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

RESPONDENT'S BRIEF IN OPPOSITION OF PETITION FOR WRIT OF CERTIORARI

MICHAEL M. DANIEL
Counsel of Record
LAURA B. BESHARA
DANIEL & BESHARA, P.C.
3301 Elm Street
Dallas, Texas 75226
(214) 939-9230
daniel.michael@att.net
laurabeshara@swbell.net

Counsel for Respondent
The Inclusive Communities Project, Inc.

CORPORATE DISCLOSURE

The Inclusive Communities Project, Inc. is a non-profit corporation formed under section 501(c)(3) of the Internal Revenue Code. It has no parent corporation and no publicly held corporation owns 10% of more of any stock in The Inclusive Communities Project, Inc.

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RESPONDENT'S BRIEF IN OPPOSITION

The petition should be denied because the issues it seeks to raise are not properly presented. In the decision below, the Fifth Circuit adopted a Department of Housing and Urban Development (HUD) regulation that recognizes and defines disparate impact liability under the Fair Housing Act (FHA). Thus, this case does not present the question whether "disparate impact claims are cognizable under the [FHA]." It instead raises the question whether HUD's regulation recognizing such liability under the FHA is valid. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Petitioners did not challenge the validity of the HUD regulation and thus that question was neither "pressed nor passed on" below. *See Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981). The validity of HUD's regulation has been challenged in two suits brought on an expedited basis by insurance associations in district courts in two different circuits. Those cases – not this one – will provide vehicles for addressing the validity of HUD's regulation.

Indeed, not only is the first question petitioners seek to raise not presented in this case, there is a substantial risk that resolution of that question in their favor would amount to an advisory opinion. If this Court were to conclude that the FHA is ambiguous but is best read as not authorizing recovery on a disparate impact basis, the lower courts could, on remand, defer to HUD's contrary reading. *See National Cable & Telecommunications Ass'n v. Brand X*

Internet Servs., 545 U.S. 967, 982 (2005). Such a decision by this Court would not alter the judgment, and would result in an improper advisory opinion. Resolution of the disparate impact liability question in these circumstances is inappropriate – particularly when petitioners themselves urged the lower court to accord *Chevron* deference to the burden-shifting standards of the regulation.

Petitioners cannot raise the second question because the Fifth Circuit adopted the burden-shifting standards of HUD's regulation at petitioners' urging. This Court does not review questions that a party believes were resolved correctly in its favor. In all events, the issue does not merit review, as the HUD regulation resolves any differences among the circuits over the appropriate burden-shifting standards for disparate impact claims under the FHA.

COUNTER-STATEMENT OF THE CASE

The FHA provides that it is unlawful to "refuse to sell or rent . . . , or otherwise make unavailable or deny a dwelling to any person because of race. . . ." 42 U.S.C. § 3604(a). It further provides that it is 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 . . . because of race. . . ." *Id.* § 3605(a). In this case, respondent challenges petitioners' discriminatory

practice of disproportionately allocating Low Income Housing Tax Credit (LIHTC) units in minority areas while disproportionately denying LIHTC units in predominantly White non-Hispanic areas of Dallas. That practice makes dwellings unavailable in particular areas, thereby perpetuating racial segregation in the Dallas area. Pet. App. 186a. *Inclusive Comtys. Project, Inc. v. Texas Dep't of Hous. and Comty. Affairs*, 749 F.Supp.2d 486, 499-500 (N.D. Tex. 2010).

The LIHTC program is the largest federal program to fund the development and rehabilitation of housing for low-income households. Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 U. Miami L. Rev. 1011, 1012 (1998). The federal government provides an allocation of LIHTCs to state housing agencies. 26 U.S.C. § 42. State housing agencies then distribute the LIHTCs to developers. Pet. App. 4a.

Petitioners have allocated LIHTC units in a racially segregated pattern that mirrors the racial segregation produced by *de jure* and other overt discrimination in Dallas public housing. Racially segregated public housing existed in Dallas before 1955 and had largely remained in place. Ninety-five percent of non-elderly public housing units were in census tracts with more than 50% minority residents as of 1994. The Fifth Circuit described the history of this pattern as "a sordid tale of overt and covert racial discrimination and segregation." *Walker v. City*

of Mesquite, 169 F.3d 973, 976, n.4, 976 n.5 (5th Cir. 1999).

