions, they will not be restated here.

verdict in the nonmoving party's favor. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). A fact is "material" if, under the governing substantive law, a dispute about the fact might affect the outcome of the suit. *Id.* In considering a motion for summary judgment, a district court may not make credibility determinations or engage in any weighing of the evidence; instead, the non-moving party's evidence "is to be believed and all justifiable inferences are to be drawn in his favor." *Marino v. Industrial Crating Co.,* 358 F.3d 241, 247 (3d Cir. 2004) (quoting *Anderson,* 477 U.S. at 255).

Initially, the moving party has the burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Once the moving party has met this burden, the nonmoving party must identify, by affidavits or otherwise, specific facts showing that there is a genuine issue for trial. *Id.* Thus, to withstand a properly supported motion for summary judgment, the nonmoving party must identify specific facts and affirmative evidence that contradict those offered by the moving party. *Anderson,* 477 U.S. at 256-57. A party opposing summary judgment must do more than just rest upon mere allegations, general denials, or vague statements. *Saldana v. Kmart Corp.,* 260 F.3d 228, 232 (3d Cir. 2001).

B. Analysis

1. Count One-Fair Housing Act

This Court has already analyzed plaintiffs' Fair Housing Act claim substantively in the context of plaintiffs' motion for a preliminary injunction. That analysis was adopted in the Court's most recent Opinion, which converted defendants' motions to dismiss into ones for summary judgment. That analysis found that plaintiffs had not demonstrated that the redevelopment has had a disparate impact on a protected group, or that defendants did not have a legitimate interest in the redevelopment, or that no alternative course of action would have a lesser impact. Recognizing that plaintiffs' Fair Housing Act claim had only been considered in the context of a preliminary injunction, the Court afforded plaintiffs time to gather specific facts to show a genuine issue for trial on these issues. The Court now affirms its prior decision on plaintiffs' FHA claim because plaintiffs have not provided the requisite proof to take the issues to a jury.

As a preliminary matter, plaintiffs argue that they should be afforded time for discovery, and are prejudiced in their ability to oppose the converted motions because of the lack of discovery. Plaintiffs contend that they require a look into the defendants' state of mind and intentions, as well as documents that are only within the control of defendants and, thus, unavailable to plaintiffs. Without this information, plaintiffs argue that summary judgment is

premature, which is further evidenced by the fact that defendants have not even filed their answers to plaintiffs' complaint.

Although the Court recognizes the peculiar procedural history that has led to the resolution of summary judgment motions without the filing of answers or the undertaking of formal discovery, this is not a case where plaintiffs are neophytes filing an initial challenge to the Gardens redevelopment plan. Not only has there been extensive proceedings over two years in this Court, most of these issues have been thoroughly litigated in New Jersey state court over the course of several years preceding this case.[3] As pointed out by defendants, plaintiffs have already had the ability to obtain the information they seek through Open Public Records Act requests, as well as through the previous state court litigation. Further, much of the information is available by other means, including from the residents themselves or the Public Advocate, who undertook an investigation of the Township's relocation practices.[4]

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[3] The Court recognizes that the state court case was more narrow than this one, and the civil rights claims had been dismissed as unripe, but none of the discovery plaintiffs contend they need here to supplement the discovery from the state court litigation would save their otherwise deficient claims.

[4] In the Court's February 13, 2009 Opinion, the Court considered and referenced the Public Advocate's report, which was provided by plaintiffs pursuant to the Court's November 25, 2008 Order granting plaintiffs' request to supplement the record with the report.

Moreover, plaintiffs do not specifically identify what information defendants hold to support their claims, and instead request discovery generally, such as depositions of key officials in order to acquire testimony as to their intent to "rid [the Township] of a minority community." (Pomar Cert., Docket No. 106-41) ("Residents are severely prejudiced by being unable to probe, at a deposition, the attitudes, intent, and motives of the Township officials who made the critical decisions to pursue the Gardens redevelopment project."). Discovery, however, cannot serve as a fishing expedition through which plaintiffs search for evidence to support conclusory speculations. *Giovanelli v. D. Simmons General Contracting,* 2010 WL 988544, *5 (D.N.J. 2010). Further, such depositions may be barred by a privilege afforded to decision-making government officials. *See, e.g., U.S. v. Sensient Colors, Inc.,* 649 F. Supp. 2d 309, 316 (D.N.J. 2009).[5]

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[5] Indeed, in addressing the same argument by plaintiffs in the earlier state court litigation, Judge Sweeney explained,

> There are many reasons why discovery is the exception rather than the rule in actions such as this one. First, a public official's state of mind is rarely an issue and can usually be determined from the record below. There are transcripts, tapes, minutes and the like. Secondly, and no less important, is the consideration that members of the municipal governing bodies and local boards serve without significant remuneration. They would be far less likely to serve if their official actions frequently subjected them to the arduous discovery process. Interrogatories would have to be

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Overriding all these points with specific reference to plaintiffs' FHA claim, however, is that in order to prove their claim, none of the discovery plaintiffs claim they lack would save their allegations, as plaintiffs must present their own proof of disparate impact and a more-viable alternative. Stated several times before, Section 3604(a) of the Fair Housing Act makes it unlawful 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." 42 U.S.C. § 3604(a) (emphasis added). The FHA can be violated by either intentional discrimination or if a

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> answered and depositions attended after usual hours of public service. It would place a chilling effect on public service.
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> Here, I am convinced that the discovery sought would burden the officials involved to a degree that would be totally disproportionate to any usable information that could be recovered. Furthermore, there has already been one hearing in this matter. Although I limited plaintiffs to two expert witnesses, I also afforded them the right to call township officials to testify. They elected, for whatever reason, not to do so. Following that hearing, I determined that the designation of the Gardens as an area in need of redevelopment had substantial credible support in the record, was a designation made in accordance with statutory criteria, and I found no evidence of racial or ethnic bias or animus in the testimony of . . . the town planner.

(August 30, 2005 Opinion, L-3027-03, at 6-7, Def. Ex. A, Docket No. 84-3.)

practice has a disparate impact on a protected class. *Community Services, Inc. v. Wind Gap Mun. Authority,* 421 F.3d 170, 176 (3d Cir. 2005).

