No. 11-1159

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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

Plaintiffs-Appellants

v.

TOWNSHIP OF MOUNT HOLLY, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

STATUTES:

STATUTES (continued): **PAGE**

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INTEREST OF THE UNITED STATES

The United States Department of Justice and the United States Department of Housing and Urban Development (HUD) share enforcement authority under the Fair Housing Act (FHA). 42 U.S.C. 3614(d), 3612(a) & (o). The Department of Justice and HUD frequently bring cases alleging disparate impact claims. See, *e.g.*, *United States* v. *AIG Fed. Sav. Bank*, No. 10-178 (D. Del.) (order granting unopposed motion for entry of consent order entered on March 19, 2010); *Mountain Side Mobile Estates P'ship* v. *Secretary of Hous. & Urban Dev.*, 56 F.3d

1243, 1251 (10th Cir. 1995); *United States* v. *City of Black Jack*, 508 F.2d 1179, 1186 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975). This Court's resolution of the question presented regarding the standards for establishing a prima facie case of disparate impact will likely affect the Justice Department's and HUD's enforcement responsibilities under the FHA.

STATEMENT OF THE ISSUE

Whether the district court erred in concluding, on summary judgment, that plaintiffs failed to state a prima facie case of disparate impact discrimination because they did not show that the challenged redevelopment would be unaffordable for "all or most" of the township's minority households, and because there were enough middle-income minority households in the county to theoretically occupy all of the proposed higher-priced housing.[1]

STATEMENT OF THE CASE

Plaintiffs, residents of the Mount Holly Gardens neighborhood in Mount Holly, New Jersey, sued to stop the township's redevelopment of their neighborhood. R. 73 (Second Amended Complaint); R. 114 at 2, App. 5 (Jan. 3,

[1] The United States takes no position on the other issues presented in this appeal.

2011 Opinion).[2] They alleged that the redevelopment, which would replace their homes with higher-priced housing, would have a disparate impact on the mostly-minority residents and violate the Fair Housing Act. Plaintiffs also brought claims under 42 U.S.C. 1982, 42 U.S.C. 1983, and state law. R. 114 at 3, App. 6 (Jan. 3, 2011 Opinion). They sought injunctive relief and compensatory and punitive damages. R. 73 at 52 (Second Amended Complaint). In addition to the federal case, there were several years of litigation in state courts. R. 73 at 3 (Second Amended Complaint); R. 114 at 6-7, App. 9-10 (Jan. 3, 2011 Opinion). The state courts upheld the township's designation of the Gardens neighborhood as blighted and "in need of redevelopment," but those courts did not address the plaintiffs' Fair Housing Act claims. See R. 73 at 3 (Second Amended Complaint).

The district court conducted several hearings over two years, denied a temporary restraining order and preliminary injunction, and issued several opinions. R. 114 at 2. n.1, App. 5 (Jan. 3, 2011 Opinion). Parties were not allowed formal discovery. R. 114 at 6, App. 9 (Jan. 3, 2011 Opinion). Finally, the district court converted defendants' motion to dismiss to a motion for summary

[2] "R. __" refers to documents filed in the district court, identified by docket number. "App. __" refers to pages in the Appellants' appendix, volume 1, attached to their opening brief. Subsequent volumes of the appendix were not available to amicus.

judgment, took supplemental briefing, and granted the motion. R. 114 at 2-3, App. 5-6 (Jan. 3, 2011 Opinion).

