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 FOR THE AMERICAN PLANNING ASSOCIATION AND HOUSING LAND ADVOCATES AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

The American Planning Association (APA) is a nonprofit public interest and research organization founded in 1909 to advance the art and science of land use, economic, and social planning at the local, regional, state, and national levels. The APA represents approximately 40,000 professional planners, planning commissioners, and citizens involved with urban and rural planning issues. The APA regularly files amicus briefs in federal and state appellate courts in cases of importance to the planning profession and the public interest.

The APA recognizes that disparate-impact suits under the Fair Housing Act (FHA) often seek to overturn decisions made with the involvement of professional planners. However, the question before the Court transcends individual planners' interest in protecting their work from the scrutiny and other burdens of disparate-impact litigation. The APA's mission is to provide leadership in development by advocating excellence in planning, promoting education and citizen empowerment, and providing the tools and support necessary to meet the challenges of growth and change. The APA be-

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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 persons other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. Letters from the parties consenting to the filing of *amicus* briefs have been filed with the Clerk of the Court.

lieves that all planners serve the public interest, in part because of the fundamental economic, environmental, and social justice issues raised by development projects. In light of those issues, keeping faith with the public requires planners to be transparent and accountable.

Housing Land Advocates (HLA) is an Oregon-based nonprofit organization founded in 2004 to advocate for affordable housing as a necessary component of responsible land use and planning policies in the state. HLA is the only organization in Oregon whose sole mission is the advancement of affordable housing. HLA regularly provides technical and legal support to public agencies on housing issues and participates in administrative and judicial proceedings regarding affordable housing policies and practices. HLA also regularly comments on comprehensive land use plans and regulations promulgated by regional and state bodies, in addition to advocating for affordable housing in regional planning and in the receipt of federal and state grants.

Since their inception, the APA and HLA have worked with planning commissioners, elected officials, and engaged citizens in an effort to promote excellence in local decision making. As such, the APA's membership and HLA are intimately familiar with the requirements of the Fair Housing Act, including the disparate-impact standard that has existed under the Act for the past four decades. The basic requirements embodied by that standard—nondiscrimination, transparency, and accountability—have become accepted components of the modern planning process in Oregon and around the country. The APA and HLA submit this brief

because their experiences with the FHA's disparate-impact standard teach that it has advanced, rather than thwarted, responsible development efforts. Beyond its positive implications for responsible development, the disparate-impact standard is required by law and essential to fulfilling the purpose and promise of the federal low-income housing tax credit (LIHTC) program.

SUMMARY OF ARGUMENT

From the perspective of professional planners engaged in development efforts across the United States, the benefits of continued recognition of a disparate impact-standard under the FHA substantially outweigh the minimal costs that the standard imposes. Decades of operation under a legal framework that has uniformly recognized disparate-impact claims has taught the institutions and professionals engaged in development to work within the standard's requirements. Those requirements have proven to be fully consistent with efficient project planning and execution efforts. Reversing course at this point would be disruptive to established practices and, ultimately, would thwart just and effective planning efforts.[2]

The benefits that flow from compliance with the FHA's disparate-impact standard have been substantial. The legitimacy of public institutions depends, in significant part, on transparent decision making. In the context of urban and rural development efforts, it is inevitable that certain projects will affect some groups of persons more than others. Responsible planners consider the unintended consequences of development projects, explain to the public why a project is necessary and beneficial notwithstanding its disadvantages, and engage in dialogue with affected community members to minimize a project's drawbacks. Institutions that

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[2] *Amici* address only disparate-impact claims brought under Section 804(a) of the FHA, 42 U.S.C. § 3604(a). Amici take no position at this time on claims brought under other provisions of the FHA, which are not presently before this Court.

properly explain the reasoning behind their decisions enjoy greater public support for and participation in their long-term objectives.

