No.

In the Supreme Court of the United States

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, ET AL., PETITIONERS

v.

THE INCLUSIVE COMMUNITIES PROJECT, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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

2. If disparate-impact claims are cognizable under the Fair Housing Act, what are the standards and burdens of proof that should apply?

PARTIES TO THE PROCEEDING

Petitioners Texas Department of Housing and Community Affairs, Michael Gerber, Leslie Bingham-Escareno, Tomas Cardenas, C. Kent Conine, Dionicio Vidal Flores, Juan Sanchez Munoz, and Gloria L. Ray were Defendants-Appellants in the court of appeals.[1]

Respondent The Inclusive Communities Project, Inc., was a Plaintiff-Appellee in the court of appeals.

Respondent Frazier Revitalization, Inc., was an Intervenor-Appellant in the court of appeals.

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[1] Pursuant to Supreme Court Rule 35, Petitioners note that Michael Gerber, Tomas Cardenas, C. Kent Conine, Dionicio Vidal Flores, and Gloria L. Ray were sued in their capacities as public officials and no longer hold office. They have been replaced by Timothy Irvine, J. Paul Oxer, Tom H. Gann, J. Mark McWatters, and Robert D. Thomas.

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The Fair Housing Act forbids landlords, homeowners, state housing authorities, and others to discriminate against any person "because of" race. 42 U.S.C. §§ 3604(a), 3605(a). Many courts interpret this statute to forbid practices that have a disparate impact, even when there is no evidence that a challenged decision was made *because of* a person's race. This Court has twice granted certiorari to resolve whether the Fair Housing Act provides for disparate-impact liability, but each case was dismissed before the Court could resolve the question. *See Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, 134 S. Ct. 636 (2013) (mem.); *Magner v. Gallagher*, 132 S. Ct. 1306 (2012) (mem.). This case presents an opportunity for this Court finally to resolve

whether disparate-impact claims are cognizable under the Fair Housing Act.

OPINIONS BELOW

The opinion of the court of appeals is available at 2014 WL 1257127. *See* Pet. App. 1a–21a. The district court's findings of fact and conclusions of law, which found that the respondent had "proved its disparate impact claim" under the FHA, are reported at 860 F. Supp. 2d 312. *See* Pet. App. 146a–189a. The district court's remedial order is available at 2012 WL 3201401, Pet. App. 104a–145a, and the district court's order granting in part the petitioners' motion to amend the judgment is available at 2012 WL 5458208, Pet. App. 63a–67a.

JURISDICTION

The court of appeals entered its judgment on March 24, 2014. *See* Pet. App. 22a–25a. The petitioners timely filed this petition for a writ of certiorari on May 13, 2014. *See* 28 U.S.C. § 2101(c). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Fair Housing Act provides, in relevant part:

> As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—
>
> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person be-

> cause of race, color, religion, sex, familial status, or national origin.

42 U.S.C. § 3604(a).

> It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.

42 U.S.C. § 3605(a).

STATEMENT

Federal law offers tax credits to developers who build "qualified" low-income housing projects. *See* 26 U.S.C. § 42(g)(1).[2] This tax subsidy is known as the Low-Income Housing Tax Credit Program (LIHTC). The States administer this program by selecting the developers and projects that will receive these federal tax credits. *See* Pet. App. 4a, 6a–7a. And federal law requires States to allocate these credits according to a "qualified allocation

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[2] A "qualified low-income housing project" is any residential rental property in which either (a) 20 percent or more of the units are both rent-restricted and occupied by individuals whose income is 50 percent or less of the area's median gross income (the "20–50 test"), or (b) 40 percent or more of the units are both rent-restricted and occupied by individuals whose income is 60 percent or less of area median gross income (the "40–60 test"). *See* 26 U.S.C. § 42(g)(1).

plan" (QAP) that "sets forth selection criteria to be used to determine housing priorities of the housing credit agency which are appropriate to local conditions." 26 U.S.C. § 42(m)(1)(B).

