No. 23-1340

In the Supreme Court of the United States

WAPLES MOBILE HOME PARK LIMITED PARTNERSHIP, *et al.*,
Petitioners,

v.

ROSY GIRON DE REYES, *et al.*,
Respondents.

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

BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA, 22 OTHER STATES, AND THE ARIZONA LEGISLATURE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether a plaintiff relying on a disparate impact theory of liability under the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, carries her prima facie burden by showing only a preexisting statistical disparity within the affected population that the defendant did not create.

2. Whether a defendant carries its burden to rebut such a case by showing that the challenged policy significantly serves a legitimate business purpose, or instead must further show that the policy is necessary to serve that purpose.

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[*]

"[D]isparate impact can be dangerous." *Tex. Dep't of Hous. & Cmty. Affs.* v. *Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 588 (2015) (Alito, J., dissenting). Among other things, when courts apply disparate-impact liability too broadly, States, employers, landlords, and others must increasingly consider—and then act on—race and other protected traits. Yet "[t]he way to stop discrimination on the basis of race"—or sex, or national origin, or anything else, for that matter—"is to stop discrimination on the basis of" those characteristics. *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007). By forcing regulated parties to instead fixate on those characteristics to avoid being accidentally smeared as discriminators, disparate-impact liability threatens to turn anti-discrimination provisions on their heads. No wonder, then, that "the distinction between disparate impact and discriminatory intent … marks the boundary between consensus and controversy over the concept of equality in civil rights law." George Rutherglen, *Disparate Impact, Discrimination, and the Essentially Contested Concept of Equality*, 74 FORDHAM L. REV. 2313, 2313 (2006).

These worries are no different when it comes to the Fair Housing Act. Just a few years ago, in *Inclusive Communities*, the Court tried to put some limits on disparate-impact liability in the FHA context lest the doctrine run amuck. The Court stressed that "safeguards" were needed to prevent simple statistical differences from "displac[ing] valid governmental and

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[*] Under Supreme Court Rule 37, *amici* timely notified counsel of record of their intent to file this brief.

private priorities." *Inclusive Cmtys.*, 576 U.S. at 544. But as Petitioners well explain, time has shown that the safeguards have not been working as they should. Indeed, "lower courts are now struggling to decipher and implement" them. Melvin J. Kelley IV, *Trading Places or Changing Spaces? At the Crossroads of Defining and Redressing Segregation*, 54 CONN. L. REV. 845, 860 (2022). Cases like this one show that real harm can result from this struggle.

The Court should grant the Petition to dispel the confusion. Two of the three safeguards from *Inclusive Communities* are directly at issue here, and both were botched below. If the Fourth Circuit's erroneous treatment of them stands, then the effects will stretch far beyond a mobile-home park in Fairfax. Rather, the decision below threatens to prevent States and others from implementing valid policies that make housing better and more affordable. That mission is even more important during a nationwide housing crunch. The decision also directly prevents landlords and localities from accounting for real, on-the-ground complications that arise from our current immigration crisis. And truth be told, the decision's logic can't be limited to the housing realm. So all manner of policies, laws, and regulations could now be in danger, especially in geographic areas with large minority populations (including many of the States here). In other words, the decision below imperils the "valid" objectives that *Inclusive Communities* set out to protect.

"[D]isparate-impact provisions place a racial thumb on the scales," which is reason enough to handle them with extreme care. *Ricci* v. *DeStefano*, 557 U.S. 557, 594 (2009) (Scalia, J., concurring). Because the Fourth Circuit's decision fails to do so, the Court should grant the Petition and re-affirm that real safeguards must be applied.

SUMMARY OF ARGUMENT

I. The decision below was egregiously wrong. This Court has said that courts below must employ meaningful safeguards before giving a greenlight to potential disparate-impact claims. The Fourth Circuit ignored that instruction. Most obviously, it did not require the plaintiffs to show robust causation. It conducted an incorrect statistical analysis and leaned on numbers alone to justify liability. It also rewrote the FHA's text by essentially adding undocumented aliens as a protected class. And it made the business justification rebuttal so hard to prove that it will become much of an afterthought, especially when the business's justification hinges on potential legal exposure.

