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., *et al.*,

Respondents.

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

BRIEF OF *AMICUS CURIAE* NATIONAL MULTIFAMILY HOUSING COUNCIL IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The *amicus curiae* National Multifamily Housing Council ("NMHC") is based in Washington, DC. NMHC is a national association representing the interests of the largest and most prominent apartment firms in the U.S. NMHC's members are the principal officers of firms engaged in all aspects of the apartment industry, including ownership, development, management, and financing. NMHC advocates on behalf of rental housing, conducts apartment-related research, encourages the exchange of strategic business information, and promotes the desirability of apartment living. One-third of American households rent, and over 14 percent of households live in a rental apartment (buildings with five or more units).

BACKGROUND

Congress adopted the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3601 *et seq*. ("FHAct"), in 1968 to address persistent problems of discrimination in housing. Originally focused on discrimination on the basis of race, color,

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[1] 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. Written consent from counsel for the parties of record to the filing of amicus briefs has been filed with the Clerk.

national origin and religion, the FHAct was expanded to address sex-based discrimination in 1974 and to address discrimination on the basis of familial status and disability in 1988. 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).

In 2008, The Inclusive Communities Project, Inc. ("ICP") sued the Texas Department of Housing and Community Affairs ("TDHCA") alleging, *inter alia*, that TDHCA's allocation of Low Income Housing Tax Credits ("LIHTCs") resulted in a disparate impact on African American residents in violation of the FHAct. Pet. App. 7a. After a bench trial on the merits, the district court concluded that ICP had not proven intentional discrimination but had established a claim under the FHAct for disparate impact. Pet. App. 9a-10a. In doing so, the district court applied the standard of proof used by the Second Circuit in *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 939 (2d Cir. 1988), *aff'd*, 488 U.S. 15 (1988), thereby requiring TDHCA to (1) justify its actions with a compelling government interest, and (2) prove that there were no less discriminatory alternatives. *Id.*

TDHCA appealed, and while its appeal was pending, the United States Department of Housing and Urban Development ("HUD") issued regulations purporting to establish the standard for proving disparate impact claims under the FHAct. *See* Pet.

App. 14a; Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013); 24 C.F.R. § 100.500. According to HUD, the FHAct imposes liability for any housing practice that "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." 24 C.F.R. § 100.500(a).

HUD's regulations also purport to establish a burden-shifting standard to determine disparate impact liability. Plaintiffs bear the initial burden of proving that a housing practice has a disparate impact. *Id.* at § 100.500(c)(1). Upon meeting that burden, defendants must prove that the challenged practice is "necessary to achieve one or more substantial, legitimate, non-discriminatory interests." *Id.* at § 100.500(c)(2). If defendants meet that burden, plaintiffs would then have to show that the identified interests "could be served by another practice that has a less discriminatory effect." *Id.* at § 100.500(c)(3).

On appeal, the Fifth Circuit explained that it was bound to follow its prior precedents recognizing that disparate impact claims are cognizable under the FHAct. However, the Fifth Circuit had never previously determined the proper legal standard to establish a disparate impact claim and concluded that HUD's burden-shifting standard should be applied. Accordingly, it reversed and remanded the

case to the district court to apply HUD's burden-shifting standard.

SUMMARY

The Petition raises important questions about the scope and proper application of the FHAct. The Petition's first question raises the issue of whether the FHAct creates liability with respect to facially-neutral policies that have a disproportionate effect – or "disparate impact" – on members of the classes protected by the FHAct. Disparate impact cases are distinguished from "disparate treatment" cases, which typically require a showing of actual intent to discriminate against members of protected classes. Lower federal courts have erroneously concluded that the FHAct creates disparate impact liability where, in the absence of evidence of intent to discriminate, neutral policies and practices have a harsher impact on members of the classes protected by the FHAct than on the population at-large. The Petition therefore provides the Court with an opportunity to correct widespread misinterpretation of the FHAct and ensure consistency in statutory interpretation and this Court's precedents.

As applied, disparate impact liability has created a series of widespread and intractable problems in practice that underscore how inappropriate it is in the context of combatting housing discrimination. Accordingly, the first question of the Petition also raises an issue of

exceptional importance that should be resolved by this Court.

