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 *AMICI CURIAE* REAL ESTATE PROFESSIONAL TRADE ORGANIZATIONS IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

The National Association of Hispanic Real Estate Professionals ("NAHREP") is a membership organization made up of multicultural real estate professionals dedicated to increasing the rate of sustainable Hispanic homeownership and to serving the community at large. NAHREP is one of the largest minority trade groups in the real estate industry and regularly addresses issues related to lending parameters, business practices and regulations that affect access to homeownership. NAHREP believes that strong consumer protection through laws like the Fair Housing Act is necessary to restore consumer and market confidence in homeownership.

The National Association of Real Estate Brokers ("NAREB") is a membership organization of predominately African American real estate professionals. Founded in 1947, NAREB is the nation's oldest and one of the largest minority real estate trade associations. NAREB was formed out of a need to secure the right to equal housing opportunities regardless of race, creed or color. Since its inception, NAREB has participated in advocacy efforts on behalf of minorities and fair housing for all.

The Asian Real Estate Association of America ("AREAA") is a nonprofit professional trade organization dedicated to promoting sustainable homeowner-

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[1] Petitioners' and Respondents' written letters of consent to amicus briefs have been lodged with the Clerk. Pursuant to Rule 37.6, counsel for amici authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity—other than amici, their members, and their counsel—contributed monetarily to the preparation or submission of this brief.

ship opportunities in Asian American communities by creating a powerful national voice for housing and real estate professionals that serve this dynamic market. Founded in 2003, AREAA is the only trade association dedicated to representing the interest of the Asian real estate market nationwide, and its membership represents a broad array of real estate, mortgage and housing-related professionals that service the diverse Asian American market. AREAA advocates for policy positions at the national level that will reduce homeownership barriers facing the Asian-Pacific American community.

SUMMARY OF ARGUMENT

Amici are trade groups made up of real estate professionals who know that open markets that are free of discrimination are critical to maintaining a healthy, robust real estate industry. Markets tainted by discrimination are inefficient and adversely affect all market participants. To this end, real estate developers and housing advocacy organizations have often worked together as plaintiffs in FHA lawsuits to root out all forms of discrimination. *See, e.g.*, *Hallmark Developers, Inc. v. Fulton Cnty.*, 466 F.3d 1276, 1279-80 (11th Cir. 2006) (private developer challenging city zoning ordinance); *Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1285-86 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978) (developer challenging city's refusal to rezone property). These cases often arise in response to the enactment of municipal zoning or housing codes that needlessly restrict the free movement of people and the efficient transfer of property. Disparate-impact claims are critical in combating discrimination in the housing market because many discriminatory restrictions arise from fa-

cially-neutral regulations, some of which are not obviously fueled by improper animus.

Amici note that this case comes to the Court in an unusual posture. The Issue Presented was not preserved for appellate review. It was not decided, argued—or even briefed—before the district court or the Fifth Circuit Court of Appeals. Nor is there a circuit split on the Issue Presented—every circuit that has considered the issue over the past forty years has held that disparate-impact claims exist under the Fair Housing Act (the "FHA" or the "Act"). *See, e.g.*, *Mt. Holly Gardens Citizens in Action v. Twp. of Mount Holly*, 658 F.3d 375, 384 (3d Cir. 2011).

Indeed, not only was the issue not addressed below, but Petitioner, who now challenges the existence of disparate-impact liability, should be judicially estopped from doing so. Petitioner *successfully argued* below that the Department of Housing and Urban Development ("HUD") should be afforded *Chevron* deference in its interpretation of the Act. The Petitioner prevailed in its argument that the Fifth Circuit should defer to HUD and adopt HUD's three-part burden-shifting approach for disparate-impact claims under the Act—not the two part burden-shifting test adopted by some of the other circuits. Petitioner should therefore be judicially estopped from arguing—as it does here—that HUD's interpretation of the FHA should be afforded no deference at all. *New Hampshire v. Maine*, 532 U.S. 742 (2001).

In any event, HUD's interpretation of the FHA, including its final ruling on the implementation of the Fair Housing Act's Discriminatory Effects Standard (the "Final Rule") should certainly be given deference. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984). And, since every circuit court of appeals to have

considered the issue over the past forty years has concluded that disparate-impact claims exist under the Act, it is certainly the case that HUD's interpretation is—at a minimum—a reasonable construction of the Act.