Plaintiffs here contend that the Gardens redevelopment plan has a disparate impact on the minorities living in the Gardens. In order to prove their claim, plaintiffs must first establish a prima facie case of disparate impact. *Resident Advisory Board v. Rizzo,* 564 F.2d 126, 148 (3d Cir. 1977). To show disparate impact, plaintiffs must show that the Township's actions have had a greater adverse impact on the protected groups (here, African-Americans and Hispanics) than on others. *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment of Tp. of Scotch Plains,* 284 F.3d 442, 466-67 (3d Cir. 2002).

If a plaintiff establishes his prima facie case, the burden shifts to the defendant to demonstrate justification. The "justification must serve, in theory and practice, a legitimate, bona fide interest of the Title VIII defendant, and the defendant must show that no other alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact." *Rizzo,* 564 F.2d at 149. Finally, "[i]f the defendant does introduce evidence that no such alternative course of action can be adopted, the burden will once again shift to the Plaintiff to demonstrate that other practices are available." *Id.* at 149 n.37. "If the Title VIII prima facie case is not rebutted, a violation is proved." *Id.* at 149.

Thus, it is plaintiffs' burden to show disparate impact, and if they do, it is their burden to rebut the Township's position[6] and demonstrate a more-viable alternative course of action. Plaintiffs have done neither.

To support disparate impact, plaintiffs argue that the redevelopment more negatively affects minorities in Mt. Holly than non-minority residents because the redevelopment is driving out the minority population of Mt. Holly. Plaintiffs also argue that the redevelopment plan has a disparate impact on minorities because the plan is targeted at an area that is populated by mostly minorities. To support their position, plaintiffs had previously presented a report of a demographic and statistical expert, Andrew A. Beveridge, Ph.D. Dr. Beveridge opined that the redevelopment of the Gardens effectively and significantly reduces the minority population in Mt. Holly.

The Court had rejected that proof. The Court explained,

> Even though plaintiffs have pointed out that the redevelopment of the Gardens has reduced the minority population of Mt. Holly, they have not accounted for how many

[6] In the October 23, 2009 Opinion, the Court found that the Township had already met its burden based on the record before the Court at that time. As explained more fully herein, plaintiffs' supplemental briefing does not demonstrate a material issue of fact regarding the Township's legitimate interest and alternative choices.

> minorities will move into the new housing. Furthermore, and more importantly for the plaintiffs' FHA claim of disparate impact, the redevelopment plan does not apply differently to minorities than non-minorities. Several plaintiffs classify themselves as "white," yet the plan affects them in the exact same way as their minority neighbors. The real effect of the Gardens redevelopment is that there will be less lower-income housing in Mt. Holly. Although the Township may have some obligation with regard to providing a certain number of low-income housing pursuant to other law, the reduction of low-income housing is not a violation of the FHA. The FHA prohibits the Township from making unavailable a dwelling to any person because of race – it does not speak to income. Redevelopment of blighted, low-income housing is not, without more, a violation of the FHA. Here, where fourteen homes are occupied by African-American plaintiffs, thirteen homes are occupied by Hispanic plaintiffs, and six homes are occupied by "white" plaintiffs, and all are affected in the same way by the redevelopment, the Court cannot find, on the current record at this preliminary injunction stage, that plaintiffs will succeed on their disparate impact FHA claim.

(Feb. 13, 2009 Op. at 7-8.)

In their opposition to the converted motions, plaintiffs present the same statistics, and further argue that there is disparate impact on minorities

because the displaced plaintiffs will not be able to afford the new $200,000+ homes, or the $1,300 to rent these same properties.[7] As explained before, however, if none of the plaintiffs can afford the new homes, it is not just the African-American and Hispanic plaintiffs who are impacted by the increased housing prices – it is all Gardens residents, including the Caucasian residents.[8] Additionally, as also explained before, plaintiffs have not demonstrated that the Township is preventing minorities from purchasing or moving into the new homes, or otherwise limiting the new residents to non-minorities. Plaintiffs have not provided any proof or statistics to suggest that the new homes created by the redevelopment will be financially out-of-reach for all or most minorities.[9]

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[7] Although 464 units will be market rate, 56 will be deed-restricted affordable housing units.

[8] Relatedly, plaintiffs argue that because a greater percentage of minority Township residents have been affected by the redevelopment they have demonstrated a disparate impact. Even if this statistic was sufficient to establish a prima facie case, plaintiffs' FHA claim fails for reasons other than the disparate impact analysis.

[9] Plaintiffs present statistics that only 21% of African-American and Hispanic households in Burlington County would be able to afford the new houses, because that percentage of African-American and Hispanic population earns above 80% of the median income ($44,580). (Bev. Cert., Ex. B-2, Docket No. 106-4.) This is in contrast to 79% of white Burlington County residents who earn above 80% of the median income. (*Id.*) These statistics hold little validity to show a disparate impact on the Township's minority population for several reasons: (1) they take into account the entire population of Burlington County, rather

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Furthermore, under plaintiffs' logic, any action by the Township to do anything with regard to the Gardens would result in a disparate impact, simply because of the racial composition of the Gardens. The FHA (or any other civil rights law) does not contemplate that a town will never be permitted to ameliorate a blighted area inhabited mainly by minorities simply because it will affect minorities. *See, e.g., City of Memphis v. Greene,* 451 U.S. 100, 128 (1981) ("Because urban neighborhoods are so frequently characterized by a common ethnic or racial heritage, a regulation's adverse impact on a particular neighborhood will often have a disparate effect on an identifiable ethnic or racial group. To regard an inevitable consequence of that kind as a form of stigma so severe as to violate the Thirteenth Amendment would trivialize the great purpose of that charter of freedom.").

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than only Mt. Holly Township, and the towns in Burlington County are of various economic and racial compositions; (2) they do not account for minorities who will move into Mt. Holly Township from outside Burlington County; (3) they do not account for the deed restricted units that will be more affordable; (4) they do not account for a non-minority purchaser who rents to a minority; (5) they do not account for the minorities who will move elsewhere within Mt. Holly Township; and (6) more recent population survey data (from 2008, compared to the 2000 Census data used by plaintiffs' expert) shows 16,744 African-American and Hispanic households in Burlington County have incomes exceeding $45,000, evidence of the minority population's ability to occupy all 464 market rate homes.