STATEMENT OF THE FACTS

1. Facts And Procedural History

There were roughly 330 homes in the 30-acre Mount Holly Gardens neighborhood. R. 17-3 at 8 (Beveridge Decl.); R. 73 at 2, 11 (Second Amended Complaint); R. 106-1 at 2 (Responding Statement of Facts). About half the neighborhood's residents were homeowners in 2000. R. 73 at 13 (Second Amended Complaint); R. 106-1 at 6 (Responding Statement of Facts). Almost all residents have very low or extremely low incomes, defined as less than 50% or 30% of the area median income, respectively. R. 17-3 at 9 (Beveridge Decl.). Defendants began purchasing homes as early as 2002, and by 2008 had already purchased, vacated, and boarded up more than 200 homes. R. 73 at. 3, 24 (Second Amended Complaint). They had demolished more than 70. R. 17-3 at 8 (Beveridge Decl.); R. 73 at 25 (Second Amended Complaint).

Redevelopment would substantially increase housing costs in the neighborhood. See R. 73 at 14, 34 (Second Amended Complaint). Indeed, nearly all Gardens residents could not afford to purchase or rent market-rate homes in the redeveloped area. R. 73 at 14 (Second Amended Complaint); R. 94 at 11 n.4 (Feb. 13, 2009 Opinion); R. 106-1 at 42 (Responding Statement of Facts); R. 112 at 38-

40 (Def. Summ. J. Br.). The township pays between $32,000 and $49,000 for each home it buys in the Gardens. R. 73 at 24 (Second Amended Complaint); R. 106-1 at 34 (Responding Statement of Facts). Redevelopment plans call for 464 homes selling for between $200,000 and $275,000. R. 73 at 34 (Second Amended Complaint); R. 106-1 at 41-42 (Responding Statement of Facts). A one-bedroom apartment will rent for more than $1200 per month. R. 73 at 34 (Second Amended Complaint); R. 106-1 at 41-42 (Responding Statement of Facts). There will also be 56 deed-restricted, affordable units, but these will not be affordable for very low income residents. R. 73 at 34 (Second Amended Complaint); R. 114 at 12 n.7, App. 15 (Jan. 3, 2011 Opinion).

Plaintiffs presented expert evidence that the redevelopment in the Gardens would greatly impact the minority population of Mount Holly. R. 17-3 at 16 (Beveridge Decl.). Mount Holly is 66% white, 21% African-American, and 9% Hispanic. R. 17-3 at 13 (Beveridge Decl.); R. 73 at 12 (Second Amended Complaint); R. 106-1 at 4 (Responding Statement of Facts). It has a population of more than 10,700. R. 17-3 at 13 (Beveridge Decl.). Burlington County is, overall, 76% white, 15% African-American, and 4% Hispanic. R. 17-3 at 13 (Beveridge Decl.); R. 73 at 12-13 (Second Amended Complaint); R. 106-1 at 3 (Responding Statement of Facts). The population is very different, however, within the census blocks containing the Gardens neighborhood. The population is 20% white, 46%

African-American, and 29% Hispanic. R. 17-3 at 14 (Beveridge Decl.); R. 73 at 12 (Second Amended Complaint); R. 106-1 at 4 (Responding Statement of Facts). The neighborhood accounts for 32% of Mount Holly's entire Hispanic population and 21% of the township's entire African-American population. But only 3% of the township's white residents live there. R. 106-1 at 5 (Responding Statement of Facts). It contains the highest percentage of African-American and Hispanic residents of any neighborhood in the township. R. 73 at 12 (Second Amended Complaint); R. 106-1 at 5 (Responding Statement of Facts). Seventy-five percent of the neighborhood's residents are minorities. R. 17-3 at 17 (Beveridge Decl.); R. 102 at 8 (Oct. 23, 2009 Opinion).

