No. 11-1507

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 TOWNSHIP OF MOUNT HOLLY, JULES THIESSEN, AS MAYOR OF TOWNSHIP OF MOUNT HOLLY,

Petitioners,

v.

MT. HOLLY GARDENS CITIZENS IN ACTION, INC., *ET AL.,*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF PETITIONER

LAWRENCE J. JOSEPH
1250 CONNECTICUT AVE. NW
SUITE 200
WASHINGTON, DC 20036
(202) 669-5135
ljoseph@larryjoseph.com

Counsel for Amicus Curiae

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?

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund, Inc. ("Eagle Forum")[1] is a nonprofit

[1] *Amicus* files this brief with consent by all parties, with 10 days' prior written notice; *amicus* has lodged the parties' written letters of consent with the Clerk. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity – other than *amicus* and its counsel – contributed monetarily to preparing or submitting the brief.

corporation founded in 1981 and headquartered in Saint Louis, Missouri. For thirty years, Eagle Forum has consistently defended federalism and supported state and local autonomy from federal intrusion – particularly under the guise of the Commerce Clause – into areas of traditionally state and local concern. *See* Brief *Amicus Curiae* of Eagle Forum Education & Legal Defense Fund, at 4-16, *U.S. v. Morrison,* 529 U.S. 598 (2000) (Nos. 99-5, 99-29). Further, Eagle Forum opposes disparate-impact analyses because they create grievance-based spoils systems along racial, sexual, or other lines and thus not only divide the Nation but often end up hurting the groups that the law purportedly seeks to help. Accordingly, Eagle Forum has a direct and vital interest in the issues raised here.

STATEMENT OF THE CASE

The respondents – minority residents and former residents (collectively, "Residents") – of a poor and run-down neighborhood in the Township of Mount Holly, New Jersey, have sued that Township and various Township officers (collectively, "Mt. Holly") to enjoin redevelopment of the neighborhood and for damages under the Fair Housing Act, PUB. L. NO. 90-284, Title VIII, 82 Stat. 83 (1968) ("FHA").[2] The Residents allege that, by targeting Mt. Holly's poorest neighborhood, the

[2] Redevelopment plans can raise valid concerns for property rights under the Fifth Amendment. The sole issue before this Court, however, is whether the Residents can raise disparate-impact claims under the FHA.

redevelopment efforts violate 42 U.S.C. §3604(a) of the FHA by disproportionately impacting racial minorities, who make up a disproportionate share of the affected population. The District Court granted summary judgment for Mt. Holly, and the Residents appealed. The Third Circuit reversed the summary judgment, based on its finding that the Residents had made out a *prima facie* case under a disparate-impact theory.

The Residents do not allege – much less establish sufficiently to deflect a summary judgment motion – that Mt. Holly engaged in intentional, race-based discrimination. Instead, the Residents merely allege disparate impacts under a facially neutral redevelopment plan. As such, this litigation picks up where *Magner v. Gallagher,* No. 10-1032 (U.S.), left off: does the FHA allow disparate-impact claims and, if so, how should courts evaluate such claims?

STATEMENT OF FACTS

The Residents' 30-acre neighborhood in Mt. Holly was run down and overcrowded. The overcrowding led to a parking shortage, which led to paving over back yards to supplement parking. Pet. App. 6a-7a. In turn, these factors led to poor drainage and a loss of open space. *Id.* According to data from the 2000 census, the neighborhood was 19.7% non-Hispanic White, 46.1% African-American, and 28.8% Hispanic, with almost all classified as low-income and most classified as either very-low or extremely-low income. *Id.* at 6a. Many of the properties in the neighborhood fell into disrepair or even dilapidation, *id.* at 7a, and the

neighborhood accounted for more than a quarter of Mt. Holly crimes in 1999, although it represented less than two percent of the Township.