Finally, it is important to point out that none of the plaintiffs has been forced out of their homes by the Township without the offer of relocation services. The FHA makes it unlawful to otherwise make unavailable or deny a dwelling to any person because of race. The Township has advised the residents not to move until directed by the Township so that they will be eligible for relocation assistance. All plaintiffs, save for one who was told to leave by her landlord, are still residing in the Gardens. Thus, on this basis alone, plaintiffs' FHA claim fails.

But even if plaintiffs were able to establish their prima facie case, they have not rebutted the Township's legitimate interest in the redevelopment, and they have not shown how an alternative course of action would have a lesser impact. Plaintiffs cannot refute that redevelopment of the community to remove blight conditions is a bona fide interest of the state, as explained previously by this Court and by the New Jersey Appellate Division. (*See* Feb. 13, 2009 Op. at 9, citing *Wilson v. City of Long Branch,* 142 A.2d 837, 842 (N.J. 1958) ("Community redevelopment is a modern facet of municipal government. Soundly planned redevelopment can make the difference between continued stagnation and decline and a resurgence of healthy growth. It provides the means of removing the decadent effect of slums and blight on neighboring property values, of opening up new areas for residence and industry."); *Citizens In Action v. Township Of Mt. Holly,* 2007 WL 1930457, *13 (N.J. Super. Ct. App. Div. July 5, 2007) (finding that "[t]he

dilapidated, overcrowded, poorly designed community [the Gardens], in addition to the high level of crime in the area, is clearly detrimental to the safety, health, morals and welfare of the community").) It is clear that the Township has a legitimate interest in the redevelopment of the Gardens.

With regard to alternatives, plaintiffs have not identified disputed issues of fact concerning whether the Township failed to show "that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact." *Rizzo,* 564 F.2d at 149. The adequacy of the redevelopment plan, as opposed the rehabilitation plan advocated by Plaintiffs, was extensively analyzed in New Jersey state court. *See Citizens In Action v. Township Of Mt. Holly,* 2007 WL 1930457, 14 (N.J. Super. Ct. App. Div. 2007) (finding that "the redevelopment designation is based on a record that provides substantial evidence in support of the determination").[10]

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[10] Even though that analysis was performed in the context of plaintiffs' claims under New Jersey's Local Housing and Redevelopment Law, N.J.S.A. 40A:12A-1 to -73 (LHRL), the issue of the sufficiency of the 2005 redevelopment plan was extensively litigated. Thus, collateral estoppel principles may also apply. *See In re Graham,* 973 F.2d 1089, 1097 (3d Cir. 1992) (citations omitted) (explaining that issue preclusion applies when "(1) the issue sought to be precluded is the same as that involved in the prior action; (2) that issue was actually litigated; (3) it was determined by a final and valid judgment; and (4) the determination was essential to the prior judgment"). The Court,

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Plaintiffs have not presented any plan more viable than the one implemented by the Township.[11] They advocate rehabilitation, but have proposed a plan, as pointed out by defendants, that relies upon governmental subsidies and upon costs based on property conditions in 1989. It also does not take into account rehabilitation costs to rehab owner-occupied

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however, refrains from considering this issue because plaintiffs' FHA claim, which also concerns the 2008 revised redevelopment plan, was not litigated in state court.

[11] The Township has shown that several organizations have attempted to rehabilitate the Gardens in the last 15 or so years. These small scale efforts were ineffective in curing the overall blight of the community, which was a frustrating result for the organizations, the Township, and the residents. (*See* Sept. 8, 2003 Town Council meeting transcript at 25-26, 31-32, Def. Ex. B.). Plaintiffs argue that it is not their burden to prove a better alternative. Although it is true that the Township must show the other alternatives they considered and rejected, and that the alternative course of action could not "be adopted that would enable that interest to be served with less discriminatory impact," once that showing is made, the ultimate burden "once again shift[s] to the Plaintiff to demonstrate that other practices are available." *Rizzo,* 564 F.2d at 149. Thus, plaintiffs in this case have the obligation to show what alternatives would have better served the community. Of course, this analysis was intended to be performed after a finding of disparate impact, which causes this "alternative course of action" analysis to make more sense in that context – that is, if disparate impact is shown, the Township has the burden of showing it had no choice but to proceed in its chosen path despite the disparate impact. Here, where no disparate impact has been shown, this analysis devolves into plaintiffs' personal disagreement with the plan, and an argument as to what they believe to be the best course of action. The fact that the Township did not follow a plan sanctioned by the plaintiffs is not the standard for a FHA claim.

homes, which is an additional $2.5 million, and it does not account for temporary relocation costs.[12] Simply because the properties could have been rehabilitated does not mean that rehabilitation was the feasible option.[13]

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[12] Plaintiffs' residential planning expert, Gary Smith, AIA, AICP, relates in his updated certification that the Township is violating several building codes in its demolition process. The legality of how the Township is currently proceeding under its redevelopment plan is not before the Court. Mr. Smith also opines that the redevelopment plan should be halted, and redirected to save the existing housing stock for rehabilitation. As the Court commented before, however, "[e]ffectively, plaintiffs are seeking to remain living in the blighted and unsafe conditions until they are awarded money damages for their claims and sufficient compensation to secure housing in the local housing market. Although couched at times like an effort to have the development go up around them, like a highway built around a protected tree, or to have their units rehabilitated, this makes little if no practical sense after years of litigation, approved redevelopment plans, and the expenditure of significant public resources. At this late stage, the only real practical remedy is for plaintiffs to receive the fair value for their home as well as proper and non-discriminatory relocation procedures and benefits. . . . The relief they are seeking is inconsistent with proving the fourth element of their FHA claim – namely, that an alternative course of action to eminent domain and relocation is viable." (Feb. 9, 2009 Op. at 10-11.)

[13] The state appellate court commented,

> Photographic evidence reveals areas within the Gardens that are dilapidated. Additionally, there was testimony that there was overcrowding and excessive land coverage because of the way the units were arranged in blocks in fee simple ownership. Accordingly, a dilapidated home on one lot had a serious effect on homes on either side of it. Excessive land coverage

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In short, Plaintiffs have failed to show an impermissible disparate impact. Even if they have made such a showing, they have failed to offer sufficient evidence to rebut the Township's legitimate governmental purpose or demonstrate illegitimate discriminatory intent. Therefore, plaintiffs have not demonstrated that material disputed facts exist as to their FHA claim. Accordingly, summary judgment must be entered in favor of defendants on this claim.[14]

> was also evident where a majority of the rear yards were paved or covered with gravel to accommodate additional parking spaces. Finally, the alleyways created a faulty arrangement or design for the Gardens because it increased the amount of crime in the area. The dilapidated, overcrowded, poorly designed community, in addition to the high level of crime in the area, is clearly detrimental to the safety, health, morals and welfare of the community.