II. If allowed to stand, the Fourth Circuit's decision will harm the States. Building codes, zoning ordinances, tax liens, and other laws are now under threat if the Fourth Circuit's lax approach to causation is the right one. A loose view of causation also invites more conflict between the FHA and equal protection guarantees. And the new standards that the Fourth Circuit has endorsed will undermine state housing markets, both by depriving those in the market of essential tools and by incentivizing developers and others to shift to "safer" places to avoid liability. The Fourth Circuit's dismissive attitude to the business-justification safeguard will have painful spillover effects, too. These kinds of policies could discourage the illegal immigration currently plaguing the States. Now, they're off the table.

The Court should therefore grant the Petition.

REASONS FOR GRANTING THE PETITION

I. The Fourth Circuit's Decision Is Fatally Flawed.

A. When this Court first acknowledged disparate-impact liability under the FHA, it did so cautiously. The Court recognized that—as with all disparate-impact liability—it must be properly "limited." *Inclusive Cmtys.*, 576 U.S. at 540. "[A]dequate safeguards at the prima facie stage" are crucial. *Id.* at 542. These "limitations" are "necessary to protect potential defendants against abusive disparate-impact claims." *Id.* at 544. In other words, the limits aren't just window-dressing; they must operate with real force.

The robust causation (or causality) requirement is one essential safeguard. *Inclusive Cmtys.*, 576 U.S. at 542. This prima facie burden requires a plaintiff to (1) identify a defendant's policy, (2) demonstrate the policy has a statistical disparate impact, and (3) show the policy caused the disparate impact. *Id.* The requirement ensures defendants are not "held liable for racial disparities they did not create." *Id.*. And it is meant to be a "stringent" one. *Inclusive Cmtys. Project, Inc.* v. *Lincoln Prop. Co.*, 920 F.3d 890, 906 (5th Cir. 2019).

To show a disparity under the second prong, statistics must look at the right group and rely on the proper comparators, and these two are interrelated. See *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642, 649 (1989). Statistics focus on the "right group" when they look at those impacted by a policy. See *id.* at 650-51. In the employment context, for example, that means looking at "otherwise-qualified applicants." *Id.* at 651; see also *Hazelwood Sch. Dist.* v. *United States*, 433 U.S. 299, 308 (1977) (analyzing the "qualified public school teacher

population in the relevant labor market"). An allegedly discriminatory hiring policy—applied across the board—doesn't affect those who were unqualified, and thus beyond the reach of the policy, from the start. See *Watson* v. *Fort Worth Bank & Tr.*, 487 U.S. 977, 996 (1988).

To show the key disparity, plaintiffs also must rely on proper comparators. Broad-brush racial comparisons—white to nonwhite, or Latino to non-Latino—miss the mark. *Wards Cove*, 490 U.S. at 650 (rejecting statistics showing "a high percentage of nonwhite workers in [lower-paying] jobs [to] a low percentage of [nonwhite] workers in [higher-paying] positions"). Disparate impact demands a more precise picture. Looking again to Title VII, the proper comparison is between the pool of selected applicants and the pool of qualified applicants. *Id.*; see *Hazelwood Sch. Dist.* v. *United States*, 433 U.S. 299, 308 (1977). In FHA terms, the analysis includes comparing the racial composition of those impacted by a policy to the racial composition of those similarly situated in the relevant geographic area. See *id.* At bottom, the inquiry is this: does a housing policy impact individuals in "a racial pattern significantly different from that of the" relevant population? *Watson*, 487 U.S. at 995 (quoting *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975)).

Even if the numbers reveal an actionable "pattern," a plaintiff still must show the defendant's policy is to blame. And this last inquiry packs a punch. To prove robust causation, the defendant's policy must *cause*—not just affect—a statistical disparity. After all, a "myriad of innocent causes … may lead to statistical imbalances." *Watson*, 487 U.S. at 992; see also *Inclusive Cmtys.*, 576 U.S. at 542. When a "statistical disparity" is just a reflection of the "racial imbalance" of the community, a plaintiff's claim falls flat. *Inclusive Cmtys.*, 576 U.S. at

542. One glaring red flag that a plaintiff cannot prove robust causation—and thus has a fatally flawed claim—is if it "is possible that" the plaintiff's "prima facie case of disparate impact [could] 'disappear'" "with no change whatsoever in [the defendant's policy.]" *Wards Cove*, 490 U.S. at 654 (emphasis omitted).

