

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA *ex rel.* :
ANTI-DISCRIMINATION CENTER OF :
METRO NEW YORK, INC., :

Plaintiff, : 06 CV 2860 (DLC)

-v- :

WESTCHESTER COUNTY, NEW YORK, :

Defendant. :

-----X

**BRIEF FOR *AMICI CURIAE* ENHANCED SECTION 8 OUTREACH PROGRAM,
INCLUSIVE COMMUNITIES PROJECT, NATIONAL FAIR HOUSING ALLIANCE,
ERASE RACISM, DISABILITY LAW CENTER, MIAMI VALLEY FAIR HOUSING
CENTER, CENTRAL OHIO FAIR HOUSING ASSOCIATION, FAIR HOUSING
CENTER OF THE GREATER PALM BEACHES, FAIR HOUSING CENTER OF
CENTRAL INDIANA, AND FAIR HOUSING COUNCIL OF ORANGE COUNTY
IN SUPPORT OF THE COURT’S FULL CONSIDERATION OF
ANTI-DISCRIMINATION CENTER’S MAY 11TH LETTER AND MATERIALS
SUBMITTED THEREWITH, AND IN SUPPORT OF THE REMEDIES THAT
ANTI-DISCRIMINATION CENTER SEEKS IN ORDER
TO VINDICATE THE INTEGRITY OF THE CONSENT DECREE**

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INTRODUCTION

The consent decree in this matter provided more opportunity to effect significant structural change in hyper-segregated residential housing patterns than any other legal proceeding in the last 25 years. Westchester was obliged through all its housing policies and programs to seek the “elimination of *de facto* residential segregation” in the county. Consent Decree ¶ 31(a). The legal proceedings that Westchester was obliged to bring against municipalities that retained barriers to fair housing choice were not limited to causing a minimum of 750 units of affordable housing to be built. The decree specifically provided that legal action must be initiated in order to meet a broader goal beyond the unit-specific requirements of Consent Decree ¶ 7; namely, “to accomplish the purpose of this [decree] to AFFH” (affirmatively further fair housing). Consent Decree ¶ 7(j).

From the outset, it was understood that jurisdictions throughout the country would be looking at how the decree was enforced: would it be a replay of the pre-decree analysis of impediments process -- what this Court memorably characterized as treating AFFH requirements as a “boilerplate formality,” *United States ex rel. Anti-Discrimination Center v. Westchester County, N.Y.*, 668 F.Supp.2d 548, 569 (S.D.N.Y. 2009) -- or would the decree actually be carried out according to its terms? As such, the full and genuine enforcement of the decree was and remains a matter of national importance.

At the May 23rd hearing, the Court stated, “I am trying to stay forward looking.” Transcript of May 23, 2016 hearing at. 14.¹ *Amici* agree that the question is, “What is to be done now?” But the nature of the remedial steps needed to be taken now is necessarily a function of:

¹ The relevant page of the transcript is annexed to the Declaration of Jerrold M. Levy, dated June 13, 2016 (“Levy Declaration”), as Exhibit 1.

(a) the extent to which Westchester has brazenly and persistently ignored its obligations; and (b) the extent to which the intended results of the decree have or have not been achieved.

As the recent report of Dr. Andrew Beveridge makes clear, Westchester is characterized by high levels of segregation; the towns and villages where consent decree housing can be built contribute significantly to that segregation; and fully 19 of the 25 municipalities with African-American population of less than 3.0 percent have exclusionary zoning because of limited opportunity to develop multi-family housing, most especially in principally residential zones.²

Anti-Discrimination Center (ADC), the original relator in the case, continues to be prepared to identify the full scope of defendant Westchester's non-compliance and to seek relief adequate to the scope of that non-compliance. ADC has information and expertise that is unique and specifically provides information that is otherwise missing but crucial to assessing next steps. It remains essential that ADC's voice be heard as an *amicus*, and it is essential that the relief sought by ADC be ordered.

INTERESTS OF AMICI

The Enhanced Section 8 Outreach Program (ESOP) is a fair housing mobility program in Westchester County³ that has a decades-long track record of moving poor and working-class families from racially concentrated areas of poverty to housing in neighborhoods of opportunity within the overwhelmingly white towns and villages that are among the municipalities where affordable housing with maximum desegregation potential is supposed to be built under the

² See, *inter alia*, the Map annexed as Exhibit 9 to the Beveridge Report (ECF No. 592-10).