Citizens In Action v. Township of Mt. Holly, 2007 WL 1930457, *13 (N.J. Super. Ct. App. Div. 2007).

[14] Plaintiffs' FHA claim was lodged against all defendants, including the construction company selected to undertake the redevelopment, Keating Urban Partners, LLC, and the company hired by Keating to conduct the relocation activities, Triad Associates, Inc. In their previous motion to dismiss, Triad argued, and Keating joined in that argument, that it cannot be held liable under the FHA because it had no part in the drafting and adoption of the Township's redevelopment plan, and its actions with regard to the relocation activities do not fall within the province of the FHA-protected conduct. Because the Court has found no FHA violation, Triad's argument will not be considered.

2. Counts Two, Three, Five-Civil Rights Act and State and Federal Equal Protection Clause

Plaintiffs claim that the Township violated the Civil Rights Act of 1866, 42 U.S.C. § 1982, the Equal Protection Clause of the U.S. Constitution, brought pursuant to 42 U.S.C. § 1983, and the Equal Protection Clause of the New Jersey State Constitution. In order to prove such claims, plaintiffs must show that they were the target of intentional, purposeful discrimination by the Township. *City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation,* 538 U.S. 188, 194 (2003) (citation omitted) ("'Proof of racially discriminatory intent or purpose is required' to show a violation of the Equal Protection Clause."); *Bradley v. U.S.,* 299 F.3d 197, 205 (3d Cir. 2002) (stating that in order to establish a claim under the Equal Protection Clause, a plaintiff needs to prove that the actions (1) had a discriminatory effect and (2) were motivated by a discriminatory purpose); *Brown v. Philip Morris Inc.,* 250 F.3d 789, 797 (3d Cir. 2001) (citations and quotations omitted) ("In order to bring an action under § 1982, a plaintiff must allege with specificity facts sufficient to show or raise a plausible inference of (1) the defendant's racial animus; (2) intentional discrimination; and (3) that the defendant deprived plaintiff of his rights because of race."); *Greenberg v. Kimmelman,* 494 A.2d 294, 308 (N.J. 1985) (stating that if a law is facially neutral, "an equal protection claim could succeed only if the statute had an invidious purpose").

Plaintiffs claim that through the redevelopment plan the Township is intentionally seeking to deprive plaintiffs and other African-Americans and Hispanics of the right to property and equal protection under the law. In the Court's prior Opinion denying plaintiffs' request for preliminary injunction, the Court found that plaintiffs did not demonstrate that the Township "implemented the development plan to intentionally or effectively drive out the minority population of Mt. Holly." (Feb. 9, 2009 Op. at 7.) Thus, as with their FHA claim, the Township's motion to dismiss these claims was converted to one for summary judgment, and the Court afforded plaintiffs the opportunity to provide other proof to support their claims of intentional discrimination.

In their response, plaintiffs have failed to provide such proof. As discussed above, plaintiffs first argue that summary judgment is premature, because their ability to prove these intentional discrimination claims is thwarted by the lack of discovery – namely, the depositions of Township officials. As also discussed above, however, even if such depositions were permitted, the Court doubts that any Township official will testify to his or her "discriminatory purpose" in approving the redevelopment plan. *See, e.g., Smith v. Town of Clarkton, N.C.,* 682 F.2d 1055, 1064-65 (4th Cir. 1982) (in an FHA case, stating, "Municipal officials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority. Even individuals

acting from invidious motivations realize the unattractiveness of their prejudices when faced with their perpetuation in the public record. It is only in private conversation, with individuals assumed to share their bigotry, that open statements of discrimination are made, so it is rare that these statements can be captured for purposes of proving racial discrimination in a case such as this.").

With regard to other methods for proving discriminatory intent, plaintiffs have had years to gather such proof, including obtaining affidavits from Gardens residents or other people who have been involved in the Gardens redevelopment process. Instead, plaintiffs' brief details the Township's alleged discriminatory actions, but none of the claims are supported by any documentary or other evidence.[15]

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[15] Several affidavits by plaintiffs were submitted in support of their motion for preliminary injunction. In their brief, plaintiffs specifically refer to one of them by Santos Cruz to support the claim that the Township's redevelopment activities lowered the property values of the remaining homes, and the Township took advantage of that situation by pressuring residents to sell their homes at deflated prices that did not represent fair market value. (Pl. Opp. at 31.) This conclusion is based on Mr. Cruz's "belief." (Cruz Cert., Docket No. 17-9 ("I believe the houses are worth much more than the Township is offering.") The other affidavits by plaintiffs in the record contain similar statements as to their "beliefs" and "feelings." *See* Ancho Cert., Docket No. 17-7, ¶ 18, "I believe that my home is worth much more than that [$39,000 to $42,000 offered to others] because we invested a great amount of money to make it comfortable for our retirement"); Simons Cert., Docket No. 17-10, ¶ 14, "I believe my house is worth a great deal more than what the Township is

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Rather, plaintiffs tell a story, long on accusations and suppositions but short on proof, of the Township's ten-year, insidious desire to displace the minority population of Mt. Holly. If there were merit to these claims, plaintiffs would be able to annotate their allegations with factual evidence that would infer such discriminatory motive.[16] They have not done so. *See Village of*

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offering me," because it has three bedrooms, a large lot, and it has undergone "costly upgrades.") These affidavits are insufficient to defeat a summary judgment motion. *Celotex,* 477 U.S. at 332 ("[C]onclusory, self-serving affidavits are insufficient to withstand a motion for summary judgment. Instead, the affiant must set forth specific facts that reveal a genuine issue of material fact.").

Incidentally, these affidavits relate the plaintiffs' extensive participation in numerous meetings with the Township and the builders over the years.