The FHA's disparate-impact framework furthers transparency and legitimacy by committing planning professionals and public institutions to a dialogue with those affected by their actions. Under the most pervasive articulation of the standard, housing plans must serve legitimate, nondiscriminatory interests through the least discriminatory means available. This includes development efforts that are part of the LIHTC program. Over the course of decades, that norm has become an accepted component of the planning process. Today, responsible developers share their objectives with potentially disadvantaged persons and groups and together develop plans to minimize projects' adverse effects. This kind of transparency makes affected groups more apt to lend their support to projects, view such projects as fair, and regard planners and public institutions as legitimate actors in the public space.

The costs, meanwhile, of the disparate-impact framework have proven to be minimal. Over the course of four decades, complying with the existing legal regime has not thwarted economically beneficial development efforts, including those made as part of the LIHTC program. That is because, properly understood, the possibility of a disparate impact does not make a development project unlawful—it simply requires that institutions provide and articulate nondiscriminatory justifications for projects that adversely affect protected groups.

In sum, the FHA's disparate-impact standard has promoted just and efficient planning and devel-

opment efforts for decades. Overturning that standard now would decrease the legitimacy of public institutions and the planning profession, disrupt practices that have advanced under the standard, and ultimately disadvantage the public interests that development projects are designed to serve.

ARGUMENT

I. TRANSPARENT AND INCLUSIVE DECISION-MAKING PROCESSES ENHANCE THE LEGITIMACY AND EFFICACY OF DEVELOPMENT EFFORTS

Development cannot succeed without the understanding and support of affected communities. Sound "redevelopment practice requires that the public have sufficient and appropriate opportunities to learn how effective redevelopment improves community life." Am. Planning Ass'n, *Policy Guide on Public Redevelopment* § III.9 (2004), *available at* http://www.planning.org/policy/guides/adopted/redevelopment.htm. Because professional planners understand this reality, they have long sought to promote "a conscientiously attained concept of the public interest that is formulated through continuous and open debate." AICP, Code of Ethics & Prof'l Conduct § A.1 (2009), *available at* http://www.planning.org/ethics/ethicscode.htm; s*ee also* Am. Planning Ass'n, *Policy Guide on Public Redevelopment* § III.10 (endorsing "an inclusive and informative public notice and public participation process to ensure open and participatory redevelopment programs"). To serve the public interest effectively, planners aspire to "pay special attention

to the interrelatedness of decisions," "provide timely, adequate, clear, and accurate information on planning issues to all affected persons and to governmental decision makers," and "give people the opportunity to have a meaningful impact on the development of plans and programs that may affect them." AICP, Code of Ethics & Prof'l Conduct § A.1.c-e.

Planning professionals live by these ideals because they work. Decades of experience in the development field has demonstrated that the failure to win the support of the individuals and groups most affected by projects can doom those efforts to failure. *See, e.g.*, Judith E. Innes, *Planning Through Consensus Building: A New View of the Comprehensive Planning Ideal,* 62 J. Am. Planning Ass'n 460, 469-70 (1996) (concluding that the lack of stakeholder participation jeopardizes planning efforts); s*ee generally* Kristina Ford, *The Trouble With City Planning* (2010). The risks of failure are compounded where, as is often the case, a particular group is disproportionately disadvantaged by the proposed development. Often, these groups are protected by the FHA. *See* 42 U.S.C. § 3604(a) (protecting groups based on "race, color, religion, sex, familial status, [and] national origin").

The facts of this case are illustrative of the disparate impacts that too often result from implementation of LIHTC programs.[3] The district court held that the Department had "disproportionately approved tax credits for non-elderly developments

[3] The LIHTC is a federal program administered by the Treasury Department that subsidizes the development of low-income housing to create integrated communities.

in minority neighborhoods and, conversely, has disproportionately denied tax credits for non-elderly housing in predominantly Caucasian neighborhoods." J.A. 358-59; *see also* J.A. 191-92, 213. The resulting allocation of tax credits served to perpetuate segregation within minority and Caucasian neighborhoods.