The degree of racial segregation in the LIHTC program administered by petitioners is the same as that produced by the long history of federal and local involvement in public housing segregation. As of 2008, after only 20 years of the LIHTC program, 92.29% of LIHTC units in the city of Dallas were located in census tracts with more than 50% minority residents. *Inclusive Comtys. Project, Inc.*, 749 F.Supp.2d at 499. While creating the same pattern as that brought about by purposeful segregation, petitioners significantly increased the scale of the segregation. The number of the segregated LIHTC units is substantially greater than the number of the segregated public housing units. There were 6,100 non-elderly public housing units in minority concentrated areas of Dallas as of 1994. *Walker*, 169 F.3d at 976 n.4. There were 17,409 non-elderly LIHTC units in Dallas minority concentrated areas as of 2008. ICP Exhibit 11, *ICP v. TDHCA*, August 29, 2011 trial exhibit. By restricting LIHTC units to predominantly minority areas, petitioners have perpetuated racial segregation by making LIHTC units unavailable in White non-Hispanic areas.

Respondent assists clients who seek housing in non-minority areas that have lower poverty rates than the Dallas average. There are few apartment complexes in these areas that will accept respondent's clients and other housing voucher families. Only 11.9% of non-LIHTC developments will accept voucher

families. *Inclusive Comtys. Project, Inc.*, 749 F.Supp.2d at 496. As opposed to private rental housing, all LIHTC developments have the obligation to refrain from refusing to lease to voucher families because of their status as voucher holders. 26 U.S.C. § 42(h)(6)(B)(iv); Tex. Gov't Code § 2306.269(b). The existing segregated pattern of LIHTC units makes most of the LIHTC units unavailable in areas preferred by respondent's clients.

Respondent brought claims for violations of 42 U.S.C. §§ 1982 and 1983, the Fourteenth Amendment, and the FHA. It sought an injunction including relief to end petitioners' practice of allocating LIHTC units in areas of slum, blight, high crime, and environmental hazards. *See* Complaint ¶¶ 1, 13, 15-16, *Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, 3:08-CV-0546-D (N.D. Tex., filed Mar. 28, 2008).

On motions for summary judgment, the district court held that respondent met its burden of making out a prima facie case of both intentional discrimination and disparate impact. *Inclusive Comtys. Project, Inc.*, 749 F.Supp.2d at 500. With regard to disparate impact, respondent presented evidence that petitioners' disproportionate approval of applications for non-elderly LIHTC units in minority neighborhoods and, conversely, their disproportionate denial of tax credits for non-elderly units in predominantly white non-Hispanic neighborhoods, resulted in segregating 92.29% of all LIHTC units into minority census tracts. Respondent's evidence included statistics from

petitioners' own records, the report of the House Committee on Urban Affairs prepared for the Texas House of Representatives, and HUD studies and databases of all LIHTC housing showing racial segregation. *Id.* at 499-500.

Petitioners presented no summary judgment evidence that the discriminatory housing practice was caused by differences in the applications or other race-neutral factors. Instead, they assumed the existence of a prima facie showing of disparate impact, and sought summary judgment on the basis of their asserted justifications for their practices. The district court rejected petitioners' argument that federal law required that LIHTC units be placed in high-percentage minority areas. *Id.* at 503-04.

At trial, petitioners claimed that their practices served the legitimate interest of "awarding of tax credits in an objective, transparent, predictable, and race-neutral manner, in accordance with federal and state law." Pet. App. 168a-169a. Petitioners also stated that their discretion was not unlimited and that they had attempted to make changes that would have a positive effect in increasing LIHTC developments in high opportunity areas. Pet. App. 171a-172a. The district court assumed that petitioners' proffered interests were bona fide and legitimate. Pet. App. 174a. It found, however, that petitioners had failed to show that these interests could not be served "without disproportionately approving LIHTC in predominantly minority neighborhoods and disproportionately denying LIHTC in predominantly

Caucasian neighborhoods." Pet. App. 175a. Indeed, the record contained evidence of less discriminatory alternatives including adding points or set-asides that significantly improve the prospects of projects in high-opportunity, low-poverty areas and using discretionary forward commitment of tax credits from a subsequent year for projects in high opportunity and low poverty areas. Pet. App. 175a-184a.

