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

REPLY BRIEF OF RESPONDENT FRAZIER REVITALIZATION INC. IN SUPPORT OF PETITIONERS

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REPLY

Respondent Frazier Revitalization, Inc. ("Frazier") agrees with Respondent Inclusive Communities Project, Inc. ("ICP") and its supporting amici curiae that purposeful racial discrimination in housing was and is immoral and is a blight on our nation that government should strive to eradicate completely. Frazier also agrees that contrived government segregation of housing by race is detrimental to minorities and non-minorities alike, is abhorrent to the values upon which our country and its Constitution are founded, and is prohibited by the Fair Housing Act. But the Act, by its terms, does not presumptively invalidate any housing practice or policy that merely happens to affect one race more than another. Rather, it prohibits only policies adopted or practices implemented "because of" race. This is as it should be; good, or even self-evident, reasons may support the disproportionate allocations of housing resources. In this case, for example, the disproportionate allocations fulfill a competing policy interest promoted in the low-income housing tax credit statute: the moral imperative to improve the substandard and inadequate affordable housing in many of our inner cities. The text of the Act and sound public policy dictate that a plaintiff challenging government allocations for housing as discriminatory and illegal must show more than a statistical imbalance to gain a foothold in court under the FHA.

ARGUMENT

I. The Attempt of ICP and Its Amici Curiae Supporters to Convert the FHA from Anti-Discrimination Legislation into a Law Requiring Race-Based Distribution of Government Resources Is Not Supported by the Text or Intent of the Act.

A. Neither the Language nor the Intent of the FHA Supports Disparate-Impact Liability.

The FHA makes it unlawful to refuse to sell, rent, "or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin." 42 U.S.C. § 804(a). ICP and the many amici curiae that have filed briefs in its support rely largely on the "otherwise make unavailable or deny" language for their position that the FHA prohibits not only intentional discrimination but also actions that have disproportionate effects on different racial groups. *See, e.g.*, ICP Br. 45-47; U.S. Br. 18. But the language cited by ICP refers only to the type of action that could subject a person or entity to liability; it does not remove the requirement that to impose liability the action be taken "because of" race. In this case, for example, the Department obviously did not refuse to sell or rent housing to anyone. But, through distributing tax credits to those who built affordable housing in minority neighborhoods, the Department arguably "made unavailable" affordable housing in non-minority neighborhoods, so its distribution of tax credits would be prohibited by the statute ***if it was***

done "because of" race. But the element of intent remains an essential part of a claim under the statute.

Similarly, the language in the FHA making it unlawful for any person or entity whose business includes engaging in residential real estate transactions "to discriminate against any person in making available such a transaction . . . because of" race (42 U.S.C. § 805(a)) unambiguously imposes liability only upon proof of discrimination "because of" race. Both § 804(a) and § 805(a) require proof of discriminatory intent for liability to attach; neither statute allows the imposition of liability for disparate impact alone.

ICP quotes extensively from the Congressional record in an attempt to demonstrate that, notwithstanding the plain text of the FHA, Congress intended to prohibit disparate impacts in housing even absent evidence of an intent to discriminate. ICP Br. 2-12. But many of the statements quoted by ICP indicate that Congress understood that the legislation did not undertake management of the racial composition of neighborhoods, but instead was intended to guarantee to all Americans the freedom "to live in any neighborhood which their income permits." ICP Br. 11 (quoting Senator Brooke). The FHA, Senator Brooke added, "will not tear down the ghetto. It will merely unlock the door for those who are able and choose to leave." *Id*. Although the FHA unquestionably seeks to remedy the effects of racial discrimination, it does not do so by requiring proportional racial representation

in housing; rather, it does so by prohibiting purposeful discrimination in providing housing opportunities. As the district court found, the Department did not intend to discriminate on the basis of race in distributing affordable housing tax credits. Thus, even if it allocated the credits disproportionally to projects in minority neighborhoods, its distribution of the credits did not violate the FHA.

B. The U.S. Solicitor General's Suggestion that Disparate-Impact Claims Be Permitted but that Reasonable Justification for the Racial Disparities Be Considered as a Defense Would Provide Insufficient Protection from Overbroad Liability Unintended by Congress.

In its amicus curiae brief, the United States suggests that the existence of reasonable justifications for disproportionate allocation of housing tax credits to projects in minority neighborhoods should more appropriately be considered a defense to a disparate-impact claim than a reason to reject the disparate-impact theory. U.S. Br. 30 n.7. This case demonstrates the dangers of such a permissive approach. ICP predicated its prima facie case under the Act on numbers alone, without identifying any particular requirement or criterion that could have resulted in the numerical disparity, and the district

court agreed that the statistics established a prima facie case.[1] In ICP's and the district court's view, ICP did not need to allege that a specific practice of the Department was pretextual and caused the racial imbalance. The district court's application of the FHA thus required the Department to attempt to defend its system for awarding tax credits as a whole (or in each and every aspect) in the most generalized, abstract way. Given the impossibility of this task, it is unsurprising that the district court found that the Department had failed to provide a reasonable justification for the allocation that resulted from the Department's process. JA 195-213.