B. The Fourth Circuit got this analysis all wrong. Its analysis began and ended with this: Latinos make up a significant portion of the undocumented immigrant population in Virginia, so the policy "was likely to cause Latino tenants at the Park to be disproportionately subject to eviction compared to non-Latino tenants." *Reyes* v. *Waples Mobile Home Park* (*Waples I*), 903 F.3d 415, 429 (4th Cir. 2018). But this bare-bones analysis does not resemble robust causation. It did not even prove a statistical disparity. And it would seem to allow for liability whenever even the most neutral, unobjectionable policy is applied to a majority-minority population. By taking this approach, the Fourth Circuit then held that a park occupied primarily by Latinos could be discriminating against Latinos.

The court's statistical disparity analysis was flawed in two ways: it looked at the wrong group and relied on improper comparators.

First, the court focused on the wrong group. Plaintiffs' statistics were framed around race and national origin. Yet the policy impacted them based on documentation status. *Waples I*, 903 F.3d at 419-20. Focusing on race and national origin, Latino versus non-Latino, is "at once both too broad and too narrow." *Wards Cove*, 490 U.S. at 653. Too broad because, practically speaking, the policy impacts only undocumented tenants, not all members of a given racial population. See *Waples I*, 903 F.3d at 419-20. Including documented tenants in the statistics—who are

predominately non-Latino—misleadingly suggests the policy applies differently to each race. On the other hand, the group is too narrow because the policy impacts all undocumented tenants—not just Latinos. Framing the statistics around race or national origin while minimizing the role of documentation status is "nonsensical." *Wards Cove*, 490 U.S. at 651.

Second, the court relied on improper comparators. The Fourth Circuit used the exact type of broad-brush racial comparisons this Court has rejected for disparate impact claims. See *Wards Cove*, 490 U.S. at 650. It compared "Latino tenants at the Park" "to non-Latino tenants at the Park." *Waples I*, 903 F.3d at 429 & n.8. But here again, that comparison is "of little probative value" because it ignores documentation status. *Watson*, 487 U.S. at 997. Instead, the court should have compared Latinos impacted by Waples's policy to all those hypothetically impacted by the policy—undocumented non-Latino immigrants who would have otherwise been qualified to live in the park, drawn from the relevant geographic area. See *Wards Cove*, 490 U.S. at 651-52. And were all that not enough, the decision focused on state-wide statistics, not even looking at the relevant figures from Fairfax County or some other area from which applicants to the park are drawn.

The question is whether Waples's policy impacted individuals in "a racial pattern significantly different from that of the" applicable population. *Watson*, 487 U.S. at 995. And it did not. Instead, it had about the impact you would expect. Many undocumented immigrants in Virginia are Latino, and many of those affected by Waples's policy were also Latino. *Waples I*, 903 F.3d at 421, 422. And "[n]ot all Latinos are impacted negatively by the policy, nor are Latino undocumented aliens

impacted more harshly than non-Latino undocumented aliens." *Id.* at 434 (Keenan, J., dissenting). The "geographical happenstance" that caused more Latinos to be impacted by the policy "cannot give rise to liability" because Waples is "not responsible for the geographical distribution" of Virginia. *Id.*

How the Fourth Circuit skirted past the issue of causation matters, too. The court reasoned that "Plaintiffs satisfied the robust causality requirement by *asserting* that [Waples's policy] . . . was likely to cause Latino tenants at the Park to be disproportionately subject to eviction compared to non-Latino tenants." *Waples I*, 903 F.3d at 429. (emphasis added). But how is that showing sufficient to plead, let alone prove, robust causation? All that sounds like "mere conclusory statements" that shouldn't even survive a motion to dismiss. *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009).

C. The Fourth Circuit's reading warps the FHA, taking it well "beyond its stated terms." *Waples I*, 903 F.3d at 434 (Keenan, J., dissenting). The Act makes it illegal to discriminate based on "race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604. Notice what's missing. As a dissenting judge below recognized, "citizenship and immigration status are not protected classes under the FHA." *Waples I*, 903 F.3d at 434 (Keenan, J., dissenting). Yet "[b]y holding that a policy targeting undocumented aliens could violate the FHA based on the policy's impact on Latinos, the majority in effect extends FHA protection to individuals based on their immigration status." *Id.* (citing *Keller* v. *City of Fremont*, 719 F.3d 931, 949 (8th Cir. 2013)). But the court had "no license to expand the scope of the FHA to beyond what Congress enacted." *Inclusive Cmtys.*, 576 U.S. at 589 (Alito, J., dissenting).