Accordingly, plaintiffs argued that redevelopment that forces residents to leave the Gardens will disproportionately affect minority households. R. 73 at 37 (Second Amended Complaint); R. 114 at 12 n.8, App. 15 (Jan. 3, 2011 Opinion). Residents are not only displaced from their neighborhood, but also will likely leave the township – and perhaps Burlington County – altogether. Plaintiffs showed that there is a shortage of low-income housing in the township and its immediate surroundings, suggesting they would likely not be able to find replacement housing there. R. 17-3 at 18-19 (Beveridge Decl.); R. 73 at 36 (Second Amended Complaint). It appears residents who have left the Gardens most often move outside Mount Holly. R. 17-32 at 9, 27-31 (Redevelopment Report). There is also

a shortage of low-income housing in the county as a whole. The plaintiffs' expert stated that in 2000 there were roughly 5300 units affordable for families making 50% or less of area median income, while more than 22,000 households needed such affordable housing. R. 17-3 at 12 (Beveridge Decl.). Affordable units decreased between 2000 and 2006 in part, plaintiffs' expert stated, "due to the vacant and now demolished units in the Gardens being removed from the housing stock." R. 17-3 at 12 (Beveridge Decl.). Destruction of the Gardens will eliminate some 5% of the county-wide stock of housing affordable for very low or extremely low income residents. R. 17-3 at 12 (Beveridge Decl.).

Indeed, relatively few minorities in the county will be able to buy the new homes. Plaintiffs presented evidence that only 21% of African-American and Hispanic households in the county would likely be able to afford the new market-rate homes, compared to 79% of white households. R. 106-2 at 8 (Beveridge Summ. J. Decl.); R. 114 at 12-13 n.9, App. 15-16 (Jan. 3, 2011 Opinion).

2. The District Court's Decision

The district court granted summary judgment for the defendants. Among other things, the court held that the plaintiffs had not presented a prima facie case under their disparate impact theory. It acknowledged that the project had "an effect on low-income families, and, correspondingly, minority families." R. 114 at 3, App. 6 (Jan. 3, 2011 Opinion). But "under plaintiffs' logic," the court

concluded, "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." R. 114 at 13, App. 16 (Jan. 3, 2011 Opinion).

In particular, the court rejected plaintiffs' statistical analysis. According to the district court, the analysis improperly included the whole of Burlington County (rather than only Mount Holly township), did not account for minorities who might move in from outside the county, and did not consider how many displaced residents would move elsewhere in the township. R. 114 at 12-13 n.9, App. 15-16 (Jan. 3, 2011 Opinion). Furthermore, the district court concluded, plaintiffs had not accounted for how many minorities will move into the new development by buying one of the 56 planned affordable units or renting from a white purchaser. R. 114 at 11-13 & n.9, App. 14-16 (Jan. 3, 2011 Opinion). The court concluded that plaintiffs' analysis was insufficient because it did not show that "the new homes created by the redevelopment will be financially out-of-reach for all or most minorities." R. 114 at 12, App. 15 (Jan. 3, 2011 Opinion).

Turning to statistics on the *absolute* numbers of African-American and Hispanic households who could likely afford the homes, the court concluded that there were 16,744 such families in Burlington County. R. 114 at 12 n.9, App. 15 (Jan. 3, 2011 Opinion). This population had the "ability to occupy all 464 market rate homes." R. 114 at 12 n.9, App. 15 (Jan. 3, 2011 Opinion). Furthermore, the

court stated the plan did not "apply differently to minorities than non-minorities," because many residents – including some plaintiffs – were white and would nevertheless lose their housing. R. 114 at 11, App. 14 (Jan. 3, 2011 Opinion).

The court further decided that plaintiffs had failed to establish a prima facie case of disparate impact on the ground that no one has "been forced out of their homes by the Township without the offer of relocation services." R. 114 at 14, App. 17 (Jan. 3, 2011 Opinion). In so holding, the court noted that all plaintiffs, except one removed by her landlord, still reside in the neighborhood. R. 114 at 14, App. 17 (Jan. 3, 2011 Opinion).

The court found that, in any event, defendants met their burden to show a legitimate government interest. R. 114 at 10 & n.6, App. 13 (Jan. 3, 2011 Opinion). Plaintiffs, the court concluded, had not rebutted this conclusion with any showing that less discriminatory actions were available. R. 114 at 10 & n.6, App. 13 (Jan. 3, 2011 Opinion).

