No. 13-1371

In The
Supreme Court of the United States

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

Petitioners,

v.

THE INCLUSIVE COMMUNITIES PROJECT, INC.,

Respondent.

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

BRIEF OF RESPONDENT FRAZIER REVITALIZATION INC. IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

STATEMENT OF THE CASE

A. Frazier Revitalization Inc. and Its Interest in this Litigation

Frazier Courts is a historic, predominantly African-American neighborhood located in Southern Dallas east of Fair Park. R 6889.[1] The neighborhood is named for a public housing project that experienced significant decline through decades of discrimination and neglect. *Id.* Beginning in 2003, the Dallas Housing Authority obtained millions of dollars in federal grants and loans and used the funds and other capital to raze Frazier Courts and replace it with new and affordable housing units. *Id.* The Frazier Neighborhood Plan, completed in 2004 by the Dallas Housing Authority with input from Frazier residents, calls for more than $270 million in new development, including housing, retail, industrial, and healthcare facilities. R 6889-90.

Frazier Revitalization Inc. ("Frazier"), a nonprofit corporation under section 501(c)(3) of the Internal Revenue Code, was formed in 2005 with the support of the Dallas Housing Authority to help implement the Frazier Neighborhood Plan. R 6889. From its inception, Frazier's board of directors has included five Frazier community residents and five Dallas business leaders. *Id.* Its role, like that performed by similar nonprofits in other cities, is to facilitate comprehensive revitalization in keeping with the

[1] Citations to the record in the Fifth Circuit will be indicated by the prefix "R" and the page number.

resident-driven plan. *Id.* Its work includes acquiring critically located parcels of land, often with blighted structures and noxious uses, and passing them on to high-quality, responsible developers. *Id.* Frazier also works with residents to come up with community-based design standards and works with both residents and developers to see that these guidelines are followed. *Id.* The goal is a mixed-income neighborhood with ample fit and affordable housing for both current residents and newcomers, plus a full range of basic services. R 6889-90.

Frazier depends on low-income housing tax credits ("LIHTCs" or "tax credits") authorized by section 42 of the Internal Revenue Code to fund its revitalization efforts. The competition for LIHTCs is intense. The federal government provides a finite amount of such credits to each state to distribute each year, R 6252, and in Texas, the program has been historically oversubscribed by a ratio of two-to-one. R 6087. For LIHTCs to be awarded to projects in urban areas in Region 3 (North Texas) the competition for tax credits is even more fierce. In 2010, applicants in Region 3 sought $92.5 million in credits from a pool of $8.3 million – less than a 10 percent grant rate. R 7168. And because the cost of submitting an application for LIHTCs can be as much as $50,000 (R 5695-96), predictability and objectivity in the application process are especially important.

B. Background of the Litigation

Under the section 42 of the United States Tax Code, the Texas Department of Housing and Community Affairs ("the Department") is the state agency responsible for distributing low-income housing tax credits to private developers for the construction of affordable housing in the State of Texas. 26 U.S.C. § 42. In 2008, the Inclusive Communities Project ("ICP") sued the Department and its individual board members alleging that the Department violated the Fair Housing Act ("FHA"), 42 U.S.C. §§ 3601-3619, and the Fourteenth Amendment of the United States Constitution by distributing LIHTCs disproportionately to proposed projects in minority neighborhoods as opposed to proposed ventures in high opportunity, predominantly Caucasian neighborhoods. JA 75-96. This allocation pattern had the effect, ICP contended, of concentrating low-income housing in minority neighborhoods. JA 77. ICP alleged that the Department acted with discriminatory intent in distributing LIHTCs in this pattern, JA 75-76, but also asserted that, even in the absence of intent by the Department to discriminate, the pattern of distribution itself had a disparate impact on racial minorities which was remediable under the Fair Housing Act. JA 81, 85, 92. To remedy the alleged violation, ICP sought, among other relief, a court order requiring the Department to allocate LIHTCs in equal amounts to projects in minority and non-minority communities, regardless of any other criteria for distributing LIHTCs. JA 93.