The district court issued an opinion and order finding that respondent had proved its disparate impact claim under 42 U.S.C. §§ 3604 and 3605, but finding in favor of petitioners on the intentional discrimination claim. Pet. App. 147a. The district court ordered petitioners to submit a remedial plan to bring their allocation decisions into compliance with the FHA. Pet. App. 188a. Petitioners subsequently proposed a multi-faceted remedial plan. Pet. App. 32a-59a. The district court adopted most of the elements petitioners proposed. Pet. App. 125a-142a. Although this case involves only the Dallas Metropolitan area, petitioners voluntarily applied the elements in the proposed plan on a statewide basis. Pet. App. 57a.

On appeal, petitioners argued that the district court had applied the wrong burden-shifting standard to analyze the disparate-impact claim. Because there was no controlling Fifth Circuit precedent establishing the relevant standards, the district court applied the burdens of proof set forth in *Huntington Branch, NAACP v. Town of Huntington*, 844 F.3d 926, 939 (2d Cir. 1988), *affirmed in part*, 488 U.S. 15 (1988) (per curiam). After the district court ruled, HUD issued

regulations that disparate impact is a valid basis of liability under the FHA, defining actionable "disparate effects," and setting forth the standards for proving such claims. *Implementation of the Fair Housing Act's Discriminatory Effects Standard*, 78 Fed. Reg. 11,460, 11,461-11,463 (Feb. 15, 2013); 24 C.F.R. § 100.500.

Petitioners urged the Fifth Circuit to adopt the HUD regulation's burden-shifting test for disparate-impact claims. Noting that "Congress has given HUD authority to issue regulations interpreting the FHA," and that the HUD regulation had been "subject to notice and comment," petitioners argued that the regulation's burden-shifting standards were entitled to *Chevron* deference. Appellants' Br. at 29. Petitioners recognized that Title VII (which authorizes disparate impact liability), and the FHA "are similarly worded in their prohibition of discrimination," and that it therefore "makes sense to continue to interpret the two statutory schemes similarly." *Id.* at 30. Petitioners also asserted that the district court had erred in finding that respondent had made out a prima facie claim of disparate impact, arguing, among other things, that respondent had failed to identify the neutral rule or practice that caused the disparity.

The Fifth Circuit did not address petitioners' challenges to the adequacy of respondent's prima facie showing and whether petitioners waived these challenges by failing to contest respondent's showing. Pet. App. 8a n.1. The court of appeals instead reached "only one issue: whether the district court correctly

found that [respondent] proved a claim of violation of the Fair Housing Act based on disparate impact." Pet. App. 11a-12a. In stating that disparate impact was a valid basis for liability under the FHA, the Fifth Circuit cited its own prior precedent, that of other circuits, and the HUD regulation. Pet. App. 12a & n.4.

With respect to the regulation, the Fifth Circuit noted that Congress had given HUD authority to administer the FHA and issue regulations to carry it out, and that "[t]he regulations recognize, as we have, that 'Liability may be established under the Fair Housing Act based on a practice's discriminatory effect, as defined in paragraph (a) of this section, even if the practice was not motivated by discriminatory intent.'" Pet. App. 15a (quoting 24 C.F.R. § 100.500. The Fifth Circuit also quoted the regulation's definition of an actionable discriminatory effect: "[a] practice has a discriminatory effect where it 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." Pet. App. 15a (quoting 24 C.F.R. § 100.500(a)). After adopting the regulation's burden-shifting standards (as petitioners had urged), the court of appeals explained that "a plaintiff must prove a prima facie case of discrimination by showing that a challenged practice causes a discriminatory effect, as defined by 24 C.F.R. § 100.500(a)." Pet. App. 16a. The court then remanded "for the district court

to apply this legal standard [the regulation] to the facts in the first instance." Pet. App. 17a.

REASONS FOR DENYING THE PETITION

I. THE FIRST QUESTION PETITIONERS POSE IS NOT PRESENTED BY THE DECISION BELOW AND ITS RESOLUTION WOULD LIKELY RESULT IN AN ADVISORY OPINION

Petitioners argue that, because the Court has previously granted petitions presenting the question whether disparate-impact claims may be brought under the FHA, the Court should grant their petition to resolve the same question. *See* Pet. at 11-15. That argument rests on a faulty premise. In the prior cases on which petitioners rely – *Magner v. Gallagher*, 132 S. Ct. 548 (2011) and *Township of Mt. Holly v. Mt. Holly Gardens Citizen in Action, Inc.*, 133 S. Ct. 2824 (2013) – the courts of appeals had decided that the FHA encompasses disparate impact liability. In this case, the court of appeals applied HUD's new disparate impact regulation, and the question on review to this Court should be whether application of the HUD regulation is proper under *Chevron*. The question on which petitioners do seek review is not properly presented in this case, and this Court's resolution of that question runs a substantial risk of yielding an impermissible advisory opinion.