[16] For example, plaintiffs state that "the Township failed to provide adequate compensation and relocation assistance to enable residents to purchase a replacement house in the Township or surrounding region." (Pl. Opp. at 38.) In the Court's prior Opinion, however, the Court noted, "The evidence on the record shows that other Garden residents whose homes have been acquired by the Township and have been relocated are pleased with both their compensation and place of relocation. In fact, the evidence demonstrates that many residents now have significantly improved living conditions and are in better circumstances financially. Additionally, the defendants represent, and plaintiffs do not dispute, that none of the people who have been relocated and wanted to remain in Mt. Holly were unable to." (Feb. 9, 2009 Op. at 12 n.5.) Moreover, it is an undisputed fact that New Jersey statute only requires the Township to pay $4,000 in relocation benefits to tenants, and $15,000 in relocation benefits to homeowners, but the Township has paid $7,500 to tenants and $35,000 to homeowners. (*See* Def. Statement of Facts, ¶ 23, at 31.)

Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266-67 (1977) (explaining that the determination as to "whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," and identifying objective factors that may be probative of racially discriminatory intent: (1) the racial impact of an official action; (2) the historical background of the decision; (3) the sequence of events leading up to the challenged decision, including departures from normal procedures and usual substantive norms; and (4) the legislative or administrative history of the decision).

In contrast, the Township provides transcripts of town council and planning board meetings, where concerned citizens and council members discussed the plans for the Gardens. The Township has also provided letters and affidavits from former Gardens residents, as well as certifications from individuals involved with the redevelopment plan implementation and relocation process. These documents range in date from 2002 through early 2010. The documents show that from the very beginning, the planning board was aware of the sensitive issues that would arise as they undertook the process, the desire to have direct communication with Gardens' residents, and the Township's consideration of the residents' concerns. (*See, e.g.,* Sept. 8, 2003 Town Council meeting transcript at 36-44, Def Ex. B.) Although many viewpoints were expressed by the Gardens' residents

and community activists, with some being supportive and hopeful, while other disenfranchised residents speaking emphatically and eloquently on their negative opinion on the redevelopment plan, their input was welcomed and encouraged.[17]

Furthermore, nowhere in plaintiffs' recitation of the Township's motives do plaintiffs specifically acknowledge the extensive deterioration, crime, and overall unsafe living conditions the Township was endeavoring to cure. Although plaintiffs feel that the Township simply wishes to remove all minorities from the town, evidence in the record supports an opposing viewpoint – that but-for the significant concern for the Gardens' resident's welfare, and the desire to make the Township as a whole a safe and pleasant town for all of its citizens, minority and non-minority,

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[17] Plaintiffs refer to the Township's "secret," off-the-record meetings among Township officials and the redevelopers where decisions were made without input from the community, and where they presume the true discriminatory intent of the Township was revealed. Although "New Jersey has a strong, expressed public policy in favor of open government, as evidenced by our Open Public Meetings Act, N.J.S.A. 10:4-6 to -21," *Times of Trenton Pub. Corp. v. Lafayette Yard Community Development Corp.,* 874 A.2d 1064, 1070 (N.J. 2005) (citation omitted), the OPMA sets forth specific instances where closed-door sessions are appropriate, *see* N.J.S.A. 10:4-12, -13. It is unclear whether these alleged "secret" meetings met the requirements of New Jersey's OPMA. The Township's compliance with OPMA is not before the Court, however, and plaintiffs' allegations concerning these meetings as evidence of discriminatory intent are speculative, and, therefore, of insufficient weight to defeat summary judgment.

the Township would have never undertaken the long-overdue project, particularly considering the challenges that the redevelopment would, and did, inspire.[18] Additionally, as noted above and previously, evidence in the record shows that many relocated residents have been pleased with the process, and are now in a much better place as a result.

It also cannot be forgotten that the redevelopment plan has gone through three machinations, from the Gardens Area Redevelopment Plan ("GARP") in 2003, to the West Rancocas Redevelopment Plan ("WRRP") in 2005, and then to the Revised West Rancocas Redevelopment Plan in September 2008. For each of these plans, the Township Council and the builder heard extensive public comment, testimony, and written objections (as intricately detailed in plaintiffs' complaint), and even though the 2005 WRRP was approved by the New Jersey Department of Community Affairs and affirmed by the New Jersey state trial and appellate courts, the Township and redevelopers conducted a reevaluation of the plan which resulted in the 2008 Revised WRRP. Despite plaintiffs' claims that all the plans were adopted without meaningful consideration of the residents' objections, it seems specious to believe that

[18] It seems that plaintiffs could not dispute the ironic observation that if the Township had allowed the Gardens to continue to deteriorate as it had over the years, that it might then be fairly characterized as having a discriminatory intent toward its minority, low-income residents.

the Township extensively reevaluated and revised its plans while entertaining numerous opportunities for public comment and objection simply as a ruse to mask its ultimate purpose of "ridding" Mt. Holly of its minority population.

The Court acknowledges that for every governmental action, people will object, for personal reasons, or as a champion for those who cannot speak out for themselves. The Court also acknowledges that governing officials are often not the most efficient or pragmatic in their decision-making process. When people's homes are at stake, and when issues concerning race and economic status are involved, the emotions of everyone are amplified. This is evidenced not only by the 10-year litigation concerning the Gardens' redevelopment, but by the voices of the residents who have expressed the extremes of satisfaction and displeasure with the plan. In addition to the people who feel benefitted by the Township, it is undisputable that people have felt unjustifiably wronged by the Township, which has had to make some hard decisions along the way.

The Court, however, must view the case under the legal framework that constrains this Court's consideration of these issues, rather than under the emotional contours of the situation. At this summary judgment stage in the context of what proof has been provided, and in deciding what material issues of fact need to be resolved, the weight of the record evidence demonstrates that no reasonable juror could find that the Township acted with intentional discrimination in

the development and implementation of the Gardens' redevelopment plan. Moreover, no additional discovery appears calculated or even remotely likely to provide the missing proofs. Consequently, summary judgment must be entered in favor of the Township on plaintiffs' intentional discrimination claims.

3. Punitive damage claims

Plaintiffs are also seeking punitive damages for all of their claims. The Township had moved to dismiss plaintiffs' request for punitive damages, arguing that under various legal principles, punitive damages cannot be imposed against a municipality. In the Court's previous Opinion, all of plaintiffs' punitive damages requests were dismissed, except for those relating to plaintiffs' FHA and Civil Rights Act claims (Counts One and Two). The Court reserved decision on these two claims pending consideration of the converted motions.