In 2000, Mt. Holly found the neighborhood a prime candidate for redevelopment, based on excess land coverage, poor land use, and excess crime. *Id.* at 8a. In a series of redevelopment plans, Mt. Holly proposed new market-rate housing, with various set asides designated for senior citizens or as affordable housing. *Id.* Due to their low-income status, however, the Residents did not believe that they could afford even these set asides. *Id.* at 9a. The District Court summarized the Residents' preferred alternative as "seeking to remain living in the … unsafe conditions until they are awarded money damages for their claims and sufficient compensation to secure housing in the local housing market." Pet. App. 50a n.12. After bringing an unripe claim in state court, the Residents brought this claim in federal court.

REASONS TO GRANT THE WRIT

The FHA's "because of race" standard prohibits disparate race-based treatment (*i.e.,* intentional discrimination), not disparate race-correlated impacts (Section I). Because the FHA lacks any indicia of legislative intent to adopt a disparate-impact standard, this Court need not consider canons of statutory construction beyond the statutory text. Whatever the contours of federal power under the Constitution and countervailing state power reserved by the Tenth Amendment, the FHA simply does not prohibit disparate impacts.

If it goes beyond the statutory text, this Court must find that the FHA does not adopt a disparate-impact standard. *First,* the Commerce Clause – under which Congress enacted the FHA – does not provide a federal police power to regulate housing, something that neither moves in interstate commerce nor substantially affects interstate commerce (Section II.A). *Second,* even if Congress had that power, this Court would need to overcome the presumption against preemption before inferring that the federal power's exercise here preempts Mt. Holly's historic police power over housing (Section II.B). *Third,* neither an existing interpretation nor a future regulation from the federal Department of Housing and Urban Development ("HUD") warrants deference on the question of whether the FHA allows disparate-impact claims (Section II.C).

If it holds that the FHA includes disparate-impact claims, this Court should rely on the presumption against preemption to adopt a narrow scope of FHA's preemption of local police power (Section III). Although race unfortunately correlates with wealth, that does not justify assuming that all wealth-related actions also necessarily implicate race. To the contrary, the proper disparate-impact analysis under that circumstance requires correcting for wealth to reveal only the race-based correlations.

As signaled above, the following three sections elaborate on these three significant legal reasons for the Court to grant the petition for a writ of *certiorari:*

I. The Third Circuit's decision is inconsistent with the decisions of this Court on the statutory language Congress intends to prohibit disparate impacts versus the statutory language Congress intends to prohibit only disparate treatment and intentional discrimination.

II. FHA's application to both public and private housing exceeds the scope of Congressional power under the Fourteenth Amendment and its application to residential real estate exceeds the scope of Congressional power under the Commerce Clause. In any event, given the history of state and local police power in the field, Third Circuit's decision is inconsistent with this Court's preemption analysis and the presumption against preemption, which this Court can decide without deference to HUD's administrative interpretations.

III. Assuming *arguendo* that it upholds the disparate impact analysis under the FHA, this Court should resolve the deep circuit split on how courts should conduct their disparate-impact analyses.

Amicus Eagle Forum respectfully submits that each of the foregoing reasons provides sufficient legal justification for this Court to grant the petition.

Under the circumstances, however, this litigation and the issues that it represents raise an issue of great public importance. Specifically, the Assistant Attorney General for the Civil Rights Division, Thomas E. Perez, reportedly "convinced the Democratic mayor of Saint Paul, Minnesota, to

withdraw his case" in *Magner* in order to avoid this Court's rejecting the use of disparate-impact analysis under FHA and other similar federal statutes. Mary Kissel, *Mr. Perez's Comeuppance?* WALL ST. J., June 26, 2012. The Civil Rights Division reportedly relies on disparate-impact theories to coerce settlements from large corporations who – while lacking in discriminatory intent or animus – do not fight such charges and prefer to settle. *Id.* By scuttling *Magner,* the Executive makes clear that it understands the law, even if it prefers operating under its own law.