A. The First Question Petitioners Pose Is Not Presented By The Decision Below.

In the decision below, the Fifth Circuit did not simply follow prior circuit precedent recognizing the existence of disparate impact liability under the FHA, and then adopt the burden-shifting standards of the HUD regulation. Instead, the lower court adopted the regulation's definition of an actionable "discriminatory effect" for purposes of disparate impact liability, and directed the district court to apply the HUD-defined liability standard on remand. The lower court stated that "'*Liability* may be established under the Fair Housing Act based on a practice's discriminatory effect, *as defined in paragraph (a) of this section,* even if the practice was not motivated by discriminatory intent.'" Pet. App. 15a (quoting 24 C.F.R. § 100.500) (emphasis added). After quoting the definition of an actionable "discriminatory effect" set forth in paragraph (a) of the regulation, Pet. App. 16a, and adopting the regulation's burden-shifting standards, the lower court held that "a plaintiff must prove a prima facie case of discrimination by showing that a challenged practice causes a discriminatory effect, *as defined by 24 C.F.R. § 100.500(a).*" Pet. App. 16a. (emphasis added). The court then remanded "for the district court to apply *this legal standard* to the facts." Pet. App. 17a (emphasis added).

Thus, this Court is being asked to review the Fifth Circuit's judgment that respondent's disparate impact claim is governed by the liability standard of the HUD regulation. *See also* Pet. App. 18a (Jones, J.,

concurring "in the court's judgment to reverse and remand for reconsideration under the recently promulgated HUD guidelines"). In light of that judgment, the first question petitioners ask this Court to decide is not presented. Because the Fifth Circuit has remanded for application of HUD's liability standard, this case presents the question whether HUD's regulation is valid under the *Chevron* framework. That question is different from the question whether "disparate impact claims [are] cognizable under the" FHA. Pet. at i.

Chevron applies where an agency administers a statute and has authority to issue regulations to enforce and implement it. *See Brand X*, 545 U.S. at 980-81. In such circumstances (which petitioners concede are satisfied here, *see* Appellants' Br. at 29), a regulation is valid unless (1) "the statute *unambiguously forecloses* the agency's interpretation, and therefore contains no gap for the agency to fill," *Brand X*, 545 U.S. at 982-83 (emphasis added), or (2) the agency's gap-filling interpretation is not a reasonable policy choice, *id.* at 986. By contrast, in the absence of an agency interpretation, a court must determine what is "the *best* reading" of a statute, "not [what is] the *only permissible* reading." *Id.* at 984. The validity of HUD's regulation thus turns on distinctly different questions than the question the petition purports to present.

B. It Is Highly Likely That Resolution Of The First Question Presented Would Result In An Advisory Opinion.

Because a "judicial construction of a statute trumps an agency construction *only* if the . . . court decision holds that its construction flows from *the unambiguous terms of the statute*," *Brand X*, 545 U.S. at 982 (emphasis added), a holding that the FHA is "best read" as not authorizing disparate impact liability would not affect the Fifth Circuit's judgment. To the contrary, "*Chevron* teaches that a court's opinion as to the best reading of a statute an agency is charged with administering is not authoritative." *Id.* at 983. Thus, a "best reading" of the FHA in petitioners' favor would leave HUD's regulation undisturbed, and would therefore provide no basis for reversing a judgment that simply requires a district court to apply that regulation on remand.

There is ample evidence, moreover, that the FHA does not *unambiguously* foreclose HUD's interpretation of the FHA. *Id.* Eleven circuits concluded (before HUD promulgated its regulation) that the FHA authorizes disparate impact liability, and no court of appeals has ever reached a contrary conclusion. *See* Pet. at 18-19. Petitioners claim that these decisions rest on analogies to Title VII that were undermined by the plurality decision in *Smith v. City of Jackson*, 544 U.S. 228 (2005), which highlighted the supposedly distinct language of Title VII that authorizes disparate impact liability. Pet. at 19-21. But even if petitioners' reading of *Smith* were correct, the fact

that eleven courts of appeal relied on an (allegedly) inapt analogy to Title VII in ruling that the FHA *authorizes* disparate impact claims does not show that the FHA "*unambiguously* forecloses" such claims.