ARGUMENT

I. OPEN MARKETS, FREE FROM DISCRIMINATION, ARE CRITICAL TO THE PROSPERITY OF THE REAL ESTATE INDUSTRY

Where discrimination occurs, it distorts and limits access to markets. It not only harms those who are the specific victims of the discrimination but also hurts all who participate or want to participate in those markets. For that reason, developers and others in the real estate industry have, on many occasions, brought suits under the FHA to combat overt and covert discrimination and arbitrary practices with discriminatory effects. For example, in *Greater New Orleans Fair Housing Action Center. v. St. Bernard Parish* ("*St. Bernard*"), a developer and a nonprofit housing organization joined together in bringing an action challenging a moratorium on the construction of multi-family housing in the parish. The plaintiffs proceeded under the FHA and also sought to enforce a prior consent decree that had settled a previous fair housing claim relating to the post-Katrina enactment of a "blood relative ordinance," which restricted residents from renting to anyone other than blood relatives. *See* 641 F. Supp. 2d 563, 565-66 & 565 n.1 (E.D. La. 2009) (describing the initial action and defendants' later violations of the consent order). In the underlying action, one of the plaintiffs' claims alleged that the "colorblind" ordinance had a disparate impact under the FHA because it effectively locked blacks out of the 93 percent white parish.[2] In the consent decree enforcement action, the court found that

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[2] Amended Complaint at 11, *St. Bernard*, No. 2:06-cv-07185 (E.D. La. Nov. 2, 2006), *available at* http://www.lawyerscommittee.org/admin/fair_housing/documents/files/0023.pdf.

the moratorium on the development of multi-family dwellings also had a disparate impact on African Americans. *Id.* at 565-67, 574.

A. Discrimination Creates Inefficiencies in Housing and Financial Markets

Economists have studied the negative impacts of discrimination on free markets for more than 50 years. In 1957, University of Chicago economist (and future Nobel Prize winner) Gary Becker published a groundbreaking work on the impact of discrimination on economic markets. Gary S. Becker, *The Economics of Discrimination* (2d ed. 1971). In it, he provided the first systematic effort to use economic theory to analyze the effects of prejudice on the earnings, employment and occupations of minorities. Since then, many studies have built on his work. *See*, *e.g.*, David Rusk, *The "Segregation Tax": The Cost of Racial Segregation to Black Homeowners*, (The Brookings Institution 2001), available at http:// www.brookings.edu/~/media/ research/files/reports/2001/10/metropolitanpolicy%20rusk /rusk.pdf (finding that in the 100 largest metropolitan areas, black homeowners receive 18 percent less value for their homes than white homeowners); John Yinger, *Closed Doors, Opportunities Lost: The Continuing Cost of Housing Discrimination* 98-103 (Russell Sage Foundation 1997) (estimating the annual cost of discrimination in the mid-1990s housing market at $2.0 billion for Blacks and $1.2 billion for Hispanics).

Alan Greenspan, while Chairman of the Federal Reserve, observed that, quite simply, discrimination is bad for business:

> Discrimination is against the interests of business—yet business people too often prac-

> tice it. To the extent that market participants discriminate, they erect barriers to the free flow of capital and labor to their most profitable employment, and the distribution of output is distorted. In the end, costs are higher, less real output is produced, and national wealth accumulation is slowed. By removing the non-economic distortions that arise as a result of discrimination, we can generate higher returns to both human and physical capital.

Alan Greenspan, Remarks before the Annual Conference of the National Community Reinvestment Coalition, Economic Challenges in the New Century (March 22, 2000), *available at* http://www.federalreserve.gov/boarddocs/speeches/2000/20000322.htm.[3]

The negative financial consequences of segregation and discrimination have also been well documented. *See, e.g.*, Alan Berube & Bruce Katz, *Katrina's Window: Confronting Concentrated Poverty Across America* (The Brookings Institution 2005), *available at* http:///www.brookings.edu/~/media/research/files/reports/2005/10/poverty%20berube/20051012_concentratedpoverty.pdf (discussing the relationship between segregation and concentrated poverty); Thomas M. Shapiro, *The Hidden Cost of Being African American: How Wealth Perpetuates Inequality* 105-25 (Oxford University Press 2005) (discussing how segregation and discriminatory financing contribute to wealth inequality).

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[3] The Court has also noted that the financial benefits of diversity and integration are "not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Grutter v. Bollinger*, 539 U.S. 306, 330-31 (2003).