The second question presented by the Petition raises the issue of what the appropriate legal standard for determining liability should be if disparate impact claims are viable under the FHAct. There is no uniformity among the circuits with respect to proving disparate impact liability under the FHAct. In 2013, after the district court's decision in this case, HUD promulgated regulations that purport to establish yet another burden-shifting framework for determining disparate impact liability under the FHAct. Thus, even if the Court does not believe the first question presented warrants review, the Court should grant the Petition to resolve the second question presented by establishing a uniform standard and burdens of proof for determining disparate impact liability under the FHAct.

ARGUMENT

I. The Court Should Grant the Petition to Determine Whether the FHAct Recognizes Disparate Impact Liability.

Lower federal courts, including the Fifth Circuit in this case, and HUD, have misinterpreted the FHAct to permit disparate impact liability. Their interpretations are contrary to the plain text of the FHAct and precedent of this Court interpreting nearly identical language in antidiscrimination legislation. These misinterpretations have created a

veritable minefield for housing providers who, while attempting to protect their properties and residents using facially neutral policies that are sometimes required by federal or state law, may be subject to disparate impact liability.

A. The Plain Language of the FHAct Prohibits Only Intentional Discrimination in Housing Practices.

The language of the FHAct (42 U.S.C. § 3604(a)) is clear and concise: it makes it unlawful "to refuse to sell or rent …, or otherwise make unavailable or deny, a dwelling to any person *because of* race, color, religion, sex, familial status or national origin" (emphasis added). The first step in statutory interpretation is to look at the language of the statute itself. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). By outlawing discrimination "because of" these protected classes, Congress prohibited only intentional discrimination, or disparate treatment, in housing. *See, e.g., Community Services, Inc. v. Wind Gap Mun. Auth.*, 421 F.3d. 170, 177 (3rd Cir. 2005) (discussing nature of required "discriminatory purpose").

In spite of that clear language, lower courts have held that the FHAct supports a claim of disparate impact liability, usually by analogizing to other federal laws. *E.g.*, *Metro Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977). Disparate impact liability goes far beyond the

parameters of the statute by permitting a finding of unlawful discrimination as a result of an incidental correlation between an otherwise facially neutral policy and the impact of that policy on a class of persons.

Disparate impact claims have been permitted under other federal discrimination laws, but only where Congress inserted language that prohibited an action that had the effect or result of imposing outcomes on protected classes. *See, e.g.*, *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003) ("Both disparate-treatment and disparate-impact claims are cognizable under the [Americans with Disabilities Act]."); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (recognizing that disparate impact claims are cognizable under § 703(a)(1) of Title VII). Indeed, this Court concluded that nearly identical language to that of the FHAct in the Age Discrimination in Employment Act ("ADEA") did not permit disparate impact claims. *See Smith v. City of Jackson*, 544 U.S. 228 (2005).

B. The Court Is Not Required to Defer to HUD's Regulations.

Although HUD's regulations state that disparate impact liability may be established under the FHAct, see 24 C.F.R. § 100.500, HUD's interpretation is not entitled to deference. The plain language of the FHAct leaves no doubt that Congress intended to prohibit only intentional discrimination in housing practices, not disparate

impacts resulting from housing practices. Because "the intent of Congress is clear" under the terms of the FHAct, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 841 (1984). Indeed, the Court has refused to defer to regulatory "rights-creating language" that is contrary to statutory text in similar circumstances. *E.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 285, 291 (2001) (evaluating Title VI of the Civil Rights Act of 1964); *see also, e.g.*, *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2040 (2012) (refusing to defer to HUD's policy statement because the statute was unambiguous).

Further, the FHAct does not give HUD authority to create a right of action for disparate impact claims. Section 808(a) of the FHAct grants HUD "authority and responsibility for administering" the FHAct, and § 815 permits HUD to "make rules to carry out this title." 42 U.S.C. §§ 3608(a), 3614a. However, these provisions are devoid of any "rights-creating" language and do not display any "congressional intent to create new rights." *Sandoval*, 532 U.S. at 288-89. Instead, they limit HUD to "administering" and "carry[ing] out" other provisions of the FHAct. *Cf. id.* at 289 ("§ 602 limits agencies to 'effectuating' rights already created by § 601.").