The court's interpretation would make immigration status a de facto protected class in any area where a high concentration of immigrants of one ethnicity is present. That's basically everywhere, as "people tend to resettle in areas where there are other people that come from the same country." Patrick Kennedy, *The Labor Economics Case for the Diversity Visa Lottery*, 71 STAN. L. REV. ONLINE 159, 162 (2018). So in Virginia, where many of the illegal immigrants are Latino, *Waples I*, 903 F.3d. at 421, and every other place with many illegal immigrants of one ethnicity, immigration status becomes protected under the cloak of race or national origin. See *id.* at 434 (Keenan, J., dissenting); cf. *United States* v. *Jimenez Joachin*, 646 F. Supp. 3d 229, 232 (D. Mass. 2022) (agreeing that policies targeted at undocumented immigrants often present an unactionable disparate impact on Latinos because "the disproportionate share of Latinos among those unlawfully entering the United States and the extensive border between the United States and Mexico explains the disparate impact"). But it is "illogical to impose FHA disparate impact liability based on the effect an otherwise lawful ordinance may have on a sub-group of the unprotected class of aliens not lawfully present in this country." *Keller*, 719 F.3d at 949.

And under the Fourth Circuit's approach, why stop with immigration status? The same rationale would cause "housing providers [to be] effectively prohibited from taking certain actions against entire unprotected classes of people simply because the unprotected class coincidentally contains a disproportionate number of individuals that belong to protected classes." Amicus Br. of Nat'l. Leased Hous. Ass'n, *Tex. Dep't of Hous.* v. *Inclusive Cmtys.*, No. 13-1371 (U.S. Nov. 24, 2014), 2014 WL 6706837, at *27-28. So, take "Section 8 voucher holders, ex-offenders, [or] persons with poor credit"—and

loop them under the FHA, too. *Id.* at 27. This "endless, increasing number of de facto protected classes" is at odds with the FHA. *Id.*

D. Adding to the insult and injury in its causation analysis, the Fourth Circuit also misunderstood another important safeguard—the allowance for business justifications. A challenged policy is not actionable discrimination if there's a legitimate "business justification" for it that won't be equally served by less restrictive means. *Inclusive Cmtys.*, 576 U.S. at 533. And a little "disagreement" with the justification "does not create a triable issue." *Abril-Rivera* v. *Johnson*, 806 F.3d 599, 607 (1st Cir. 2015).

Petitioners offered a straightforward justification—among other things, they wanted to avoid being criminally charged with harboring illegal aliens under federal law. The concern is no doubt legitimate, as some courts have at least left the door open for liability even for those who don't have knowledge a tenant is undocumented. See, *e.g.*, *United States* v. *Zheng*, 87 F.4th 336, 345 (6th Cir. 2023) (rejecting a scienter requirement for harboring); *United States* v. *Acosta de Evans*, 531 F.2d 428, 430 (9th Cir. 1976) (omitting any scienter requirement); see also 8 U.S.C. § 1324(a)(1)(A)(iii) (defining the offense). Cases like these "suggest … landlords could be at risk of being prosecuted and convicted of harboring" where they rent to the undocumented. Sophie Marie Alcorn, *Landlords Beware, You May Be Renting Your Own Room … in Jail: Landlords Should Not Be Prosecuted for Harboring Aliens*, 7 WASH. U. GLOB. STUD. L. REV. 289, 295 (2008). That's a scary prospect when harboring and its statutory cousins in Section 1324(a) are the "second most common charge in U.S. District Courts." Marshall B. Lloyd, *Los Vaqueros, Coyoteros, y Pollos: Combating Human*

Smuggling Beyond the Border, 58 TULSA L. REV. 245, 260 (2023). And that's not even to mention potential liability under local statutes. See, *e.g.*, Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. 55, 60 (2009) (describing how, at one point, about "105 localities in twenty-nine states" had considered anti-harboring ordinances).