At a minimum, this appears to confuse the constitutional demand that the Executive "take Care that the Laws be faithfully executed," U.S. CONST. art. II, §3, with an attorney's duty of zealous representation. *E.g.,* D.C. Rules of Prof'l Conduct, Rule 1.3(a). But "[t]he United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, … is not that it shall win a case, but that justice shall be done." *Berger v. U.S.,* 295 U.S. 78, 88 (1935). Here, the Executive apparently has resorted to subterfuge to avoid this Court's clarifying the law. This case provides the opportunity both to clarify the law for the Nation and to restrain an overzealous Executive.

For all of the foregoing reasons, the Court should grant the petition for a writ of *certiorari.*

I. THE FHA PROHIBITS DISPARATE TREATMENT, NOT DISPARATE IMPACTS

The Third Circuit ended its decision with a rhetorical flourish that evokes balance, reason, and the Constitution:

> 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.

Pet. App. 29a. Of course, the Constitution does not prohibit disparate impacts. *Pers. Adm'r v. Feeney,* 442 U.S. 256, 279 (1979). Indeed, notwithstanding that lofty close, the body of the appellate decision falls flat and Orwellian, rejecting "specious concepts of equality." Pet. App. at 19a. Equality under the law, however, is the cornerstone of a Constitution that "neither knows nor tolerates classes among citizens." *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 521 (1989) (Scalia, J., concurring in the judgment) (*quoting Plessy v. Ferguson,* 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). Leaving the Constitution momentarily aside, Mt. Holly's petition squarely presents the question whether the FHA *statutorily* prohibits disparate impacts. *Amicus* Eagle Forum respectfully submits that the FHA does not.

Consistent with this Court's rules, *amicus* Eagle Forum will not extensively brief the FHA's limitation to intentional discrimination because Mt. Holly covers the topic well. *See* Pet. at 15-21; S. Ct.

Rule 37.1 (*amicus* briefs should focus on matters not already addressed by the parties). Simply put, statutes that prohibit discrimination *because of* race or other protected status prohibit only purposeful discrimination and disparate treatment, not disparate impacts; in other words, they prohibit actions taken *because* of the protected status, not those taken merely *in spite of* that status. *Alexander v. Sandoval,* 532 U.S. 275, 282-83 & n.2 (2001); *cf. Feeney,* 442 U.S. at 279 (Constitution prohibits only intentional discrimination).

In the limited instances where this Court has found Congress to have intended to prohibit disparate impacts, the statutes used more expansive, effect-based language, not the stark because-of language used in FHA. *See* 42 U.S.C. §§1973c(b), 2000e-2(a)(2); 29 U.S.C. §623(a)(2); *Griggs v. Duke Power Co.,* 401 U.S. 424, 432 (1971); *Smith v. City of Jackson, Miss.,* 544 U.S. 228, 236-40 (2005) (plurality); *Reno v. Bossier Parish Sch. Bd.,* 520 U.S. 471, 482 (1997). Similarly, in the limited instances where Congress has abrogated a holding of this Court with respect to disparate impacts, Congress has done so with pinpoint precision to allow disparate-impact claims under the affected statute, *see Reno,* 520 U.S. at 482, not under all statutes. Therefore, unless and until Congress specifies otherwise, "because" means "because."

Accordingly, without the need for any legislative or administrative gloss, this Court should answer the first Question Presented in the negative.

II. THE FHA CANNOT BE INTERPRETED TO INCLUDE DISPARATE-IMPACT CLAIMS

In this Section, *amicus* Eagle Forum evaluates three layers of statutory construction to demonstrate that, even if this Court inquires further, the answer is the same: the FHA cannot be interpreted to prohibit disparate impacts. *First,* Congress lacks the authority to regulate purely intrastate housing under the Commerce Clause. *Second,* even if Congress had that authority, this Court nonetheless should apply the presumption against preemption in this area of traditionally local concern. Because Congress has not clearly and manifestly ordained the disparate-impact standard, the question here is not whether the Residents' position is *arguable* or even better, but whether Mt. Holly's position is *untenable. Third,* and finally, this Court owes no deference to HUD interpretations and, in any event, must evaluate the FHA under traditional tools of statutory construction before considering HUD's views.