HUD's regulations cannot "administer" or "carry out" the other provisions of the FHAct by

creating a new or different right. Thus, HUD's regulations are entitled to no deference. Indeed, they exceed HUD's statutory authority and are therefore invalid. *See Batterton v. Francis*, 432 U.S. 416, 426, 428 (1977); *cf. Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 613 (1983) (O'Connor, J., concurring) ("If … the purpose of Title VI is to proscribe *only* purposeful discrimination in a program receiving federal financial assistance, it is difficult to fathom how the Court could uphold administrative regulations that would proscribe conduct by the recipient having only a discriminatory *effect*.") (emphasis in original).

C. Disparate Impact Liability Creates Unique and Widespread Problems in the Housing Context.

NMHC represents members who are engaged in all aspects of the apartment industry and are therefore on the front line of the Nation's ongoing effort to prevent housing discrimination and to assure that housing is made available to all, without regard to race, color, national origin, religion, sex, familial status, and disability. As a result, NMHC is in a unique position to comment on the broad and unintended consequences that current disparate impact rules have on the housing industry.

As housing providers, NMHC's members often are called upon to develop rules or policies that facilitate the operation of their properties. These policies deal with all aspects of their operations,

including, among many others, tenant screening, credit scoring, maintenance of waiting lists, and security procedures. Additionally, they are required to adhere to governmental rules that affect the location and zoning of their developments, the choice of their tenants, and the terms of tenancy.

In these situations, housing providers face a difficult dilemma: they need to adopt neutral policies that benefit tenants and facilitate sound management practices, but worry that after the fact, those policies may be challenged because of an alleged disproportionate impact on classes protected by the FHAct. This is almost inevitable. Given the wide economic and demographic disparities in the Nation's population, it is difficult to construct a policy, even the most benevolent and useful, that does not have an impact on some persons different from the impact it has on others. Indeed, almost any policy of general application will tend to confer greater benefits or burdens on one group than another. If such neutral housing practices or actions disproportionately affect a protected class of people under the FHAct, they may become actionable under the FHAct by applying a disparate impact standard of liability.

Although far from exhaustive, the following list provides examples of problems that disparate impact liability is causing for housing providers:

- Many private owners and public agencies participate in the Section 8 rental assistance

program. 42 U.S.C. § 1437f. Pursuant to this program, HUD pays a portion of tenant rents for lower income families, either to owners directly or through vouchers provided to tenants. Initially, HUD adopted a policy – dubbed "take-one, take-all" – requiring that an owner must accept all Section 8 tenants if it accepted any. Based on the "take-one, take-all" requirement, plaintiffs successfully argued in some courts that refusing to rent to some Section 8 tenants constituted discrimination prohibited by statute (§ 1437f(t)).

Congress subsequently repealed the "take-one, take-all" requirement in the Quality Housing and Work Responsibility Act of 1998 in Title V of HUD's FY 1999 Appropriations Act (P.L. 105-276). Nevertheless, some courts have continued to permit disparate impact claims against owners under the FHAct, including claims against owners that withdraw from the Section 8 program after initially accepting Section 8 tenants. *See, e.g.*, *Graoch Assocs. v. Louisville/Jefferson County Metro Human Relations Comm'n*, 508 F.3d 366, 376-77 (6th Cir. 2007) (applying disparate impact analysis to withdrawal of Section 8 program but finding no liability based on the facts); *Green v. Sunpointe Assocs., Ltd.*, No. C96-1542C, 1997 WL 1526484 (W.D. Wash. May 12, 1997) (recognizing disparate impact liability from owner's withdrawal from Section 8 program). Of course, to prevail, plaintiffs must show

sufficient statistical evidence to support a disparate impact claim. *See, e.g.*, *Wadley v. Park at Landmark, LP*, No. 1:06cv777 (JCC), 2007 Dist. LEXIS 5029, *9-12 (E.D. Va. Jan. 24, 2007) (finding insufficient statistical evidence to show a disparate impact). And owners can rebut these claims with legitimate business justifications. *See Graoch Assocs.,* 508 F.3d. at 376 (identifying Section 8 program costs as legitimate justification).