The hyper-segregation of blacks and Latinos in urban areas has also led to inferior access to public services, education, jobs and transportation, all of which have a negative economic impact. *See* Douglas S. Massey & Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* 148-85 (1993). "[B]arriers to spatial mobility are barriers to social mobility, and where one lives determines a variety of salient factors that affect individual well-being: the quality of schooling, the value of housing, exposure to crime, the quality of public services, and the character of children's peers." *Id.* at 150. Segregation also contributes to wealth inequality, since, for example, American familial wealth is closely tied to home values and homes located in neighborhoods with high concentrations of nonwhites tend to be undervalued.[4] *See generally* Melvin L. Oliver & Thomas M. Shapiro, *Black Wealth, White Wealth* 12-35 (Taylor & Francis 2006). And discrimination imposes significant costs on minority households when they search for properties to purchase, "whether or not [they] actually encountered discrimination." John Yinger, *Cash in Your Face: The Cost of Racial and Ethnic Discrimination in Housing*, 42 J. Urb. Econ. 339, 340 (1997).

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[4] In the aftermath of the foreclosure crisis, communities of color have experienced a disproportionate loss of wealth. Between 2005 and 2009, median wealth adjusted for inflation fell by 66 percent among Latino households and 53 percent among African-American households, compared with 16 percent among white households. Rakesh Kochhar et al., *Twenty-to-One: Wealth Gaps Rise to Record Highs Between Whites, Blacks and Hispanics* 1 (Pew Research Ctr. 2011) *available at* http:///www.pewsocialtrends.org/files/2011/07/SDT-wealth-report_7-26-11_FINAL.pdf.

B. Disparate Impact Liability Promotes Efficiency in Housing Markets

Often the only way to weed out facially-neutral but nonetheless discriminatory practices in housing markets—and thus improve those markets for everyone—is for market participants to pursue disparate-impact claims where appropriate. In 2014, it is hard (though not impossible) to imagine a federal agency, state government, local municipality, planning board, or private firm supporting an overtly discriminatory, Jim Crow-style housing policy.[5] But that is not to say that housing discrimination has been eradicated—far from it.

Discrimination and segregation endure for two main reasons. First, "because clever men may easily conceal their motivations." *United States v. City of*

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[5] Of course, amici are well-aware that intentional discrimination in violation of the FHA continues to exist. *See, e.g., United States v. Beck*, No. 09-CV-01143, (D. Minn. Feb. 28, 2011 (Consent Decree and Order), *available at http://www.justice.gov/crt/about/hce/documents/becksettle.pdf* (settling case in which landlord refused to rent to an African American); *United States v. Biswas*, No. 09-cv-683, (M.D. Ala. Feb. 3, 2011) (Consent Decree and Order), *available at* http://www.justice.gov/crt/about/hce/documents/ biswassettle.pdf (settling case wherein landlords admitted to white testers that they had adopted rental policies intended to discourage African-American applicants). *United States v. Uvaydov*, No. 09-04109, (E.D.N.Y. Nov. 29, 2010 (Settlement Agreement and Order), *available at* http://www.justice.gov/crt/about/hce/documents/uvaydovsettle.pdf (settling lawsuit which alleged that defendants had expressed a desire not to rent to African Americans); *Reg'l Econ. Community v. City of Middletown*, 294 F. 3d 35, 48¬52 (2d Cir. 2002) (finding triable issues of facts as to whether the city intentionally discriminated based on disability); *Kormoczy v. HUD*, 53 F. 3d 821, 823-25 (7th Cir. 1995) (upholding administrative law judge decision that defendants had intentionally discriminated based on familial status).

Black Jack, 508 F.2d 1179, 1185 (8th Cir. 1974) (citations omitted). Defendants—even those who are consciously aware of their own prejudices—are less likely today to discriminate blatantly than they were in the past. Disparate-impact claims are therefore vital in stopping facially-neutral policies that have the same discriminatory effects as Jim Crow laws.