In an order granting partial summary judgment in favor of ICP, the district court found that ICP had standing to sue for the alleged statutory and constitutional violations and that ICP had established a prima facie case of racial segregation. JA 132-70, *Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, 749 F. Supp. 2d 486, 491-507 (N.D. Tex. 2010). The court then conducted a bench trial at which the parties presented evidence on the Department's alleged intent to discriminate in the distribution of LIHTCs and on the alleged disparate impact of the agency's distribution of the credits on minority communities. In a memorandum opinion and order, the district court found that the Department did not intend to discriminate in awarding LIHTCs. JA 182-91, *Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, 860 F. Supp. 2d 312, 318-21 (N.D. Tex. 2012). The district court also found, however, that the Department's distribution of a disproportionate amount of LIHTCs to projects in minority areas had a disparate impact on minorities remediable under the FHA. JA 191-213, 860 F. Supp. 2d at 322-31. The court required the Department to submit a proposed plan to remedy the violations. JA 216-17, 860 F. Supp. 2d at 33 (N.D. Tex. 2012).

At this point in the litigation, moved to intervene as a party under Rule 24 of the Federal Rules of Civil Procedure. R 7090-91. As is explained above, Frazier depends on LIHTCs to fund its revitalization efforts. And because Frazier seeks tax credits to improve an impoverished, predominantly minority neighborhood, any remedial plan that would require the Department

to increase the percentage of tax credit awards to projects in Caucasian neighborhoods regardless of other, proper considerations would necessarily reduce the amount of tax credits available to Frazier. Such a plan, Frazier argued, would deprive not only Frazier but also all other similarly situated organizations seeking to improve low-income neighborhoods of an irreplaceable funding source. R 7096. Frazier premised its application to intervene on its concern that in proposing a remedial plan, the Department lacked sufficient incentive to protect Frazier's interest in obtaining tax credits to revitalize its historic minority neighborhood. R 7105-06.

The district court granted Frazier's motion to intervene. JA 218-24. It found that Frazier "has a direct, substantial, legally protectable interest in the subject of this action, which involves the allocation of LIHTC." JA 223. The court also noted that Frazier's interest "is considerably broader than a single application in a single application cycle," but seeks the implementation of criteria "that will not unnecessarily hinder the award of LIHTC to developments that revitalize low-income areas, even if located in predominantly minority areas." JA 223-24.

The Department submitted its proposed remedial plan. R 7109-32. ICP filed a response and objections. R 7344-84. Frazier filed its own objections, which contended that the Department's proposed plan failed to give preference to projects in impoverished "qualified census tracts" as required by the LIHTC statute, 26 U.S.C. § 42(m)(1)(B)(ii)(III). R 7486-7502. The district court entered an amended final judgment

largely incorporating the remedial plan proposed by the Department. JA 317-350.

On appeal, the Fifth Circuit did not address the viability of ICP's disparate impact claim under the FHA, because it was bound by prior decisions of that court holding that the FHA permits claims based on disparate impact alone. JA 362. *Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, 747 F.3d 275, 280 (5th Cir. 2014) (citing *Artisan/Am. Corp. v. City of Alvin*, 588 F.3d 291, 295 (5th Cir. 2009) and *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996)). The court noted that during the pendency of the appeal, the United States Department of Housing and Urban Development ("HUD") issued a regulation that adopted a standard for proving disparate-impact claims under the FHA. JA 365, 747 F.3d at 282. The court adopted the HUD standard as the law of the circuit, and reversed the district court's judgment and remanded the case to that court for application of that standard. JA 366-68, 747 F.3d at 282-83. In a special concurrence, Judge Jones suggested that the district court reconsider whether the plaintiff had even identified a facially neutral practice that caused the disparate impact, as is required by this Court's disparate-impact precedent. JA 368-71, 747 F.3d at 283-84 (Jones, J., specially concurring).

On October 2, 2014, this Court granted certiorari to consider whether disparate-impact claims are cognizable under the Fair Housing Act.

SUMMARY OF THE ARGUMENT

Neither the language of, nor the policy underlying, the Fair Housing Act supports the imposition of liability based solely on the disparate impact that a facially neutral practice or policy has on different racial populations. Unlike Congressional enactments prohibiting potentially discriminatory practices in the context of employment decisions, the Fair Housing Act limits liability to decisions made or actions taken "because of" race. As this Court has recognized, such language reserves for liability only acts taken with discriminatory intent, which the district court found is absent in this case. And the authorization to pursue disparate-impact claims, which is absent from the statute itself, cannot be supplied by a HUD regulation adopted 45 years after passage of the FHA purporting to clarify the Act's language and intent. The statute itself is unambiguous and simply does not permit claims based on disparate impact alone.

