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 FOR *AMICUS CURIAE* THE HOUSTON HOUSING AUTHORITY IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

Amicus curiae—The Houston Housing Authority ("HHA")—develops and operates affordable housing developments and provides related services to more than 58,000 low-income residents of Houston, Texas. Its mission is to "improve lives by providing quality, affordable housing options and promoting education and economic self-sufficiency." It provides housing subsidies to over 17,000 families through the Housing Choice Voucher Program and to another 5,700 families living in 25 public housing and low-income housing tax-credit ("LIHTC") developments in Houston. Directly or through its affiliates, HHA oversees each of its 25 sites. HHA also administers the nation's third largest voucher program that exclusively serves homeless veterans. Through its programs and affiliates, HHA helps public housing residents and voucher holders increase their education, live healthier lives, and reach their economic goals.[1]

While HHA believes firmly in providing for equal access to housing for all Americans, HHA files this brief in support of Petitioner because the use of the disparate-impact theory of liability under the Fair Housing Act, 42 U.S.C. § 3601, *et seq.*, ("FHA") has effectively halted HHA's ability to develop new affordable housing and to serve its clients, thereby adversely impacting the very individuals the FHA seeks to protect.

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1. The parties consented to the filing of *amicus curiae* briefs generally in this case. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* has made a monetary contribution to the preparation or submission of this brief.

BACKGROUND

HHA submits this brief in support of Petitioners' position that the FHA does not recognize disparate-impact claims. HHA also wishes to provide the Court with its insights based on its experience as a major public housing authority directly affected by the consequences of disparate-impact liability under the FHA, especially as that experience pertains to the development of much-needed affordable housing financed with public housing funds appropriated pursuant to § 9 of the U.S. Housing Act of 1937, 42 U.S.C. 1437, housing vouchers under § 8 of the Housing Act, Community Development Block Grants-Disaster Relief, specially appropriated by Congress, and the LIHTC program pursuant to § 42 of the Internal Revenue Code, 26 U.S.C. § 42. Disparate-impact liability under the FHA has proven to be extremely nebulous in practice and to have done little to combat actual housing discrimination. Instead, it has prevented HHA and similarly-situated affordable housing developers and operators from carrying out their mission to use federal government programs to create and to maintain affordable housing opportunities for Houstonians and to invest in low-income communities. A finding by the Court that FHA disparate-impact claims are viable will perpetuate the unintended consequence of hurting the very groups that Congress intended to protect by severely retarding the necessary development of affordable housing units and by stymying investments in under-served communities.

A. THE FAIR HOUSING ACT - 42 U.S.C. § 3601, *et seq.*

In 1968, Congress passed the FHA, as Title VIII of the Civil Rights Act of 1968, to address housing discrimination. As originally enacted, the FHA prohibited discrimination based on race, color, national origin and religion. Congress later expanded the FHA to prohibit discrimination on the grounds of gender, familial status, and disability as well. Housing and Community Development Act of 1974, Pub. L. 93-383, § 808, 88 Stat. 633, 729 (1974); Fair Housing Amendments Act of 1988, Pub. L. 100-430, 102 Stat. 1619-39 (1988). When enacting the FHA, Congress stated that its goal was to "provide, *within constitutional limitations*, for fair housing throughout the United States." 42 U.S.C. § 3601 (emphasis added). Congress made it unlawful under the FHA 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 because of" that person's protected status under the FHA. *Id.* § 3604(a).

B. THE LOW-INCOME HOUSING TAX CREDIT PROGRAM - 26 U.S.C. § 42(g)(1)

Federal law offers tax credit subsidies to developers who construct "qualified low-income housing projects" through the LIHTC program. *See* 26 U.S.C. § 42(g)(1).[2]

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2. The statute defines a "qualified low-income housing project" as any residential rental property in which one of the following requirements is met:

> (A) 20-50 test--The project meets the requirements of this subparagraph if 20 percent or more of the

Participating states administer LIHTCs, choose the developers, and select the projects. 26 U.S.C. § 42(m). Federal law governs states throughout the selection process and the administration of the projects. The LIHTC program requires that tax credit subsidies be distributed according to a "qualified allocation 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). Federal law sets forth threshold requirements for the QAP which states must include to qualify for LIHTC. 26 U.S.C. § 42(m)(1).

