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Settlement in Fair Housing Case -- A Sigh of Relief

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Less than one year after the Supreme Court ended its term with the gutting of the Voting Rights Act, it is clear that at least four of the members of the current Supreme Court (the number needed for a case to be heard by the highest court) are eager to limit the reach of another pillar of the Civil Rights legislation from the 1960s -- the **Fair Housing Act**.

In the past two years, the Supreme Court has granted certiorari in two Fair Housing Act cases, both of which would have required the Supreme Court to determine whether acts that are not intentionally discriminatory, but still have a disproportionate negative impact on minority communities, may be prohibited by the Fair Housing Act. Each of these cases -- first *Magner v. Gallagher* and then, just this week, ***Township of Mt. Holly v. Mt. Holly Gardens Citizens In Action, Inc.*** – settled just weeks before oral arguments were scheduled.

Those who would have liked the case to move forward argue that, unless plaintiffs can prove that a defendant harbored racial animus or *intended* to discriminate, the law should not recognize that discrimination has taken place. This proposition is countered by widely accepted social science, not to mention human experiences, that indicates that *intent* actually has very little to do with whether discrimination occurred. Regardless, to those displaced by discriminatory redevelopment decisions or lending policies, it is little comfort that the decision-makers may have had no conscious intent to cause harm based on race. What is in the mind of those engaged in discriminatory actions is of no comfort to the victims of discrimination and should be of limited import under the Fair Housing Act.

It is important to keep in mind that the question before the Supreme Court in both *Gallagher* and *Mt. Holly* was whether disparate impact claims are cognizable under the Fair Housing Act -- that is, the Supreme Court was to decide whether plaintiffs who have been harmed by practices with discriminatory effects can get through the courtroom door. To actually prevail in their cases, such plaintiffs have the heavy burden of proving, among other things, that there was a less discriminatory means by which the defendant could have accomplished its goals. Disparate impact analysis is no slam dunk for plaintiffs, but it is critical to ensuring that the Fair Housing Act lives up to its name -- i.e. that it ensures *fairness*.

As noted in the **amicus brief** submitted in the *Mt. Holly* case by Howard University School of Law's **Fair Housing** and **Civil Rights** Clinics, no one is suggesting that "disparate impact analysis should prohibit municipalities from achieving legitimate redevelopment goals; but it does arm communities of color with one small tool of protection when there is a clear means to achieve that legitimate goal in a way that would be less disastrous to the very communities that the Fair Housing Act was designed to protect."

As the debate about disparate impact under the Fair Housing Act continues (and it is not unlikely that the Supreme Court will agree to hear yet another similar case), it is important to remember what is at stake. After hundreds of years of *legal* discrimination based on race, communities protected by the Fair Housing Act need a tool to combat the much more subtle forms of discrimination that persist today – disparate impact analysis is that tool.