The Fourth Circuit rejected this justification as "phony" based on its own reading of the federal harboring statute. Pet.App.11. Put aside for a moment that there are other justifications for the policy; for instance, illegal immigrants might be harder to pursue for rent or damages seeing as how they are experienced "law 'avoiders.'" *United States* v. *DeBorba*, No. 3:22-CR-05139, 2024 WL 342546, at *12 (W.D. Wash. Jan. 30, 2024); see also *United States* v. *Torres*, 911 F.3d 1253, 1264 (9th Cir. 2019) (noting how undocumented persons "often live largely outside the formal system of registration, employment, and identification, and are harder to trace and more likely to assume a false identity" (cleaned up)). Just looking to the harboring concerns, the Fourth Circuit never explained why its after-the-fact exegesis on the federal harboring statute rendered Petitioners' initial choice to employ the documentation policy retroactively illegitimate, even assuming the Fourth Circuit's reading was right to begin with. Now, a justification defense premised on fears of legal liability must effectively come off the table if there's a chance a federal court will second guess that fear down the road. And all that can happen even without any evidence that the justification defense is pretextual. In other words, the Fourth Circuit's approach changes the justification guardrail into a simple necessity defense. And that transformation in turn effectively defeats the safeguard, as necessity defenses aren't

especially favored. Cf. *United States* v. *Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 491 (2001) (discussing necessity defense in context of Controlled Substances Act).

* * * *

This Court is obviously not a court of error correction, and it might be tempting to dismiss the mistakes below as a one-off. But the Fourth's Circuit's statistical sleight of hand has not gone unnoticed. Its causation-less test, for example, has even been hailed as proof that "proximate cause is wholly unnecessary" to the robust causation analysis under *Inclusive Communities*. Quinn Marker, *Zoning for All! Disparate Impact Liability Amidst the Affordable Housing Crisis*, 88 U. CIN. L. REV. 1105, 1123 (2020). So the decision below is merely a harbinger of things to come.

Considering *Inclusive Communities* itself, this Court's extensive precedent on statistical disparities in disparate-impact claims, and the facts on the ground here, the court below should have never held that the plaintiffs had established a prima facie disparate impact case. Its egregious misstep warrants this Court's attention.

II. The Fourth Circuit's Approach Will Have Painful Effects On States And Their Housing Markets.

Left untouched, the Fourth Circuit's decision threatens deleterious effects. With the bar for robust causation set so low, plaintiffs can carry their prima facie burden with ease—wielding statistical disparities based on "geographical happenstance" as a silver bullets, thereby exposing the State and private actors to liability in almost every situation imaginable. And refusing to

allow landlords to ask about immigration status invites more problems tied to illegal immigration. These consequences doubly prove how wrong the court got it.

A. Under its watered-down causation standard, a "whole range" of neutral regulations—no matter how innocuous or virtuous—could create liability for States. *Washington* v. *Davis*, 426 U.S. 229, 248 (1976). States regulate housing in many critical ways—creating health codes, passing zoning regulations, providing tax credits for low-income housing, and managing the Section 8 rental assistance program, to name a few. These actions are at the heart of States' police powers. See, *e.g.*, *Sobel* v. *Higgins*, 590 N.Y.S.2d 883, 884 (N.Y. App. Div. 1992). Beyond that, they are essential for the well-being of the States' citizens and communities. And the States "must not be prevented from achieving [these] legitimate objectives." *Inclusive Cmtys.*, 576 U.S. at 544.

Take housing codes first. Housing codes "play an important role in ensuring the safety of tenants." Claire Williams, Inclusive Communities *and Robust Causality: The Constant Struggle to Balance Access to the Courts with Protection for Defendants*, 102 MINN. L. REV. 969, 1005 (2017). As the federal government acknowledged years ago, "aggressive enforcement of a housing code can lead to an *increase* in the availability of low-income housing that meets minimal safety standards, thus potentially benefitting groups who are disproportionately represented in low-income housing." Amicus Br. of the U.S., *Magner* v. *Gallagher*, No. 10-1032 (U.S. Dec. 29, 2011), 2011 WL 6851347, at *31. But *Inclusive Communities* recognized how un-cabined disparate impact liability would wreak havoc on the States' ability to regulate in this area. See 576 U.S. at 544, 557-58. That's exactly what happened in *Gallagher* v. *Magner*, 619 F.3d

823 (8th Cir. 2010), for instance. When the City of St. Paul enacted a housing code that established "minimum maintenance standards," landlords had to address problems such as "rodent infestation, missing dead-bolt locks, inadequate sanitation facilities, inadequate heat, inoperable smoke detectors, [and] broken or missing doors." *Id.* at 829-30. From there, a chain of dominoes outside the City's control caused the code to have a disproportionate impact on African Americans. *Id.* at 834-35. Thus, even the "[C]ity's good-faith attempt to remedy deplorable housing conditions" "for its poorest residents could not ward off a disparate-impact lawsuit." *Inclusive Cmtys.*, 576 U.S. at 558, 584 (Alito, J., dissenting).

