RECORD
AND
BRIEFS

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No. 13-1371

IN THE

Supreme Court of the United States

TEXAS DEPT. 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 *AMICUS CURIAE* AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Ambassador Curtin Winsor, Jr.; former Assistant Attorney General for Justice Programs, Richard

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[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties were timely notified and have consented to the filing of this brief.

Bender Abell and former Ohio Secretary of State J. Kenneth Blackwell.

This case is of interest to the ACRU because we are concerned that America be governed under the rule of law.

STATEMENT OF THE CASE

The Texas Dept. of Housing and Community Affairs (the Department) is responsible for distributing federal tax credits throughout Texas to developers who build qualified low-income housing projects. *See* 26 U.S.C. Sect. 42(g)(1). The tax credits are known as the Low-Income Housing Tax Credit Program.

The States are each responsible for administering this program by selecting the developers and projects that will receive these tax credits. J.A. 354, 356-57. Federal law requires states to allocate these tax credits based on a "qualified allocation plan" that "sets forth selection criteria to be used to determine housing priorities of the housing credit agency which are appropriate to local conditions." 26 U.S.C. Sect. 42(m)(1)(B).

Federal law requires a state's qualified allocation plan to give preference to projects in low-income areas. 26 U.S.C. Sect. 42(m)(1)(B)(ii)(III). Federal law defines low-income areas as "qualified census tracts" for which 50 percent or more of the households have an income of less than 60 percent of the area median gross income, or that have poverty rates of at least 25 percent. 26 U.S.C. Sect. 42(d)(5)(B)(ii)(I).

State law requires the Department to "score and rank the application using a point system" that "prioritizes in descending order" 11 criteria. Tex. Gov't Code Sect. 2306.6710(b)(1). First is "(A) financial feasibility of the development...." Thirdly is "(C) the income levels of tenants of the development." Fifthly is "(E) the commitment of development funding by local political subdivisions." Eight is "(H) the services to be provided to tenants of the development."

Respondent The Inclusive Communities Project, Inc. (ICP) is a non-profit dedicated to helping to place Section 8 tenants in high income, predominantly white suburban neighborhoods in Dallas. The goals of ICP are explicitly race-conscious. ICP itself describes its mission as "assist[ing] Black or African American Dallas Housing Authority Section 8 families in finding housing opportunities in the suburban communities in the Dallas area." J.A. 78. ICP also describes its mission as assisting "DHA Section 8 program families who choose to lease dwelling units in non-minority areas." J.A. 79.

ICP pursues its mission by helping low income clients find vacant apartments for rent in high income, predominantly white, suburban Dallas neighborhoods. J.A. 133. It then subsidizes the family's moving expenses, and will even pay a "landlord incentive bonus" when necessary to persuade a landlord to accept a Section 8 voucher to pay the rent. J.A. 133-34. ICP focuses on placing clients in properties that receive low-income housing credits because federal law prohibits owners and landlords of such properties from discriminating

against Section 8 tenants. 26 U.S.C. Section 42(h)(6)(B)(iv); J.A. 90-91, 142-43.

ICP sued the Department in federal district court in Dallas in 2008 alleging disparate-treatment claims under the Equal Protection Clause and 42 U.S.C. Section 1982, and a disparate-impact claim under the FHA. J.A. 171-72. ICP alleged that the Department "disproportionately allocates" tax credits to properties in minority-populated areas. J.A. 81.

ICP sought an injunction requiring the Department "to allocate Low Income Housing Tax Credits in the Dallas metropolitan area in a manner that creates as many Low Income Housing Tax Credit assisted units in non-minority census tracts as exist in minority census tracts." J.A. 93. ICP also sought to "enjoin the defendants from...denying Low Income Housing Tax Credits to units in the Dallas metropolitan area when such denial is made by taking the race and ethnicity of the residents of the area in which the project is to be located and the race and ethnicity of the probable residents of the project into account." J.A. 93.

These mutually self-contradictory injunctions sought by Plaintiff ICP, however, would be the only real violations of the Fair Housing Act in this case, as the Act prohibits the Department from allocating tax credits to locations "because of race." 42 U.S.C. Sect. 3604(a).

After trial, the district court ruled that ICP failed to prove intentional discrimination, and dismissed the Equal Protection and Section 1982 claims. JA 191. On

the disparate impact claim, the district court ruled that ICP had proven a "prima facie case" with evidence arguing that the Department had "disproportionally approved tax credits for non-elderly developments in minority neighborhoods and, conversely, has disproportionally denied tax credits for non-elderly housing in predominantly Caucasian neighborhoods. J.A. 358-59; *see also* J.A. 191-92, 213.

The district court held that solely because of such statistical differences alone, and no more, and even though the Judge explicitly found no intentional discrimination by the Department, the Department must prove that its actions furthered a legitimate government interest and that "no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact." J.A. 192-94.