Even though "punitive damages can be awarded in a civil rights case where a jury finds a constitutional violation, even when the jury has not awarded compensatory or nominal damages," *Alexander v. Riga,* 208 F.3d 419, 430 (3d Cir. 2000) (citing *Curtis v. Loether,* 415 U.S. 189 (1974)) (both discussing FHA claims), a finding of a violation is a mandatory prerequisite to any possibility of punitive damages. Because the Court has not found defendants to be

liable for plaintiffs' FHA and civil rights claims, plaintiffs' punitive damages claims fail as well.[19]

CONCLUSION

For the reasons expressed above, defendants' converted motions for summary judgment shall be granted on the four remaining claims in plaintiffs' complaint. An appropriate Order will be entered.

Date: January 3, 2011 /s/ Noel L. Hillman
NOEL L. HILLMAN,
At Camden, New Jersey U.S.D.J.

[19] For punitive damages, plaintiffs would also need to prove that defendants' "'conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.'" *Alexander v. Riga,* 208 F.3d 419, 430 (3d Cir. 2000) (quoting *Smith v. Wade,* 461 U.S. 30, 56 (1983)). Plaintiffs cannot make this showing.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MT HOLLY CITIZENS IN ACTION, INC., et al., Plaintiffs, v. TOWNSHIP OF MOUNT HOLLY, et al., Defendants.	Civil Action No. **08-2584 (NLH) (JS)** **ORDER** (Filed Jan. 3, 2011)

For the reasons expressed in the Court's Opinion filed today,

IT IS HEREBY on this 3rd day of January, 2011

ORDERED that defendants' converted motions for summary judgment [74, 84, 86, 112] are GRANTED; and it is further

ORDERED the Clerk of the Court shall mark this matter as CLOSED.

/s/ Noel L. Hillman
At Camden, New Jersey NOEL L. HILLMAN, U.S.D.J.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11-1159

MT. HOLLY GARDENS CITIZENS IN ACTION, INC., a New Jersey non-profit corporation; PEDRO AROCHO; REYNALDO AROCHO; ANA AROCHO; CHRISTINE BARNES; BERNICE CAGLE; LEON CALHOUN; GEORGE CHAMBERS; DOROTHY CHAMBERS; SANTOS CRUZ; ELIDA ECHEVARIA; NORMAN HARRIS; MATTIE HOWELL; NANCY LOPEZ; VINCENT MUNOZ; ELMIRA NIXON; LEONARDO PAGAN; ROSEMARY ROBERTS; WILLIAM ROBERTS; EFRAIM ROMERO; HENRY SIMONS; JOYCE STARLING; TAISHA TIRADO; VIVIAN BROOKS; ANGELO NIEVES; DOLORES NIXON; ROBERT TIGAR; JAMES POTTER; RADAMES TORRES-BURGOS; LILLIAN TORRES-MORENO; DAGMAR VICENTE; CHARLIE MAE WILSON; LEONA WRIGHT; MARIA AROCHO; PHYLLIS SINGLETON; FLAVIO TOBAR; MARLENE TOBAR; SHEILA WARTHEN; ALADIA WARTHEN,
Appellants,

v.

TOWNSHIP OF MOUNT HOLLY, a municipal corporation of the State of New Jersey; TOWNSHIP COUNCIL OF TOWNSHIP OF MOUNT HOLLY, as governing body of the Township of Mount Holly; KATHLEEN HOFFMAN, as Township Manager of the Township of Mount Holly; KEATING URBAN

PARTNERS L.L.C., a company doing business in New Jersey; TRIAD ASSOCIATES, INC., a corporation doing business in New Jersey; JULES K. THIESSEN, as Mayor of the Township of Mount Holly.

SUR PETITION FOR REHEARING EN BANC

(Filed Mar. 13, 2012)

Present: McKEE, *Chief Judge*, SLOVITER, SCIRICA, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR. and VANASKIE, *Circuit Judges*

The Petition for Rehearing En Banc filed by the Appellees in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the Petition for Rehearing by the Court en banc, is hereby DENIED.

BY THE COURT,

/s/ Julio M. Fuentes
Circuit Judge

DATED: March 13, 2012

APPENDIX F

N.J.S.A. 40A:12A-5. Conditions within delineated area establishing need for redevelopment

Effective: July 9, 2003

A delineated area may be determined to be in need of redevelopment if, after investigation, notice and hearing as provided in section 6 of P.L.1992, c. 79 (C.40A:12A-6), the governing body of the municipality by resolution concludes that within the delineated area any of the following conditions is found:

a. The generality of buildings are substandard, unsafe, unsanitary, dilapidated, or obsolescent, or possess any of such characteristics, or are so lacking in light, air, or space, as to be conducive to unwholesome living or working conditions.

b. The discontinuance of the use of buildings previously used for commercial, manufacturing, or industrial purposes; the abandonment of such buildings; or the same being allowed to fall into so great a state of disrepair as to be untenantable.

c. Land that is owned by the municipality, the county, a local housing authority, redevelopment agency or redevelopment entity, or unimproved vacant land that has remained so for a period of ten years prior to adoption of the resolution, and that by reason of its location, remoteness, lack of means of access to developed sections or portions of the municipality, or topography, or nature of the soil, is not likely to be

developed through the instrumentality of private capital.

d. Areas with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community.

e. A growing lack or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real property therein or other conditions, resulting in a stagnant or not fully productive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare.

f. Areas, in excess of five contiguous acres, whereon buildings or improvements have been destroyed, consumed by fire, demolished or altered by the action of storm, fire, cyclone, tornado, earthquake or other casualty in such a way that the aggregate assessed value of the area has been materially depreciated.

g. In any municipality in which an enterprise zone has been designated pursuant to the "New Jersey Urban Enterprise Zones Act," P.L.1983, c. 303 (C.52:27H-60 et seq.) the execution of the actions prescribed in that act for the adoption by the municipality and approval by the New Jersey Urban Enterprise Zone Authority of the zone development plan for the area

of the enterprise zone shall be considered sufficient for the determination that the area is in need of redevelopment pursuant to sections 5 and 6 of P.L.1992, c. 79 (C.40A:12A-5 and 40A:12A-6) for the purpose of granting tax exemptions within the enterprise zone district pursuant to the provisions of P.L.1991, c. 431 (C.40A:20-1 et seq.) or the adoption of a tax abatement and exemption ordinance pursuant to the provisions of P.L.1991, c. 441 (C.40A:21-1 et seq.). The municipality shall not utilize any other redevelopment powers within the urban enterprise zone unless the municipal governing body and planning board have also taken the actions and fulfilled the requirements prescribed in P.L.1992, c. 79 (C.40A:12A-1 et al.) for determining that the area is in need of redevelopment or an area in need of rehabilitation and the municipal governing body has adopted a redevelopment plan ordinance including the area of the enterprise zone.

h. The designation of the delineated area is consistent with smart growth planning principles adopted pursuant to law or regulation.

