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.

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

REPLY BRIEF FOR THE PETITIONERS

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HUD's disparate-impact regulation is irrelevant to the certworthiness of this case, just as it was irrelevant in *Township of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, No. 11-1507. In *Mount Holly*, the respondents and the Solicitor General urged this Court to deny certiorari because the HUD regulation was new, no court had applied or analyzed it, and the petitioner did not raise the question presented in the Court of Appeals. *See* Br. in Opp., 2014 WL 3991474, at *11–*26, *Twp. of Mount Holly*, No. 11-1507; Brief of the United States as Amicus Curiae at 22, *Twp. of Mount Holly*, No. 11-1507 (May 2013). All of the petitioners' answers to those arguments in *Mount Holly* are equally applicable here. Indeed, this case provides an even better vehicle

than *Mount Holly* for considering the question presented because the State already has faced a full trial on the merits. *Cf.* Br. in Opp., 2014 WL 3991474, at *23–*26, *Twp. of Mount Holly*, No. 11-1507 (emphasizing unresolved factual issues at summary-judgment stage); Brief of the United States as Amicus Curiae at 21–22, *Twp. of Mount Holly*, No. 11-1507 (May 2013) (same).

The respondent attempts to distinguish *Mount Holly* only by complaining that the State "did not challenge the validity of the HUD regulation" in the Fifth Circuit. Br. in Opp. at 1.[1] But the State could not challenge the HUD regulation before the Fifth Circuit panel because the binding precedent of that court established that the Fair Housing Act provides for disparate-impact liability. *See Artisan/Am. Corp. v. City of Alvin*, 588 F.3d 291, 295 (5th Cir. 2009); *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996). A Fifth Circuit panel is powerless to overrule the holdings of previous panels, and the State was obligated to candidly acknowledge these adverse precedents and accept them as the law of the circuit. *See French v. Allstate Indem. Co.*, 637 F.3d 571, 589 (5th Cir. 2011) (panels of the Court are bound by prior decisions absent an intervening Supreme Court decision or en banc vote). All that the State could do before the Fifth

[1] The respondent is wrong to assert that the Fifth Circuit's application of the HUD regulation is "not properly presented in this case." Br. in Opp. 10. Any attempt to answer the question presented will involve consideration of what deference (if any) is owed to HUD's interpretation of the statute, and whether HUD's regulation can survive judicial scrutiny. The validity of HUD's regulation is squarely within the scope of the question presented.

Circuit was *preserve* its contention that the FHA cannot be construed to impose disparate-impact liability, while arguing for application of the HUD regulation as a second-best option given the Fifth Circuit's adverse case law on the disparate-impact question.[2] The State fully preserved its argument that disparate-impact claims are not cognizable under the Fair Housing Act. *See* Appellants' Br. 29 n.10, *The Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, No. 12-11211 (5th Cir. Apr. 22, 2013) ("In the event the Supreme Court grants certiorari [in *Mount Holly*] and rules that such a cause of action is not available, Defendants ask the Court to reverse and render judgment in their favor."). That is enough to show that the issue was "pressed *or* passed upon below." *Verizon Commc'ns, Inc. v. F.C.C.*, 535 U.S. 467, 530 (2002) (emphasis added); *see also Medellin v. Dretke*, 544 U.S. 660, 684–85 (2005); *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991). And it was more than the petitioners did in *Mount Holly*. *See* Petition for a Writ of Certiorari, 2012 WL 2151511, at *37–*38, *Twp. of Mount Holly*, No. 11-1507 (conceding that

[2] The disparate-impact framework in the HUD regulation was a significant improvement over the framework adopted by the district court, and it was the best that the State could hope for from a Fifth Circuit panel that was bound by its prior precedent holding that disparate-impact claims are cognizable under the Fair Housing Act. The State made clear that it was not conceding the validity of the HUD regulation, and that it was preserving its no-disparate-impact-liability argument for further appeal to the en banc Fifth Circuit or to this Court. Appellants' Br. 29 n.10, *The Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, No. 12-11211 (5th Cir. Apr. 22, 2013).

the petitioners did not preserve the question presented before the court of appeals).

Finally, the respondent never addresses the most compelling reason to grant certiorari: The widespread application of disparate-impact liability creates incentives for landlords, property owners, and government entities to resort to illegal race-conscious decisionmaking as a way to stave off potential disparate-impact lawsuits. *See Ricci v. DeStefano*, 557 U.S. 557, 580–84 (2009); *id.* at 594 (Scalia, J. concurring). Nowhere are these incentives more pronounced than in the housing context, where racial quotas and set-asides may be the only way for a potential defendant to prevent litigants from establishing a "prima facie case" against him. "Racial balancing" is supposed to be unconstitutional. *See Grutter v. Bollinger*, 539 U.S. 306, 330 (2003). But it appears to be the only way that the State's housing authority could have avoided disparate-impact liability in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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