Second, even in the absence of such obvious "clever" machinations, courts have recognized that "the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme." *Id.* (internal quotation marks and citations omitted). Or, as Saint Bernard of Clairvaux put it, "hell is full of good wishes and desires." Individuals and legislatures and other groups often act with built-in unconscious biases that have effects just as pernicious as those driven by blind hatred. The ability to prosecute disparate-impact claims is therefore necessary because it allows plaintiffs to pursue FHA lawsuits that would not otherwise survive as disparate treatment claims alone. *See, e.g.*, *Oti Kaga, Inc. v. S. D. Hous. Dev. Auth.*, 342 F.3d 871, 883 (8th Cir. 2003) (denying plaintiff developer's disparate treatment claim for lack of evidence, but remanding a disparate-impact claim for further consideration); *Arlington Heights*, 558 F.2d at 1287-88 (rejecting plaintiffs' disparate treatment claim, but remanding the disparate-impact claim, and emphasizing the differences between the two). "A twenty-first century local government bureaucrat or elected official did not create racial segregation in housing, but he or she can virtually guarantee its perpetuation, with or without discriminatory purpose, by simply engaging in practices that help maintain the residential status quo." Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Dispar-*

ate Impact Claims under the Fair Housing Act, 63 Am. U. L. Rev. 357, 416 (2013).

In the interest of supporting open markets, real estate developers often bring FHA suits against municipalities. In such suits, it can be difficult to divine the intent of municipal legislators disparate impact analysis. In those instances, it is necessary to guard against the passage of similar "neutral" laws with discriminatory results that restrict market access and decrease efficiency. The ability to pursue disparate-impact claims therefore is essential to the efficient operation of housing markets and to combating public or private actions that distort those markets.[6] Such is the case with the Dallas redevelopment plan and the tax credits being allocated in a way that resulted in housing being developed in the minority communities as opposed to the Caucasian ones. Certainly, the broader integration goals of the FHA are also best served by disparate-impact claims, which recognize "'[e]ffect, not motivation, [as] the touchstone because a thoughtless housing practice can be as unfair to minority rights as a willful scheme.'" *Mount Holly*, 658 F.3d at 385 (quoting *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231, 233 (8th Cir. 1976)).

Even before the enactment of the FHA, this Court had addressed fair housing in several landmark

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[6] The elimination of disparate-impact liability may endanger other forms of FHA liability, such as the Seventh Circuit's "exploitation theory" wherein "the plaintiffs must show that (l) as a result of racial segregation, dual housing markets exist, and (2) defendant sellers took advantage of this situation by demanding prices and terms unreasonably in excess of prices and terms available to white citizens for comparable housing." *Honorable v. Easy Life Real Estate Sys.*, 100 F. Supp. 2d 885, 886-87 (N.D. Ill. 2000) (citing *Clark v. Universal Builders, Inc.*, 706 F.2d 204, 206 (7th Cir. 1983)).

cases. *See, e.g.*, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 438 (1968) (Thirteenth Amendment gives Congress the power to stop private acts of racial discrimination); *Reitman v. Mulkey*, 387 U.S. 369, 379 (1967) (invalidating a facially-neutral state law that codified private sellers' "right to discriminate"). Most notably, in *Shelley v. Kraemer*, this Court prohibited the enforcement of racially restrictive housing covenants. 334 U.S. 1, 20 (1948).

II. HUD'S FINAL RULE DESERVES *CHEVRON* DEFERENCE

A. Petitioner is Judicially Estopped from Arguing that HUD's Final Rule is Not Entitled to Deference

In the Fifth Circuit, Petitioner *successfully argued* that HUD's interpretation of the FHA should be afforded *Chevron* deference. Petitioner argued this point clearly below:

> Because HUD's regulations were subject to notice and comment, they deserve deference unless Congress has clearly spoken on the issue or the regulations are not based on a permissible construction of the statute. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844-45 (1984). As evidenced by the range of courts of appeals decisions, Congress has not spoken clearly on the burden-of-proof issue in disparate-impact claims under the FHA. See supra, Section II.A. HUD's regulations are a reasonable interpretation of the burden of proof and should be applied in this case.

Pet. Fifth Circuit Br. at 28-31.

The Petitioner *prevailed* in its argument and the Fifth Circuit adopted HUD's three-part burden-shifting approach for disparate-impact claims under the Act:

> after the district court's decision in this case, HUD issued regulations regarding disparate impact claims under the FHA. *See* 24 C.F.R. § 100.500; Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013). Congress has given HUD authority to administer the FHA, including authority to issue regulations interpreting the Act. 42 U.S.C. §§ 3608(a), 3614a. Specifically, 42 U.S.C. § 3608(a) gives the Secretary of HUD the "authority and responsibility for administering this Act," and § 3614a provides expressly that "The Secretary may make rules. . . to carry out this subchapter." The new regulations issued by HUD took effect in March 2013. 24 C.F.R. § 100.500. The 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 a discriminatory intent." 24 C.F.R. § 100.500. The regulations further provide that "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." *Id.* § 100.500(a). . . .
>
> We now adopt the burden-shifting approach found in 24 C.F.R. § 100.500 for claims of

> disparate impact under the FHA. See 24 C.F.R. § 100.500.

Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, 747 F.3d 275, 282 (5th Cir. 2014)

Petitioner at no point—either in the district court or at the Fifth Circuit—argued that disparate impact claims do not exist under the Act, only noting in a footnote that a petition for *certiorari* was pending in the Mt. Holly case. Pet. Fifth Circuit Br. at 29, n. 10. Nor did Petitioner seek *en banc* review of the issue in the Fifth Circuit. Petitioner should therefore be judicially estopped from arguing—as it does here—that HUD's interpretation of the FHA should be afforded no deference at all. *New Hampshire v. Maine*, 532 U.S. 742 (2001).

In *New Hampshire v. Maine*, the Court barred New Hampshire from asserting a position that was inconsistent with a position that it had successfully argued in the past. The Court noted that

> "[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Davis v. Wakelee*, 156 U. S. 680, 689, 39 L. Ed. 578, 15 S. Ct. 555 (1895). This rule, known as judicial estoppel, "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Pegram v. Herdrich*, 530 U. S. 211, 227, n. 8, 147 L. Ed. 2d 164, 120 S.Ct. 2143 (2000); *see* 18 Moore's Federal Practice §

> 134.30, p. 134-62 (3d ed. 2000) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding"); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4477, p.782 (1981) ("absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory").

New Hampshire, 532 U.S. at 749.

The factors that courts consider in determining whether a litigant is judicially estopped from asserting a position all weigh heavily in favor of barring Petitioner from arguing against deference to HUD:

> First, a party's later position must be "clearly inconsistent" with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled," . . . . A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id. at 750-51 (citations omitted).

As discussed above, there is no question that Petitioner's current position is inconsistent with its prior position. There is similarly no question about whether

the Petitioner succeeded in persuading the Fifth Circuit to defer to HUD's interpretation of the FHA regulation. With regard to the last consideration, it is clear that having this Court review an unpreserved issue that was never litigated below is hugely detrimental to the Respondent. And Petitioner should therefore be judicially estopped from raising this issue on appeal to this Court.

B. HUD's Final Rule is Entitled to Chevron Deference

As this Court made clear in *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984), where a statute "is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." The agency has the power to "fill any gap left, implicitly or explicitly by Congress." *Id.* at 843, (citing *Morton v. Ruiz*, 415 U.S. 1999, 231 (1974)). A court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 844.

This case stands in stark contrast to *Freeman v. Quicken Loans, Inc.*, __U.S.__, 132 S. Ct. 2034 (2012), in which the Court interpreted Section 8(b) of the Real Estate Settlement Procedures Act ("RESPA") codified at 12 U. S. C. § 2607(b). In *Freeman*, the Court unanimously found that RESPA Section 8(b) was clear in that it prohibited the splitting of fees between multiple parties. HUD's interpretation, which was significantly broader (and did not require multiple parties), was contrary to the plain language of the statute, and therefore HUD was not entitled to deference. *Id.* at 2040. Here, the language of the FHA is silent on the issue of what proof needs to be adduced to prove a violation of the ACT.

On February 15, 2013, HUD issued the Final Rule, which outlines that the FHA prohibits any conduct that has discriminatory effects regardless of any evidence of intent. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460-11482 (February 15, 2013) (codified at 24 C.F.R. pt. 100). The Final Rule defined Discriminatory Effect occurring "where a facially neutral practice actually or predictably results in a discriminatory effect on a group of persons protect by the Act (that is, has a disparate impact), or in the community as a whole on the basis of a protected characteristic (perpetuation of segregation). *Id.* at 11,479 (describing 24 C.F.R. 100.500(a)).

Under the Department of Housing and Urban Development Act, HUD has general rule making authority to enact such rules and regulations as may be necessary to carry out its function, power and duties. 42 U.S.C. 3535(d). Section 815 of the Act provides that the HUD Secretary may make rules to carry out the Fair Housing Act. 42 U.S.C. 3615.