The Fourth Circuit's causation standard promises more of the same. Any time a policy happens to fall on a community with a high concentration of protected individuals, code enforcers will have to worry about a claim. That's intolerable—pragmatically and by *Inclusive Communities*'s own terms. See 576 U.S. at 544, 557-58. "Imagine . . . a rental house where raw sewage has been piling up," there is "[in]adequate heating and cooling," there are no "carbon monoxide or smoke detectors," and "the locks do not work." Williams, *supra*, at 969. In the face of such squalid living conditions, States should not be forced to sit idly by or risk being sued.

Housing codes aren't the only problem—take zoning next. "Zoning is the quintessential local government power." John Infranca, *The New State Zoning: Land Use Preemption Amid A Housing Crisis*, 60 B.C. L. REV. 823, 825 (2019). Zoning allows municipalities to "preserve the character of specific areas of a city," and it influences property taxes and values. *Young* v. *Am. Mini Theatres, Inc.*, 427 U.S. 50, 80 (1976) (Powell, J., concurring). Zoning officials "often make decisions based on a mix of

[objective and subjective] factors," *Inclusive Communities*, 576 U.S. at 542, and because it is a matter of trade-offs, someone is always left unhappy. At the same time, "members of minority groups, on average, have lower incomes than White people" and therefore are more likely to live in "lower-value homes." Stewart E. Sterk, *Incentivizing Fair Housing*, 101 B.U. L. REV. 1607, 1625 (2021). Many zoning decisions might disproportionately impact minority groups, but for reasons entirely outside a city's control. See *id.*

A lax causation standard thus threatens to "invalidate nearly all zoning." Sterk, *supra*, at 1625. Localities may face backlash for zoning decisions, and that's expected. But if the most accessible and powerful tool in the disgruntled citizen's toolbelt is a federal disparate-impact lawsuit, those localities would be completely handicapped in this "quintessential [exercise of] local government power." Infranca, *supra*¸ at 825. That is not right. Cf. *Hemisphere Bldg. Co.* v. *Vill. of Richton Park*, 171 F.3d 437, 440 (7th Cir. 1999) (addressing another anti-discrimination law and explaining that, while "[z]oning may be good or bad," the federal law should not be "the charter of its abolition").

Last, don't forget about liens. "Every state has a process authorizing local governments to place liens on properties when homeowners fail to pay property taxes or certain municipal charges" such as "water and sewer services." Coty Montag, *Lien in: Challenging Municipalities' Discriminatory Water Practices Under the Fair Housing Act*, 55 HARV. C.R.-C.L. L. REV. 199, 207 (2020). Liens allow States to ensure citizens do not run up their tab only to make the taxpayer foot the bill. But because "[l]ien sales and foreclosures can have a disparate impact on Black homeowners and tenants," *id.*

at 215, unrestrained disparate impact liability would jeopardize the State's ability to recover these debts. See, *e.g.*, *Pickett* v. *City of Cleveland*, No. 1:19 CV 2911, 2020 WL 11627247, at *6 (N.D. Ohio Sept. 29, 2020) (relying on *Waples I* to deny a motion to dismiss in such a case). State budgets will then be burdened by both the costs of litigation and the uncollectible debts.

These are just a few examples. As if they weren't enough, one more piece further complicates the picture. Because the Fourth Circuit's standard imposes disparate impact liability on no more than a preexisting racial imbalance in the community, the same neutral regulation could be discriminatory in some places and not others. It would be "astonishing to interpret a national civil rights statute in a way that makes conduct in one city illegal while allowing exactly the same conduct in another city, just because of the different racial makeup of the two cities." Roger Clegg, *Silver Linings Playbook: "Disparate Impact" and the Fair Housing Act*, 2015 CATO SUP. CT. REV. 165, 180 (2015). But from all appearances, we're there.