But these requirements simply highlight the problem with disparate impact analysis: a housing provider cannot determine whether any policy it adopts – no matter how neutral in form or benevolent in intent – is consistent with the FHAct until a court or HUD administrative law judge has determined if it has a disparate impact on a protected class and if so, whether there is a legitimate, nondiscriminatory purpose for the rule or policy. As the *Graoch* case shows, some courts continue to believe that a housing provider may face potential disparate impact liability for deciding whether to withdraw from or restrict its participation in a federal program. Under such an approach, virtually ***any*** rule or policy adopted by a housing provider that may have a disparate impact on protected classes places the provider at risk for an FHAct claim, even though Congress has clearly expressed its view that participation in that program is *purely voluntary*. *See, e.g.*, *Salute v. Stratford Greens*

Garden Apts., 134 F.3d 293, 300 (2d Cir. 1998) ("[T]he Section 8 program … remains as voluntary today as it was when originally enacted."). Such concerns discourage housing providers from pursuing legitimate policy goals that may benefit the majority of residents or that improve the operations of the provider and its properties.[2]

- Many owners of multifamily housing participate in one or more federal housing programs that, pursuant to HUD regulations,

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[2] Several states and localities have adopted so-called "source of income" provisions, making it unlawful to discriminate on the basis of the type of income (including public assistance or Section 8 assistance) used by tenants to pay their rent. *See, e.g.*, Cal. Gov't Code § 12955; N.J. Stat. Ann. § 10:5-4; Robert G. Schwemm, *Housing Discrimination: Law and Litigation,* § 30.3, n.3 (identifying states and local jurisdictions with source of income rules). No such amendment has been made to the FHAct. Given that Congress has reaffirmed the voluntary nature of the Section 8 program and has not included source of income as a protected class, it is particularly inappropriate to use disparate impact analysis to put housing providers at risk of fair housing violations based on their decisions relating to participation in the Section 8 program or the source of tenant income in deciding whether or not to rent to a tenant.

involve a so-called "one strike rule," that requires owners to refuse admission to, or in some cases evict, tenants who have records of crime or drug use. *See* 25 C.F.R. §5.850 *et seq.* HUD's rules set certain minimum requirements, but allow owners to adopt rules that impose stricter limitations. *See* HUD Handbook 4350.3, §4-7C.3-.4. Ominously, HUD recently urged owners to reconsider their limitations on providing housing to ex-offenders. *See* U.S. Department of Housing and Urban Development, Letter from HUD Secretary Shaun Donovan to PHA Executive Directors (2011), *available at* https://docs.google.com/document/d/1P2k1hE--ZKYceL0UJTy2vBzP4s3JBV3rkfvDQP9LQS4/edit?hl=en_US. HUD's argument suggests that owners who adopt rules that are stricter than HUD's minimal standards may subject themselves to disparate impact claims if those policies inadvertently affect protected classes differently from other persons. Indeed, some disparate impact complaints appear to challenge owners' adoption of strict one-strike responses.

- In addition to screening for undesirable criminal backgrounds, all private firms and public agencies that provide housing adopt other standards for admission of tenants. These standards may include analysis of income sufficiency, credit-worthiness, and past rental history. For example, owners may use income

multipliers to confirm that a tenant has monthly income that is two or three times greater than the rent, to ensure that the tenant can pay rent while paying other living expenses. Similarly, an owner may seek to confirm that a prospective tenant can provide evidence of income or employment through consecutive current paystubs. Housing providers also have legitimate reasons to inquire about renters' credit history to determine whether they have a record of defaulting on their obligations. A lease is, after all, a contract to provide housing for a period of time in exchange for promises to make periodic rent payments, and, before signing a lease, an owner is justified in trying to assure that tenants can meet those rent obligations during the lease term.

Nevertheless, because of the association between income and race in the United States, income or credit-worthiness standards may have a disparate impact on protected classes. *See* U.S. Census Bureau, Statistical Abstract of the United States, *Income, Expenditures, Poverty, & Wealth: Household Income*, Tables 690 & 691 (2012), *available at* http://www.census.gov/compendia/statab/2012/tables/12s0690.pdf. For example, Section 8 renters could argue that income multipliers have an impermissible disparate impact on lower income persons who, coincidentally, are also disproportionately minorities.