Nor does public policy demand that the Court read into the statute an authorization to pursue claims based solely on the disparate impact of a practice upon different populations. No rule of law mandates that statistical demographic balance trumps all other societal interests, and the drive to equalize the siting of affordable housing projects conflicts with the goals of the low-income housing tax credit statute, which is at issue in this case. That statute seeks to promote the revitalization of blighted inner-city neighborhoods and to provide residents of those neighborhoods the opportunity to live in decent,

affordable housing by providing developers with tax incentives to build them. Those goals would be impeded were this Court to interpret the FHA to require that the agencies charged with distributing tax credits allocate them by race. Commentators have questioned whether the benefits of relocating poor minorities to affluent non-minority communities are exaggerated. The very existence of the debate counsels against contorting the language of the Fair Housing Act to promote that result.

ARGUMENT

I. The "Disparate Impact" Theory Is Not Supported by the Language of the Fair Housing Act.

The Department, supported by five briefs of amici curiae, argued persuasively in its petition that the text of the Fair Housing Act does not impose liability merely for engaging in race-neutral practices that result in disproportionate effects on minorities.[2] As the Department explained, the text of the FHA prohibits the refusal to sell, rent or make available

[2] *See* Pet. of Texas Dep't of Housing and Community Affairs, et al., at 18-21; Br. Amicus Curiae of Eagle Forum Education & Legal Defense Fund, Inc. at 8-9; Br. Amicus Curiae of Pacific Legal Foundation, et al., at 14-18; Br. Amicus Curiae of American Bankers Ass'n, et al., at 11-13; Br. Amicus Curiae of Texas Apartment Ass'n at 5-10; Br. Amicus Curiae of National Multifamily Housing Council at 5-7.

housing "*because of* race, color, religion, sex, familial status or national origin." 42 U.S.C. § 3604(a) (emphasis added). Thus, the statute prohibits only actions taken "because of" – *i.e.*, based on – race.

In contrast, other Congressional enactments clearly prohibit disparate results regardless of the intent of the actor. For example, Title VII of the Civil Rights Act of 1964 prohibits actions that would "*tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee*, because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(a)(2). As this Court recognized in *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971), through this language "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation."[3] In 1967, Congress enacted the Age Discrimination in Employment Act ("ADEA"), using identical language to that contained in 42 U.S.C. § 2000e-2(a)(2) to prohibit actions that would tend to deprive individuals of employment opportunities or otherwise adversely affect employment status because of age. 29 U.S.C. § 629(a)(2). In finding that proof of disparate impact establishes a prima facie

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[3] In 1991, Congress enacted the Civil Rights Act of 1991, which expressly provides that a plaintiff establishes a prima facie violation of the Act by showing that an employer uses "a particular employment practice that causes a disparate impact on the bases of race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-(2)(k)(1)(A)(i); *see also Ricci v. DeStefano*, 557 U.S. 557, 577-78 (2009) (describing the history of Title VII).

case of violation of the ADEA, the Court observed that the text of the statute "focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer." *Smith v. City of Jackson*, 544 U.S. 228, 236 (2005) (emphasis in original).

The FHA simply contains no similar language prohibiting disparate results in housing. With respect to the FHA's prohibition of the refusal to sell, rent, or make available housing "because of" race, the Court has held that similar language in Title VII and the ADEA imposes liability only for disparate treatment, not for disparate impact. *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009) (Title VII's prohibition of unfavorable treatment "because of" race establishes liability "only for disparate treatment"); *Smith v. City of Jackson*, 544 U.S. at 249 (O'Connor, J., concurring) (portion of statute that prohibits action "because of" a person's race "plainly requires discriminatory intent" and does not authorize disparate-impact claims). Because the FHA lacks an analog to the statutory text authorizing disparate-impact claims in Title VII and in the ADEA, the disparate-impact theory cannot support the claims against the Department advanced here.

The recent promulgation of a regulation by HUD purporting to establish a standard for imposing liability for practices having a "discriminatory effect" (24 C.F.R. § 100.500(a)) does not effectively supplement the statutory text. ICP has argued that HUD's determination that the FHA provides a remedy for housing practices that have a disparate impact on

different races is entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Resp. Br. in Opp. at 13-17. But in *Chevron* the Court emphasized that an agency's interpretation of a statute is not entitled to deference if the statute is unambiguous. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." 467 U.S. at 843; *see also Public Emps. Ret. Sys. v. Betts*, 492 U.S. 158, 171 (1989) ("of course, no deference is due to agency interpretations at odds with the plain language of the statute itself."). For the reasons expressed above, the text of the FHA cannot reasonably be construed to provide a remedy for race-neutral practices that result in some disproportionate effects, and HUD cannot create such a right to such a remedy through a regulation.[4]