The Texas Department of Housing and Community Affairs, its board members, and executive director (collectively, "the Department") are responsible for distributing these tax credits throughout Texas. *See* Tex. Gov't Code § 2306.6701; Pet. App. 4a. But federal and state law impose many constraints on the Department's decision-making. Federal law, for example, requires a State's qualified-allocation plan to give preference to projects in low-income areas. *See* 26 U.S.C. § 42(m)(1)(B)(ii)(III).[3] And state law requires the Department to "score and rank the application using a point system." Tex. Gov't Code § 2306.6710(b). This point system requires the Department to "prioritize in descending order" the following eleven criteria:

> (A) financial feasibility of the development … ;
>
> (B) quantifiable community participation with respect to the development … ;
>
> (C) the income levels of tenants of the development;

[3] Specifically, federal law requires preferences for projects located in "qualified census tracts"—tracts for which 50 percent or more of the households have an income of less than 60 percent of the area median gross income, or that have poverty rates of at least 25 percent. *See* 26 U.S.C. § 42(d)(5)(B)(ii)(I).

> (D) the size and quality of the units;
>
> (E) the commitment of development funding by local political subdivisions;
>
> (F) the rent levels of the units;
>
> (G) the cost of the development by square foot;
>
> (H) the services to be provided to tenants of the development;
>
> (I) whether … the proposed development site is located in an area declared to be a disaster under Section 418.014;
>
> (J) quantifiable community participation with respect to the development, evaluated on the basis of written statements from any neighborhood organizations on record with the state or county in which the development is to be located and whose boundaries contain the proposed development site; and
>
> (K) the level of community support for the application, evaluated on the basis of a written statement from the state representative who represents the district containing the proposed development site;

Tex. Gov't Code § 2306.6710(b)(1). The Department has also developed "below-the-line" criteria to supplement these statutorily mandated factors, but no Department-created consideration may outweigh any "above-the-line" factor codified in section 2306.6710. *See* Tex. Att'y Gen. Op. No. GA-0208 (2004).

Respondent The Inclusive Communities Project, Inc., (ICP) is a non-profit that works to place Section 8 tenants in Dallas's affluent and predominantly white suburban neighborhoods. ICP's goals are explicitly race-conscious. It describes its mission as "assist[ing] Black or African American Dallas Housing Authority Section 8 families in finding housing opportunities in the suburban communities in the Dallas area." *See* Complaint ¶ 3, *Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, 3:08-CV-0546-D (N.D. Tex., filed Mar. 28, 2008); *see also id.* ¶ 6 ("ICP assists DHA Section 8 program families who choose to lease dwelling units in non-minority areas"). ICP helps its clients by locating apartments, subsidizing their expenses, and paying a "landlord incentive bonus," if necessary, to persuade an owner to accept a Section 8 voucher. *See Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, 749 F. Supp. 2d 486, 492 (N.D. Tex. 2010). Because federal law forbids properties receiving low-income housing tax credits to discriminate against Section 8 tenants, ICP finds it easier and less expensive to place clients in those properties. *See* 26 U.S.C. § 42(h)(6)(B)(iv).

ICP sued the Department in 2008, accusing it of "disproportionately allocat[ing]" tax credits to properties in minority-populated areas. *See* Complaint ¶ 13, *Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, 3:08-CV-0546-D (N.D. Tex., filed Mar. 28, 2008). ICP brought disparate-treatment claims under the equal-protection clause and 42 U.S.C. § 1982, and a dis-

parate-impact claim under the FHA. *See* Pet. App. 146a.[4] It demanded an injunction requiring the Department "to allocate Low Income Housing Tax Credits in the Dallas metropolitan area in a manner that creates as many Low Income Housing Tax Credit assisted units in non-minority census tracts as exist in minority census tracts."[5] Complaint at 16, *Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, 3:08-CV-0546-D (N.D. Tex., filed Mar. 28, 2008). ICP also asked the court to "enjoin[] the defendants from … denying Low Income Housing Tax Credits to units in the Dallas metropolitan area when such denial is made by taking the race and ethnicity of the residents of the area in which the project is to be located and the race and ethnicity of the probable