Section 8 voucher holders could also argue that they are disparately impacted when required to accept a lease offer in the same amount of time as any other tenant. In some parts of the country, a lease offer must be accepted within 72 hours, which could result in a disparate impact on a voucher holder because public agencies sometimes require significantly more time to approve proposed leases and participants in the Section 8 program are more likely to be part of protected classes under the FHAct.

Other efforts to verify income and employment may also lead to disparate impact claims. Especially in the wake of the financial crisis of 2008, housing providers, lenders, and others have taken well-considered measures to tighten credit standards, including, as noted before, proof of current income and current employment. Tighter credit standards tend to have a harsher impact on lower income persons, presenting those providers or lenders with a Hobson's choice – maintain lower credit standards and risk further losses, or tighten standards and risk disparate impact claims. Here again, the prospect of disparate impact claims may prevent housing providers, lenders and others from adopting policies that are needed to maintain their balance sheets and the integrity of the Nation's financial system.

- The Violence Against Women Act, 42 U.S.C. §13701 *et seq*., provides a variety of protections to victims of domestic violence, dating violence, sexual assault and stalking. Under the one-strike rules discussed above, some owners have adopted policies that require eviction where a person commits an act of violence, including an act of domestic violence. According to guidance released by HUD in February 2011, such policies – while neutral on their face and otherwise consistent with HUD's own one-strike polices – may result in disparate impact liability under the FHAct if they have a disproportionate impact on protected classes. *See* U.S. Department of Housing and Urban Development, Assessing Claims of Housing Discrimination Against Victims of Domestic Violence under the Fair Housing Act (FHAct) and the Violence Against Women Act (VAWA) (2011), *available at* http://www.hud.gov/offices/fheo/library/11-domestic-violence-memo-with-attachment.pdf. The guidance identified several cases in which such disparate impact claims were asserted based on sex. *See id.* at 6-9; s*ee also, e.g.*, *Warren v. Ypsilanti Hous. Auth.*, No. 4:02-cv-40034 (E.D. Mich. 2002) (zero tolerance policy); *Blackwell v. H.A. Hous. L.P.*, No. 05-cv-01225-LTB-CBS (D. Colo. 2005) (anti-transfer policy). This is a classic "damned if you do and damned if you don't situation." Owners are required to conform to HUD's anti-crime policies, but if they adopt stricter policies that are still

> consistent with HUD's guidelines, they may become subject to disparate impact liability. Disparate impact liability should not be used to threaten owners, who have legitimate grounds to prevent crime and maintain security at their properties, with FHAct violations based on extreme applications of disparate impact liability.

These are only a few examples of the distortions that disparate impact claims cause for public and private housing providers. They suffice to demonstrate, however, that virtually every rule or policy that a housing provider adopts may have a disparate impact on one or more protected class even if housing providers have neither the intent to discriminate nor any understanding of how different races might be impacted by such a policy. Indeed, in many cases, a housing provider cannot predict whether a particular policy or practice will potentially violate the FHAct under a theory of disparate impact until after the rule or practice is put into place. The threat of such liability may deter a provider from adopting policies that prevent rental losses and reduce eviction rates, or that promote residents' peaceful enjoyment of their apartments by excluding persons with a history of involvement in violent crime, gang activities, or drug dealing. Simply put, the implications of disparate impact liability for housing providers are staggering.

Given the harmful and significant consequences of disparate impact liability, the Court

should grant the Petition to determine, once and for all, whether the FHAct recognizes disparate impact liability.

II. If the FHAct Recognizes Disparate Impact Liability, the Court Should Establish a Uniform Standard and Burdens of Proof in Disparate Impact Cases.

The circuit courts are fractured on the issue of the proper standard and burdens of proof to use to determine disparate impact liability. HUD's burden-shifting framework in 24 C.F.R. § 100.500(c), and the Fifth Circuit's adoption of it, only deepened the rift. Uniformity is critical to provide some predictability for housing providers nationwide if the FHAct does permit disparate impact liability. HUD's burden-shifting framework is inappropriate to provide that uniformity because it is contrary to precedent of this Court and dramatically increases the risk of liability for defendants by imposing minimal burdens on plaintiffs and substantial burdens on defendants.