One might wonder—"[h]ow did we get to the point where everything or nearly everything a[] [State] can do is presumptively a violation of [the FHA]?" Gail L. Heriot, *Title VII Disparate Impact Liability Makes Almost Everything Presumptively Illegal*, 14 N.Y.U. J.L. & LIBERTY 1, 6 (2020). No need to wonder long. Misguided causation analysis like the Fourth Circuit's is to blame.

B. The Fourth Circuit's causation approach also puts States between a rock and a hard place when it comes to liability—with disparate impact on the one hand, and disparate treatment and Equal Protection on the other. Although some tensions always exist between these ends

of the spectrum, the causation standard at least mitigated the problem.

On the disparate-impact side, the Fourth Circuit's decision sends a sharp message. It tells the State that any neutral policy, though applied fairly across the board, carries a strong risk of being "discriminatory." And there is only one "cost-effective" way to avoid this "potentially catastrophic liability:" "quotas and preferential treatment," *Watson*, 487 U.S. at 993, which inevitably devolves into "pursuing a purely racial agenda," Lawrence Rosenthal, *Saving Disparate Impact*, 34 CARDOZO L. REV. 2157, 2209 (2013).

So States are strongarmed into considering "race, color, religion, sex, familial status, or national origin," 42 U.S.C. § 3604, "in a pervasive and explicit manner," *Inclusive Communities*, 576 U.S. at 543. But "[class]-based decisionmaking in the housing area [is] exactly what the [FHA] was meant to prohibit." Clegg, *supra*, at 166. When a State changes course to minimize impact on a protected class, it is discriminating "because of" that characteristic. 42 U.S.C. § 3604. This "racial double standard" is forbidden by the FHA's clear terms. Clegg, *supra*, at 174. There's the catch-22: by trying to limit disparate-impact liability, a State walks straight into disparate-treatment liability. And even more to the point, the States here have no wish to engage in race-based exercises at all. (The same goes for sex, religion, and the other protected traits.)

And FHA liability is just the beginning. Class-based considerations also raise serious Equal Protection concerns. *Inclusive Cmtys.*, 576 U.S. at 540. This is particularly true when it comes to race. See *id.* Lurking in the shadows of every disparate impact case is the question: "[w]hether, or to what extent, are the disparate-

impact provisions . . . consistent with the Constitution's guarantee of equal protection?" *Ricci* v. *DeStefano*, 557 U.S. 557, 594 (2009) (Scalia, J., concurring). When disparate-impact liability is so expansive that it injects racial considerations into every State decision, the answer is easy—disparate impact is "directly at odds with the Equal Protection Clause." Alamea Deedee Bitran, *Equal Opportunity, Not Equal Results: Benign Racial Favoritism to Remedy Mere Statistical Disparate Impact Is Never Constitutionally Permissible*, 11 FIU L. REV. 427, 427 (2016). The only hope to outrun the disparate impact bear is "outright racial balancing"—which is "patently unconstitutional." *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard Coll.*, 600 U.S. 181, 223 (2023) (quoting *Fisher* v. *Univ. of Tex.*, 570 U.S. 297, 311 (2013)).

After States are forced to walk this tightrope, comes one final twist: "[t]here is probably *no* selection or sorting criterion that doesn't have a disparate impact on some group or subgroup." Clegg, *supra*, at 174. So in truth, there's no escaping liability after all.

C. The Fourth Circuit's causation ruling also threatens the use of neutral and necessary risk-mitigation considerations in lending. The States here embrace the free market. And in free-market lending, there are "sensible, risk-based criteria" used to evaluate potential borrowers. Amicus Br. for Am. Fin. Servs. Ass'n, *Texas Dep't of Hous.* v. *Inclusive Cmtys.*, No. 13-1371, (U.S. Nov. 24, 2014), 2014 WL 6706832, at *28. These criteria include "income, debt, credit score, and the like," because they "correlate with loan performance." Amicus Br. for Chamber of Com., *Nat'l Ass'n of Mut. Ins.* v. *HUD*, No. 23-5275, (D.C. Cir. filed May 1, 2024), 2024 WL 2078484 (citing 78 Fed. Reg. 6,408, 6,527 (Jan. 30, 2013)). But

national averages reveal "racial and ethnic groups have [key] differences in economic and credit characteristics." Amicus Br. for Am. Fin. Servs. Ass'n, *Inclusive Cmtys.*, at *26.