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[4] ICP established Article III standing by relying on the monetary harm caused by the Department's failure to approve more low-income housing tax credits in white-populated locations. ICP's mission is to place Section 8 tenants in predominantly white neighborhoods, and ICP must spend more resources to achieve that goal when applications for tax credits in those neighborhoods are denied. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *Inclusive Cmtys. Project*, 749 F. Supp. 2d at 495–97.

[5] The Department would be able to escape this obligation only if its "approval rates for Low Income Housing Tax Credits in minority census tracts in the Dallas metropolitan area does not exceed the approval rate for Low Income Housing Tax Credit units in non-minority census tracts" *and* "the approved projects in the minority census tracts do not contain a higher percentage of low income residents than the percentage of low income residents in the projects approved in the non-minority census tracts." Complaint at 16, *Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, 3:08-CV-0546-D (N.D. Tex., filed Mar. 28, 2008).

residents of the project into account." *Id.* ICP did not explain how the Department could comply with the first of these proposed injunctions without violating the second—or without violating the Fair Housing Act, which prohibits the Department from making decisions regarding the location and allotment of low-income housing "because of race." 42 U.S.C. § 3604(a).

After a four-day bench trial, the district court found that ICP had failed to prove intentional discrimination and dismissed its equal-protection and section 1982 claims. *See* Pet. App. 164a.

As for the disparate-impact claim, the district court first concluded that ICP established a "prima facie case" by showing that the Department had "disproportionately approved tax credits for non-elderly developments in minority neighborhoods, and, conversely, has disproportionately denied tax credits for non-elderly housing in predominately Caucasian neighborhoods." Pet. App. 8a; *see also* Pet. App. 165a, 186a. Specifically, the district court found that the Department "approved tax credits for 49.7% of proposed non-elderly units in 0% to 9.9% Caucasian areas, but only approved 37.4% of proposed non-elderly units in 90% to 100% Caucasian areas." Pet. App. 165a (footnote omitted). The mere existence of this statistical disparity—without regard to whether it was affected by the strength of the applications or other race-neutral factors—was sufficient (in the district court's view) to establish a "prima facie case" and flip the burden of proof to the Department.

The district court next held that the Department must "prove" that its actions furthered a "legitimate"

government interest *and* that "no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact." Pet. App. 166a–167a (citations and internal quotation marks omitted).[6] The Department argued that this statistical disparity arose from federal and state laws requiring the Department to award low-income housing tax credits according to fixed criteria, some of which are correlated with race. *See* Pet. App. 168a–172a; *see also* 26 U.S.C. § 42(m)(1)(B)(ii)(III) (requiring a State's qualified-allocation plan to give preference to projects built in low-income areas). The district court assumed that compliance with these laws qualified as a "legitimate" interest but held that the Department failed to prove the absence of any alternative that would reduce the disparity in approval rates. Specifically, the court noted that the Department had not proven that it "cannot add other below-the-line criteria" or otherwise re-jigger its scoring criteria to achieve parity in its rates of approval for LIHTC applications. *See* Pet. App. 176a. Then the district court entered judgment for ICP on its disparate-impact claim and imposed a lengthy structural injunction on the Department. Pet. App. 68a–145a.

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[6] The district court recognized that the Fifth Circuit had not yet adopted a "standard and proof regime for FHA-based disparate impact claims" and noted that the federal courts of appeals have adopted "at least three different standards and proof regimes." Pet. App. 166a (citing cases). Nevertheless, the district court chose to follow an approach similar to the opinion in *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 939 (2d Cir. 1988).