A. Uniform Standards Are Necessary to Resolve Conflicting Rules Among the Circuits and HUD.

Petitioners, the Fifth Circuit, and HUD have all identified the intractable circuit split that exists on the issue of the proper standard and burdens of proof for determining whether a housing practice creates liablilty for a disparate impact. *See* Pet. 21-

23; Pet. App. 13a-14a. The Fifth Circuit's adoption of HUD's burden-shifting framework only deepened the split among the circuits. The current state of the law is unfair to housing providers, results in disparate housing standards and conditions nationwide, is inefficient and wasteful of time and resources of litigants and courts, and undermines the purpose of federal antidiscrimination law.

The lack of a clear national standard for determining disparate impact liability is unfair for housing providers and may threaten their financial wellbeing. Under the current circuit split, housing providers in one circuit may be liable under the FHAct for facially neutral policies or practices that have a disparate impact, while housing providers in another circuit may not be for the same policies or practices. Conversely, housing providers in one circuit may be obligated to adhere to state or municipal standards because they do not violate the FHAct in that circuit, while housing providers in another circuit may not be obligated to adhere to similar standards because the FHAct effectively prohibits the implementation of such standards under the law of that circuit. Unpredictability associated with potential liability may ultimately threaten the financial stability of apartment communities.

In circuits that impose lax standards and burdens of proof on FHAct plaintiffs, housing providers and municipalities may relax housing codes or standards or refuse to enforce standards

that improve the safety of residents. As discussed above, housing practices placed at risk by disparate impact liability include criminal background screenings, occupancy limitations, credit reviews, and certain Section 8 voucher policies, among others. Unpredictability and variability in the application of disparate impact standards and burdens of proof exacerbate the problems caused by disparate impact liability generally. If this trend continues, housing conditions could worsen, and the risk of crime could increase, in numerous apartment communities.

The lack of a clear, uniform standard and burdens of proof also wastes time and financial resources of litigants and the courts due to confusion about the applicable analysis and unpredictable results of litigation. Dubious disparate impact claims may sometimes proceed to trial in some circuits, while potentially meritorious claims are dismissed on dispositive motions in others. Indeed, the history of this case is demonstrative. In her concurrence, Circuit Judge Jones expressed significant doubt about whether the appellees had demonstrated a prima facie case of disparate impact discrimination in the district court. Her concurrence states that TDHCA had a "forceful argument that the appellees did not prove a facially neutral practice that has caused the observed disparity" because appellees' argument hinged on merely a "statistical 'imbalance' in the location of LIHTC units approved by TDHCA." Pet. App. 18a-19a. "Put more bluntly, if the appellees' framing of disparate impact analysis is correct, then the NBA is prima facie liable for

disparate impact in the hiring of basketball players." Pet. App. 20a. Similar disagreements and confusion have occurred in other circuits as well. *See, e.g.*, *Mount Holly Gardens Citizens in Action, Inc. v. Twp of Mount Holly*, 658 F.3d 375 (3d Cir. 2011); *Cmty. Servs. v. Wind Gap Mun. Auth.*, 421 F.3d 170 (3d Cir. 2005); *Charleston Hous. Auth. v. USDA*, 419 F.3d 729 (8th Cir. 2005). Such doubt and resulting confusion is inevitable absent a clear national standard and burdens of proof.

Finally, lack of uniformity undermines the policy of the FHAct to ensure "fair housing *throughout* the United States." 42 U.S.C. § 3601 (emphasis added). So long as different standards are applied by different courts, inconsistent outcomes are inevitable, which diminishes public confidence in our judiciary and in the fairness of our Nation's laws.

B. The HUD Regulations Cannot Serve as a National Standard.

HUD's burden-shifting framework ignores critical safeguards for disparate impact analysis that this Court explained in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) in Title VII cases. Congress subsequently amended Title VII, see *City of Jackson*, 544 U.S. at 240, but this Court has continued to apply the disparate impact analysis from *Wards Cove* in other contexts. *See, e.g.*, *id.* at 240-43. HUD's burden-shifting framework, which has now been adopted by the Fifth Circuit,

improperly distorts the requirements of *Wards Cove* in multiple ways, thereby magnifying problems associated with disparate impact liability in the housing context.