The Department argued that the statistical disparity arose because of federal and state laws requiring the Department to award low-income housing tax credits following statutory criteria some of which are correlated with race. J.A. 195-99. Indeed, federal law requires the Department to give preference to projects built in low-income areas. 26 U.S.C. Sect. 42(m)(1)(B)(ii)(III).

But while the district court recognized that compliance with these laws qualified as a "legitimate" interest, it held that the Department failed to prove there was no other alternative that would reduce the statistical disparity. J.A. 203. The district court consequently entered judgment for ICP on the disparate impact claim, and imposed a severe

structural injunction on the Department. J.A. 231-250.

While the case was on appeal to the Fifth Circuit, the Department of Housing and Urban Development (HUD) issued a regulation to define standards for proving a disparate-impact claim under the FHA. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013)(24 C.F.R. pt. 100). HUD's regulation imposed liability under the Fair Housing Act on practices with a "discriminatory effect," which would include any 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, family status, or national origin." 24 C.F.R. Sect. 100.500(a) (2014).

Under HUD's regulation, the plaintiff bears the burden of proving that the challenged practice has a discriminatory effect. 24 C.F.R. Sect. 100.500(c)(1). If the plaintiff satisfies that burden, then the defendant must prove that the challenged practice is "necessary to achieve one or more substantial, legitimate, nondiscriminatory interests." *Id.*, Sect. 100.500(c)(2). If the defendant satisfies that burden, then the plaintiff must bear the burden of proving that those same interests "could be served by another practice that has a less discriminatory effect." *Id.*, Sect. 100.500(c)(3).

The Fifth Circuit was bound by prior decisions of that court that the FHA provides for disparate impact liability. J.A. 362-63; *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). But the Fifth Circuit had never before established any standards for proving a disparate impact claim. So the Circuit panel adopted the HUD regulations as the Fifth Circuit rule and remanded for the district court to apply that standard. J.A. 353.

On October 2, 2014, this Court granted certiorari on the question of whether disparate impact claims are cognizable under the Fair Housing Act. On November 3, 2014, the U.S. District Court for the District of Columbia ruled in a separate lawsuit brought under the Administrative Procedures Act, *Am. Ins. Ass'n v. U.S. Dept. of Hous. & Urban Dev.*, No. 1:13-cv-00966 (RJL) (D.D.C., filed Nov. 3, 2014), that the Fair Housing Act "unambiguously prohibits *only* intentional discrimination" and that HUD "exceeded [its] authority" by issuing a rule that provides for imposing disparate-impact liability. *Am. Ins. Ass'n, supra,* 2014 WL 5802283, at *1, *7 (D.D.C. Nov. 7, 2014). The district court consequently vacated HUD's disparate-impact rule. Order at 1, *Am. Ins. Ass'n, supra.*

SUMMARY OF ARGUMENT

The plain text of the Fair Housing Act prohibits only intentional discrimination, and cannot be construed to provide for disparate impact liability. Indeed, that plain text can only be read to unambiguously preclude disparate impact liability.

Because the disparate impact construct would prohibit lots of necessary practices for our society to

function, HUD tries to read into the language exceptions for any practice with a "legally sufficient justification." But there is no statutory language that would allow the prohibited discrimination if there is a "legally sufficient justification" for it.

That "legally sufficient justification" framework is just a design that would operate to give maximum, arbitrary power to rework society in great detail to government bureaucrats and enforcement agents, and to courts, rather than to the democratically elected representatives of the people. That design effectively applies strict scrutiny to every standard or practice in our society, with the bureaucrats and enforcement agents to decide if the justification is "legally sufficient."

That disparate impact construct is nowhere to be found in the statutory language of the Fair Housing Act. The term "because of race" refers to intentional discrimination, not to disparate effects of facially neutral practices.

HUD never offers a textual argument for its disparate impact interpretation of the Fair Housing Act, rebutting the arguments above. Instead, it relies on this Court's ruling in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), which interpreted Section 703(a)(2) of Title VII to impose disparate impact liability, subject to a business necessity defense created by the Court in that case.

HUD effectively argues that *Griggs* provides a precedent for reading the text of the Fair Housing Act to provide for disparate impact liability under that Act

as well, with a similarly broad and malleable "legally sufficient justification" defense created by the courts as well.

This Court has consistently interpreted statutes prohibiting discrimination "because of race" or "on account of race," as in the Fair Housing Act, to prohibit *only* intentional racial discrimination.

In *Smith v. City of Jackson*, 544 U.S. 228 (2005), this Court held in a unanimous opinion that Section 703(a)(2) of Title VII could be read to provide for disparate impact liability only because the statute prohibits actions that "deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's race...."

But the Fair Housing Act does not include any such *otherwise adversely affect* language, or any other language about effects. It includes the "because of race" language that the Court has consistently found to ban only intentional discrimination.

Consequently, *Griggs* cannot serve as a precedent to justify HUD's interpretation of the Fair Housing Act.