In Texas, the Texas Department of Housing and Community Affairs ("TDHCA") is responsible for disbursement of LIHTC to HHA and other affordable housing developers. Tex. Gov't Code § 2306.6701. For nearly 20 years, HHA and other public housing authorities have used LIHTC as a necessary means to generate additional funding from private investors to substantially rehabilitate or develop new affordable housing units. As a result of the lower court's decision in this case, TDHCA's current QAP and LIHTC underwriting process prevents HHA from investing in underserved communities, even

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> residential units in such project are both rent-restricted and occupied by individuals whose income is 50 percent or less of area median gross income.
>
> (B) 40-60 test--The project meets the requirements of this subparagraph if 40 percent or more of the residential units in such project are both rent-restricted and occupied by individuals whose income is 60 percent or less of area median gross income.

26 U.S.C. § 42(g)(1).

those in which HHA's development activities would improve the overall well-being, health, and safety of that community.

As the concurring opinion in the Court of Appeals noted, TDHCA "policies and practices for awarding LIHTC grants are anything but simple." *Inclusive Cmtys. Project, Inc. v. Texas Dept. of Hous. And Cmty. Affairs*, 747 F.3d 275, 283 (5th Cir. 2014) (Jones, J., concurring). Federal law *requires* a QAP to "advantage projects located in low-income census tracts or subject to a community revitalization plan." *Ibid.* (*citing* 26 U.S.C. § 42(m)(1)(B)). Specifically, federal law requires preferences for projects located in "qualified census tracts" ("QCTs"), defined as tracts in 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. 26 U.S.C. § 42(d)(5)(B)(ii)(I). Meanwhile, Texas law requires that TDHCA "score and rank the application using a point system." Tex. Gov't Code § 2306.6710(b). TDHCA must "prioritize in descending order" eleven criteria, including financial feasibility, quantifiable community participation, income levels of tenants, commitment of development funding, rent levels, and cost per square foot. Tex. Gov't Code § 2306.6710(b)(1). As applied to HHA's properties, a disparate-impact theory of liability directly conflicts with Texas's statutory requirement, since many QCTs also have high concentrations of persons protected under the FHA.

As a public housing authority, HHA faces a host of potential FHA lawsuits under the disparate-impact theory of liability. In particular, HHA's efforts to develop and operate affordable housing creates the possibility of liability because HHA's clients are predominantly

persons in classes that the FHA protects, because many of HHA's properties that require redevelopment are located in communities of color, and because Houston is a "majority-minority city."[3] To make matters worse, federal and state agencies have begun to regularly withhold necessary approvals because of concerns about the potential disparate-impact based on the location of HHA's project requests, hampering HHA's development of affordable housing.

SUMMARY OF THE ARGUMENT

This Petition addresses a critical issue regarding the FHA and its impact on the housing sector: whether wholly unintentional and facially non-discriminatory policies and procedures can result in liability under the FHA because those policies and procedures result in a disparate-impact on persons in a class that the FHA protects. Disparate-impact cases do not require any showing of actual discrimination against a person of a protected class. Federal courts have analogized other federal anti-discrimination laws to interpret the FHA as recognizing disparate-impact. *See, e.g., Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 987-88 (4th Cir. 1983) (analogizing Title VII & VIII disparate-impact claims to claims under the FHA). However, such analogizing is incorrect under the plain language of the FHA and its amendments, the absence of any effects-based language as described in *Smith v. City of Jackson*, 544 U.S. 228, 233-35 (2005), and the FHA's legislative history.

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3. Generally speaking, a "majority-minority city" is where one or more racial or ethnic minorities constitute a majority of a city's population.

HHA strongly believes in the purposes that Congress mandated for the FHA, and, through its housing programs works to serve low-income persons that Congress has sought to protect and assist with affordable housing. Should the Court recognize disparate-impact liability under the FHA, the people who are clients or prospective clients of HHA, nearly all of whom fall within the protections of the FHA, will be unfairly denied opportunities for affordable subsidized housing. HHA will be unable to maintain safe and sanitary existing units or develop new public housing units in a manner consistent with the federal requirements. In addition, disparate-impact liability has even more far reaching consequences—for example, potentially frustrating the purposes of agreements between HHA and the United States Department of Housing and Urban Development ("HUD") and also hampering HHA's HUD-required background screening.[4]