The court further concluded that the plaintiffs had not shown intentional discrimination. R. 114 at 20-21, App. 23-24 (Jan. 3, 2011 Opinion); see also R. 94 at 7 (Feb. 13, 2009 Opinion). Accordingly, the court granted summary judgment for defendants on plaintiffs' 42 U.S.C. 1982 and 42 U.S.C. 1983 claims, as well as their intentional discrimination claims brought under New Jersey law. R. 114 at 18-26, App. 21-29 (Jan. 3, 2011 Opinion).

SUMMARY OF ARGUMENT

The district court applied the wrong legal standard in evaluating plaintiffs' disparate impact claim, and consequently erred in ruling that they had not presented a prima facie case. The district court held that plaintiffs had failed to establish a prima facie case of disparate impact under the FHA because they had not shown that the new homes created by the redevelopment would be financially unavailable for most or all minorities. In so ruling, the district court failed to properly resolve the determinative question: whether the proposed redevelopment would have a *disproportionate* effect on a protected group. Because plaintiffs presented sufficient evidence that the redevelopment would have a disproportionate adverse effect upon minorities in Mount Holly Township, as well as Burlington County, the district court erred in granting summary judgment to defendants on the ground that plaintiffs had failed to present a prima facie case of disparate impact under the FHA.

The district court similarly erred in rejecting plaintiffs' disparate impact claim on the ground that there were, in absolute terms, enough higher-income minority households in Burlington County to purchase all of the houses in the planned redevelopment. While there is no one statistical method to demonstrate disparate impact, the analysis should be based on relative numbers of minority and nonminority households adversely affected by the proposed redevelopment, rather

than on the absolute number of minority households who the court finds earn enough income to be able to afford the new housing to be created by redevelopment.

In this case, the district court did not fulfill its proper role in resolving defendants' summary judgment motion. The court plainly did not view the facts on the disproportionate racial effect of the redevelopment in the light most favorable to plaintiffs, instead rejecting plaintiffs' evidence – including expert reports – that the proposed redevelopment will effectively and significantly affect the minority population in Mount Holly. Because of this, and the erroneous legal standards it applied, the district court's determination that plaintiffs failed to establish a prima facie case of disparate impact should be reversed.

ARGUMENT

THE DISTRICT COURT ERRED IN CONCLUDING THAT THE PLAINTIFFS DID NOT PRESENT A PRIMA FACIE CASE OF DISPARATE IMPACT DISCRIMINATION

A. Standard Of Review

The issue of whether plaintiffs presented a prima facie case of disparate impact is a matter of law, reviewed *de novo*. *EEOC* v. *Metal Serv. Co.*, 892 F.2d 341, 345 (3d Cir. 1990) ("[A] district court's analysis of whether the evidence presented is sufficient to establish a prima facie case" of discrimination, as

opposed to liability, "is plenary because it necessarily implicates the application of a legal standard to historical facts").

This Court reviews a district court's grant of summary judgment *de novo*. *Lapid-Laurel* v. *Zoning Bd. of Adjustment of Twp. of South Plains*, 284 F.3d 442, 449 & n.4 (3d Cir. 2002). A court should grant summary judgment only where, "viewing the facts in the light most favorable to the non-moving party," there is "no genuine issue of material fact." *Id.* at 449 n.4. "The judge's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter." *Ibid*.

B. Disparate Impact Analysis Under The Fair Housing Act

The Fair Housing Act 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). This Court – and indeed every Circuit to consider the issue – has concluded that the Act encompasses disparate impact claims.[3] *Community Servs., Inc.* v. *Wind Gap Mun. Auth.*, 421 F.3d 170, 176 (3d Cir. 2005); *Lapid-Laurel*, 284 F.3d at 466-467;

[3] Under the Fair Housing Act a prima facie showing of discriminatory effect may also be established by evidence that a facially neutral housing practice perpetuates segregated housing patterns. See, *e.g.*, *Hallmark Developers, Inc.* v. *Fulton Cnty.*, 466 F.3d 1276, 1286 (11th Cir. 2006); *Huntington Branch, NAACP* v. *Town of Huntington*, 844 F. 2d 926, 937 (2d Cir. 1988), aff'd, 488 U.S. 15 (1988) (per curium); *United States* v. *City of Black Jack*, 508 F.2d 1179, 1184-1186 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975).