N.J.S.A. 40A:12A-6. Preliminary investigation by planning board; notice; hearing; determination of redevelopment area; review; redevelopment area deemed blighted area

Effective: July 9, 2003

a. No area of a municipality shall be determined a redevelopment area unless the governing body of the municipality shall, by resolution, authorize the planning board to undertake a preliminary investigation to determine whether the proposed area is a redevelopment area according to the criteria set forth in section 5 of P.L.1992, c. 79 (C.40A:12A-5). Such determination shall be made after public notice and public hearing as provided in subsection b. of this section. The governing body of a municipality shall assign the conduct of the investigation and hearing to the planning board of the municipality.

a. (1) Before proceeding to a public hearing on the matter, the planning board shall prepare a map showing the boundaries of the proposed redevelopment area and the location of the various parcels of property included therein. There shall be appended to the map a statement setting forth the basis for the investigation.

(2) The planning board shall specify a date for and give notice of a hearing for the purpose of hearing persons who are interested in or would be affected by a determination that the delineated area is a redevelopment area.

(3) The hearing notice shall set forth the general boundaries of the area to be investigated and state that a map has been prepared and can be inspected at the office of the municipal clerk. A copy of the notice shall be published in a newspaper of general circulation in the municipality once each week for two consecutive weeks, and the last publication shall be not less than ten days prior to the date set for the hearing. A copy of the notice shall be mailed at least ten days prior to the date set for the hearing to the last owner, if any, of each parcel of property within the area according to the assessment records of the municipality. A notice shall also be sent to all persons at their last known address, if any, whose names are noted on the assessment records as claimants of an interest in any such parcel. The assessor of the municipality shall make a notation upon the records when requested to do so by any person claiming to have an interest in any parcel of property in the municipality. The notice shall be published and mailed by the municipal clerk, or by such clerk or official as the planning board shall otherwise designate. Failure to mail any such notice shall not invalidate the investigation or determination thereon.

(4) At the hearing, which may be adjourned from time to time, the planning board shall hear all persons who are interested in or would be affected by a determination that the delineated area is a redevelopment area. All objections to such a determination and evidence in support of those objections, given

orally or in writing, shall be received and considered and made part of the public record.

(5) After completing its hearing on this matter, the planning board shall recommend that the delineated area, or any part thereof, be determined, or not be determined, by the municipal governing body to be a redevelopment area. After receiving the recommendation of the planning board, the municipal governing body may adopt a resolution determining that the delineated area, or any part thereof, is a redevelopment area. Upon the adoption of a resolution, the clerk of the municipality shall, forthwith, transmit a copy of the resolution to the Commissioner of Community Affairs for review. If the area in need of redevelopment is not situated in an area in which development or redevelopment is to be encouraged pursuant to any State law or regulation promulgated pursuant thereto, the determination shall not take effect without first receiving the review and the approval of the commissioner. If the commissioner does not issue an approval or disapproval within 30 calendar days of transmittal by the clerk, the determination shall be deemed to be approved. If the area in need of redevelopment is situated in an area in which development or redevelopment is to be encouraged pursuant to any State law or regulation promulgated pursuant thereto, then the determination shall take effect after the clerk has transmitted a copy of the resolution to the commissioner. The determination, if supported by substantial evidence and, if required, approved by the commissioner, shall be

binding and conclusive upon all persons affected by the determination. Notice of the determination shall be served, within 10 days after the determination, upon each person who filed a written objection thereto and stated, in or upon the written submission, an address to which notice of determination may be sent.

(6) If written objections were filed in connection with the hearing, the municipality shall, for 45 days next following its determination to which the objections were filed, take no further action to acquire any property by condemnation within the redevelopment area.

(7) If a person who filed a written objection to a determination by the municipality pursuant to this subsection shall, within 45 days after the adoption by the municipality of the determination to which the person objected, apply to the Superior Court, the court may grant further review of the determination by procedure in lieu of prerogative writ; and in any such action the court may make any incidental order that it deems proper.

c. An area determined to be in need of redevelopment pursuant to this section shall be deemed to be a "blighted area" for the purposes of Article VIII, Section III, paragraph 1 of the Constitution. If an area is determined to be a redevelopment area and a redevelopment plan is adopted for that area in accordance with the provisions of this act, the municipality is

authorized to utilize all those powers provided in section 8 of P.L.1992, c. 79 (C.40A:12A-8).

N.J.S.A. 40A:12A-7. Redevelopment plan; contents; report and recommendation of planning board; preparation of plan by planning board; amendment or revision by governing body

Effective: July 17, 2008

a. No redevelopment project shall be undertaken or carried out except in accordance with a redevelopment plan adopted by ordinance of the municipal governing body, upon its finding that the specifically delineated project area is located in an area in need of redevelopment or in an area in need of rehabilitation, or in both, according to criteria set forth in section 5 or section 14 of P.L.1992, c. 79 (C.40A:12A-5 or 40A:12A-14), as appropriate.

The redevelopment plan shall include an outline for the planning, development, redevelopment, or rehabilitation of the project area sufficient to indicate:

(1) Its relationship to definite local objectives as to appropriate land uses, density of population, and improved traffic and public transportation, public utilities, recreational and community facilities and other public improvements.

(2) Proposed land uses and building requirements in the project area.

(3) Adequate provision for the temporary and permanent relocation, as necessary, of residents in the project area, including an estimate of the extent to which decent, safe and sanitary dwelling units affordable to displaced residents will be available to them in the existing local housing market.

(4) An identification of any property within the redevelopment area which is proposed to be acquired in accordance with the redevelopment plan.

(5) Any significant relationship of the redevelopment plan to (a) the master plans of contiguous municipalities, (b) the master plan of the county in which the municipality is located, and (c) the State Development and Redevelopment Plan adopted pursuant to the "State Planning Act," P.L.1985, c. 398 (C.52:18A-196 et al.).