³ ESOP was created pursuant to a consent decree that was entered 1993 in the case of *Giddins et al. v. HUD et al.*, 91-CV-7181 (RPP) (S.D.N.Y. 1993). Westchester's Planning Department was among the defendants in that case. It was alleged to have operated its Section 8 program in a manner to have perpetuated racial segregation.

consent decree. But there have been and continue to be many families that ESOP cannot help achieve their desire to move to neighborhoods of opportunity because, in the absence of Westchester's compliance with the consent decree, the supply of affordable housing with maximum desegregation potential remains extraordinarily small.⁴

The Inclusive Communities Project (ICP) is a not-for-profit organization that works for the creation and maintenance of thriving racially and economically inclusive communities, expansion of fair and affordable housing opportunities for low income families, and redress for policies and practices that perpetuate the harmful effects of discrimination and segregation. ICP envisions an America where equality is created and sustained in a community through access to good schools, affordable housing, safe neighborhoods, and economic opportunity.

ICP's litigation secured the Supreme Court's 2015 decision affirming the viability of the disparate impact and perpetuation of segregation doctrines in the fair housing context. *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507 (2015).

ICP has followed the Westchester litigation closely, and believes that this Court's decision in *U.S. ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County, N.Y.*, 668 F.Supp.2d 548 (S.D.N.Y. 2009), and the subsequent entry of the consent decree in this matter were important milestones in the "Fair Housing Act's continuing role in moving the Nation toward a more integrated society." *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. at 2525-26. Indeed, the role of this litigation in HUD's promulgation of the Affirmatively Furthering Fair Housing regulation in June of 2015 cannot be overstated. ICP believes it is important that, as jurisdictions across the

⁴ See Levy Declaration.

country move toward compliance with the mandates of the regulation, they do so with the firm knowledge that non-compliance will not be without consequence. The actions by Westchester, as documented by the Anti-Discrimination Center, call for a forceful response by the Government that makes clear that persistent violations of the terms of an agreement related to a jurisdiction's duty to affirmatively further fair housing will be met with appropriate and forceful enforcement action.

The National Fair Housing Alliance (NFHA) is the only national organization dedicated solely to ending discrimination and ensuring equal opportunity in housing for all people. Founded in 1988, NFHA is a consortium of more than 220 private, non-profit fair housing organizations, state and local civil rights agencies, and individuals throughout the United States. NFHA and its members use a variety of means to accomplish the Fair Housing Act's goals of ensuring equal and fair access to housing. Those means include education and outreach, research, public policy initiatives, and, where appropriate, enforcement actions.

NFHA has followed this case closely, expressing concerns about non-compliance and non-enforcement as early as 2010, and, in 2011, urging the Monitor to reverse his opposition to ADC's motion to intervene. NFHA believes that full enforcement of the consent decree is essential to deter jurisdictions across the country from perpetuating segregation.

ERASE Racism is a civil rights not-for-profit organization, founded in 2001, with a mission to expose forms of racial discrimination and advocate for laws and policies that help eliminate racial disparities, particularly in the area of housing. ERASE Racism's fair housing activities impact Long Island and extend throughout New York State, including Westchester County. On Long Island, the tenth most segregated metropolitan area in the United States in terms of black-white residential segregation, ERASE Racism confronts issues that are mirrored

in Westchester County -- severe segregation and resistance to the development of affordable housing in high-opportunity areas. The precedent set by whether the consent decree is or is not fully implemented will have a profound impact on fair housing on Long Island and in the rest of the United States.

The Disability Law Center is a Utah-based not-for-profit. In addition to working to enforce and strengthen laws that protect the opportunities, choices, and legal rights of people with disabilities, the Center operates a Fair Housing Program. The Fair Housing Program serves people across the state who have experienced housing discrimination on the basis of any protected class (race, religion, familial status, etc.). The Center is concerned that the failure to hold the defendant in this case to all of its obligations will embolden others across the country to continue to perpetuate segregation.