Even if disparate impact claims are cognizable under the FHA, the Court should reaffirm its prior

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[4] In a sharply worded opinion issued just ten days before the filing of this brief, Judge Richard J. Leon of the United States District Court for the District of Columbia agreed that the FHA "unambiguously prohibits *only* intentional discrimination." *Am. Ins. Ass'n v. United States Dep't of Hous. & Urban Dev.*, No. CV 13-009666 (RJL), 2014 WL 5802283, at *7 (D.D.C. Nov. 7, 2014) (emphasis in original). Finding the issuance of the regulation "yet another example of an Administrative Agency trying desperately to write into law that which Congress never intended to sanction," Judge Leon vacated HUD's disparate-impact regulation. *Id.* at *13 (footnote omitted).

observations that statistics alone cannot establish a viable claim based on disparate impact. Rather, the plaintiff must identify a particular practice or policy that causes the disparity in results. *See, e.g.*, *Smith v. City of Jackson*, 544 U.S. 228, 241 (2005) ("[I]t is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact."); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657 (1989) (statistical imbalance alone "will *not* suffice to make out a prima facie case of disparate impact"; plaintiff must demonstrate that a particular challenged practice "has a significantly disparate impact on employment opportunities for whites and non-whites.") (emphasis in original). The practices or policies identified by the plaintiff may take different forms. For example, in *Griggs*, the plaintiff identified the policy of using generally administered aptitude tests and a high school diploma requirement as causing an impermissible statistical imbalance in the racial make-up of the employer's workers. Other facially neutral policies supporting a viable claim based on disparate impact include height and weight requirements[5] and a policy of not hiring workers at the "jobsite gate."[6]

But in this case, ICP never identified a policy, practice, criterion, or requirement that resulted in the statistical disparity between LIHTC awards in

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[5] *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

[6] *Furnco Const. Corp. v. Walters*, 438 U.S. 567 (1978).

minority and in non-minority neighborhoods. As the Fifth Circuit's concurring opinion points out, ICP's (and the district court's) "entire argument for disparate impact here assumed the conclusion: there is a statistical 'imbalance' in the location of LIHTC approved by the [Department], therefore there must be a disparate approval 'practice' that causes the statistical imbalance. This has not been the law for many years." *Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, 747 F.3d 275, 283-84 (5th Cir. 2014) (Jones, J., specially concurring).

Thus, if the FHA allows assertion of a disparate-impact claim at all, it certainly does not do so in the form conceived of by ICP and the district court. Should the Court choose to recognize the viability of disparate-impact claims under the Fair Housing Act, it should impose the same requirements on those claims – *i.e.*, the requirement of identifying a specific race-neutral practice that causes the disparity – that it does in the employment context.

II. The "Disparate Impact" Theory Oversimplifies the Complex Choices That Confront State Agencies in Allocating Scarce Resources Available to Promote the Development of Decent Affordable Housing.

A. The FHA Does Not Compel State Agencies to Deviate from the Language and Purpose of the LIHTC Statute.

Congress established the low-income housing tax credit program in 1986 "to stimulate investment in

low-income housing development" and in doing so "to increase the supply of decent and affordable housing in the United States." David Philip Cohen, *Improving the Supply of Affordable Housing: The Role of the Low-Income Housing Tax Credit*, 6 J.L. & POL'Y 537, 537 (1998). The program is part of a trend, which began in the late 1960s, to shift the task of building and providing affordable housing from the public to the private sector. *Id.* at 537-538. The LIHTC program has become "the largest federal subsidy for the development and rehabilitation of affordable housing." Megan J. Ballard, *Profiting from Poverty: The Competition Between For-Profit and Non-Profit Developers for Low-Income Housing Tax Credits*, 55 HASTINGS L.J. 211, 212 (2003).