This case is not an outlier. Too often, LIHTC projects are disproportionately sited in predominately minority neighborhoods. *See* Jill Khadduri, *Creating Balance in the Locations of LIHTC Developments: The Role of Qualified Allocation Plans*, Poverty & Race Research Action Council (2013), *available at* http://www.prrac.org/pdf/Balance_in_the_Locations_of_LIHTC_Developments.pdf. In many states that have developed LIHTC housing in census tracts with low poverty rates, few of those developments for families with children are in locations without minority concentrations. Housing segregation also persists in areas where African Americans and Hispanics form a large share of the regional population.[4]

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[4] The disproportionate allocation of LIHTC projects is detrimental to the public interest for several reasons. First, the LIHTC program fails to complement the federal housing voucher program by developing housing where the voucher program cannot reach when used to develop housing in substantially minority neighborhoods, where choice-based housing vouchers are already easy to use. Second, siting LIHTC projects in poor and minority neighborhoods essentially supplants housing that the private market would have built without a subsidy. Third, when LIHTCs are used in low-income neighborhoods, the scale of development is often too small to have a major effect on the neighborhood as a whole. *See id.*

Implementation of tax credits for low income housing is most effective in advancing the goals of the federal LIHTC program when implemented in "high-opportunity" neighborhoods; precisely the sort of neighborhood where respondents urged petitioners to develop. *See id.* Siting rules promulgated by the U.S. Department for Housing and Urban Development (HUD) and acknowledged by federal courts presumptively prohibit siting affordable housing in majority non-white neighborhoods. Without the threat of enforcement, however, implementation of LIHTC programs will continue to disproportionately affect protected groups. That inevitability underscores the importance of approaching such projects with care and sensitivity to the risk of perpetuating segregation of protected communities. Planners and developers involved in implementing the LIHTC program must engage with stakeholders to explain the purposes of the program, including why the program will bring benefits that outweigh the disadvantages that may result.

When planning professionals, developers, and public institutions engage affected stakeholders in decision-making processes, development efforts are substantially more likely to succeed. *See* Innes, *Planning Through Consensus Building*, 62 J. Am. Planning Ass'n at 464 (describing successful development projects that included stakeholder participation); *see also* Lisa T. Alexander, *Stakeholder Participation in New Governance: Lessons from Chicago's Public Housing Reform Experiment*, 16 Geo. J. on Poverty L. & Pol'y 117, 175 (2009) (arguing that meaningful stakeholder participation is a necessary component of successful development).

Moreover, beyond the success of any individual project, a sustained commitment to transparency and public engagement enhances the legitimacy of public institutions engaged in development efforts. *See, e.g.,* Innes, *Planning Through Consensus Building*, 62 J. Am. Planning Ass'n at 465-466.

II. THE FAIR HOUSING ACT'S DISPARATE-IMPACT STANDARD FURTHERS TRANSPARENT, EFFICIENT, AND JUST DEVELOPMENT

The planning and development community has operated under the FHA's disparate-impact framework for nearly forty years. Since at least the early 1970s, planners and developers have implemented tax credit programs for low-income housing despite potential exposure to disparate-impact claims under the FHA. To date, eleven federal circuits and the HUD, the agency charged with administering the FHA, have concluded that the FHA "prohibit[s] practices with an unjustified discriminatory effect." Final Rule, *Implementation of the Fair Housing Act's Discriminatory Effects Standard*, 78 Fed. Reg. 11,460, 11,460 (Feb. 15, 2013); *see also 2922 Sherman Ave. Tenants' Ass'n v. District of Columbia*, 444 F.3d 673, 679 (D.C. Cir. 2006). Thus, implementation of LIHTC programs over the last four decades has taken place under the shadow of potential FHA disparate-impact suits.

The existence of a disparate-impact standard does not mean that any alleged disparity is actionable. Pursuant to the FHA's burden-shifting framework, a plaintiff must first demonstrate "that a practice caused, causes, or predictably will cause a discriminatory effect on a group of persons or a