The Miami Valley Fair Housing Center, located in Dayton, Ohio, works to eliminate housing discrimination and ensure equal opportunity to people throughout its region. It envisions a country where integrated neighborhoods are the norm, and where the private and public sectors guarantee civil rights in an open and barrier-free community committed to healing the history of discrimination in America. The Center believes that the efficacy of the enforcement of the consent decree in this matter is a critical test of whether the will exists to remedy, as Westchester agreed to do, the ongoing scourge of residential racial segregation.

The Central Ohio Fair Housing Association, located in Columbus, Ohio, operates fair housing enforcement, advocacy, training, education, and outreach programs in recognition of the fact that where we live determines what kind of education our children will have; what kinds of professional and social associations we will have in our community; what kinds of physical danger we will be exposed to; what kinds of values and expectations will be opened up to us; and

what kinds of job opportunities will be nearby. The Association believes that Westchester's pattern of non-compliance is a fundamental challenge to the rule of law.

The Fair Housing Center of the Greater Palm Beaches, headquartered in Lantana, Florida, enforces fair housing laws throughout the State of Florida. Its mission is to ensure equal and affordable housing opportunities for all people, by promoting culturally diverse communities through open housing and the elimination of all barriers to that goal. Seeing a county held to its obligations to ensure that its localities take such actions as are necessary to undo residential segregation would be an important model for the nation.

The Fair Housing Center of Central Indiana (FHCCI) is a private, non-profit fair housing organization based in Indianapolis, Indiana, where it serves 24 counties. Its mission is to ensure equal housing opportunities by eliminating housing discrimination through advocacy, enforcement, education and outreach. The FHCCI believes that failure to hold the defendant accountable in this action will perpetuate housing discrimination and segregation across the country, including in the FHCCI's service area.

The Fair Housing Council of Orange County, a not-for-profit organization located in Santa Ana, California, is in its 51st year of serving what is now California's third largest county, with a population in excess of 3,000,000. The agency's mission is to foster diversity in housing through education and enforcement of state and federal fair housing laws. To support that mission, it operates fair housing enforcement, advocacy, training, education, and outreach programs. The agency sees similarities in the issues of racial segregation raised by the Anti-Discrimination Center regarding Westchester County to conditions present in Orange County. We believe that requiring true consent decree compliance by Westchester will be an important impetus in causing jurisdictions throughout the nation to take meaningful actions to meet their

long-established obligation to affirmatively further fair housing.

ARGUMENT

POINT I

ADC'S LETTER SHOULD BE ACCEPTED AS AN *AMICUS* BRIEF BECAUSE THE INFORMATION AND PERSPECTIVE OFFERED BY ADC IS TIMELY AND USEFUL AND NOT OTHERWISE BEFORE THIS COURT.

ADC, of course, is no stranger to this litigation. It was the original relator in the case, prosecuting the matter throughout the litigation phase of the case without the assistance of the Government, and then participating in the negotiations over the language of the consent decree. It was ADC that sought early on to bring Westchester's policy of non-compliance to the Court's attention, *see* ADC Motion to Enforce (ECF No. 345, May 31, 2011), and to have this Court exercise its "independent, juridical interests" in ensuring decree compliance. *Id.* at 24-25 (internal citation omitted).⁵ After ADC's 2014 filing of its *Cheating on Every Level* report, this Court effectively conferred *amicus* status on ADC. *See* Transcript of May 2, 2014 conference at 2 (the Court decides to treat ADC as an *amicus* or the equivalent).⁶

Most important in the current context is the fact that ADC is bringing matters to the Court's attention that neither the Government nor the Monitor have addressed.

1. The scope and "triggering" of the first part of Consent Decree ¶ 7(j). The Court has

⁵ In the face of the Government's joining Westchester's opposition to ADC's concurrently-filed motion to intervene, the Court dismissed ADC's motion to enforce without prejudice. Order of June 9, 2011 (ECF No. 360); *see also* Transcript of Conference of June 7, 2011 at 4-7 (rejecting ADC's request for concurrent briefing on the motions to enforce and to intervene). The relevant pages of the transcript are annexed to the Levy Declaration as Exhibit 2.