(6) As of the date of the adoption of the resolution finding the area to be in need of redevelopment, an inventory of all housing units affordable to low and moderate income households, as defined pursuant to section 4 of P.L.1985, c. 222 (C.52:27D-304), that are to be removed as a result of implementation of the redevelopment plan, whether as a result of subsidies or market conditions, listed by affordability level, number of bedrooms, and tenure.

(7) A plan for the provision, through new construction or substantial rehabilitation of one comparable, affordable replacement housing unit for each affordable housing unit that has been occupied at any time within the last 18 months, that is subject

to affordability controls and that is identified as to be removed as a result of implementation of the redevelopment plan. Displaced residents of housing units provided under any State or federal housing subsidy program, or pursuant to the "Fair Housing Act," P.L.1985, c. 222 (C.52:27D-301 et al.), provided they are deemed to be eligible, shall have first priority for those replacement units provided under the plan; provided that any such replacement unit shall not be credited against a prospective municipal obligation under the "Fair Housing Act," P.L.1985, c. 222 (C.52:27D-301 et al.), if the housing unit which is removed had previously been credited toward satisfying the municipal fair share obligation. To the extent reasonably feasible, replacement housing shall be provided within or in close proximity to the redevelopment area. A municipality shall report annually to the Department of Community Affairs on its progress in implementing the plan for provision of comparable, affordable replacement housing required pursuant to this section.

b. A redevelopment plan may include the provision of affordable housing in accordance with the "Fair Housing Act," P.L.1985, c. 222 (C.52:27D-301 et al.) and the housing element of the municipal master plan.

c. The redevelopment plan shall describe its relationship to pertinent municipal development regulations as defined in the "Municipal Land Use Law," P.L.1975, c. 291 (C.40:55D-1 et seq.). The redevelopment plan shall supersede applicable provisions of

the development regulations of the municipality or constitute an overlay zoning district within the redevelopment area. When the redevelopment plan supersedes any provision of the development regulations, the ordinance adopting the redevelopment plan shall contain an explicit amendment to the zoning district map included in the zoning ordinance. The zoning district map as amended shall indicate the redevelopment area to which the redevelopment plan applies. Notwithstanding the provisions of the "Municipal Land Use Law," P.L.1975, c. 291 (C.40:55D-1 et seq.) or of other law, no notice beyond that required for adoption of ordinances by the municipality shall be required for the hearing on or adoption of the redevelopment plan or subsequent amendments thereof.

d. All provisions of the redevelopment plan shall be either substantially consistent with the municipal master plan or designed to effectuate the master plan; but the municipal governing body may adopt a redevelopment plan which is inconsistent with or not designed to effectuate the master plan by affirmative vote of a majority of its full authorized membership with the reasons for so acting set forth in the redevelopment plan.

e. Prior to the adoption of a redevelopment plan, or revision or amendment thereto, the planning board shall transmit to the governing body, within 45 days after referral, a report containing its recommendation concerning the redevelopment plan. This report shall include an identification of any provisions in the

proposed redevelopment plan which are inconsistent with the master plan and recommendations concerning these inconsistencies and any other matters as the board deems appropriate. The governing body, when considering the adoption of a redevelopment plan or revision or amendment thereof, shall review the report of the planning board and may approve or disapprove or change any recommendation by a vote of a majority of its full authorized membership and shall record in its minutes the reasons for not following the recommendations. Failure of the planning board to transmit its report within the required 45 days shall relieve the governing body from the requirements of this subsection with regard to the pertinent proposed redevelopment plan or revision or amendment thereof. Nothing in this subsection shall diminish the applicability of the provisions of subsection d. of this section with respect to any redevelopment plan or revision or amendment thereof.

f. The governing body of a municipality may direct the planning board to prepare a redevelopment plan or an amendment or revision to a redevelopment plan for a designated redevelopment area. After completing the redevelopment plan, the planning board shall transmit the proposed plan to the governing body for its adoption. The governing body, when considering the proposed plan, may amend or revise any portion of the proposed redevelopment plan by an affirmative vote of the majority of its full authorized membership and shall record in its minutes the reasons for each amendment or revision. When a redevelopment plan

or amendment to a redevelopment plan is referred to the governing body by the planning board under this subsection, the governing body shall be relieved of the referral requirements of subsection e. of this section.

APPENDIX G

[Nonrelevant Data Omitted]

Table DP-1. Profile of General Demographic Characteristics: 2010

Geographic area:
Mount Holly township State:34 County:005

Subject	Number	Percent
Total Population	9,536	100.0
* * *		
RACE		
One race	9,047	94.9
White	6,253	65.6
Black or African American	2,203	23.1
American Indian and Alaska Native	35	0.4
Asian	140	1.5
Asian Indian	29	0.3
Chinese	18	0.2
Filipino	25	0.3
Japanese	7	0.1
Korean	28	0.3
Vietnamese	8	0.1
Other Asian[1]	25	0.3
Native Hawaiian and Other Pacific Islander	7	0.1
Native Hawaiian	4	0.0
Guamanian or Chamorro	1	0.0
Samoan	2	0.0
Other Pacific Islander[2]	0	0.0

[1] Other Asian alone, or two or more Asian categories

Some other race	409	4.3
Two or more races	489	5.1
Race alone or in combination with one or more other races:[3]		
White	6,645	69.7
Black or African American	2,543	26.7
American Indian and Alaska Native	155	1.6
Asian	231	2.4
Native Hawaiian and Other Pacific Islander	24	0.3
Some other race	496	5.2
HISPANIC OR LATINO AND RACE		
Total Population	9,536	100.0
Hispanic or Latino (of any race)	1,210	12.7
Mexican	137	1.4
Puerto Rican	749	7.9
Cuban	25	0.3
Other Hispanic or Latino	299	3.1
Not Hispanic or Latino	8,326	87.3
White alone	5,731	60.1

* * *

Source: US Bureau of the Census, 2010 Census of Population and Housing

[2] Other Pacific Islander alone, or two or more Native Hawaiian and Other Pacific Islander categories

[3] In combination with one or more of the other races listed. The following six numbers may add to more than the total population because individuals may report more than one race

Prepared by the New Jersey Department of Labor and Workforce Development, Division of Labor Market & Demographic Research, May 2011