For all of the foregoing reasons, the judgment of the court of appeals should be reversed.

ARGUMENT

I. THE TEXT OF THE FAIR HOUSING ACT CANNOT BE CONSTRUED TO PROVIDE FOR DISPARATE IMPACT LIABILITY

The plain text of the Fair Housing Act prohibits only intentional discrimination, and cannot be construed to provide for disparate impact liability. Indeed, that plain text can only be read to unambiguously preclude disparate impact liability.

The statutory language of the Fair Housing Act forbids anyone "[t]o refuse to sell or rent..., or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person *because of race....*" 42 U.S.C. Section 3605(a)(emphasis added). It also prohibits anyone involved in a residential real estate transaction "to discriminate against any person...*because of race...*" 42 U.S.C. Sect. 3605(a)(emphasis added).

There are no exceptions anywhere in this statutory language. There is also no language referencing any prohibition on any "effects" or actions that "adversely affect" others.

HUD's interpretation of this language would prohibit *some* but not all practices that result in a "disparate impact" on any racial group, regardless of whether that impact or the practice giving rise to it was motivated by discriminatory intent. J.A. 362; 24 C.F.R. Sect. 100.500.

"Disparate impact" means the impact of any practice that adversely affects any racial group more than any other. Even if it is just a desirable, facially neutral, standard of qualification not adopted for any reason involving race, but that every race cannot satisfy equally, such as a credit score, a relevant test score, a crime record, financial accumulations, school achievements, etc.

Because that disparate impact construct would prohibit lots of necessary practices for our society to function, HUD tries to read into the language exceptions for any practice with a "legally sufficient justification." But there is no statutory language that would allow the prohibited discrimination if there is a "legally sufficient justification" for it.

That "legally sufficient justification" framework is just a design that would operate to give maximum, arbitrary power to rework society in great detail to government bureaucrats and enforcement agents, and to courts, rather than to the democratically elected representatives of the people. That design effectively applies strict scrutiny to every standard or practice in our society, with the bureaucrats and enforcement agents to decide if the justification is "legally sufficient."

That disparate impact construct is nowhere to be found in the statutory language of the Fair Housing Act. The term "because of race" refers to intentional discrimination, not to disparate effects of facially neutral practices. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)(discriminatory purpose means a decisionmaker who acts "'because of,' not merely 'in

spite of,' adverse effects upon an identifiable group."); *Washington v. Davis*, 426 U.S. 229, 240 (1976) ("the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose").

Since HUD's interpretation of the Fair Housing Act is so contrary to the plain words of the statute, it is not entitled to deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Counsel, Inc.*, 467 U.S. 837 (1984). As this Court explained in *Nat'l RR Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992), *Chevron* deference is permissible only when "the agency interpretation is not in conflict with the plain language of the statute," and only when "the text is ambiguous and so open to interpretation in some respects.").

II. *GRIGGS V. DUKE POWER* DOES NOT PROVIDE A PRECEDENT FOR FINDING DISPARATE IMPACT LIABILITY UNDER THE FAIR HOUSING ACT.

HUD never offers a textual argument for its disparate impact interpretation of the Fair Housing Act, rebutting the arguments above. Instead, it relies on this Court's ruling in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), which interpreted Section 703(a)(2) of Title VII to impose disparate impact liability, subject to a business necessity defense created by the Court in that case.

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as well, with a similarly broad and malleable "legally sufficient justification" defense created by the courts as well.

This Court has consistently interpreted statutes prohibiting discrimination "because of race" or "on account of race," as in the Fair Housing Act, to prohibit *only* intentional racial discrimination. E.g., *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001)(It is "beyond dispute" that Section 601 of Title VI, 42 U.S.C. Sect. 2000d, "prohibits only intentional racial discrimination"); *City of Mobile v. Boldon*, 446 U.S. 55, 60-64 (1980)(the pre-1982 version of Sect. 2 of the Voting Rights Act prohibits only intentional racial discrimination).

In *Smith v. City of Jackson*, 544 U.S. 228 (2005), this Court held in a unanimous opinion that Section 703(a)(2) of Title VII could be read to provide for disparate impact liability only because the statute prohibits actions that "deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's race...." *Id.* at 235. The Court added, "Thus the text focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer." *Id.*, at 236 & n.6; *id.* at 243 (Scalia, J., concurring in part and concurring in the judgment).

The Court in *Smith* similarly found that Section 4(a)(2) of the ADEA could also be read to provide for disparate impact liability because it included the same *or otherwise adversely affect* language.

But the Fair Housing Act does not include any such *otherwise adversely affect* language, or any other language about effects. It includes the "because of race" language that the Court has consistently found to ban only intentional discrimination.

Consequently, *Griggs* cannot serve as a precedent to justify HUD's interpretation of the Fair Housing Act.

CONCLUSION

For all of the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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