Resident Advisory Bd. v. *Rizzo*, 564 F.2d 126, 148 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978); *Greater New Orleans Fair Hous. Action Ctr.* v. *HUD*, Nos. 10-5257 & 10-5269, 2011 WL 1327713, at *6 (D.C. Cir. Apr. 8, 2011) ("Each of the eleven circuits that have resolved the matter has found the disparate impact theory applicable under the Fair Housing Act.").

To establish a disparate impact case of racial discrimination, the plaintiff must show that the defendant's action will have a disproportionate effect on a racial group. *Rizzo*, 564 F.2d at 143 (noting disparate impact claim where city's action "had the undeniable effect of 'bear[ing] more heavily on one race than another'") (quoting *Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 270 (1977)). Although other factors may go to the ultimate merits, this Court has held that "discriminatory effect alone will, if proved, establish a * * * prima facie case." *Id.* at 148 & n.32. If the plaintiff succeeds, the burden shifts to the defendant to show "a legitimate, bona fide interest" in taking the challenged action. *Id.* at 149. If the defendant meets its burden, plaintiff then has the burden to show that less discriminatory practices are available. *Id.* at 149 n.37.

There is no clear rule for the statistical showing needed in a prima facie case; plaintiffs must offer "proof of disproportionate impact, measured in some plausible way." *Greater New Orleans*, 2011 WL 1327713, at *6. See also *Hallmark Developers, Inc.* v. *Fulton Cnty.*, 466 F.3d 1276, 1286 (11th Cir. 2006)

("no single test controls in measuring disparate impact") (quotation marks and citation omitted). This Court has stated that plaintiffs must show that a challenged housing practice "has fallen more harshly" on a protected group. *Doe* v. *Butler*, 892 F.2d 315, 323 (3d Cir. 1989). In *Rizzo*, the Court found prima facie evidence of a disparate impact where "the impact of the governmental defendants' termination of the [housing] project was felt primarily by blacks." *Rizzo*, 564 F.2d at 149.

Courts have accepted a variety of statistical showings as establishing a prima facie disparate impact case, including analyses based on a statistical connection between income and race. This can be shown where the plaintiff establishes that there is a shortage of housing accessible to a protected group, and that the shortage is causally linked to the challenged policy. In *Huntington Branch, NAACP* v. *Town of Huntington*, 844 F. 2d 926, 929 (2d Cir. 1988), aff'd, 488 U.S. 15 (1988) (per curium), for example, plaintiffs stated a prima facie case by showing a shortage of low- and moderate-income housing, and that the impact of the shortage was three times greater on African Americans than on the overall population. See also *Smith* v. *Town of Clarkton*, 682 F.2d 1055, 1062-1064 (4th Cir. 1982); cf. *Artisan/American Corp*. v. *City of Alvin*, 588 F.3d 291, 298-299 (5th Cir. 2009) (plaintiffs' claim failed where they did not make a showing typical in a disparate

impact case, such as a waiting list for affordable housing, a shortage of affordable housing, or individuals affected by the challenged action).

C. The District Court Erred In Holding That Plaintiffs Failed To Show A Prima Facie Case Of Disparate Impact Discrimination Under The Fair Housing Act Because They Did Not Show That The New Housing Would Be Unaffordable To All Or Most Minority Households

In this case, the district court applied the wrong standard to plaintiffs' statistical evidence, concluding that plaintiffs failed because they did not show that "the new homes created by the redevelopment will be financially out-of-reach for all or most minorities." R. 114 at 12, App. 15 (Jan. 3, 2011 Opinion). This standard is much more restrictive than the proper rule applied in a disparate impact case.