⁶ The transcript of the relevant Court conference, ECF No. 592-13, is annexed as Exhibit 2 to ADC's May 11, 2016 letter to the Court (ECF No. 592).

now clearly explained, in the context of one development (Chappaqua Station), that Consent Decree ¶ (7)(j) triggers the County's obligation "to 'use all available means' either when [a municipality] 'undertakes actions that hinder the objectives' of the Settlement or when a municipality 'does not take actions needed to promote' the development of new units." Order of May 24, 2016 at 51 (ECF No. 608) (emphasis in original).⁷ But the issue that ADC -- and not the Government -- raises is much more broad: Westchester has had an *a priori*, across-the-board, regardless-of-circumstance policy of refusing to push municipalities to eliminate unduly restrictive residential zoning.⁸

That policy of non-compliance implicates elements of Westchester's Consent Decree ¶ 7(j) obligations that were not necessary for the Court to address in the context of the Government's single-development application.

The first part of Consent Decree ¶ 7(j) does tie one of Westchester's obligations to take action pursuant to the provision to whether municipalities are hindering (or failing to promote) Consent Decree ¶ 7's unit-specific obligations. But it is evident that triggering circumstances can occur, from the time of the entry of the consent decree to the present, regardless of whether Westchester is "counting on" a particular development:

⁷ Each of the two sentences of Consent Decree ¶ 7(j) are set out separately, below:

In the event that a municipality does not take actions needed to promote the objectives of this paragraph, or undertakes actions that hinder the objectives of this paragraph, the County shall use all available means as appropriate to address such action or inaction, including, but not limited to, pursuing legal action.

The County shall initiate such legal action as appropriate to accomplish the purpose of this Stipulation and Order to AFFH.

⁸ Only ADC, through its expert, Dr. Beveridge, has pointed out that principally residential zoning districts cannot fairly be treated interchangeably with other types of zoning districts.

(a) The Court has held that “hinder” includes “make difficult the progress of” and that failing to act can itself “interfere.” Order of May 24, 2016, *supra*, at 51. Both of these things occur in real time. They don’t depend on calculating units or benchmarks; they require the County to compare hindering versus non-hindering and not acting-to-promote versus acting-to-promote. It is obviously easier to achieve the goal of building a minimum of 750 units in the absence of municipal hindering and in the presence of municipal actions to promote. The obligation is not stated in terms of being triggered if *necessary* to get a particular number of units built; the obligation can only reasonably be interpreted as creating the environment within which building of units can most easily occur. As made most evident by Dr. Beveridge’s expert report, 19 municipalities with exclusionary zoning is not such an environment, and Westchester was and is unwilling to act to change that.

(b) In any event, as the process was unfolding (in, for example, 2010), Westchester had no way of knowing what units it was going to need to rely on to reach a minimum of 750 units; its task was to get as many potential units into the “pipeline” as possible (it being understood by all that many of those potential units would not ultimately be developed). The decree sets forth no provision that suggests that Westchester can wait to act until it is certain which developments will be “necessary.”

(c) Even more critically, while “hindering” can operate in connection with a site as to which a developer is already proceeding, the far more important form of hindering is where a municipality has zoning so restrictive that developers are inhibited or deterred from any serious consideration of attempting to develop affordable housing in that jurisdiction.⁹ (Note that

⁹ This is one of the reasons why it was so important for Westchester to step in and acquire interests in properties with desegregation potential and then act to overcome zoning barriers -- even in the absence of a disparate impact or *Berenson* violation -- pursuant to the *County of*

hindering through restrictive zoning is very different from -- and much more concrete than -- generalized opposition to affordable housing.) It is not tenable to believe that zoning that deterred developers from exploring the possibility of development is not enough to trigger Westchester's obligation to act: such an interpretation would have the perverse effect of insulating the most aggressively exclusionary jurisdictions from any remedial action.

(d) Finally, though the parties do not focus the Court's attention on this fact, the unit-specific objective is not a *maximum* of 750, but a *minimum* of 750. Consent Decree ¶ 7. After all, there is no provision to return any unspent funds set aside for development to Westchester had the minimum number been reached early: all the funds have to be expended for AFFH development. Moreover, it is clear by looking at Consent Decree ¶ 7 in context that the unit-specific goal was to go higher if possible. *See, e.g.*, Consent Decree ¶¶ 15, 22(e) (discussing, *inter alia*, Westchester's obligation to "explore all opportunities to leverage funds" and to use a revolving fund, respectively). The objective of maximizing units is hindered when barriers to fair housing choice (like zoning barriers) are not removed. The more such barriers are removed, the cheaper it is to build units. The less subsidy each unit required, the more units Westchester could have built.

