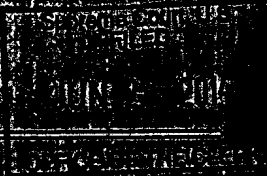


No. 18-1371



**Supreme Court of the United States**

TEXAS DEPARTMENT OF HOUSING  
AND COMMUNITY AFFAIRS, ET AL.

*Petitioners*

v

THE INTERSTATE COMMUNITIES PROHIBIT, INC.

*Respondent*

On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Fifth Circuit

BRIEF OF RESPONDENT  
INTERSTATE REHABILITATION INC.  
IN SUPPORT OF PETITION  
FOR WRIT OF CERTIORARI

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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Supreme Court Rule 29.6, respondent Frazier Revitalization Inc. discloses that it is a non-profit corporation formed under section 501(c)(3) of the Internal Revenue Code. Its objective is to support the comprehensive revitalization of the historic Frazier Courts neighborhood, which is located east of Fair Park in southern Dallas, Texas. FRI has no outstanding shares or debt securities in the hands of the public and does not have any parent, subsidiary or affiliate that has issued shares or debt securities to the public.

## **RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI**

Pursuant to Supreme Court Rule 12.6, Frazier Revitalization Inc. ("FRI"), an intervenor in the district court and appellant in the court of appeals, respectfully submits this brief in support of the petition for a writ of certiorari of the Texas Department of Housing and Community Affairs, et al. (collectively, "the Department"). The Department seeks review of the decision of the United States Court of Appeals for the Fifth Circuit in *Inclusive Cmty. Project, Inc. v. Tex. Dep't of Hous. and Cmty. Affairs*, 747 F.3d 275 (5th Cir. 2014). The Department's petition was placed on the docket on May 16, 2014; this response is submitted within 20 days of that date and is therefore timely under Rule 12.6.

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### **REASONS FOR SUPPORTING THE DEPARTMENT'S PETITION**

#### **A. Background**

The Inclusive Communities Project, Inc. ("ICP") sued the Department and its individual board members, alleging that the Department violated the Fair Housing Act ("FHA") and the Fourteenth Amendment of the United States Constitution by awarding a disproportionate amount of federal Low-Income Housing Tax Credits ("LIHTCs" or "tax credits") available for distribution in the Dallas, Texas metropolitan area to proposed developments in minority

communities. Complaint at 2, 15, *Inclusive Cmty. Project, Inc. v. Tex. Dep't of Hous. and Cmty. Affairs*, 3:08-CV-0546-D (N.D. Tex., filed Mar. 28, 2008). This allocation pattern had the effect, ICP contended, of concentrating low-income housing in minority neighborhoods. *Id.* at 2. The Department defended its method of awarding LIHTCs, arguing, among other things, that the provision of the United States Tax Code that created the LIHTC program (26 U.S.C. § 42) requires state agencies to give preference in awarding the credits to projects in disadvantaged communities which generally have a high percentage of minority residents, and thus that the disproportionate distribution of LIHTCs serves a "legitimate government interest." *See* Pet. 9.

After a bench trial, the district court concluded that although the Department did not intend to discriminate in awarding LIHTCs, the Department's disproportionate distribution of the credits to projects in minority communities imposed a "disparate impact" on minorities in violation of the FHA and asked the parties to propose a remedy. FRI, a nonprofit corporation that depends in part upon LIHTC awards to finance its inner-city revitalization projects, then intervened in the case to insure that it and other proponents of using LIHTCs to fund community development were adequately represented. After briefing, the district court approved a remedial plan that required the Department to give preference in awarding LIHTCs to applicants who propose projects in non-minority neighborhoods but to give no meaningful

preference to applicants who propose projects in areas in need of revitalization (contrary, FRI argued, to the tax credit statute). Pet. App. 26a-62a.

The Department and FRI appealed. The Fifth Circuit reversed on the narrow ground that ICP's disparate-impact claim must be evaluated by the standard recently adopted by the United States Department of Housing and Urban Development rather than the standard applied by the district court. Pet. App. 14a-18a. Judge Edith Jones specially concurred in the reversal, noting that in light of recent decisions of this Court, ICP "could not rely on statistical evidence of disparity alone for their prima facie case" of an FHA violation. Pet. App. 18a. Judge Jones suggested that on remand, the district court reconsider the Department's argument that ICP "did not prove a facially neutral practice that caused the observed disparity in [the Department's] allocation of LIHTC units to predominantly 'non-Caucasian' areas." Pet. App. 18a.

The Department now seeks review by this Court, questioning the essential premise of the district court's judgment and the Fifth Circuit's remand: that disparate-impact claims are actionable under the FHA. FRI questioned that premise below, and urges the Court to grant the Department's petition.

## **B. Reasons for Granting the Petition**

As the Department points out in its petition, and as FRI pointed out below, this Court has twice

granted certiorari to consider whether proof of disparate impact alone is enough to establish a prima facie case of a violation of the FHA. See Pet. 12-13 (citing *Magner v. Gallagher*, 132 S. Ct. 548 (2011) (mem.) and *Twp. Of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, 133 S. Ct. 2824 (2013) (mem.)). On both occasions, the cases were settled, and the Court dismissed the writs of certiorari. But the issue of whether statistical evidence of a disparate effect on a minority alone establishes a potential violation under the statute is an important one and, as the existence of this case demonstrates, a recurring one. The Court should take this opportunity to give guidance to the courts, and to the myriad state and federal agencies responsible for allocating the limited resources available for fair housing needs, on the scope of potential liability under the FHA.

The need for the Court to address the issue is particularly acute in this case, in which the interests to be promoted by the statutory LIHTC program on the one hand, and the FHA as interpreted by ICP and the district court on the other, are in obvious tension. As the Department points out in its petition, the LIHTC statute requires a state's plan for allocating tax credits "to give preference to projects in low-income areas." Pet. 4 (citing 26 U.S.C. § 42(m)(1)(B)(ii)(III)). Because, regrettably, low-income areas often have high numbers of minority residents, compliance with this requirement would naturally result in disproportionate allocation of LIHTCs for projects in minority neighborhoods. On the other hand, under ICP's

interpretation of the FHA, government must take into account and prioritize the elimination of racial disparities in the distribution of housing subsidies – meaning that tax credits intended by Congress to fund revitalization of inner-city neighborhoods must be diverted to subsidize projects in affluent areas. As the National Association of Home Builders (“NAHB”) put it in an amicus curiae brief filed below, applying a disparate-impact analysis to the distribution of low-income housing tax credits “would be elevating the Congressional objectives of the FHA over the Congressional objectives of the LIHTC.” NAHB Br. 2, filed in *Inclusive Cmty. Project, Inc. v. Tex. Dep’t of Hous. and Cmty. Affairs*, 747 F.3d 275 (5th Cir. 2014). The Court should grant certiorari to decide whether a race-neutral system for distributing the scarce resources available to encourage the construction and rehabilitation of decent affordable housing may nevertheless violate the FHA.



**CONCLUSION**

The petition for writ of certiorari should be granted.

Respectfully submitted,

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