First, HUD's burden-shifting framework does not require plaintiffs to show that a challenged housing practice creates a "significant" disparate impact on an FHAct protected class. *Wards Cove* requires plaintiffs to show that the specific practice in question would cause a "significant disparate impact" on a protected class in order to establish a prima facie case of disparate impact discrimination. However, HUD's burden-shifting framework merely requires plaintiffs to demonstrate that a "challenged practice caused or predictably will cause a discriminatory effect." 24 C.F.R. § 100.500(c)(1). HUD intentionally rejected a "significance" requirement. *See* 78 Fed. Reg. at 11468. This is particularly troubling because, as noted above, almost any housing practice could have *some* disparate impact in some circumstances.

Second, HUD's burden-shifting framework permits plaintiffs to merely "challenge the decision-making process as a whole." 78 Fed. Reg. at 11469. In contrast, the Court in *Wards Cove* required plaintiffs to "demonstrate that it is the application of a *specific* or *particular* … practice that has created the disparate impact under attack." 490 U.S. at 657 (emphasis added). The Court described this requirement as an "integral part of the plaintiff's prima facie case…." *Id.* Thus, under HUD's

regulations, housing providers may be held liable for unspecified policies or decisions that are not demonstrably linked to disparate impacts identified by plaintiffs.

Third, HUD shifted the burden of proof to defendants after plaintiffs make out a prima facie case of disparate impact. *Wards Cove* made clear that even after a plaintiff establishes a prima facie case, the burden of persuasion "remains with the disparate-impact plaintiff." 490 U.S. at 659-60. Instead of having "the *burden of proving* that the challenged practice is necessary," 24 C.F.R. § 100.500(c)(2) (emphasis added), *Wards Cove* made clear that defendants only have a "*burden of producing* evidence of a business justification." 490 U.S. at 659. "The persuasion burden here must remain with the plaintiff, for it is he who must prove that it was 'because of such individual's race, color,' etc., that he was denied a desired employment opportunity." *Id.* at 660. In its response to comments, HUD rejected the *Wards Cove* requirement. *See* 78 Fed. Reg. at 11473.

Fourth, HUD's burden-shifting framework enhances the showing that defendants must make to rebut a prima facie case. It requires defendants to demonstrate that "the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests." 24 C.F.R. § 100.500(c)(1). The Court expressly rejected such a requirement in *Wards Cove*: "[T]here is no requirement that the challenged practice be

'essential' or 'indispensable' to the employer's business for it to pass muster." 490 U.S. at 659. The Court explained that "this degree of scrutiny would be *almost impossible* … to meet, and would result in a host of evils" that the Court previously identified in its opinion. *Id.* (emphasis added).

Fifth, and finally, HUD's burden-shifting framework does not require plaintiffs to demonstrate that any proposed alternative practice it proffers will serve defendants' legitimate business interests as effectively as the challenged practice. HUD rejected such a standard out-of-hand, stating only that such a standard is inappropriate because "the wider range and variety of practices covered by the [FHAct] … are not readily quantifiable." 78 Fed. Reg. at 11473 (internal quotation marks omitted). This despite the Court's holding in *Wards Cove* that "any alternative practices which respondents offer up in this respect must be equally effective as petitioners' chosen hiring procedures in achieving petitioners' legitimate employment goals." 490 U.S. at 661. The Court explained that "factors such as the cost or other burdens of proposed alternative[s] … are relevant in determining whether they would be equally as effective." *Id.* (citation omitted).

Because Courts are "less competent" than businesses in "restructuring business practices … the judiciary should proceed with care before mandating" an alternative. *Id.* Nevertheless, HUD's regulations invite careless second-guessing.

Taken together, HUD has effectively "stacked the deck" against defendants in disparate impact cases in a way that will likely stimulate the filing of more lawsuits alleging disparate impact claims and increase the risk of liability for housing providers. Any minor statistical deviation could result in a lawsuit. Defendants would then have the burden of showing that the whole decision-making process is "necessary" for business. And if defendants succeeded in making that showing, plaintiffs would still prevail by merely suggesting a less effective option. This framework cannot be what Congress intended, and it certainly is not compatible with this Court's disparate impact analysis in similar contexts.

CONCLUSION

For the foregoing reasons, the Court should accept the Petition.

Respectfully submitted,

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As required by Supreme Court Rule 33.1(h), I certify that the document contains _____ words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 16, 2014.

_____

Roy I. Liebman, Counsel Press LLC