A. Congress Lacks Authority for the FHA

When it regulates state and local government conduct – as opposed to either private conduct or both public and private conduct – Congress can rely on the authority vested in Section 5 of the Fourteenth Amendment. U.S. CONST. amend. XIV, §5; *cf. U.S. v. Morrison,* 529 U.S. 598, 621-22 (2000) ("Fourteenth Amendment … prohibits only state action [and] erects no shield against merely private conduct, however discriminatory or wrongful") (interior citations and quotations omitted). Similarly, when it regulates conduct by public and

private recipients of federal funds, Congress can rely on the contract-like nature of the Spending Clause to attach reasonable conditions on the receipt of federal funds. U.S. CONST. art. I, §8, cl. 1; *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.,* 547 U.S. 47, 58-59 (2006); *Barnes v. Gorman,* 536 U.S. 181, 186 (2002). Where, as here, it regulates under the Commerce Clause, Congress can regulate only within the limits of that clause.

As currently interpreted, the Commerce Clause encompasses three areas that Congress may regulate: (1) "the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, and persons or things in interstate commerce," and (3) "activities that substantially affect interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005); *accord Nat'l Fed'n of Indep. Bus. v. Sebelius,* __ S.Ct. __, 2012 WL 2427810, 7 (2012) ("*NFIB*"). Because real estate cannot move in interstate commerce, congressional authority for the FHA must lie in the third prong, if at all.

Several courts of appeal have held that the Commerce Clause provides authority for the FHA. *See, e.g., Oxford House-C v. City of St. Louis,* 77 F.3d 249, 251 (8th Cir. 1996); *Morgan v. Secretary of Housing and Urban Development,* 985 F.2d 1451, 1455 (10th Cir. 1993); *Seniors Civil Liberties Ass'n, Inc. v. Kemp,* 965 F.2d 1030, 1034 (11th Cir. 1992). These decisions all rely on *Katzenbach v. McClung,* 379 U.S. 294, 301-02 (1964), which in turn relies on its companion case, *Heart of Atlanta Motel, Inc. v. U.S.,* 379 U.S. 241 (1964). These Commerce Clause authorities cannot support the FHA.

McClung and *Heart of Atlanta* concern restaurants and motels, respectively, which Congress might reasonably find to qualify as intrastate activities that affect interstate commerce. Similarly, purely *intrastate* consumption of self-grown products nonetheless might affect the *interstate* market for those products. *Wickard v. Filburn,* 317 U.S. 111, 118-19 (1942); *Gonzales*, 545 U.S. at 18. By contrast, there is no interstate market in real estate, which sits in one state, without moving. Moreover, unlike hotels or restaurants that interstate travelers might visit on their travels, homes do not "*substantially* affect interstate commerce." This Court should underscore its recent holding in *NFIB,* __ S.Ct. at __, 2012 WL 2427810, at 17, that the congressional power under the Commerce Clause is finite.

B. The Presumption against Preemption Precludes Interpreting the FHA to Preempt Local Police Power to Regulate Housing Conditions

Although the assertion of Commerce-Clause power over local housing would be troubling on federalism grounds generally, *Morrison,* 529 U.S. at 618-19 ("we always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power"), that assertion of a federal police power would be even more troubling here because of the historic *local* police power that the federal power would displace.

States and localities have a long history of regulating housing standards under the police

power for the health and safety of the community. *Edgar A. Levy Leasing Co. v. Siegel,* 258 U.S. 242, 246-47 (1922); *Mansfield & Swett, Inc. v. Town of W. Orange,* 120 N.J.L. 145, 151, 198 A. 225 (N.J. 1938).[3] In such fields traditionally occupied by state and local government, courts apply a presumption *against* preemption under which they will not assume preemption "unless that was the *clear and manifest purpose* of Congress." *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947) (emphasis added). Even assuming *arguendo* that one could interpret the FHA to allow disparate-impact claims, *but see* Section I, *supra,* the presumption against preemption would prevent this Court's entertaining that interpretation to preempt Mt. Holly's police power if this Court viably could adopt the intentional-discrimination interpretation:

> When the text of an express pre-emption clause is susceptible of more than one plausible reading, courts ordinarily "accept the reading that disfavors pre-emption."