In Houston and many other cities, especially those with "majority-minority" populations, most QCTs have extremely high numbers of the minority populations. Respondent's interpretation of the disparate-impact theory as applied to TDHCA essentially prevents construction and redevelopment of public housing projects in the major cities, even though the LIHTC program prioritizes developments in QCTs. As a result, HHA and other affordable housing developers would continue to be unable to build any new housing or substantially

4. HUD requires housing authorities to conduct criminal background checks and other forms of screening for prospective and current tenants. *See* 24 C.F.R. § 5.850 *et seq.* As a result of HUD's requirements, HHA may unintentionally incur liability because such screenings will likely have a disparate impact on persons protected under the FHA.

rehabilitate existing housing using LIHTC throughout the country, which is critical to construct and redevelop affordable housing for those who need it.

Should the Court approve FHA disparate-impact liability, HHA and every other similarly-situated public housing authority, would be forced into a paradox whereby HHA would be required to consider racial balances in its programs and services, but it could not take race into account when making those determinations. "It is utterly incomprehensible that Congress would *intentionally* provide for disparate-impact liability [in the FHA], where doing so would *require* those [same individuals] to collect and evaluate race-based data, thereby engaging in conduct expressly proscribed by [law]." *Am. Ins. Ass'n v. United States HUD*, Case No. 13-966-RJL, 2014 U.S. Dis. LEXIS 157904, at *40 (D.D.C. Nov. 7, 2014).

ARGUMENT

A. DISPARATE-IMPACT THEORY FRUSTRATES THE PURPOSE OF THE FAIR HOUSING ACT AND EFFECTIVELY PREVENTS PUBLIC HOUSING AUTHORITIES FROM FUNDING, CONSTRUCTING, MANAGING, AND REDEVELOPING AFFORDABLE HOUSING PROJECTS.

The disparate-impact theory of liability, as it has been applied to decisions regarding HHA, is having a chilling effect on the agencies that must approve HHA's development projects. Fearing liability under this theory, HUD, the Texas General Land Office ("GLO"), or TDHCA

have refused or been unwilling to approve all but two of HHA's eight development projects over the past two years. Both formally and informally, these agencies have justified their concerns as being rooted in disparate-impact liability. During this two year period of regulatory idling, the number of families seeking subsidized housing on HHA's public housing central and site-based waiting lists has increased by fifty percent and construction costs have increased dramatically.

HHA's housing developments are aging. Natural disasters, including Hurricane Ike in 2008, and the recession significantly affected the Houston area, and have taken a further toll. The state and federal agencies responsible for reviewing HHA's requests for approvals to redevelop those housing projects have repeatedly hindered HHA's redevelopment efforts by using a disparate-impact analysis to evaluate HHA's requests. Recently, the relevant funding agencies (including HUD, GLO, and TDHCA) have failed to approve HHA's multiple requests to construct and redevelop public housing and other sites. The Court of Appeals' holding has forced TDHCA to administer its QAP and underwrite projects in a manner that prevents TDHCA from allocating LIHTCs to HHA. The current QAP and underwriting process essentially eliminates the primary funding method available to public housing authorities like HHA. Because public housing programs are not sufficiently funded to maintain housing long-term to HUD standards, LIHTCs have been an integral part of nearly all of HHA's redevelopment efforts during the past two decades. However, under the Court of Appeals' opinion in this case, few, if any, of HHA's planned redevelopments meet TDHCA's QAP or underwriting standards.

The result has devastated HHA's public and affordable housing efforts. HHA cannot undertake new efforts to develop, maintain, or redevelop affordable housing, a state of affairs that directly, and negatively, affects the very classes the FHA aims to protect. Generally speaking, HHA provides services to a vast array of persons that Congress expressly designed the FHA to protect: over 82% of HHA's tenants are African American; over 20% of HHA's tenant families include a disabled family member; and over 40% of HHA's tenant families are single-mother households. HHA's waiting lists for families who seek to access public housing or voucher programs include over 43,000 families, the demographics of which closely mirror those individuals HHA is currently serving, and the need for quality affordable housing is only rising.