The Department appealed to the Fifth Circuit. During that appeal, the United States Department of Housing and Urban Development (HUD) issued a regulation that purports to establish standards for proving disparate-impact claims under the FHA. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100). According to HUD, the Fair Housing Act should impose liability on practices with a "discriminatory effect," which includes (in HUD's view) any practice that "actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin." 24 C.F.R. § 100.500(a).

HUD's regulation provides that the plaintiff should bear the burden of proving that the challenged practice has a "discriminatory effect." 24 C.F.R. § 100.500(c)(1). If the plaintiff meets this initial burden, then the defendant must prove that the challenged practice is "necessary to achieve one or more substantial, legitimate, nondiscriminatory interests." *Id.* § 100.500(c)(2). If the defendant meets that burden of proof, then the plaintiff would bear the burden of proving that those substantial, legitimate, and nondiscriminatory interests "could be served by another practice that has a less discriminatory effect." *Id.* § 100.500(c)(3).

The Fifth Circuit panel was bound by prior decisions of that court holding that the FHA provides for disparate-impact liability. *See* Pet. App. 12a (citing *Artisan/Am. Corp. v. City of Alvin*, 588 F.3d 291, 295 (5th

Cir. 2009); *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996)). But the Fifth Circuit had never before resolved the standards for proving a disparate-impact claim. Rather than endorsing the burden-shifting approach of the district court, the Fifth Circuit adopted the HUD regulations as the law of the circuit and remanded for the district court to apply that standard. Judge Jones specially concurred, questioning whether ICP had proven even a "prima facie case" of disparate-impact discrimination. *See* Pet. App. 18a–21a.

REASONS FOR GRANTING THE PETITION

I. THIS COURT HAS TWICE GRANTED CERTIORARI TO DECIDE WHETHER DISPARATE-IMPACT CLAIMS ARE COGNIZABLE UNDER THE FHA

In two previous cases, this Court granted certiorari to resolve whether disparate-impact claims may be brought under the FHA. *See Magner v. Gallagher*, 132 S. Ct. 548 (2011) (mem.); *Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, 133 S. Ct. 2824 (2013) (mem.). In both cases, however, the parties settled before oral argument and the writs of certiorari were dismissed. *See Gallagher*, 132 S. Ct. 1306; *Mount Holly*, 134 S. Ct. 636. The reasons supporting the grants of certiorari in those cases are equally applicable here.

A. The Questions Presented In This Petition Are Indistinguishable From The Questions On Which This Court Granted Certiorari In *Gallagher* and *Mount Holly*

The plaintiffs in *Gallagher* sued to block a city's increased code-enforcement efforts, alleging that it would reduce affordable housing for low-income individuals. Because low-income individuals are disproportionately minorities, the plaintiffs asserted disparate-impact claims (along with disparate-treatment claims) under the FHA. The district court dismissed all the claims at summary judgment. *See* 619 F.3d 823, 830 (8th Cir. 2010). But the Eighth Circuit reversed the grant of summary judgment on the disparate-impact claim, holding that there was a fact issue surrounding whether any alternative practices could reduce the alleged disparate impact. *See id.* at 833–38, 845. The Eighth Circuit denied rehearing en banc, but five judges dissented, questioning whether the FHA can be construed to impose any type of disparate-impact liability. *See Gallagher v. Magner*, 636 F.3d 380, 381–83 (8th Cir. 2010) (Colloton, J., dissenting).

This Court granted certiorari on two questions. The first question was: "Are disparate impact claims cognizable under the Fair Housing Act?" Pet. for Cert., *Magner v. Gallagher*, 2011 WL 549171 (Feb. 14, 2011). The second question involved the standards and burdens of proof that should apply were this Court to conclude that the FHA imposes disparate-impact liability. *See id.* But the parties settled after merits briefing and before oral argument, and the Court dismissed the writ of certiorari. *See Gallagher*, 132 S. Ct. 1306; Sup. Ct. R. 46.1.