In the employment context, a plurality of the Court recognized that it is "unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 992 (1988) (plurality opinion by O'Connor, J.). Thus, although the Court allowed the plaintiffs in *Watson* to proceed under a disparate-impact theory, "the plurality *conditioned* that holding on the corollary

[1] *See* R 6629 (ICP post-trial brief) (the Department practice complained of "is the disproportionate allocation causing the concentration of units in minority areas"); JA 213-14 (district court's memorandum opinion and order) (ICP's FHA claim "is founded on" the "disproportionate approval of tax credits for non-elderly developments in minority neighborhoods," and ICP "has presented evidence . . . to support this unlawful practice").

that merely proving that the discretionary system has produced a racial or sexual disparity *is not enough*." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2555 (2011) (emphasis in original). "[T]he plaintiff must begin by identifying the specific employment practice that is challenged." *Id.* (quoting *Watson*, 487 U.S. at 994). As Frazier noted in its initial brief, other cases confirm that a disparate-impact claim must identify a specific practice that caused the disparity. Frazier Br. 11-13 (citing *Smith v. City of Jackson*, 544 U.S. 228 (2005) and *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)). But the district court did not hold ICP to this requirement, and neither ICP nor the United States acknowledges that fact in its briefs. *Cf.* U.S. Br. at 33-34 (acknowledging the requirement that to establish a prima facie case "a plaintiff must do more than simply identify a statistical disparity – the plaintiff must link that disparity to a defendant's policy, practice, or action," but failing to explain how ICP satisfied the requirement).

Because, at least in the view of ICP and the United States, a prima facie case of disparate-impact liability can be based on nothing more than the statistical disparity itself, the suggestion of the United States that reasonable justification be allowed as a defense to a disparate-impact claim would be ineffective to allow potential defendants to avoid "expensive litigation and potentially catastrophic liability" based on justifiable disparities. *Watson*, 487 U.S. at 993. The Court should reject that approach,

and decline to recognize the expansive version of disparate-impact liability advocated by ICP and the United States.

C. The Type of Disparate-Impact Liability Advocated by ICP Inescapably Requires Impermissible Racial Balancing.

ICP insists that "no racial parity, no racial goal, no racial quota, no racial target, and no racial incentive" was required to remedy the disparate impact about which it complained in its lawsuit. ICP Br. 39. But ICP cannot deny that the very purpose of its lawsuit was to decrease the number of affordable housing units in black neighborhoods and increase the number of such units in white neighborhoods. The remedial plan proposed by the Department and largely adopted by the district court, which ICP describes as "race neutral," *id*., is expressly intended to limit affordable housing development in high poverty areas ("qualified census tracts" or "QCTs"),[2] which the district court acknowledged "are often minority areas." JA 166; *see also* Florence W. Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 U. MIAMI L. REV. 1011, 1043 (1998) (qualified census tracts "are likely to be areas of minority concentration"). In proposing its remedial plan, the Department openly acknowledged that "a significant

[2] 26 U.S.C. § 42(d)(5)(C); *see* Frazier Br. 15.

level of continuing activity in development in QCTs would be inconsistent with the remedial objectives of this Plan," JA 290, and assured the district court that the plan's criteria for revitalizing impoverished areas "will set a very high threshold, making it unlikely to yield a number of successful applicants in QCTs such that would perpetuate any discriminatory patterns found to have occurred unintentionally." JA 283. In view of the Department's statements regarding the intent of the remedial plan, ICP's assurance that "LIHTCs will continue to be allocated to units in minority areas," ICP Br. 40, rings hollow.

The absence of explicit reference to race in the remedial plan cannot disguise the racial motive embraced by ICP and the district court. *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630, 644 (1993) (prohibition of racial classification applies "to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination") (quoting *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979)). Because the very purpose of ICP's suit and the district court's remedy is to balance the distribution of tax credits along racial lines, the concern raised by the Department that the result sought by ICP would compel it to engage in impermissible race-conscious decision-making (Dep't Br. 43) is legitimate and must be considered.

II. Frazier's Support of the Use of Statutory Tax Credits to Improve Housing Conditions in Disadvantaged Neighborhoods Comports with the Purpose of the LIHTC Statute and Does Not Reflect a "Position in Favor of Racial Segregation" as ICP Suggests.

ICP characterizes Frazier's efforts to revitalize the Frazier neighborhood in part through the development of affordable housing financed by LIHTCs as indicating support of "racial segregation." ICP Br. 64.[3] The accusation that Frazier favors perpetuation of segregation is false and scurrilous, and reveals ICP's belief that statistical racial balance must be achieved at the expense of all other social objectives. Presumably, in ICP's view, any attempt to use government resources to ameliorate conditions in poor, historically disadvantaged neighborhoods "favors segregation,"

[3] ICP also denigrates the affordable housing project promoted by Frazier, emphasizing the poor conditions in the neighborhood and implying that the neighborhood cannot be revitalized. ICP 17. ICP's criticism ignores the endorsement of the Frazier project by the state legislators who represent the districts in which Frazier is located, JA 225-30. It also omits its own evidence describing the South Dallas/Fair Park neighborhood (which includes Frazier) as "an area that has experienced a number of successful neighborhood planning efforts," and observed that "a number of community development corporations . . . have successfully completed single-family and multifamily developments that have helped bring stability to some of the most blighted parts of the neighborhood." R 7205.

because those resources could be used to promote more racial balance in other neighborhoods.

But if ICP's view represents the intent of the FHA, then the squalid living conditions in blighted, historically segregated communities in our inner cities can never be remedied. "[B]lighted, low-income neighborhoods are forever condemned to remain that way." R 7516. People residing in those neighborhoods would "face the dire reality of a future without the possibility of community revitalization" resulting in "the de facto forced relocation of low income people." JA 226.

Neither the FHA itself nor the general policy underlying the legislation dictates such a draconian result. As the congressional record cited by ICP in its brief makes clear, the purpose of the FHA was to end discrimination in housing, not to dismantle inner-city neighborhoods by depriving them of much-needed affordable housing. *See* ICP Br. 2-12. The FHA's mandate prohibiting the deprivation of housing "because of" race remains much-needed and a moral imperative in this country. Frazier urges the Court to confine the operation of the FHA to its objective, and not to allow use of the statute to impair other compelling, congressionally-recognized interests, such as one in this case: the need for decent affordable housing in the neighborhoods that need it the most.

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CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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