Because of differences among borrowers and renters, even when these factors "are applied fairly and uniformly to all consumers," "differences in the economic and credit characteristics across race and ethnicity can lead to differences in the availability or terms of credit when those groups are viewed as a whole." Amicus Br. for Am. Fin. Servs. Ass'n, *Inclusive Cmtys.*, at *28. Lenders are not responsible for this heterogeneity. Yet, under a distorted FHA disparate impact regime, they might be. It could be just a matter of time before the Fourth Circuit's reasoning is adopted by those seeking to "complete[ly] overhaul" "credit-scoring mechanisms"—with no alternatives in the wings. Lisa Rice & Deidre Swesnik, *Discriminatory Effects of Credit Scoring on Communities of Color*, 46 SUFFOLK U. L. REV. 935, 962 (2013). Underwriting would suffer. And forget about non-traditional lending approaches or rental schemes; those would be too risky to try in a regime focused on bare statistics.

D. Finally, the court's causation ruling undermines the FHA's "purpose as well as the free-market system." *Inclusive Cmtys.*, 576 U.S. at 544. "The FHA . . . was enacted to eradicate discriminatory [housing] practices." *Id.* at 539. No doubt those practices were commonplace at the time. Nowadays, though, many people believe the FHA serves a much more expansive, albeit immeasurable, purpose: providing "vital protection against covert and systemic racism." Marker, *supra*, at 1127.

But by casting the disparate-impact liability net so wide, nearly everyone is bound to be caught in it. And fish

will swim to safer waters—"private developers [will] no longer [want to] construct or renovate housing units for low-income individuals." *Inclusive Cmtys.*, 576 U.S. at 544. Those who spearhead "revitalizing dilapidated housing in our Nation's cities" will reevaluate if it is worth it. *Id.* at 541. Counties that have participated in federal grant housing programs will notice "the enhanced potential liability and higher compliance costs" and may decide it is "a risk not worth the reward." Brian J. Connolly, *Promise Unfulfilled? Zoning, Disparate Impact, and Affirmatively Furthering Fair Housing*, 48 URB. LAW. 785, 837 (2016). At bottom, unrestrained disparate-impact liability discourages the very actions that benefit our housing markets and everyone in them; interacting with protected communities will just be avoided outright.

E. The Fourth Circuit's approach to justification will hurt the States, too. In essence, the decision below nearly insists that landlords be indifferent to the federal harboring statute and similar laws. Concern for compliance with those laws is minimized and dismissed. But meaningful enforcement of the harboring statute provides important protections against illegal immigration, and weakening them will only invite *more* illegal immigration. Sanctuary cities in small pockets of America will give way to sanctuary neighborhoods, sanctuary apartment complexes, and sanctuary mobile home parks. All because the FHA supposedly imposes a "don't ask, don't tell" approach to immigration status.

The Court hardly needs to be told again about "the importance of immigration policy to the States." *Arizona* v. *United States*, 567 U.S. 387, 397 (2012). Right now, "large-scale illegal immigration on our southern border is real." Major Miguel R. Acosta, *A Lawyer's Deployment*

to the Front Lines of the U.S.-Mexico Border, 67 FED. LAW. 28, 30 (2020). Some of those coming here illegally have "extensive, violent criminal records and ha[ve] been deported multiple times," and others "c[o]me with large packs of drugs on their backs." *Id.* Once those persons settle in, "local and state governments spend more on services for unauthorized immigrants than they receive from those immigrants in state and local tax revenue." Ashleigh Bausch Varley & Mary C. Snow, *Don't You Dare Live Here: The Constitutionality of the Anti-Immigrant Employment and Housing Ordinances at Issue in* Keller v. City of Fremont, 45 CREIGHTON L. REV. 503, 550 (2012). And even in interior States, illegal immigration creates substantial costs tied to education, healthcare, law enforcement and more. See, *e.g.*, *Texas* v. *Biden*, 554 F. Supp. 3d 818, 838 (N.D. Tex. 2021) (describing costs from migrants to Missouri). The decision below welcomes more of that.

Especially with an executive that has abandoned traditional avenues of immigration enforcement, courts should be applauding other efforts to ensure that persons who are here are here legally. Cf. Kris W. Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 TULSA J. COMPAR. & INT'L L. 155, 157-61 (2008) (explaining how policies that make it difficult for undocumented persons to find employment lead to "self-deportations"). The Fourth Circuit chose a different route—one that the FHA simply does not permit.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted.

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