In Houston, a "majority-minority city" where nearly 75% of the population is non-white, any affordable development by HHA, as a practical matter, will necessarily affect minority populations. There is no way around this. Respondent's position is that HHA should only be permitted to build or redevelop in more affluent areas where there is no minority concentration, so-called "higher opportunity areas." Given Houston's demographics, such a notion is impossible and impractical. It is cost prohibitive and not an effective use of HHA's limited resources to develop only in higher opportunity areas. Affordable housing would never get built. In areas where HHA has properties and seeks to redevelop affordable housing, land costs are approximately $2.5 million per site; land costs in the higher opportunity areas range from $37 to $60 million per site. The result, therefore, would be a smaller, higher cost affordable housing program that services significantly fewer residents. With over 43,000

people on HHA's waiting lists (not to mention many more who need housing but are not on any waiting list), it would be contrary to HHA's mission to restrict development in a way that provides so few housing opportunities.

Limiting development only to "higher opportunity areas" would lead to reduced investment in neighborhoods that are already suffering. HHA developments in these neighborhoods are often a catalyst for further development of commercial, governmental, and educational facilities. If public housing authorities are unable to develop in these neighborhoods because government agencies do not provide needed approvals out of concern over FHA disparate-impact liability, additional development will not follow. The neighborhoods will continue to slide into blight, and there will be no ability to use federal funds or federal programs to facilitate reinvestment. Although this was certainly never the intent of Congress, it has become the practical effect with the growing liability from disparate-impact claims.

Simply put, disparate-impact liability under the FHA has hamstrung HHA's efforts to develop affordable housing. Recently, disparate-impact liability has prevented HHA from funding, constructing, and redeveloping its public housing projects. For example, HHA could not receive approval to redevelop its Wilmington House public housing project damaged during Hurricane Ike because a third-party provided statistics to TDHCA suggesting that redevelopment would create a disparate-impact on minorities. Ultimately, HHA withdrew its bond application at TDHCA's request. The Wilmington House site remains vacant today, and there is no prospect of redevelopment. The site is also subject to a HUD use restriction that limits

its use to affordable housing, but according to TDHCA, no LIHTC units can be built on the site due to conflicts with the underwriting requirements developed in response to the lower court's decision in this case.

The Acres Homes development is another recent HHA project thwarted by the threat of FHA disparate-impact liability. The Acres Homes project proposed 200 new affordable housing units on vacant land adjacent to a major transportation hub. The location of the development would connect its residents to jobs and other services throughout Houston. After fair housing advocates expressed concerns about potential minority concentrations within the neighborhood, HUD refused to approve HHA's applications to construct public housing.

Further, concerns about proposed projects in "majority-minority" neighborhoods caused HUD to delay its approval process, which effectively halted several projects. For example, two HHA-proposed developments in the Sunnyside neighborhood were abandoned because HUD failed to timely approve the projects and contracts ultimately expired. In HHA's Crosstimbers development, HUD's delay has caused land acquisition costs to substantially increase because a private investor has since purchased necessary parcels. HUD's delays in approving these projects have left thousands of people without affordable housing. In fact, HHA has received approval on only two of its proposed projects to develop any affordable housing because of the prospect of disparate-impact liability.

B. THE PLAIN LANGUAGE OF THE FHA DOES NOT CONTAIN EFFECTS-BASED LANGUAGE & THE FHA'S LEGISLATIVE HISTORY DOES NOT DEMONSTRATE CONGRESS INTENDED THE FHA TO COVER DISPARATE-IMPACT.

In the past, this Court has looked primarily to the plain language of anti-discrimination statutes to determine whether Congress intended the statute to permit proof of discrimination by means of disparate-impact alone. *E.g., Smith v. City of Jackson*, 544 U.S. 228, 233-35 (2005) (plurality opinion). Crucial to this inquiry is the presence or absence of effects-based language. *Ibid.* For example, the ADEA prohibits actions that not only "limit, segregate, or classify" persons, but also 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. 29 U.S.C. § 623(a)(2) (emphasis added). Relying on its unanimous interpretation of Title VII to permit disparate-impact in *Griggs*, the Court recognized disparate-impact liability under the ADEA because the text "focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer." *Smith*, 544 U.S. at 236 (emphasis in original). Similarly, Title VII also contains effects-based language by making it unlawful for an employer to "limit, segregate, or classify 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." 42 U.S.C. § 2000e-2(a)(2) (emphasis added). Both ADEA and Title VII thus specifically focus on *effects*, this Court held, and thus both permit proof of discrimination by a showing of disparate-impact.