The proper analysis requires a *disproportionate* adverse effect on a protected group, rather than an adverse effect on "all or most" minority families.[4] R. 114 at 12, App. 15 (Jan. 3, 2011 Opinion). In order to make out a disparate impact claim, a plaintiff must "establish[] that a challenged practice has a significantly adverse or disproportionate impact on a protected group." See *Tsombanidis* v. *West Haven Fire Dep't*, 352 F.3d 565, 575 (2d Cir. 2003).

[4] Even if the court's standard were correct, the plaintiffs established that only 21% of African-American and Hispanic households in Burlington County could afford to live in the new development, whereas 79% of white households could afford the new homes. R. 106-2 at 8 (Beveridge Summ. J. Decl.); R. 114 at 12-13 n.9, App. 15-16 (Jan. 3, 2011 Opinion). Thus "most" minority households in the county could not afford the new housing.

In *Rizzo*, for example, this Court found a prima facie case where the city opposed a low-income housing development, and African Americans made up "a substantial proportion of those who would be eligible" to live in the challenged development. *Rizzo*, 564 F.2d at 142, 149. Waiting lists for low-income housing were 85% African-American, and this showed that African-American families would be disproportionately affected. *Ibid.* But the Court did not require plaintiffs to show that all or most African-American families in the city needed low-income housing. And in *Huntington Branch*, 844 F.2d at 929, plaintiffs stated a prima facie case where there was a shortage of low-income housing, and 24% of African-American families required such housing. Twenty-four percent was certainly not all or most African-American families, but the impact of the shortage was disproportionate; only seven percent of all families in the city needed low-income housing. *Ibid.* In this case, plaintiffs' expert opined that – at least by some measures – African-American and Hispanic families are respectively 8 and 11 times more likely than white families to be negatively affected by the redevelopment. R. 106-2 at 5 (Beveridge Summ. J. Decl.).

Indeed, a plaintiff may state a prima facie case even if substantial numbers of minority families clearly are *not* affected by the challenged practice. In *Committee Concerning Community Improvement* v. *City of Modesto*, 583 F.3d 690, 703 (9th Cir. 2009), for example, the plaintiffs argued their neighborhoods, which

were 71% Hispanic, were improperly denied certain city services. Other neighborhoods, which did receive services, also had substantial Hispanic populations of 48%. *Ibid.* Nevertheless, the Ninth Circuit concluded that plaintiffs had made a prima facie showing of disparate impact. *Id.* at 704-705.

According to plaintiffs' evidence, the proposed redevelopment in this case not only affects the availability of affordable housing in the township and county, but also directly affects a discrete group – Gardens residents. In measuring the adverse effect of the proposed redevelopment, the racial composition of potentially displaced residents is also a relevant consideration. *Betsey* v. *Turtle Creek Assocs.*, 736 F.2d 983, 987 (4th Cir. 1984). Here, it is undisputed that displaced residents are disproportionately minority when compared to the population of Mount Holly Township or Burlington County as a whole. Mount Holly Township is 66% white, 21% African-American, and 9% Hispanic; Burlington County has roughly similar demographics (76% white, 15% African-American, and 4% Hispanic). R. 17-3 at 13 (Beveridge Decl.); R. 73 at 12-13 (Second Amended Complaint); R. 106-1 at 3-4 (Responding Statement of Facts). The census blocks containing the Gardens neighborhood are 20% white, 46% African-American, and 29% Hispanic. R. 17-3 at 14 (Beveridge Decl.); R. 73 at 12 (Second Amended Complaint); R. 106-1 at 4 (Responding Statement of Facts).

