No. 18-1217

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* SOUTHEASTERN LEGAL FOUNDATION AND CENTER FOR EQUAL OPPORTUNITY IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

In *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015), this Court found that the Fair Housing Act (FHA) proscribes disparate impact discrimination in the provision or regulation of housing. The Court stressed, however, that, to state a *prima facie* case of disparate impact discrimination under the FHA, plaintiffs must plead facts that show a "robust causality" between the allegedly unlawful policy and an impact imposed disproportionately on a protected group. *Id.* at 2523.

The question presented here is:

Whether a plaintiff can allege a *prima facie* case of disparate impact discrimination on the basis of race or national origin under the FHA against a landlord's leasing policy that screens out undocumented aliens, where the landlord predominantly rents to Latino tenants, and the only factual allegation of disparate impact is that undocumented aliens in the geographic vicinity of the landlord's property happen to be disproportionately Latino.

Amici also respectfully suggest that the Court ask for briefing on whether the Court should overrule *Inclusive Communities*, 135 S. Ct. 2507.

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INTEREST OF *AMICI CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national nonprofit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. In particular, SLF advocates for a color-blind interpretation of the Constitution. *See*, *e.g.*, *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656 (1993). In addition to direct representation, SLF also files *amicus curiae* briefs regarding this aspect of its advocacy. *See*, *e.g.*, *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009); *Adarand Constrs., Inc. v. Slater*, 528 U.S. 216 (2000); and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

The Center for Equal Opportunity (CEO) is a research and educational organization formed under Section 501(c)(3) of the Internal Revenue Code and devoted to issues of race and ethnicity. Its fundamental vision is straightforward: America has always been a multiethnic and multiracial nation, and it is becoming even more so. This makes it imperative that our national policies not divide our people according to skin color and national origin. Instead, these policies should emphasize and nurture the principles that unify us.

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[1] Rule 37 statement: The parties were notified and consented to the filing of this brief more than 10 days before its filing. *See* Sup. Ct. R. 37.2(a). No party's counsel authored any of this brief; *amici* alone funded its preparation and submission. *See* Sup. Ct. R. 37.6.

E pluribus unum . . . out of many, one. CEO supports color-blind public policies and seeks to block the expansion of racial preferences and other race-based decision making, including the disparate impact approach to civil-rights enforcement, in all areas. Its work is reflected in *amicus* briefs that it filed or joined in cases such as *Texas Department of Housing & Community Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507 (2015); *Mount Holly v. Mount Holly Gardens Citizens in Action*, 571 U.S. 1020 (2013); *Magner v. Gallagher*, 565 U.S. 1013 (2011); and *Ricci v. DeStefano*, 557 U.S. 557 (2009).

SUMMARY OF ARGUMENT

Less than four years ago, this Court recognized disparate impact causes of action under the Fair Housing Act. *Tex. Dep't of Housing and Cmty. Affairs v. Inclusive Cmtys. Project*, 135 S. Ct. 2507 (2015). This means that a person alleging discrimination under the Fair Housing Act now needs to prove only that the defendant's actions have a disproportionate adverse effect on a racial or other group, even if that defendant selected the criterion without discriminatory motive and that criterion is nondiscriminatory both by its terms and in its application. By contrast, disparate treatment cases arise when a defendant takes certain actions because the plaintiff is a member of such a racial or other group. The Fair Housing Act indisputably covers disparate treatment claims and rightfully so, because this coverage is supported by both the

Constitution and the Act's text and history. But those underpinnings do not transfer easily to disparate impact claims. In fact, they don't transfer at all.

Neither the text nor the history of the Fair Housing Act support recognition of disparate impact claims under the Act. Instead, as Justice Thomas explained, the judicial recognition of such disparate impact claims rests on a foundation of "sand." *Inclusive Cmtys.*, 135 S. Ct. at 2526 (Thomas, J., dissenting). Even more, the construction of any statute to include a disparate impact cause of action raises constitutional problems and should be avoided. This is not only true when Congress, using the Fourteenth or Fifteenth Amendment, targets state actors; it is also true when Congress uses its Commerce Clause power to target private actors because the disparate impact approach in itself encourages race-based decision making.

The disparate impact approach to civil rights, especially in the interpretation and enforcement of the Fair Housing Act, is untenable as a matter of law and policy. It second-guesses nondiscriminatory selection criteria like that used by the petitioners and encourages race-based decision making. Those disturbing abuses of federal power come at the expense of liberty and limited federal government. Although the petitioners did not ask this Court to overrule *Inclusive Communities*, this case provides an excellent opportunity for the Court to revisit and overrule its fewer than four-year-old expansion of the Fair Housing Act to disparate impact claims. The time to address the

problems resulting from the disparate impact approach is now.

If this Court chooses however, not to revisit *Inclusive Communities*, it should still reverse the Fourth Circuit's judgment. The lower court's treatment of the "robust causality" showing required to state a *prima facie* case lacks rigor, and it is one step removed from the actual protection of a statutorily protected class. As Judge Keenan observed in her dissent, petitioners' policy "disproportionately affects Latinos not because they are Latino, but because Latinos are the predominant sub-group of undocumented aliens in a specific geographic area." *de Reyes v. Waples Mobile Home Park LP*, 903 F.3d 415, 434 (4th Cir. 2018) (Keenan, J., dissenting).