community on the basis of race, color, religion, sex, disability, familial status, or national origin." 24 C.F.R. 100.500(a). This step ensures that "[p]roviders of housing opportunities are not [held] liable for the various innocent causes that may lead to statistical imbalances in the racial composition of the opportunities they provide." Robert G. Schwemm & Sara K. Pratt, *Disparate Impact under the Fair Housing Act: A Proposed Approach*, National Fair Housing Alliance, at 20 (2009), *available at* http://ssrn.com/abstract=1577291. Plaintiffs do not succeed on this prong by "merely rais[ing] an inference of discriminatory impact." *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 575 (2d Cir. 2003). They must instead demonstrate that the challenged action produces "significant discriminatory effect," demonstrated by valid statistical analyses that courts examine in great detail. *Hallmark Developers, Inc. v. Fulton Cnty., Ga.*, 466 F.3d 1276, 1286 (11th Cir. 2006); *see also Bonvillian v. Lawler-Wood Housing, LLC*, 242 F. App'x 159, 160 (5th Cir. 2007) (finding no prima facie case of disparate impact where plans to demolish housing complex impacted the disabled, elderly and racial minorities, who comprised the majority of the building's residents, as the building was closed to all prospective residents).

The second and third steps of the framework, meanwhile, have proven over time to enhance the transparency, inclusiveness, and efficacy of responsible development plans. If a plaintiff can demonstrate a prima facie case, the burden of proof shifts to the defendant to demonstrate that the challenged practice "is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests

of the respondent or defendant" 24 C.F.R. 100.500(c)(2). Once the defendant meets this burden, the plaintiff may still prove liability by demonstrating that the "substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by a practice that has a less discriminatory effect." 24 C.F.R. 100.500(c)(3).

The second and third prongs require due diligence, but from a planning perspective, that is a benefit rather than a detriment. Planners must think carefully about a project's goals and ensure that they serve legitimate objectives. Legitimate and nondiscriminatory reasons must be real and well supported with objective evidence. 78 Fed. Reg. at 11,473. These requirements are hardly radical or onerous impositions—rather, they reflect core principles of responsible planning. *See* AICP, Code of Ethics & Prof'l Conduct § A.1. Indeed, assembling such information early in the planning process allows planners and developers to educate the public about a project's benefits.

The disparate-impact standard encourages planners and developers to engage proactively with communities affected by development plans. The third step, in particular, creates incentives for institutions and developers to share their findings with stakeholders and to explore less burdensome alternatives in an effort to obtain community support. The transparency that this process demands enhances institutional legitimacy because stakeholders are exposed to the careful study that planners invest in the variety of options available to achieve a project's goals.

The third prong of the disparate-impact framework does not require planners to adopt proposals offered by stakeholders simply because their pro-

posals may benefit those groups. Courts do not impose liability against developers simply because plans might have been "incrementally improved." *Darst-Webbe Tenant Ass'n Bd. v. St. Louis Housing Auth.*, 417 F.3d 898, 904 (8th Cir. 2005). In other words, "it is not sufficient for the plaintiffs merely to prove the viability of an alternative housing plan or housing mix." *Id.* at 906. Instead, plaintiffs must meet the heavy burden of offering "a viable alternative that satisfies" a housing provider's "legitimate policy objectives while reducing the … discriminatory impact." *Id.*; *see also Graoch Assocs. #33, L.P. v. Louisville/Jefferson Cnty. Metro Human Relations Comm'n*, 508 F.3d 366, 374-75 (6th Cir. 2007) ("We use the burden-shifting framework . . . to distinguish the artificial, arbitrary, and unnecessary barriers proscribed by the FHA from valid policies and practices crafted to advance legitimate interests.").

After decades of compliance, planning and development professionals have internalized the disparate-impact standard's due-diligence and transparency norms. The APA's ethical and policy guidelines reflect that these norms are core elements of any fair process to revitalize communities. But the APA is not alone: "Today, the inclusion of participatory mechanisms in local decision-making is an accepted cornerstone practice in the field of land use planning and development and environmental management." Audrey G. McFarlane, *When Inclusion Leads to Exclusion: The Uncharted Terrain of Community Participation in Economic Development*, 66 Brooklyn L. Rev. 861, 868 (2000). These participatory measures help "take into account the interests of groups that are typically excluded from political or planning processes." *Id.*