Indeed, relatively few minorities in the county will be able to buy the new homes. Plaintiffs' expert stated that only 21% of African-American and Hispanic households in the county would likely be able to afford the new market-rate homes, compared to 79% of white households. R. 106-2 at 8 (Beveridge Summ. J. Decl.); R. 114 at 12-13 n.9, App. 15-16 (Jan. 3, 2011 Opinion). Moreover, it is undeniable that nearly all Gardens residents have low incomes and could not afford to purchase or rent market-rate homes in the redeveloped area. R. 73 at 14 (Second Amended Complaint); R. 106-1 at 42 (Responding Statement of Facts); Doc. 112 at 38-40 (Def. Summ. J. Br.).

On this record, then, plaintiffs have plainly made a plausible statistical showing of disparate impact sufficient to state a prima facie case. The district court's conclusion that plaintiffs failed to prove that most or all minorities would be unable to afford the new housing does nothing to undermine this conclusion.[5]

[5] Given the flexible standards for establishing a prima facie statistical showing, the district court also erred in concluding plaintiffs' analysis was too narrow because it did not "account for minorities who will move into Mt. Holly Township from outside Burlington County." R. 114 at 12-13 n.9, App. 15-16 (Jan. 3, 2011 Opinion). Where there is a sufficient impact in a smaller region, broader analysis may not be necessary. See *Huntington Branch*, 844 F.2d at 938 n.8. Going to the opposite extreme, the court erred in rejecting plaintiff's analysis because it was too broad, including "the entire population of Burlington County, rather than only Mt. Holly Township." R. 114 at 12-13 n.9, App. 15-16 (Jan. 3, 2011 Opinion). Plaintiffs in fact *did* include statistics about the township, adjacent areas, and the Gardens neighborhood. R. 17-3 at 5, 9-11 (Beveridge Decl.). Plaintiffs' expert stated that nearly all Gardens residents would be unable to afford

(continued...)

D. The District Court Erred In Holding That Plaintiffs Failed To Establish A Prima Facie Case Of Disparate Impact Because There Were Enough Minority Households In Burlington County To Occupy All Of The Proposed New Units

The court also erred in rejecting plaintiffs' prima facie showing on the ground that there were, in absolute terms, enough middle-income minority families in Burlington County to occupy all of the proposed new units. R. 114 at 12-13 n.9, App. 15-16 (Jan. 3, 2011 Opinion). The district court found that there were some 16,744 African-American and Hispanic families in Burlington County who could likely afford houses in the new development. R. 114 at 13 n.9, App. 16 (Jan. 3, 2011 Opinion); see also R. 112 at 39 (Def. Summ. J. Br.). The court concluded that this showed "the minority population's ability to occupy all 464 market rate homes." R. 114 at 13 n.9, App. 16 (Jan. 3, 2011 Opinion). While there is no specific rule about the form of statistical analysis required to show disparate impact, the analysis should be based, by definition, on a *disproportionate* impact on a protected group, rather than on *absolute* numbers.

Other appellate courts have specifically considered and rejected analyses of absolute rather than proportional statistics. In *Huntington Branch*, the Second

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(...continued)
the new homes, and that the development project would have a disparate impact on the township *and* the county. R. 17-3 at 5, 9-11, 51 (Beveridge Decl.); R. 17-4 (Beveridge Decl. Exh.). The county-wide impact does not negate plaintiffs' showing; rather it underscores the scope of the disparate impact.