No such "effects" language exists in the FHA. The text of the FHA, unlike the effects-based language of Title VII or the ADEA, focuses on the *conduct*—refusing to *sell* or *rent* or *negotiate* or *make unavailable* or *deny* or *discriminate*—and not the *result* or *effect* of particular conduct. As recently stated, "the operative verbs in § 3604 are 'refuse,' 'make,' 'deny,' and—of course, 'discriminate' [and the] use of these particular verbs is telling, and indicates that the statute is meant to prohibit intentional discrimination only." *Am. Ins. Ass'n*, 2014 U.S. Dist. LEXIS 155383, at *27-28. Indeed, "when Congress intends to expand liability to claims of discrimination based on disparate-impact, it uses language focused on the result or effect of particular conduct, rather than the conduct itself." *Id.* (*citing* 42 U.S.C. § 2000e-2(a)(2) (employer shall not "limit, segregate, or classify his employees . . . in an way which *would deprive or tend to deprive* any individual of employment opportunities" or "otherwise *adversely affect* his status as an employee" (emphasis added)); 29 U.S.C. § 623(a)(2) (same); *see also Smith*, 544 U.S. at 235-36). Thus, the FHA's "operative terms [ ] describe intentional acts, which are . . . motivated by specific factors [and] not the effect of conduct, but rather the motivation for the conduct itself." *Am. Ins. Ass'n*, 2014 U.S. Dist. LEXIS 155383, at *28-29.

As discussed, Congress could have—but did not—include such language to provide for FHA disparate-impact liability. On three separate occasions, Congress passed FHA-related legislation; and, on each of those three occasions, it declined to include effects-based language that would expand liability for unintentional effects.

Proponents of disparate-impact liability under the FHA also argue that the 1988 amendments to the FHA implicitly ratified the view that such disparate-impact liability exists. The history of the FHA indicates otherwise. First, when signing the FHA amendments, President Reagan stated that the FHA goes "only to intentional discrimination" and that the amended FHA does "not represent any congressional or executive branch endorsement by a showing of disparate-impact . . . without discriminatory intent." President Ronald Reagan Remarks, Sept. 13, 1988, 24 Weekly Comp. Res. Doc. 1140, 1141. Second, the fact that Congress did not change the operative language of the FHA even in the face of several judicial decisions recognizing disparate-impact liability does not constitute grounds to infer that Congress intended that the statute include disparate-impact liability. *See* HUD Disparate-Impact Rule, 78 Fed. Reg. 11,467.[5]

In the wake of the 1988 FHA amendments, Congress enacted two other anti-discrimination statutes that did expressly authorize disparate-impact claims. Congress enacted Section 102 of the Americans with Disabilities Act in 1990, expressly allowing for disparate-impact claims by allowing a *cause* of action where there are "adverse[ ] [e]ffects" upon disabled employees. 42 U.S.C. § 12112(b); *see Raytheon*, 540 U.S. at 53. Congress also modified the language to Title VII in 1991, codifying the Supreme Court's earlier interpretation in *Griggs v. Duke Power*

5. In the event that the Court finds disparate-impact to be a recognized theory under the FHA, HHA contends that HUD should promulgate a revised rule excepting affordable housing development.

Company, 401 U.S. 424 (1971). *See* 42 U.S.C. § 2000e-2(k). These amendments to two other anti-discrimination statutes to provide discriminatory intent *or* disparate-impact liability, close in time to when Congress amended the FHA and chose not to provide expressly for such liability, constitute strong evidence that Congress did not intend for FHA liability to extend to disparate-impact cases.

The legislative history of the FHA also supports the meaning of the plain language. During debate on the Senate floor of the initial Act, Senator Walter Mondale stated that the purpose of the legislation "is to permit people who have the ability to [buy] any house offered to the public if they can afford to buy it," and added that the bill "would not overcome the economic problem of those who could not afford to purchase the house of their choice." 114 Cong. Rec. 3421 (1968). Senator Joseph Tydings similarly remarked that the problem the bill addressed was "the *deliberate* exclusion from residential neighborhoods on the grounds of race." 114 Cong. Rec. 2530 (1968) (emphasis added). Thus, neither the FHA's plain language nor its legislative history recognizes disparate-impact liability.

CONCLUSION

The Court should reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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