Widespread adaptation to the requirements of the FHA's disparate-impact standard may explain the infrequency of successful enforcement actions and lawsuits under the standard. The number of administrative housing actions brought under the FHA pales in comparison to the number of employment discrimination enforcement actions. *See* Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact?: An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 Am. U. L. Rev. (2013) (manuscript at 61) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336266. With respect to litigation, the lower courts have adopted "rigorous prima facie proof requirements," *id.* at 18, and the courts as a whole "have overwhelmingly controlled for perverse outcomes," *id.* at 61. Even defendants who have lost at trial have overwhelmingly prevailed on appeal: defendants have won more than eighty percent of their appeals since the 1970s and more than ninety-eight percent of appeals since the year 2000. *Id.* at 39, 40.

The FHA's disparate-impact framework is critical to ensuring that transparency and inclusiveness remain part of the planning and development landscape. Best practices may be well entrenched, but they are not universal, and the continued potential for claims under the FHA will help encourage all planning and development professionals to advance these important norms. *See* Alexander, *Stakeholder Participation in New Governance*, 16 Geo. J. on Poverty L. & Pol'y at 174-75 (arguing that a balance between policies and practices to encourage stakeholder participation and "rights-bearing rules," such as disparate-impact claims under the

FHA, are necessary to ensure responsible and effective development).

Apart from the responsible planning practices that the disparate-impact framework has encouraged, the standard has also promoted the "broad and inclusive" goals of the FHA "to advance equal opportunity in housing and achieve racial integration for the benefit of all people in the United States." H.R. Res. 1095, 110th Cong. (2008). By requiring planning and development professionals to base, document, and explain their decisions in sound and neutral business objectives, their decisions are less likely to be influenced by subtle or unconscious bias or discrimination. *See E.E.O.C. v. Francis W. Parker Sch.*, 41 F.3d 1073, 1076 (7th Cir. 1994) ("Disparate impact is the result of more subtle practices, which on their face are neutral in their treatment of different groups but which in fact fall more harshly on one group than another."); Girardeau A. Spann, *Disparate Impact*, 98 Geo. L.J. 1133, 1136 (2010). The burden-shifting framework thus helps public institutions make decisions free from subtle discrimination.

The costs of complying with the FHA's disparate-impact standard have not proven to be unduly burdensome for planning and development professionals. As described above, the framework does not prohibit all practices that have a discriminatory effect. *See* 24 C.F.R. 100.500(c). Rather, when a plaintiff has shown that a challenged practice has a disparate impact on one or more protected groups, the entity covered by the FHA need merely show that its activities serve legitimate, nondiscriminatory purposes and goals. The available evidence suggests that this burden has not thwarted economically beneficial development projects. *See*

Seicshnaydre, *Is Disparate Impact Having Any Impact?*, at 61 (arguing that "disparate impact has already been available as a theory under the FHA for forty years . . . and it has been overwhelmingly unsuccessful" for plaintiffs); *id.* ("If governmental entities have been slow to revitalize, the disparate impact standard is not the likely cause.").

Indeed, transparent and inclusive decision-making processes allow planners and developers to minimize their exposure to lawsuits by avoiding inaccurate perceptions that projects are being carried out to further discriminatory ends. The failure to obtain public support for development efforts can lead to expensive litigation and project delays with or without a disparate-impact standard. But the risk of such delays and lawsuits decreases substantially when planning and decisional processes are perceived to be open and fair. *Amici*'s professionals have experienced lower costs and delays by opening their processes to public scrutiny from the start.

Ultimately, the benefits of enhanced credibility and legitimacy that derive from transparent decision-making processes substantially outweigh the burdens of complying with a disparate-impact rule under the FHA. Professional planners have learned over time to balance the requirements of the FHA's disparate-impact standard with sound planning and development objectives. This Court should not upset that balance now.

CONCLUSION

As Justice Kennedy wrote in *Parents Involved in Community Schools v. Seattle School District No. 1*, "[t]his nation has a moral and ethical obligation to

fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all." 551 U.S. 701, 797 (2007). Elimination of the disparate-impact standard would remove the single most effective tool available to ensure legitimacy in the LIHTC's implementation and to combat discrimination and segregation.

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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