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 *AMICUS CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

1. Are disparate-impact claims cognizable under the Fair Housing Act?

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Home Builders (NAHB) is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers, and constitute 80% of all homes constructed in the United States. NAHB's Multifamily Builders Council represents the specific interests of builders, developers, owners, and managers of all sizes and types of condominiums and rental apartments.

NAHB is a vigilant advocate in the nation's courts. It frequently participates as a party litigant and *amicus curiae* to safeguard the constitutional and statutory rights and business interests of its members and those similarly situated. Many NAHB members utilize the Low Income Housing Tax Credit (LIHTC) program to provide subsidized housing in areas that desperately need it. The LIHTC program "is the largest federal program to fund the

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1 Letters of blanket consent are on file with the Clerk. 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 *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

development and rehabilitation of housing for low-income households." Respondents Brief in Opposition of Petition For Writ of Certiorari, *Tex. Dep't of Hous. and Cmty. Affairs, et al. v. ICP*, 2014 WL 3589783 (No. 13-1371) at 3, citing Florence Wagman Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 U. Miami. L. Rev. 1011, 1012 (1998). NAHB recognizes the crucial value of statutory protection for discrimination, but is concerned that the limitless application of disparate impact will place builders and developers in a Catch-22, where they could be subject to an intentional discrimination claim under the Fair Housing Act (FHA) if they are forced to shift construction projects away from low-income communities due to the threat of a FHA disparate impact claim.

INTRODUCTION AND SUMMARY OF ARGUMENT

NAHB recognizes that this Court has limited *certiorari* to Question 1: Are disparate-impact claims cognizable under the FHA? Intertwined with this question is the fate of the Department of Housing and Urban Development's (HUD) Rule regarding disparate impact. *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)("HUD Rule"). If this Court upholds disparate impact under the FHA, it must reverse the Fifth's Circuit reliance on the HUD Rule.

The HUD Rule is directly connected to Question 1, as it was used by the lower court to justify the existence of disparate impact. Further, Respondents argue that if this Court invalidates disparate impact under the FHA, lower courts could still follow the HUD Rule due to *Chevron* deference. *See* Resp'ts Br. in Opp'n at 1, citing *Chevron, U.S.A. v. Nat'l Resources Def. Council, Inc.*, 467 U.S. 837 (1984) ("If this Court were to conclude that the FHA is ambiguous but is best read as not authorizing recovery on a disparate impact basis, the lower courts could, on remand, defer to HUD's contrary reading.").

In reality, HUD has gone too far, using authority it claims to have under the FHA to mandate judicial rules of procedure and evidence in disparate impact cases. Stated simply, Congress did not delegate authority to HUD to regulate judicial rules of procedure and evidence as the Agency has done under the HUD Rule.

ARGUMENT

I. THE HUD RULE IS A MANDATE BY A FEDERAL AGENCY TO THE JUDICIARY TO UTILIZE SPECIFIED RULES OF PROCEDURE AND EVIDENCE IN THE COURTROOM.

The Fifth Circuit relied on and adopted the HUD Rule to support a claim that a disparate impact claim is cognizable under the FHA. *Inclusive Communities Project, Inc. v. Texas Dept. of Hous. and Cmty. Affairs*, 747 F.3d 275, 280 fn. 4 (5th Cir. 2014) (citing

the HUD Rule to support its claim that the court "agree[s] that a violation of the FHA may be established not only by proof of discriminatory intent, but also by a showing of significant discriminatory effect."); *Id.* at 282 ("We now adopt the burden-shifting approach found in [the HUD Rule] for claims of disparate impact under the FHA"); *see* Resp'ts Br. in Opp'n at 1 ("In the decision below, the Fifth Circuit adopted a [HUD] regulation that recognizes and defines disparate impact liability under the [FHA]").

A. The HUD Rule.

The HUD Rule, in relevant part, provides:

> (1) The charging party or the plaintiff has the *burden of proving* that a challenged practice caused or predictably will cause a discriminatory effect.
>
> (2) Once the charging party or plaintiff satisfies the *burden of proof* set forth in paragraph (c)(1) of this section, the respondent or defendant has the *burden of proving* that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant.
>
> (3) If the respondent or defendant satisfies the *burden of proof* set forth in paragraph (c)(2) of this section, the charging party or plaintiff may still prevail upon proving that the substantial, legitimate,

> nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.