Sixteen months later, this Court again granted certiorari to resolve whether the FHA imposes disparate-impact liability. *See Mount Holly*, 133 S. Ct. 2824; Pet. for Cert., *Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, 2012 WL 2151511 (June 11, 2012). The plaintiffs in *Mount Holly* alleged that a township's efforts to renew a blighted area would reduce affordable housing, adversely affecting low-income residents who are disproportionately minorities. *See Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375, 377–81 (3d Cir. 2011). The district court dismissed the plaintiffs' disparate-treatment and disparate-impact claims on summary judgment. *Id.* at 380–81. On appeal, the Third Circuit affirmed the dismissal of the disparate-treatment claims, but reversed and remanded on the disparate-impact claims, holding that fact issues existed on whether any alternative practice might reduce the alleged disparate impact. *Id.* at 387.

The township sought certiorari on the same two questions that this Court had agreed to resolve in *Gallagher*. *See* Pet. for Cert., *Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, 2012 WL 2151511 (June 11, 2012). This time, however, the Court called for the views of the Solicitor General before ruling on the certiorari petition. *See Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, 133 S. Ct. 569 (Oct. 29, 2012) (mem.). And while the certiorari petition was pending, HUD issued new regulations declaring that the FHA (in HUD's view) imposes disparate-impact liability and purporting to announce the standards and

burdens of proof that courts should apply to those disparate-impact claims. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013).

When the Solicitor General filed his petition-stage amicus brief in May of 2013, he urged this Court to deny certiorari, noting that the recently issued HUD regulation "directly addresses those questions" and arguing that the courts of appeals should have the first opportunity to weigh in on the legality of HUD's rule. *See* Brief of the United States as Amicus Curiae at 5–6, *Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, No. 11-1507 (U.S., filed May 17, 2013). The Solicitor General also argued that this Court should deny certiorari because the case was "in an interlocutory posture" and because "neither of the questions presented was addressed below." *Id.* at 6. This Court nevertheless granted the petition, though only on the first question presented: whether disparate-impact liability can exist under the FHA. *See Mount Holly*, 133 S. Ct. 2824.

As with *Gallagher*, though, this Court was unable to resolve the question presented because the parties settled before oral argument and the Court dismissed the writ of certiorari. *See Mount Holly*, 134 S. Ct. 636; Sup. Ct. R. 46.1.

This case presents the opportunity for this Court to finally resolve the question on which it has twice granted certiorari. Neither the interlocutory posture nor the recently issued HUD regulation dissuaded this Court from granting certiorari in *Mount Holly,* and they should not do so here. The Department has already spent more

than a year operating its low-income housing tax credit program under a structural injunction designed to achieve race-specific outcomes. The Department is now faced with the prospect of litigating anew a disparate-impact claim that may not even exist. If this Court wants to resolve whether the FHA imposes disparate-impact liability, it should not wait and see if the Department will be found liable a second time.

B. The Far-Reaching Scope Of Disparate-Impact Liability Makes This A Question Of Exceptional Importance

The need for the Court's guidance on this issue is acute, given the wide variety of actions that can trigger disparate-impact liability. The Department, for example, administers almost two dozen housing programs throughout the State of Texas. *See* Tex. Gov't Code ch. 2306. Until Texas achieves racial symmetry in all aspects of government decisionmaking, operating any one of those programs exposes the State to a potential disparate-impact lawsuit. *See, e.g.*, Tex. Gov't Code §§ 2306.581 to .591 (establishing program to help colonias, which are low-income communities near the Mexican border); 2306.801 to .805 (funding rehabilitation of certain at-risk multifamily housing developments); 2306.921 to .933 (governing migrant labor housing facilities). And given the wide scope of actionable conduct under the FHA, there is almost no housing decision for which a litigant would be unable to establish a "prima facie case." *See* 42 U.S.C. §§ 3604, 3605 (applying to selling, renting, negotiating, advertising, making representations, financing, and otherwise making unavailable or

denying a dwelling to someone); *see also Washington v. Davis*, 426 U.S. 229, 248 (1976) ("A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.").