The Final Rule makes clear that HUD "has long interpreted the Act to prohibit housing practices with an unjustified discriminatory effect, regardless of whether there has been no intent to discriminate." Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11460. The Final Rule recognizes the validity of disparate-impact claims in FHA cases and reinforces HUD's long-established reasonable interpretation of the FHA as covering all actions with discriminatory effect, regardless of intent. *See* Seicshnaydre, 63 AM. U. L. REV. at 359.

As "HUD emphasizes in its preamble to the final rule, 'HUD is not proposing new law in this area.'" *Id.* at 52 (citing to Implementation of the Fair Housing

Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11,462). The Final Rule "embodies law that has been in place for almost four decades and that has consistently been applied, with minor variations, by HUD, the Justice Department and nine other federal agencies, and federal courts." Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11,462. All eleven federal courts of appeals that have had the opportunity to address discriminatory effects liability, have agreed that liability does exist under the FHA when a facially-neutral practice has a discriminatory effect.[7] *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard: Final Rule, 78 Fed. Reg. 11460-11482 (Feb. 15, 2013), 24 C.F.R. Part 100. *See also Sec'y v. Mountain Side Mobile Estates P'ship*, Docket Nos. 08-92-0010-1 & 08-92-0011-1, 1993 WL 307069, at *5 (HUD July 19, 1993), *aff'd in relevant part*, 56 F.3d 1243, 1250 (10th Cir. 1995) (noting that administrative courts have consistently found FHA liability under a disparate impact theory); *Sec'y v. Pfaff*, Docket No. 10-93-0084-8, 1994 WL 592199, at *7-9 (HUD Oct. 27, 1994), *rev'd on other grounds*, *Pfaff v. HUD*, 88 F.3d 739 (9th Cir. 1996) (same). These cases are also significant because *Chevron* deference can extend not only to final rules, but also to ALJ decisions—

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[7] *See, e.g.*, *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934-36 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 146-48 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982); *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Arthur v. City of Toledo*, 782 F.2d 565, 574-75 (6th Cir. 1986); *Arlington Heights*, 558 F.2d at 1290 (Seventh Circuit); *City of Black Jack*, 508 F.2d at 1184-85, *cert. denied*, 422 U.S. 1043 (1975) (Eighth Circuit); *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1311 (9th Cir. 1982); *United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1559 n.20 (11th Cir.), *cert, denied*, 469 U.S. 976 (1984).

even where the agency has not gone through the formal rulemaking procedures.[8] *See, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 230 & n.12 (2001) ("[A]s significant as notice and comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded. . . ."). And, in 1994, as a precursor to HUD's adopting the final rule in 2013, HUD joined with other federal agencies to adopt the "Interagency Policy Statement on Discrimination in Lending," which recognized disparate impact liability under the FHA. Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18,266, 18,269-70 (Apr. 15 1994).

The Final Rule and the longstanding, consistent interpretation that it embodies are entitled to *Chevron* deference. "In *Chevron*, this Court held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). Under *Chevron*, the Court "ordi-

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[8] For example, HUD previously issued a memorandum to its field offices discussing the applicability of disparate-claims for female victims of domestic violence who are evicted due to "zero-tolerance" policies, under which the entire household is evicted for the criminal activity of one household member. Because the overwhelming majority of domestic violence victims are women, it is women who are disproportionately affected by such policies. *See* Memorandum from Sarah Pratt, HUD Deputy Assistant Secretary for Enforcement and Programs, to Fair Housing and Equal Opportunity Office Directors and Regional Directors 5-6 (Feb. 9, 2011) (*available at* http://portal.hud.gov/hudportal/documents/huddoc?id=FHEODomesticViolGuidEng.pdf).

narily defer[s] to an administering agency's reasonable statutory interpretation." *Meyer v. Holley*, 537 U.S. 280, 287-88 (2003); *see also Smith v. City of Jackson*, 544 U.S. 228, 243-47 (2005) (Scalia, J., concurring in part and in the judgment) (recognizing deference to agency).

The Final Rule was adopted through the regulatory comment and rule making process; and, almost by definition it is a reasonable interpretation of the statute since it is in accordance with the vast majority of federal courts that have considered the issue and with HUD's own longstanding understanding of the FHA. It is therefore entitled to the broad deference described in *Chevron.*

CONCLUSION

For the foregoing reasons, Amici respectfully request that this Court affirm the judgment of the Court of Appeals in the Fifth Circuit as to the availability of FHA disparate-impact claims based on the HUD Final rule that codifies prior judicial precedent and the negative impact that disparate impact has on the real estate market in the United States.

Respectfully Submitted,

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