24 C.F.R. § 100.500(c) (emphasis added).

Pursuant to section 100.500(c) HUD has established a procedure (and burdens of proof) that courts are to utilize when adjudicating disparate impact cases. It is apparent, based on the plain language, that HUD is asserting an authority to regulate judicial rules of procedure and rules of evidence. For example, HUD uses the terms "plaintiff" and "defendant", which are clearly parties in litigation. Similarly, HUD attempts to control who has the "burden of proof" during different parts of a trial.

Furthermore, HUD admits that it aims to achieve "nationwide consistency", and that this HUD Rule "formaliz[es] the three-part burden-shifting test for *proving* such liability under the [FHA], [and] the rule provides for consistent and predictable application of the test on a national basis." [HUD Rule at 11,460] (emphasis added). HUD does this despite recognizing[2] a circuit split in the way that courts

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2 *See ICP v. Tex. Dept. of Hous. & Cmty Affairs*, 747 F.3d 275 (5th Cir. 2014), *citing Mt. Holly Gardens Citizens in Action, Inc. v. Twp of Mt. Holly*, 658 F.3d 375, 382 (3d Cir. 2011); *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 936 (2d Cir. 1988) (burden on defendant to show no less discriminatory alternative followed by plaintiff to prove there is a less discriminatory alternative); *Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev.*, 56 F.3d

have analyzed disparate claims. Unfortunately, HUD sugarcoats these conflicts as simply "variation[s] of existing law." HUD Rule at 11,462.

B. Rules of Procedure and Evidence Are Significant.

Rules of procedure and evidence used by courts have a fundamental impact on the outcome of a case. As this Court has explained: "[t]o experienced lawyers it is commonplace that the outcome of a lawsuit depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents." *Speiser v. Randall*, 357 U.S. 513, 520 (1958). In turn, "the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied." *Id.* In *McDonnell Douglas Corp. v. Green*, this Court used its power to determine the "proper order and nature of proof" in employment discrimination cases. 411 U.S. 792, 793 (1973). The Court recognized the importance of rules of procedure and evidence by referring to "order and allocation of proof" as a "critical issue." *Id.* at 800.

1243, 1252 (10th Cir. 1995) (applying a four-step balancing test rather than burden shifting); *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 988 n.5 (4th Cir. 1984) (applying different standards for private vs. public defendants). The D.C. Circuit has not determined whether disparate impact is a valid cause of action under the FHA. *Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep't of Hous. & Urban Dev.*, 639 F.3d 1078, 1085 (D.C. Cir. 2011).

Clearly, the differing burdens of proof required by the lower federal courts in disparate impact cases are not simply "variations of existing law" as referred to by HUD; instead, these burdens of proof establish the fundamental underpinnings of the court's adjudication in disparate impact cases.

II. ANY ATTEMPT BY A FEDERAL AGENCY TO REGULATE JUDICIAL RULES AND PROCEDURES REQUIRES AN EXPRESS AND CLEAR DELEGATION OF SUCH AUTHORITY BY CONGRESS.

A. Congress May and Has Delegated Its Authority Over Court Rules to the Judiciary.

Article III of the U.S. Constitution states: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST., ART. III §1. In turn, this Court has recognized that Article III vests the "judicial Power" in the Supreme Court while also acknowledging that Congress's authority to establish lower courts provides Congress with certain powers over the conduct of those courts. Paul Taylor, *Congress's Power to Regulate the Federal Judiciary: What the First Congress and the First Federal Courts Can Teach Today's Congress and Courts,* 37 Pepp. L. Rev. 847, 887 (2010) (providing Supreme Court quotes pertaining to Congress's power over the federal courts).