This concern exists not only in Texas but nationwide. In the past sixteen months, there have been nine courts of appeals decisions involving disparate-impact claims brought under the FHA.[8] Zoning decisions frequently become the subject of disparate-impact lawsuits. *See Town of Huntington, N.Y. v. Huntington Branch NAACP*, 488 U.S. 15 (1989); *Reinhart v. Lincoln Cnty.*, 482 F.3d 1225 (10th Cir. 2007); *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565 (2d Cir. 2003); *Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977). Other lawsuits have challenged occupancy limits, *see Mountain Side Mobile Estates P'ship v.*

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[8] *McCulloch v. Town of Milan*, No. 12-4574-CV, 2014 WL 1189868 (2d Cir. Mar. 25, 2014); Pet. App. 1a–21a; *City of Fort Lauderdale v. Scott*, No. 12-15014, 2014 WL 28612 (11th Cir. Jan. 3, 2014); *Pac. Shore Props., LLC v. City of Newport Beach*, 730 F.3d 1142 (9th Cir. 2013); *Whitaker v. N.Y. Univ.*, 531 F. App'x 89 (2d Cir. 2013); *Rodriguez v. Nat'l City Bank*, 726 F.3d 372 (3d Cir. 2013); *L&F Homes & Dev., LLC v. City of Gulfport*, 538 F. App'x 395 (5th Cir. 2013); *Keller v. City of Fremont*, 719 F.3d 931 (8th Cir. 2013); *Sheptock v. Fenty*, 707 F.3d 326 (D.C. Cir. 2013).

Sec'y of Hous. & Urban Dev., 56 F.3d 1243 (10th Cir. 1995); the closure of a homeless shelter, *see Boykin v. Gray*, No. 10-1790 (PLF), 2013 WL 5428780 (D.D.C. Sept. 30, 2013); and charging a fee to collect garbage, *see 30 Clinton Place Owners, Inc. v. City of New Rochelle*, No. 13 CV 3793(VB), 2014 WL 890482 (S.D.N.Y. Feb. 27, 2014). The aftermath of Hurricane Katrina produced at least three lawsuits alleging that recovery efforts produced a disparate impact on minorities. *See Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep't of Hous. & Urban Dev.*, 639 F.3d 1078 (D.C. Cir. 2011); *Anderson v. U.S. Dep't of Hous. & Urban Dev.*, 554 F.3d 525 (5th Cir. 2008); *Bonvillian v. Lawler-Wood Hous., LLC*, 242 F. App'x 159 (5th Cir. 2007). And ICP recently sued HUD for disparate-impact discrimination over its actions in setting small-area fair-market rents for housing vouchers in the Dallas area. *See Inclusive Cmtys. Project, Inc. v. U.S. Dep't of Hous. & Urban Dev.*, 3:14-cv-1465-K (N.D. Tex.).

This proliferation of lawsuits alone calls for the Court's attention. But there is yet a further danger that disparate-impact liability will push defendants (or potential defendants) to resort to illegal race-based discrimination. *See Ricci v. DeStefano*, 557 U.S. 557, 580–84 (2009); *id.* at 594 (Scalia, J. concurring) ("Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes"). The structural injunction imposed by the district court forces the Department to walk that tightrope—attempting to achieve

racial balancing in the low-income housing tax credit program without actually taking race into account. No statute should be construed to force defendants (or potential defendants) into that balancing act absent clear and unambiguous language.