One of the express objectives of the statute creating low-income housing tax credits is to improve conditions of urban poverty and blight that afflict our inner cities. The goal of revitalizing neighborhoods inhabited by low-income residents is referenced twice in section 42. First, section 42(m)(1) requires that housing tax credits be allocated by state agencies under a qualified allocation plan ("QAP")

> (i) which sets forth selection criteria to be used to determine housing priorities of the housing credit agency which are appropriate to local conditions,
>
> (ii) which also gives preference in allocating housing credit dollar amounts among selected projects to –

> (I) projects serving the lowest income tenants,
>
> (II) projects obligated to serve qualified tenants for the longest periods, and
>
> (III) *projects which are located in qualified census tracts (as defined in subsection (d)(5)(C)) and the development of which contributes to a concerted community revitalization plan.*

26 U.S.C. § 42(m)(1)(B) (emphasis added). A qualified census tract ("QCT") is defined in the Code as follows:

> The term "qualified census tract" means any census tract which is designated by the Secretary of Housing and Urban Development and, for the most recent year for which census data are available on household income in such tract, either in which 50 percent or more of the households have an income which is less than 60 percent of the area median gross income for such year or which has a poverty rate of at least 25 percent.

26 U.S.C. § 42(d)(5)(C). In short, a QCT is a low-income area in which a large percentage of poor people reside.

In addition, Congress left no doubt about its preference for developments that help to revitalize blighted areas by making additional funds available for such projects. As the district court acknowledged, the statute expressly authorizes a development in a

QCT to receive 130% of the tax credits that a LIHTC development not in such an area would receive. JA 167 n.22, 749 F. Supp. 2d at 506 n.22; 26 U.S.C. §§ 42(d)(5)(B)(i) and (ii).

Thus, the language of the LIHTC statute is clear. In practice, the statute provides "an especially important financing tool for community revitalization projects designed to bring opportunity to low-income and high-minority communities." R 7516. As one national nonprofit provider of financing for affordable housing advised the district court, reducing the LIHTCs available to these communities "could mean that blighted, low-income neighborhoods are forever condemned to remain that way, limiting opportunity for the most vulnerable people in our communities." *Id.*

Consequently, fair housing advocates – even those who assert that the FHA requires state agencies to prioritize the siting of affordable housing in "high-opportunity" neighborhoods – acknowledge the tension between the goals of the LIHTC statute to provide affordable housing for low-income individuals and to encourage redevelopment of impoverished inner-city neighborhoods and the supposed goal of the FHA to promote integration of minorities into non-minority communities. *See, e.g.*, Florence W. Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 U. MIAMI L. REV. 1011, 1043 (1998) ("[T]he tax credit statute itself encourages developers to apply for allocations for qualified census tracts and difficult development areas, which are likely to be areas of minority concentration."); *see also* Olatunde C.A.

Johnson, *Stimulus and Civil Rights*, 111 COLUM. L. REV. 154, 196-97 (2011) (attempts to obtain court orders requiring race-based low-income housing support are "fraught with difficulty" because of "the amorphous nature of the [FHA] statutory requirement" and the varying "willingness and competence of courts to decide between conflicting goals for federal spending (such as integration versus affordable housing development)"; James A. Long, Note, *The Low-Income Housing Tax Credit in New Jersey: New Opportunities to Deconcentrate Poverty Through the Duty to Affirmatively Further Fair Housing*, 66 N.Y.U. ANN. SURV. AM. L. 75, 76 (2010) (the LIHTC statute "seemingly betrays" the ideals of the FHA "by requiring that state LIHTC administrators give preference to developers who plan to site their low-income housing in communities that are already destabilized by a concentration of poor residents and a lack of educational opportunities.") (footnote omitted).

At least one court has recognized this tension between the FHA and the LIHTC statute and rejected a challenge to a state plan for distributing LIHTCs based on an alleged violation of the FHA. *In re Adoption of the 2003 Low Income Housing Tax Credit Qualified Allocation Plan*, 848 A.2d 1 (N.J. Super. Ct. App. Div. 2004) ("*In re 2003 LIHTC QAP*"). As in this case, the plaintiffs in *In re 2003 LIHTC QAP* claimed that the New Jersey Housing Mortgage Financing Agency ("HMFA") – New Jersey's analog to TDHCA – violated the FHA, federal and state civil rights