In *Wayman v. Southard*, this Court addressed whether Congress may delegate its authority over the judicial branch to the courts. 23 U.S. 1, 10 Wheat 1 (1825). Chief Justice Marshall stated that "Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself." *Id.* at 43. Furthermore, he explained that in the Judiciary Act of 1789, Congress *had* properly delegated to the courts the authority to "make rules, directing the returning of writs and processes, the filing of declarations and other pleadings, and other things of the same description." *Id.* at 43. This notion was repeated in *Sibbach v. Wilson*, where the Court declared "Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or constitution of the United States." 312 U.S. 1, 9 (1941). More recently, in *Mistretta v. U.S.*, the Court reiterated the idea that Congress may confer some of its powers on the judicial branch. 488 U.S. 361 (1989). Justice Blackmun explained that Congress "has authorized this Court to establish rules for the conduct of its own business and to prescribe rules of procedure for lower federal courts in bankruptcy cases, in other civil cases, and in criminal cases, and to revise the Federal Rules of Evidence." *Id.* at 388.

Finally, in *Dickerson v. United States*, the Court provided that it is "clear" that in the absence of a relevant Act of Congress, the Court "has supervisory authority over the federal courts, and [it] may use that authority to prescribe rules of evidence and

procedure that are binding in those tribunals." 530 U.S. 428, 437 (2000) (emphasis added). Therefore, pursuant to *Wayman, Sibbach, Mistretta,* and *Dickerson,* there can be little doubt that Congress has the authority to both create judicial procedural rules and to delegate that authority to the courts. It is also clear that absent such a delegation, courts are free to create rules of procedure and evidence to govern judicial proceedings.

B. A Delegation of Congressional Article III Authority *to an Executive Agency* Raises Separation of Powers Concerns, Thus Requiring A Clear Statement By Congress.

In contrast to *Wayman, Sibbach, Mistretta* and *Dickerson,* HUD has gone one step further: it enacted the HUD Rule on the assumption that Congress has delegated its authority to regulate the procedures of the federal courts to the *executive branch.* This interpretation of the FHA invokes the outer limits of Congress's authority because it raises concerns under the "principle of separation of powers." Thus, pursuant to Supreme Court precedent, the HUD Rule exceeds HUD's authority unless there exists "a clear indication that Congress intended that result." *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs,* 531 U.S. 159, 172 (2001), *citing Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council,* 485 U.S. 568, 575 (1988); *see also Greene v. McElroy,* 360 U.S. 474, 507-08 (1959) (explaining that when an executive department develops procedures "in areas of doubtful

constitutionality" there must be explicit authorization to do so). As there is no clear statement in the FHA that Congress delegated to HUD the authority to regulate the judicial branch, HUD has exceeded its authority by promulgating the HUD Rule.

1. The Importance/Purpose of the Separation of Powers Doctrine.

The principle of separation of powers:

> is a *structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified. In its major features it is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict."

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 (1995). In other words, "[g]ood fences make good neighbors." *Id.* at 240. Furthermore,

> In establishing the system of divided power in the Constitution, the Framers considered it essential that "the judiciary remain[ ] truly distinct from both the legislature and the executive." The Federalist No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961). As Hamilton put it, quoting Montesquieu, " 'there is no liberty if the power of judging

> be not separated from the legislative and executive powers.' " *Ibid.* (quoting 1 Montesquieu, Spirit of Laws 181).

Stern, 131 S. Ct. at 2608-09; *see also Northern Pipeline*, 458 U.S. at 58 (plurality opinion) (explaining that Article III of the Constitution "both defines the power and protects the independence of the Judicial Branch.").[3] Clearly, the Framers and this Court recognize the fundamental importance to protect each branch of government and balance authority to govern among the three.

2. *HUD's Interpretation of the FHA Raises Separation of Powers Concerns.*

As explained above, the HUD Rule controls the manner in which courts must adjudicate disparate impact cases. Thus, HUD's interpretation of the FHA allows the executive branch to develop procedural rules that control the judiciary. This interpretation raises two distinct issues.

First, HUD's interpretation of the FHA diminishes the power of the judiciary. *Mistretta*, 488 U.S. at 381-82 (explaining that the Court does not hesitate to strike down laws that undermine the authority of a branch of the government). The judicial branch has historically developed rules of procedure that are binding on the federal courts.

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3 While separation of powers "protect[s] each branch of government from incursion by the others," admittedly "the three branches [of government] are not hermetically sealed from one another." *Stern* at 2609 (2011).