C. The Statutory Language That Provides For Disparate-Impact Claims Under Title VII And The ADEA Is Missing From The FHA

Courts that recognize disparate-impact claims under the FHA have relied on Title VII case law. *See* 42 U.S.C. § 2000e-2; *Graoch Assocs. #33, LP v. Louisville/Jefferson Cty. Metro Human Relations Comm'n*, 508 F.3d 366, 371–73 (6th Cir. 2007); *Kyles v. J.K. Guardian Sec. Servs., Inc.*, 222 F.3d 289, 295 (7th Cir. 2000). But these statutes are not identical, and the statutory language that provides for disparate-impact liability in Title VII is nowhere to be found in the FHA.

This Court first recognized disparate-impact liability under Title VII in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), stating that the "thrust of the Act" was directed at "the consequences of employment practices, not simply the motivation." *Id.* at 432. Three years later, the Eighth Circuit became the first court of appeals to apply that reasoning to the FHA, concluding that "[e]ffect, and not motivation, is the touchstone" of claims brought under the FHA. *See United States v. City of Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974). Then the Seventh Circuit followed suit, again relying on *Griggs*. *See Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1288–90 (7th Cir. 1977). The remaining circuits (other than the D.C. Circuit, which has

yet to reach the issue) have all concluded that disparate-impact liability exists under the FHA.[9]

But in 1988, this Court identified, for the first time, the language in Title VII that allows for disparate-impact liability. *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991 (1988) (relying on § 2000e-2(a)(2), which prohibits actions that "*adversely affect* [an individual's] status as an employee.") (emphasis added). And in *Smith v. City of Jackson*, 544 U.S. 228 (2005), this Court more fully explained the language needed to create a disparate-impact cause of action. 544 U.S. 228, 235–36 (2005) (plurality op.).

The question in *Smith* was whether the Age Discrimination in Employment Act established a disparate-impact cause of action. *See* 544 U.S. at 230 (plurality op.). Seven Justices agreed that the first subsection of 29 U.S.C. § 623(a) could not support disparate-impact liability. *See id.* at 236 n.6 (plurality op. of Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ.) (citing 29 U.S.C. § 623(a)(1)); *id.* at 249 (O'Connor, J., dissenting, joined by Kennedy and Thomas, JJ.). That subsection of the ADEA provided:

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[9] *See Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49 (1st Cir. 2000); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501 (10th Cir. 1995); *Jackson v. Okaloosa Cnty.*, 21 F.3d 1531, 1543 (11th Cir. 1994); *Hanson v. Veterans' Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Arthur v. City of Toledo*, 782 F.2d 565, 574–75 (6th Cir. 1986); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982); *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1311 (9th Cir. 1982); *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1036–37 (2d Cir. 1979); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 146–48 (3d Cir. 1977).

> It shall be unlawful for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

29 U.S.C. § 623(a)(1). The seven justices agreed that the operative language in that subsection requires discriminatory intent—"to fail or refuse to hire," "to discharge," or "to discriminate" "because of" such individual's age.

Subsection (a)(2), however, prohibits an employer from "limit[ing], segregat[ing], or classify[ing] his employees in any way which would deprive or tend to deprive any individual of employment opportunities *or otherwise adversely affect his status as an employee*, because of such individual's age." 29 U.S.C. § 623(a)(2) (emphasis added). The plurality opinion, citing *Watson*, noted that *this* subsection (like Title VII) prohibits actions that "adversely affect" an individual. *See Smith*, 544 U.S. at 235–56 (plurality op.). The plurality concluded that this text focuses on the *effects* of the act on the employee, rather than the employer's motivation. *See id.* Second, the plurality highlighted the language "limit[ing] . . . *his employees*," arguing that this language emphasizes the employer's actions toward his employees as a group, even if the harm befalls only an individual. *Id.* at 236 n.6 (emphasis added). The plurality therefore concluded that the language of the ADEA supported disparate-impact liability. *Id.* at 240.