ADC alone has been prepared to raise these issues and fully inform the Court with respect to them.

2. The scope and "triggering" of the second part of Consent Decree ¶ 7(j). As the last sentence of Consent Decree ¶ 7(j) makes clear, at least some mandatory litigation is pegged *not*

Monroe doctrine. Only ADC has been prepared to point out that both acquiring such interests and utilizing *County of Monroe* were contemplated by the decree. Moreover, as Westchester has had -- independent of Consent Decree ¶ 7(j) -- a continuous obligation since 2009 "to 'use all available means as appropriate' to achieve the development of 750 new units," Order of May 24, 2016, *supra*, at 45, acquiring interests in appropriate properties was certainly a step that Westchester could have taken but, as a matter of policy, did not.

to the accomplishment of unit-specific goals of Consent Decree ¶ 7, but to the accomplishment of the purpose of the decree. The sentence does not leave open the question of what the purpose of the decree is: it is to affirmatively further fair housing. Earlier in Consent Decree ¶ 7(j) the focus was on the accomplishment of the objectives of Consent Decree ¶ 7 to develop at least 750 units of housing. So if the last sentence of Consent Decree ¶ 7(j) were also limited to the unit-specific goal, the language would not be adding anything -- an impermissible interpretation.

In fact, the pegging of litigation to accomplishing the broader purpose of the decree to affirmatively further fair housing makes sense when one puts the language in context. First, as only ADC has explained, municipal and county resistance to zoning change -- resistance that perpetuated segregation -- was at the heart of the litigation in the first place, and combatting anticipated continuing resistance was central to the aims of the decree. Second, Westchester was forced elsewhere in the decree to acknowledge as its policy the fact that “AFFH significantly advances the public interest of the County and the municipalities therein,” Consent Decree ¶ 31(b); to have as a goal the “elimination of de facto residential segregation,” Consent Decree ¶ 31(a); and to recognize that “the broad and equitable distribution of affordable housing promotes sustainable and integrated residential patterns, increases fair and equal access to economic, educational and other opportunities, and advances the health and welfare of the residents [of Westchester] and the municipalities therein,” Consent Decree, p. 1, para. 2. The achievement of these goals and interests (in a county of nearly one million people) was dependent on making structural change, specifically change to unduly restrictive zoning -- a change to low-density residential zoning that long history had shown was not going to take place voluntarily.

Read in conjunction with the presence of so many barriers to fair housing choice, the last sentence of Consent Decree ¶ 7(j) represented an obligation to take all steps, including litigating,

throughout the seven-year period in order to AFFH. Westchester has not yet begun to do so, yet only ADC -- not the Government nor the Monitor -- has sought remedies commensurate with the scope of Westchester's violations.

3. The perpetuation of segregation and disparate impact report presented by ADC is information that is necessary for the Court to have. Dr. Beveridge's report and exhibits thereto (ECF Nos. 592-1 to 592-12) make clear the fact that municipal zoning that perpetuates segregation and that operates with disparate impact to the detriment of African-Americans is widespread in Westchester.

It would be an extraordinarily important report in any circumstance, but it is crucial that the existence of segregation-perpetuating zoning in 19 of the 25 Westchester municipalities with African-American population of less than 3.0 percent (76 percent of that group of municipalities) be fully considered by the Court through ADC's submission. Indeed, it is noteworthy that this information has not otherwise come to light, nearly seven years after the entry of the decree.