statutes, and the Fourteenth Amendment by distributing LIHTCs disproportionally to projects in minority neighborhoods. The court recognized at the outset that "HMFA's power to allocate low-income housing tax credits is circumscribed by 26 U.S.C.A. § 42(m)(1)(B) and (C)." That statute, the court recognized, requires a state housing agency "to adopt a QAP that establishes specific selection criteria and preference standards that will guide it in the allocation of tax credits to competing housing sponsors, local agencies and private developers." 848 A.2d at 15. The court noted that the "overriding mission" of the state housing agency "is to foster, through its financing and other powers, the construction and rehabilitation of housing, particularly affordable housing." *Id.* To comply with the mandate in section 42, the court found, "the agency's QAP must focus primarily on the economic status of the tenants, housing needs, and sponsor qualifications, not racial composition of the area or proposed project." *Id.* The court further recognized that achievement of the goal of maximizing affordable housing "by focusing primarily on the racial composition of a relevant housing locale may compromise HMFA's fundamental mission." *Id.* Moreover, consideration of race-based criteria "may be constitutionally vulnerable, and may run counter to [the agency's] statutory duty to '[a]ssist in the revitalization of the State's urban areas.'" *Id.* at 29 (quoting N.J. Stat. Ann. 55:14K-2(e)(4)). *Id.* at 17. Ultimately, the court concluded:

> The promotion of racial integration may be a desirable by-product of HMFA's exercise of [its] duties. Indeed, we have no doubt that, in order to advance the goals of Title VIII, the agency should foster racial integration in the manner by which it administers its programs. However, HMFA's central mission and statutory purposes should not be ignored or compromised in achieving that goal.

Id. at 15.

As the *In re 2003 LIHTC QAP* court appreciated, the LIHTC statute recognizes Congress' legitimate interest in assisting efforts at improving inner-city housing and in revitalizing urban neighborhoods. This interest should not be judicially overridden by prioritizing vague social goals supposedly in the FHA but not in the LIHTC statute itself.

B. The Unintentional Siting of a Disproportionate Number of LIHTC Projects in Minority Neighborhoods Is Neither Unfair Nor Undesirable as a Matter of Public Policy.

ICP's claim under the FHA presupposes that the distribution of disproportionate federal aid to affordable housing projects in minority neighborhoods is a bad thing – detrimental to the neighborhood and unattractive and restrictive for its residents who seek and need affordable housing. But this premise cannot be accepted as a truism. Most obviously, it ignores the reality that elected state representatives for minority

neighborhoods in Dallas *want* decent affordable housing financed by LIHTCs in their neighborhoods. The Honorable Eric Johnson, who represents the district in which Frazier's proposed LIHTC is located in the Texas House of Representatives, wrote a letter to the district court in opposition to the Department's 2012 QAP proposal, which favored projects in high-opportunity areas at the expense of projects in minority neighborhoods. JA 225-27. Representative Johnson observed that the Department's QAP would leave "those with the greatest need for LIHTCs out of luck" and noted that the policy of apportioning tax credits to affluent communities "is forcing low income people in our inner cities to face the dire reality of a future without the possibility of community revitalization, the end result of the Department's policies being the de facto forced relocation of low income people." JA 226. The Honorable Rafael Anchia, a Texas House Representative from an adjacent district, also wrote the district court, expressing his concern that the 2012 QAP "does not properly award [LIHTCs] to projects in [QCTs] as mandated by the Internal Revenue Code." JA 228. This evidence indicates that the legislators elected in predominantly minority neighborhoods do not share ICP's aversion to qualified, responsible LIHTC-financed affordable housing projects.

The assumption that the practice of intentionally channeling affordable housing projects into affluent areas to achieve racial balance actually benefits minority communities and their residents is open to

debate. As one commentator observed, although the use of race-based remedies succeeded in "transforming the climate of overt racial domination that pervaded American society thirty years ago," it has been "pursued to the exclusion of a commitment to the vitality of the black community as a whole and the economic and cultural health of black neighborhoods, schools, economic enterprises, and individuals." Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 845 (1990). Another commentator noted that housing advocates who prioritize relocation of minorities to affluent communities over revitalization of disadvantaged neighborhoods rely on a "deficiency-oriented construction of the inner-city" that is "increasingly outdated." Lisa T. Alexander, *Hip-Hop and Housing: Revisiting Culture, Urban Space, Power, and Law*, 63 HASTINGS L.J. 803, 807 (2012). Such an attitude "reflects an overly simplistic understanding of the actual dynamics occurring in some low-income, predominantly minority, inner-city neighborhoods" and "ignores the positive social capital that can be an asset to traditionally marginalized groups." *Id.*

Thus, public policy does not require the Court to read into the FHA a disparate-impact theory of discrimination to achieve a racially-proportionate distribution of LIHTCs in North Texas or in any other jurisdiction. The Court should apply the plain language of the FHA and hold that proof of a disparate impact in the distribution of affordable housing tax credits does not establish a violation of the FHA.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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