The FHA, by contrast, does not contain any of the statutory language on which *Watson* and the *Smith* plu-

rality relied. All of the prohibitions in sections 3604(a) and 3605(a) are phrased to require intentional conduct: "refus[ing] to sell or rent," "refus[ing] to negotiate," "mak[ing] unavailable," "deny[ing]" a dwelling, and "discriminat[ing]" against any person "because of race, color, religion, sex, familial status, or national origin." There is no mention, as in Title VII or the ADEA, of anything "adversely affect[ing]" a person. And there is no reference to limiting, segregating, or classifying a large number of people. The FHA refers only to specific acts of intentional conduct against individuals. That is not language that can establish disparate-impact liability.

Unfortunately, by the time this Court decided *Smith*, all of the circuits (aside from the D.C. Circuit) had already concluded that the FHA provides for disparate-impact liability. The dissent from the denial of rehearing en banc in *Gallagher* was the first and (as far as we are aware) the only time that a federal appellate judge has considered how *Smith* should affect this question. 636 F.3d at 382–83 (Colloton, J., dissenting). Given that the courts of appeals have uniformly reached decisions at odds with the jurisprudence of this Court, and appear to have no intention of revisiting this issue, the Court should grant certiorari to resolve this question—just as it did in *Gallagher* and *Mount Holly*.

II. THE COURTS OF APPEALS ARE DIVIDED ON THE STANDARDS AND BURDENS OF PROOF THAT SHOULD APPLY TO DISPARATE-IMPACT CLAIMS BROUGHT UNDER THE FHA

The courts of appeals have long been divided over the standards and burdens of proof that should apply to dis-

parate-impact claims under the FHA. This circuit split has been identified and discussed in previous certiorari petitions, as well in the recently issued HUD rule. *See* Pet. for Cert., *Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, 2012 WL 2151511, at *22–33 (June 11, 2012); Pet. for Cert., *Magner v. Gallagher*, 2011 WL 549171, at *15–21 (Feb. 14, 2011); Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11,462–63.

At least three courts of appeals use a three-step burden-shifting approach similar (though not identical) to the HUD regulation. *See, e.g.*, *Charleston Hous. Auth. v. U.S. Dep't of Agric.*, 419 F.3d 729 at 740–42 (8th Cir. 2005); *Langlois*, 207 F.3d at 49–50; *Huntington Branch*, 844 F.2d at 939. The Seventh Circuit uses a four-part balancing test. *See Metro. Hous. Dev. Corp.*, 558 F.2d at 1290. Two courts of appeals use a hybrid of these two approaches. *See, e.g.*, *Graoch*, 508 F.3d at 373 (balancing test incorporated as elements of proof after second step of burden-shifting framework); *Mountain Side Mobile Estates*, 56 F.3d at 1252, 1254. And the Fourth Circuit uses a different test for public and private defendants. *See Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 989 n.5 (4th Cir. 1984). Finally, the Fifth Circuit is (as far as we are aware) the only court of appeals to have adopted the approach of the HUD regulations. In short, the courts of appeals are all over the map on this question.

In *Gallagher*, this Court granted certiorari to resolve the standard (if any) that courts should apply to disparate-impact claims under the FHA. *See* 132 S. Ct. 548. But the Court denied certiorari on that same question in

Mount Holly. *See* 133 S. Ct. 2824. By the time of *Mount Holly*, of course, HUD had issued regulations purporting to establish standards and burdens of proof for disparate-impact claims, and this may have led the Court to conclude that the issue was no longer certworthy. The Department nevertheless offers this issue for the Court's consideration, and respectfully asks the Court to grant certiorari on both questions presented. The federal district courts remain bound by the case law from their court of appeals, so it is unrealistic to expect HUD's regulation to bring about uniformity in the judicial interpretation of the FHA. Uniformity can be attained only by a decision of this Court that either rejects disparate-impact liability under the FHA, or endorses disparate-impact liability while simultaneously announcing the standards and burdens of proof that courts must apply.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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