The report tells the Court three very important things. First, whatever the "cooperative" approach might entail -- be it Westchester's version on the one hand or the Government's and the Monitor's on the other -- that approach has left the structural underpinnings of segregation in residential white Westchester fully intact. Second, Westchester could not have failed to have understood the existence and significance of the facts that Dr. Beveridge described. The County's inaction, therefore, had nothing to do with any assessment of what actions were "appropriate" to the circumstances,¹⁰ but rather everything to do with maintaining its

¹⁰ Note that the Beveridge Report points out that, in connection with 21 jurisdictions that had "a percentage of residential acreage being used for residential multi-family less than half of the average of the excluded jurisdictions," there could be "very substantial increases of acreage used for multi-family housing without changing the nature of the municipality to one where multi-family consumed anything like the percentage of land zoned for lower-density residential uses,

longstanding hands-off attitude to municipal zoning decisions. Third, the failure of the Government and the Monitor either to complete appropriate assessments of perpetuation of segregation and disparate impact, or to seek remedies for across-the-board Consent Decree ¶¶ 7(i) and (j) violations, indicates an unwillingness to defend the integrity of the decree fully or to advance its principles as robustly as is plainly necessary.

4. Neither Westchester’s failure to develop an adequate Implementation Plan nor the nature of the units built in an *ad hoc* fashion can be disregarded when evaluating the necessary relief at this juncture. Only ADC has pointed out the fact that an Implementation Plan (IP) that affirmatively furthered fair housing was an essential component of the consent decree and that it was interwoven with a variety of other obligations. *See, e.g.*, Consent Decree ¶ 20(d) (mandating the Monitor to “specify revisions or additional items” for the IP in order that the IP accomplish the “objectives and terms” of the decree); Consent Decree ¶ 21 (requiring the incorporation of the IP into the Analysis of Impediments); and Consent Decree ¶ 24 (contemplating designation of elements of IP to be incorporated into decree and “enforceable in the same manner as the other terms” of the decree). No compliant IP has ever been developed. Note that there was no authority to alter the requirement of a compliant IP without a writing signed by the parties. Consent Decree ¶ 53.¹¹

The centrality of an IP that achieved the objective of the decree to affirmatively further

 let alone changing the municipality to one where multi-family use predominated.” Beveridge Report at 15-16.

¹¹ This fact has broader significance. It is certainly true that many people may in good faith believe that “buy in” is possible to achieve and that a “carrot, not sticks” approach is the way to go. But the Court is not called upon to referee public policy debates. For the purposes of the consent decree, these disputes were indisputably resolved in the direction of an approach that emphasized the need to be ready to force towns and villages to act when those towns and villages, consistent with their historical pattern, were not ready to act.

fair housing demonstrates the fallacy of thinking about municipal-level criteria as anything but the starting point for Westchester's unit-specific locational and other obligations. If all Westchester had to do was place units in specified tranches of municipalities (under 3.0 percent African-American and under 7.0 percent Latino, for example), no IP would have been needed. But requiring an IP that furthered the objective of AFFH meant that units, beyond meeting criteria in Consent Decree ¶ 7, had to overcome barriers to fair housing choice. It meant, too, that, Westchester had to look to place units -- again, beyond the criteria set forth in Consent Decree ¶ 7 -- within the municipalities and on the census blocks with the "lowest concentrations" of African-American and Latino residents. Consent Decree ¶ 22(f).¹²

Only ADC has pointed out that, even on the municipal level, only 45 percent of the units that had financing through 2015 -- units that the parties and the Monitor have told the Court meet the "interim benchmarks" -- are located in the least African-American, least Latino municipalities when viewed through the lens of 2010 Census data. Consent Decree ¶ 7(a) contemplated at least 84 percent.

Only ADC has pointed out the consequences of *ad hoc* development: hundreds of units that do not AFFH. *See* list of sites annexed to Exhibit 8 to ADC's May 11, 2016 letter (ECF 592-19). This list reflects siting that is entirely inconsistent with an effort to eliminate barriers to

¹² ADC's motion to enforce (ECF. No. 343) contained a variety of proposals that, even if adopted by the Monitor pursuant to his mandatory Consent Decree ¶ 20(d) duty as opposed to the Court, would have yielded an IP that began to AFFH. These included but were not limited to proposals specifying the use of 2010 Census data; a limitation on the number of units on vacant blocks; a required minimum of units on Census blocks with African-American population of less than 1.0 percent and Latino population of less than 3.0 percent; the inclusion of market-rate units in each development as a guard against undesirable sites and as a means of integrating the developments into the existing community; genuine reporting on municipal non-cooperation; acquisition of interests in appropriate properties with maximum desegregation potential; and planning for litigation to vindicate the County's rights under the Fair Housing Act, *Berenson*, and *County of Monroe*. None of these were adopted.

fair housing choice; it is only consistent with Westchester's desire to *avoid* making structural change in existing, white, low-density, residential neighborhoods -- and the fact that the Government and the Monitor (at the very least) condoned that decree-violating approach.