Dickerson, 530 U.S. at 437. Referring to burdens of proof, this Court in *Wal-Mart Stores Inc. v. Dukes,* stated that *it* had "established a procedure for trying pattern-or-practice cases that gives effect to [Title VII] statutory requirements." 131 S.Ct. 2541, 2561 (2011).

Furthermore, the federal courts have already created procedures that litigants use when litigating FHA disparate impact claims. *See infra* n. 2. In contrast, HUD's interpretation of the FHA wrestles that authority from the judiciary and places it in the executive. This diminution of judicial power raises separation of powers concerns such that Congress would need to clearly indicate it intended such a result. *See Kucana v. Holder,* 558 U.S. 233, 239-40 (2010) (providing that "[s]eparation-of-powers concerns caution[ed] [the Court] against reading legislation, absent clear statement, to place in executive hands authority to remove cases from the Judiciary's domain."); *see Buckley v. Valeo,* 424 U.S. 1, 122 (1976)(stating that separation of powers is a "safeguard against the encroachment or aggrandizement of one branch at the expense of the other.")

In *Hecht Co. v. Bowles,* this Court was faced with the question of whether courts were required to issue an injunction after requested to do so by a federal agency. 321 U.S. 321 (1944). The relevant statute provided that "upon a showing by the [federal agency] that [a] person has engaged in [any prohibited acts] a permanent or temporary injunction shall be granted without bond." *Id.* at 322. The

agency argued that the operative language "shall be granted" was a mandate to the courts to issue an injunction once the agency had made its determination. This Court disagreed, stating that "if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made." *Id* at 329. In *Hecht,* the Court recognized that such a departure would alter "the requirements of equity practice with a background of several hundred years of history." *Id.*

Second, HUD's interpretation concentrates executive and judicial authority in the executive branch. *See Mistretta,* 488 U.S. at 381-82 (explaining that it is the concern of "aggrandizement that has animated [the Court's] separation-of-power jurisprudence. ") Art. II, § 2 of the Constitution provides the executive with the power to appoint federal judges. Art. II §2, cl. 2. A Congressional delegation authorizing the executive branch to also create judicial procedures (such as section 100.500(c)) would provide the executive branch with great control over the manner in which those federal judges decide[4] cases. Combining the power to select federal judges with the authority to control their trial procedures concentrates power in the executive department, thereby raising questions under the principle of separation of powers. *Cf. Mistretta,* (explaining that there was no threat of expanding the powers of the Judiciary beyond its constitutional bounds because the Commission's rulemaking power

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4 *Infra* p. 6.

over sentencing already rested in the Judiciary); *Loving v. United States*, 517 U.S. 748, (1996) (explaining that different rules on the limitation of delegation apply when Congress delegates authority that is "interlinked with duties" already assigned to the delegatee).

Thus, by promulgating the HUD Rule, HUD has interpreted the FHA in a manner that encroaches on the authority of the judiciary and aggrandizes the power of the executive branch. Because this interpretation raises separation of powers concerns, it cannot be sustained unless Congress clearly indicated this result.

III. CONGRESS HAS NOT PROVIDED A CLEAR INDICATION THAT IT INTENDED FOR HUD TO DEVELOP A RULE OF JUDICIAL PROCEDURE.

HUD's claimed intent behind the Rule is to "formalize [its] long-held interpretation of the availability of 'discriminatory effects' liability under [the FHA], and to provide nationwide consistency in the application of that form of liability." [HUD Rule at 11,460]. To do so, HUD relies on Congress's delegation of certain authority under 42 U.S.C. § 3608(a) which provides that the Secretary of HUD has the "authority and responsibility for administering this FHA."

Further, the delegation of authority by Congress provides that "[t]he Secretary may make rules (including rules for the collection, maintenance, and

analysis of appropriate data) to carry out this subchapter." 42 U.S.C.A. § 3614a (West).

This language does not mention the judiciary, rules of procedure and evidence, or any directives for HUD to assume a role that is clearly the province of the judiciary. A plain reading of the delegated authority to HUD for the administration of the FHA shows no clear indication that Congress intended for HUD to develop procedural rules that control the judiciary.

CONCLUSION

For the foregoing reasons, this Court should not rely on the HUD Rule in formulating its decision in this case.

Respectfully submitted,

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