Petitioners' contention that *Smith* undermined analogies between the FHA and Title VII is mistaken. Indeed, in direct contradiction of their current claims, petitioners conceded below that "Title VII and the FHA are similarly worded in their prohibition of discrimination," and that it therefore "makes sense to continue to interpret the two statutory schemes similarly." Appellants' Br. at 30. Petitioners' about-face in this Court rests on a misreading of *Smith*. The plurality noted that Title VII prohibits actions "that 'deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's' race or age." 544 U.S. at 235. By "focus[ing] on the *effects* of the action on the employee," this text confirmed that the provisions authorize disparate impact claims. *Id.* at 236.

The FHA uses similar language, making it unlawful to "refuse to sell or rent . . . or to refuse to negotiate for the sale or rental of, *or otherwise make unavailable or deny*, a dwelling to any person because of race." 42 U.S.C. § 3604(a). The phrase "*or otherwise make unavailable or deny*" in the FHA parallels the phrase "*or otherwise adversely affect*" in Title VII. Both phrases are catch-alls that ensure that the substantive prohibition captures all actions that produce discriminatory effects. The phrase "or otherwise adversely affect his status as an employee" was

necessary in Title VII to capture facially neutral policies that have discriminatory impacts beyond outright employment denials, such as reduced wages or benefits. In the housing setting, the phrase "or otherwise make unavailable or deny[ ] a dwelling" is a similarly generic phrase that captures neutral policies that result in discriminatory impacts such as the perpetuation of racial segregation in housing.[1]

Other text in the FHA supports this conclusion. Three of its exemptions presuppose disparate impact liability. One provides that "[n]othing in [the FHA] prohibits conduct against a person because such person has been convicted of a drug offense." 42 U.S.C. § 3607(b)(4). Because the Act does not prohibit discrimination against convicted drug offenders, the exemption makes sense only if denying housing because of such convictions would support a disparate impact claim. Similarly, the FHA provides that it does not "limit the applicability of any reasonable ... restrictions regarding the maximum number of occupants permitted to occupy a dwelling." *Id.* § 3607(b)(1).

[1] Petitioners' claim that "[a]ll of the prohibitions in sections 3604(a) and 3605(a) are phrased to require intentional conduct," Pet. at 21, is plainly wrong. Each prohibition in 42 U.S.C. § 3604(a) and 42 U.S.C. § 3605(a) ends with the phrase "because of race" or other characteristics. But Title VII itself prohibits actions that "adversely affect" persons "because of race" or other characteristics, and the latter prohibition has not been construed to require intentional conduct, notwithstanding the "because of" phrase. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-36; (1971); 42 U.S.C. § 2000e-2(a) ("because of race"); 42 U.S.C. § 2000e-2(h) ("because of race").

Because the FHA does not bar discrimination based on the number of occupants, this exemption likewise makes sense only as a limitation on disparate impact liability. Finally, the FHA states that it does not prohibit real estate appraisers from taking into consideration factors other than those identified as impermissible (*e.g.*, race, color, etc.). *Id.* § 3605(c). Once again, this exemption makes sense only as a limitation on disparate impact liability.

The statute's history also supports disparate impact liability. When it amended the FHA in 1988, Congress was aware that the courts of appeals had all recognized disparate impact claims under section 804(a), yet it did not change the provision's operative language. *See* H.R. Rep. No. 711, 100th Cong., 2d Sess. 21 (1988); *see also Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change"). And Congress specifically rejected an amendment that would have required proof of intentional discrimination in challenges to zoning decisions. H.R. Rep. No. 711, 100th Cong., 2d Sess. 21 at 89-91 (1988) (dissenting views of Rep. Swindhall). *See also* Brief For the United States As Amicus Curiae Supporting Respondents, filed in *Township of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.,* U.S. Supreme Court, 11-1507, pages 6-7, 9-12 (explaining why the HUD regulation is valid in light of the FHA's text, structure, and history).