Circuit reversed the district court in part because of its improper reliance on absolute figures. In that case, the district court compared "the larger absolute number of white poor (22,160) with minority poor (3,671)," and noted that large numbers of white residents might benefit from the proposed project. *Huntington Branch*, 844 F.2d at 933 (quoting *Huntington Branch, NAACP* v. *Town of Huntington*, 668 F. Supp. 762, 786 (E.D.N.Y. 1987)). The Second Circuit held that "[b]y relying on absolute numbers rather than on proportional statistics, the district court significantly underestimated the disproportionate impact of the Town's policy," and "perceived facts through a misapprehension of the applicable law." *Id*. at 938. The Eleventh Circuit has similarly rejected reliance on absolute numbers, noting that "[t]ypically, a disparate impact is demonstrated by statistics," and "it may be inappropriate to rely on absolute numbers rather than on proportional statistics." *Hallmark Developers, Inc*., 466 F.3d at 1286 (internal quotation marks and citations omitted).[6]

Given the relatively flexible standard for establishing a statistical prima facie showing, see *Greater New Orleans*, 2011 WL 1327713, at *6, it is clear that the

[6] The district court made a similar analytical error in rejecting plaintiffs' analysis on the ground that white residents of the Gardens were affected *in the same way* as minority residents. R. 114, App. 14 (Jan. 3, 2011 Opinion). The court should have considered the *disproportionate impact* on minority families, instead of the fact that some number of white families would also lose their homes.

district court applied impermissibly restrictive legal standards in granting defendants' summary judgment motion on the ground that plaintiffs failed to present a prima facie case of disparate impact. It is equally clear that the court failed to consider the plaintiffs' evidence "in the light most favorable to the nonmoving party," and to "draw all reasonable inferences in that party's favor." *EBC, Inc.* v. *Clark Bldg. Sys*., 618 F.3d 253, 262 (3d Cir. 2010). Here, "a rational person could conclude" that plaintiffs are correct on the disputed issue of disparate impact. *Ibid*. (internal quotation marks and citation omitted).[7]

[7] In addition, the district court erred in ruling that plaintiffs failed to establish their disparate impact claim because they have not yet been evicted, and no one has "been forced out of their homes by the Township without the offer of relocation services." R. 114 at 14, App. 17 (Jan. 3, 2011 Opinion). The Fair Housing Act states that "[a]n aggrieved person" may seek redress, and defines an aggrieved person as "any person who * * * claims to have been injured by a discriminatory housing practice" or "believes that such person will be injured by a discriminatory housing practice that is *about to occur*." 42 U.S.C. 3602(i); 42 U.S.C. 3613 (emphasis added). The Act reaches "imminent" harm, provided it is "not conjectural or hypothetical." *Lincoln* v. *Case*, 340 F.3d 283, 289 (5th Cir. 2003) (quoting *United States* v. *Hays*, 515 U.S. 737, 743 (1995)). "[A] person who is likely to suffer such an injury need not wait until a discriminatory effect has been felt before bringing suit." *LeBlanc-Sternberg* v. *Fletcher*, 67 F.3d 412, 425 (2d Cir. 1995), cert. denied, 518 U.S. 1017 (1998). Moreover, relocation assistance does not cure a potential Fair Housing Act violation. If this were so, an offer of assistance would essentially immunize a municipality against Fair Housing Act claims, even where the displacement is discriminatory.

CONCLUSION

The Court should hold that the district court erred in granting summary judgment to the defendants on the ground that plaintiffs had failed to establish a prima facie case of disparate impact.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Federal Rule of Appellate Procedure 32(a)(7)(B) and 29(d). The brief was prepared using Microsoft Word 2007 and contains no more than 5200 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

I further certify that the electronic version of this brief, prepared for submission via ECF, has been scanned with the most recent version of Trend Micro Office Scan (version 8.0) and is virus-free.

s/April J. Anderson
APRIL J. ANDERSON
Attorney

Date: June 3, 2011

CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Local Rules 28.3(d) and 46.1(a), I hereby certify that I am exempt from the Third Circuit's bar admission requirement as counsel to the United States.

s/Dennis J. Dimsey
DENNIS J. DIMSEY
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Attorney

Date: June 3, 2011

CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2011, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

I further certify that on June 3, 2011, ten (10) paper copies, identical to the brief filed electronically, were sent to the Clerk of the Court by U.S. mail.

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s/April J. Anderson
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