Altria Group, Inc. v. Good, 555 U.S. 70, 77 (2008) (*quoting Bates v. Dow Agrosciences LLC,* 544 U.S. 431, 449 (2005)). Thus, while neither Mt. Holly nor Eagle Forum concedes that the Residents'

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[3] As signaled by the date of the cited authorities, state and local housing codes easily predate the FHA's enactment in 1968, PUB. L. NO. 90-284, Title VIII, 82 Stat. 83 (1968). *See generally* Eugene B. Jacobs & Jack G. Levine, *Redevelopment: Making Misused and Disused Land Available and Useable,* 8 HASTINGS L.J. 241 (1957).

disparate-impact interpretation *is* viable, that is not the test. The burden is on the Residents to demonstrate that Mt. Holly's intentional-discrimination interpretation *is not* viable.

C. HUD Lacks the Authority to Adopt – by Regulation or by Interpretation – a Disparate-Impact Standard under an Intentional-Discrimination Statute

In a recent notice of proposed rulemaking, HUD proposes to adopt a disparate-impact standard under the FHA. Office of the Ass't Sec'y for Fair Housing & Equal Opportunity, HUD, Implementation of the Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. 70,921 (2011). Of course, the eventual rule itself cannot apply retroactively to the conduct challenged in this lawsuit. *Georgetown University Hospital v. Bowen,* 488 U.S. 204, 208 (1988). Nonetheless, under some of this Court's holdings on deference to agencies' non-rule *interpretations,* the Residents might claim deference *now,* based only on an already-extant interpretation.

At the outset, HUD's present-day claim that it "has long interpreted the Act to prohibit housing practices with a discriminatory effect, even where there has been no intent to discriminate," 76 Fed. Reg. at 70,921, does not recognize that previous Administrations took the opposite view. *See* Presidential Statement on Signing the Fair Housing Amendments Act of 1988, 24 Weekly Comp. Pres. Doc. 1141 (Sept. 13, 1988). Consistency of interpretation can increase deference, *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944), and

inconsistency can decrease or nullify it. *Id.; Morton v. Ruiz,* 415 U.S. 199, 237 (1974). On the other hand, consistency alone cannot make an arbitrary position rational. *Judulang v. Holder,* 132 S.Ct. 476, 488 (2011) ("[a]rbitrary agency action becomes no less so by simple dint of repetition"). Thus, under whatever form of deference the Residents would claim for HUD's present position, the primary issue is whether HUD's position is consistent *with the FHA.*

As explained in Section I, *supra,* Congress enacted an intentional-discrimination statute, and HUD cannot change that by agency decree. The first step of any deference analysis is for the Court to evaluate the issue independently. Thus, before considering HUD's position, this Court must employ "traditional tools of statutory construction" to determine congressional intent, on which courts are "the final authority." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843 n.9 (1984). If that analysis reveals an intentional-discrimination statute, that is the end of the matter, regardless of HUD's position:

> [D]eference is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history. Here, neither the language, purpose, nor history of §504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds. Accordingly, we hold that even if [the agency] has attempted to create such an

> obligation itself, it lacks the authority to do so.

Southeastern Cmty. Coll. v. Davis, 442 U.S. 397, 411-12 (1979) (internal quotations and citations omitted). As explained in Section I, *supra,* the FHA prohibits intentional discrimination, not disparate impacts.

But even if HUD could promulgate a regulation to establish a disparate-impact analysis for intra-agency proceedings, such as administrative hearings or enforcement, that would not establish a right of action for the public to enforce those regulations, outside of HUD. Only Congress can create rights of action:

> [I]t is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself.

Sandoval, 532 U.S. at 291. Here, Congress did not create a right of action against disparate impacts, and any HUD views to the contrary could apply only within HUD.