Respondent submits that this brief overview of the relevant statutory evidence demonstrates that the FHA is best read as authorizing disparate impact claims. *Implementation*, 78 Fed. Reg. at 11,461-11,463. At a bare minimum, however, this evidence makes it impossible for the Court to grant review of the first question presented with any certainty that resolution of that question will affect the judgment below. And if the resolution of an issue "is irrelevant to the ultimate outcome of the case before the Court," review is unwarranted. Eugene Gressman et al., *Supreme Court Practice* 248 (9th ed. 2007) (citing *Sommerville v. United States*, 376 U.S. 909 (1964)).

This critical fact distinguishes the petition in this case from those granted in *Magner* and *Mt. Holly*. HUD's regulation did not exist when this Court granted, and later dismissed, the petition in *Magner*, and it was not issued until over a year after the Third Circuit's September 2011 decision in *Mt. Holly*. *See Mt. Holly Gardens Citizen in Action, Inc. v. Township of Mt. Holly*, 658 F.3d 375 (3d Cir. 2011). Thus, the judgments in both *Magner* and *Mt. Holly* rested on the lower court's interpretation of the FHA itself. Reversal of those interpretations, therefore, would have affected the judgments in both cases, even if subsequent cases would not have been controlled by the Court's decision. There was no risk, therefore, that this Court's determination of whether the FHA was best read to authorize disparate impact liability would have amounted to a mere advisory opinion.

C. Petitioners' Other Arguments Cannot, And Do Not, Justify Review Of The First Question Petitioners Seek To Raise.

Because this Court does not grant review of issues that may not justify reversal of a lower court's judgment, petitioners' other arguments for granting review of the first question presented are irrelevant. In all events, those arguments are groundless.

Petitioners claim they have been operating "under a structural injunction designed to achieve race-specific outcomes." Pet. 15. But every element in the court-ordered plan was proposed *by petitioners* except the content of a tie-breaker. Pet. App. 27a-29a. And petitioners stated that their proposal could:

> achieve the objectives of *race neutral* dispersion of LIHTC assisted developments within the remedial plan area by fashioning clear requirements, which are reasonably calculated to yield the intended result.

Pet. App. 33a (emphasis added). Petitioners' current claims of race-conscious compulsion are also belied by their willingness to voluntarily apply elements of the plan to its LIHTC program throughout the state. Pet. App. 37a-38a. Of course, petitioners are not now subject to any remedial obligations because the Fifth Circuit vacated the amended judgment. Pet. App. 23a.

Similarly, petitioners claim that, unless "Texas achieves racial symmetry in all aspects of government decision making, operating any of [the States'

almost two dozen housing] programs exposes the State to a potential disparate-impact lawsuit." But resolution of the first question petitioners seek to raise is irrelevant to this concern. First, Texas law itself requires petitioners to undertake racial analysis of the results achieved in all of its housing programs. Tex. Gov't Code § 2306.072(c)(5) requires petitioners to conduct an annual statistical analysis, "delineated according to each ethnic and racial group served by the department," in implementing the state low-income housing plan. Tex. Gov't Code § 2306.072(c)(6) requires petitioners to conduct an annual analysis of the fair housing opportunities in each housing development that receives department assistance. Second, even if this Court were to rule that under the best reading, the FHA does not authorize disparate impact claims, HUD's regulation would still expose petitioners to disparate impact liability. *E.P.A. v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1592 (2014).

Finally, petitioners try to suggest that, after four decades of circuit court recognition of disparate impact claims, this theory of liability has suddenly resulted in an explosion of expansive and unwarranted applications of the FHA in the past sixteen months. Pet. at 16 n.8. None of the cases petitioners cite, however, upheld disparate impact liability. Indeed, in only one did a disparate impact claim survive appeal for further proceedings. *Pacific Shores Properties LLC v. City of Newport Beach*, 730 F.3d 1142, 1166 (9th Cir. 2013). There has never been a litigation explosion of disparate impact cases.

Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 Am. U. L. Rev. 357, 412, 422 Appendix A.