These facts are all crucial to the Court in understanding just how seriously the decree has detoured from its intended destination, and, therefore, to the need for the Court to fashion equitable remedies powerful enough to bring the decree back on track. *See* Order of May 24, 2016, *supra*, at 35 (“[A] court’s interest ‘in protecting the integrity of a consent decree justifies any reasonable action taken by the court to secure compliance’”) (internal citation omitted).

POINT II

A PROPER ANALYSIS OF IMPEDIMENTS IS NOT AN ADEQUATE SUBSTITUTE FOR THE PERFORMANCE OF WESTCHESTER’S OTHER OBLIGATIONS.

For the reasons stated in ADC’s May 11, 2016 letter, the undersigned 10 *amici* support the remedies proposed by ADC. Moreover, as the Levy Declaration makes clear, Westchester’s failure to comply with its decree obligations has very real and very negative consequences for African-American families in Westchester who seek to move to neighborhoods of opportunity. Notably, the Government’s May 17, 2016 letter to the Court (ECF No. 599 at 2) -- wherein the Government states that “the County will work toward the goals of the Consent Decree only when the Court or the Monitor focuses the County’s attention upon compliance” -- supports ADC’s approach, too. Here we address only two issues related to the Monitor’s call for an analysis of impediments (AI).

As the Monitor set forth in his biennial report (ECF No. 576 at 46-47), and repeated in his May 25, 2016 filing (ECF No. 609), he would like to have a consultant prepare an AI and

then have Westchester obliged to take the steps set forth in the AI. Westchester is certainly in violation of its Consent Decree ¶ 32 obligations, and the Court should formally find that Westchester has breached these obligations and that it is in contempt of court.¹³ But premising the action requirement on the fact that the County has not provided incentives to encourage municipalities to adopt the “model ordinance,” Monitor May 25, 2016 filing at 3, is incorrect: the action requirement, as ADC has pointed out, is already set forth in Consent Decree ¶ 32. It does not hinge on whether such incentives have or have not been provided.

The Monitor did not ask for a finding that Westchester has breached its Consent Decree ¶ 7(j) obligations, notwithstanding that the Monitor found that Westchester “took no direct activities to address zoning impediments in 2014,” April 1, 2015 Monitor Report (ECF No. 506 at 32), and that, “rather than promoting inclusionary zoning, the County essentially informed the municipalities that the zoning in place should not be challenged....” Monitor’s Biennial Report, April 27, 2016 at 43 (ECF No. 576).

The AI obligation is separate from and independent of the Consent Decree ¶ 7(j) obligations. The fulfillment of one does not excuse non-compliance with the other. The Consent Decree ¶ 7(j) obligations are very specifically pegged to the requirement to litigate. The proposed AI, unless the Court were to specify a required litigation component, may not.¹⁴ It is of particular significance that the decree makes clear the need to take *all* steps, a broad requirement

¹³ *Cf.* Hearing of May 23, 2016 at 38 (the Court describes the AI process thusly: “the very much failed process that we call the AI process, the analysis of impediments process, that has been part of the failed effort by the county to make a submission to HUD that could be approved”). (The relevant transcript page is annexed as part of Exhibit 1 to the Levy Declaration.)

¹⁴ The lack of a mandatory litigation component in an AI is not an idle fear. Westchester certainly would not insert such a requirement on its own. The Government has allowed six years of violation of Consent Decree ¶ 32 to go by without asking the Court to hold Westchester in contempt. The Monitor has not specified that litigation by Westchester must be part of the strategy to overcome the barriers to fair housing choice. *Id.* at 47.

that includes *County of Monroe* litigation, something that an AI consultant is unlikely to have ever encountered as part of an AI.

CONCLUSION

For the reasons stated herein, the undersigned *amici* all request that Court treat ADC's May 11, 2016 letter as an *amicus* brief, consider it for all purposes relevant to this case, and order the remedies sought by ADC.

Dated: New York, New York
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