Of course, where Congress has created a right of action to enforce regulations or where the agency regulation defines the conduct governed by a statutory cause of action, an agency regulation will play a role in the statutory cause of action. *Id.; Wright v. City of Roanoke Development & Housing Authority,* 479 U.S. 418, 419-23 (1987). But unlike the determination in *Wright* that HUD's interpreting "rent" to include utilities could bring

utility costs into a statutory action based on rent, the entire point of *Sandoval* is that an agency cannot define "discrimination" to include disparate impacts under intentional-discrimination statutes.

III. IF THIS COURT FINDS THE FHA TO ALLOW DISPARATE-IMPACT CLAIMS, THE COURT SHOULD APPLY THE PRESUMPTION AGAINST PREEMPTION TO THE SCOPE OF SUCH CLAIMS

In the second Question Presented, Mt. Holly asks this Court to resolve a deep circuit split on the type of disparate-impact analysis that courts should use to evaluate such claims, *see* Pet. at 22-33, assuming *arguendo* that the FHA includes disparate-impact claims. This circuit split provides ample need for this Court's supervision, even if the Court somehow finds the FHA to include disparate-impact claims.

Amicus Eagle Forum respectfully submits that the presumption against preemption would limit that disparate-impact regime, even if the Court finds that the FHA preempts Mt. Holly's historic police power. *But see* Section II.B, *supra.* Specifically, under *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), the presumption against preemption applies to determining the *scope* of preemption, even after a court finds a statute to preempt *some* state action. *Id.* As applied here to local government, therefore, this Court must adopt the least restrictive interpretation of FHA on state and local police power. *See* Section II.B, *supra* (*citing Altria Group,* 555 U.S. at 77).

Accordingly, if the Court finds the FHA to allow disparate-impact claims, the Court should adopt the disparate-impact analysis that best preserves state and local police power. Although *amicus* Eagle Forum does not support *any* disparate-impact analysis here, the analysis most deferential to state and local police power presumably is the *Wards Cove* analysis, under which courts evaluate claims based *inter alia* on relevant populations. *See Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 651 (1989); *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 996 (1988) (plurality). Even under that test, the residents' claims fail.

Comparing the high-minority poor part of town with the low-minority wealthy parts of town is "nonsensical" to the end of trying to demonstrate a race-based animus, *Wards Cove,* 490 U.S. at 651 (comparing participation in specialized pursuits with general population is "nonsensical"), with "little probative value" even under a disparate-impact regime like Title VII. *Watson,* 487 U.S. at 996 (1988) ("statistics based on an applicant pool containing individuals lacking minimal qualifications … [has] little probative value"). Indeed, basic statistics warns against "confusing correlation with causation." Robert Matthews, *Storks Deliver Babies ($\rho = 0.008$),* 22:2 TEACHING STATISTICS at 36 (2000); *Woodford v. Ngo,* 548 U.S. 81, 95 n.4 (2006) (cautioning against "mistak[ing]

correlation for causation").[4] Whatever correlation exists between race and Mt. Holly's redevelopment plan has nothing to do with race-based animus or intentional discrimination.

Under the circumstances here, the Third Circuit incorrectly reversed the District Court for allegedly "conflat[ing] … the concept of disparate treatment with disparate impact" because the planned action treated minorities and non-minorities equally. Pet. App. 19a. In a town like Mt. Holly, with that one poor neighborhood, treating that single neighborhood the same does not discriminate – or even correlate – on the basis of race. It discriminates and correlates on the basis of income and wealth. In other words, Mt. Holly treated *all* neighborhood residents the same. Any race-related correlation found in this case derives solely from the fact that race regrettably correlates with wealth due to societal factors that Mt. Holly did not cause and other statistical anomalies. As such, that correlation betrays no race-based animus on Mt. Holly's part.

CONCLUSION

The Court should grant the petition for a writ of *certiorari.*

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[4] The Matthews article gets its title from the strong correlation between stork populations and births in 17 European countries. *Id.* at 36-37.

Dated: July 13, 2012

Respectfully submitted,

Lawrence J. Joseph
1250 Connecticut Ave. NW
Suite 200
Washington, DC 20036
(202) 669-5135
ljoseph@larryjoseph.com
Counsel for *Amicus Curiae*