Petitioners' suggestion that zoning decisions should be outside the purview of the FHA, Pet. at 16, is flatly refuted by the FHA's legislative history, which singled out zoning decisions as examples of neutral policies that should be subject to the disparate impact standard if racial segregation is to be addressed. *Implementation*, 78 Fed. Reg. at 11,467. Nor is there anything surprising about application of disparate impact to the governmental decisions at issue here, which perpetuate racial segregation. Indeed, in explaining its proposed disparate impact rule, HUD cited the district court's 2010 summary judgment decision in this case as an example of the discriminatory housing practices the FHA was enacted to address. *See Implementation of the Fair Housing Act's Discriminatory Effects Standard*, 76 Fed. Reg. 70,921, 70,925 (Nov. 16, 2011).

D. The Court Should Not Address The Validity Of The HUD Regulation.

For good reasons, the petition does not purport to present the question that is relevant to the judgment below – *i.e.*, is HUD's regulation valid? There is no division among the circuits on this question; indeed, it appears that the lower court is the first circuit to have even adopted the regulation. This case is in an

interlocutory posture," and the Fifth Circuit did not address whether the FHA unambiguously forecloses HUD's interpretation, and thus did not wrestle with any of the relevant textual and other statutory evidence bearing on that question. This, of course, is because petitioners made no such arguments below. Instead, they sought *Chevron* deference for the regulation's burden-shifting standards. In doing so, petitioners drew no distinctions between the regulation's liability and burden-shifting sections, much less attempted to explain how HUD could validly adopt burden-shifting standards to implement a supposedly invalid liability standard.

Not only is the question of the regulation's validity not presented in this case, it is also not ripe for this Court's review. There is every reason to believe that the question will reach this Court in an appropriate vehicle. The validity of the regulation is the subject of two lawsuits, pending in district courts in different circuits, in which HUD itself is the defendant. *See American Ins. Ass'n, et al. v. United States Dep't of Hous. and Urban Dev.*, C.A. No. 13-cv-966 (D.D.C.), *filed* June 26, 2013, and *Property Casualty Ins. Ass'n of America v. Shaun Donovan and U.S. Dep't of Hous. and Urban Dev.*, C.A. No. 1:13-cv-08564 (N.D. Ill). These cases, which plaintiffs seek to prosecute on an expedited basis, will present the relevant issue after full briefing and the full involvement of the agency itself. *See* Pls. Mem. in Supp. of Summ. Judgm. in *American Ins. Ass'n,* at 1-2 (asserting that HUD's regulation is invalid because "the FHA

unambiguously prohibits only intentional discrimination," and seeking "to streamline" and "expedite" proceedings in the lower courts in order to "present the Supreme Court with an opportunity . . . to address the question"). And because the plaintiffs in both cases are insurance associations seeking declaratory and injunctive relief, there is little prospect that the cases will settle before definitive determinations can be rendered. Accordingly, the petition in this case should be denied.

II. THE SECOND QUESTION DOES NOT MERIT REVIEW.

It is doubtful that the second question petitioners raise is properly presented either. Petitioners urged the Fifth Circuit to adopt the burden-shifting standards of HUD's regulation and the lower court did so. This Court does not review questions that a party believes were resolved correctly in its favor. In all events, the question of what standards and burdens of proof should apply to disparate impact claims under the FHA does not merit review.

Stressing the supposed conflict in standards that existed before HUD issued its regulation, petitioners assert that "federal district courts remain bound by the case law from the courts of appeals, so it is unrealistic to expect HUD's regulation to bring about uniformity" with respect to these standards. This assertion is demonstrably incorrect. The division among the circuits demonstrates that the FHA does

not unambiguously compel a single burden-shifting standard. Accordingly, the standards adopted by different circuits are "not authoritative," and the lower courts must therefore defer to the standard set forth in the HUD regulation. *Brand X*, 545 U.S. at 982-83. The binding nature of that regulation undoubtedly explains why, after granting review of the burden-shifting question in *Magner* (when there was no HUD regulation), the Court denied review of the same question in *Mt. Holly* (when the regulation did exist). Just as in *Mt. Holly*, therefore, the second question presented does not merit review.

CONCLUSION

For all of the foregoing reasons, the petition should be denied.

Respectfully submitted,

MICHAEL M. DANIEL
Counsel of Record
LAURA B. BESHARA
DANIEL & BESHARA, P.C.
3301 Elm Street
Dallas, Texas 75226
(214) 939-9230
daniel.michael@att.net
laurabeshara@swbell.net

Counsel for Respondent
The Inclusive Communities Project, Inc.