ARGUMENT

I. This case provides an opportunity for this Court to revisit *Inclusive Communities*.

A. The text of the Fair Housing Act does not support a disparate impact cause of action.

With respect to discrimination, the Constitution prohibits only disparate treatment, not disparate impact. *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229, 242 (1976). Thus, interpreting the Fair Housing Act to include a disparate impact cause of action raises constitutional problems and should be avoided.

This is true regardless of the constitutional origin of Congress' power.

While "[d]isproportionate impact is not irrelevant, [] it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution." *Washington*, 426 U.S at 242. Indeed, the Court has held that where Congress exercises its remedial powers under the Constitution "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). A wide-ranging application of disparate impact fails that test. More to the point, it fails to give the key provisions of the Fair Housing Act a full and fair reading.

This Court rested its opinion in *Inclusive Communities* on the language of 42 U.S.C. § 3604(a), which makes it unlawful "[t]o refuse to sell or rent after the making of a bonafide offer, 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, color, religion, sex, familial status, or national origin." While the Court explained that "the phrase 'otherwise make unavailable' is of central importance[,]" it likewise rejected the contention that the phrase "because of race" meant that the Fair Housing Act recognizes only disparate treatment claims. *Inclusive Cmtys.*, 135 S. Ct. at 2518-19.[2]

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[2] As set forth below, *amici* disagree with this reading of the Fair Housing Act.

In contrast, Justice Alito established in his *Inclusive Communities* dissent that the far sounder reading of §§ 3604(a) and 3605(a) does not allow for disparate impact liability. He read the statutory provision as a whole: "'[M]ake unavailable' must be viewed together with the rest of the actions covered by [§ 3604(a)], which applies when a party 'refuse[s] to sell or rent' a dwelling, 'refuse[s] to negotiate for the sale or rental' of a dwelling, 'den[ies] a dwelling to any person,' or 'otherwise make[s] unavailable' a dwelling." *Id*. at 2535 (Alito, J., dissenting). Justice Alito's reading also carries less constitutional freight along with it, in that it leaves legislation to Congress and avoids upsetting the national-state balance.

Regardless of which reading controls though, the "because of" language in §§ 3604(2) and 3605(a) must be given effect.[3] Doing so is consistent with the canons of statutory construction, which include giving meaning to all parts of a clause and disdaining a reading that causes surplusage. In addition, that language "suggest[s] that something other than a pure effects test – that is, a disparate impact test – is appropriate." Roger Clegg & Hans A. von Spakovsky, "*Disparate Impact" and Section 2 of the Voting Rights Act*, Heritage

[3] 42 U.S.C. § 3605(a) states, "It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, *because of* race, color, religion, sex, handicap, familial status, or national origin." (emphasis added)

Foundation 7 (Mar. 17, 2014).[4] Otherwise, "Congress would not have used . . . this language had it intended *that*." *Id*.

Instead of a "pure effects test," the "because of" language in §§ 3604(a) and 3605(a) should be read to require disparate impact plaintiffs to show "a close nexus between the practice in question and actual disparate treatment." *Id*. at 4. As Justice Scalia noted in his *Ricci* concurrence, there is an inherent tension between disparate impact and the constitutional guarantee of equal protection. He warned that the "evil day on which the Court will have to confront the question: Whether, or to what extent . . . disparate-impact provisions . . . [are] consistent with the Constitution's guarantee of equal protection" is coming. *Ricci v. DeStefano*, 557 U.S. 557, 594 (Scalia, J., concurring). Justice Scalia went on to explain that "[w]hether Title VII's disparate-treatment provisions forbid 'remedial' race-based actions when a disparate-impact would *not* otherwise result[,] . . . it is clear that Title VII not only permits but affirmatively *requires* such actions when a disparate-impact violation *would* otherwise result." *Id*. The effect is to "place[ ] a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decisionmaking is . . . discriminatory." *Id*.

Justice Scalia also warned that "the war between disparate impact and equal protection will be waged

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[4] http://thf_media.s3.amazonaws.com/2014/pdf/LM119.pdf.

sooner or later, and it behooves us to begin thinking about how – and on what terms – to make peace between them." *Id*. at 595-96. That "war" can be postponed by requiring disparate impact claimants to prove "a close nexus between the practice in question and actual disparate treatment." Clegg & von Spakovsky, at 4.

In a similar way, in the context of the Voting Rights Act, the Eleventh Circuit, sitting *en banc*, specifically held "[t]he existence of some form of racial discrimination . . . remains the cornerstone of section 2 claims; to be actionable, a deprivation of the minority group's right to equal participation in the political process must be on account of a classification, decision, or practice that *depends on race or color, not on account of some other racially neutral cause*." *Nipper v. Smith*, 39 F.3d 1494, 1515 (11th Cir. 1994) (*en banc*) (emphasis added). The Court explained that its reading of Section 2 "is supported by the fact that any other reading might well render section 2 outside the limits of Congress' legislative powers and therefore unconstitutional." *Id*.

So, too, with disparate impact claims under the Fair Housing Act: They cannot be untethered to disparate treatment on a protected basis.

This Court itself recognized the need to restrain the use of disparate impact claims in *Inclusive Communities*. It observed, "[A] disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing

that disparity. A robust causality requirement ensures that '[r]acial imbalance . . . does not, without more, establish a prima facie case of disparate impact.'" *Inclusive Cmtys.*, 135 S. Ct. at 2523 (quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653 (1989)). Indeed, the Court warned "[w]ithout adequate safeguards at the prima facie stage, disparate impact liability might cause race to be used and considered in a pervasive way and 'would almost inexorably lead' governmental or private entities to use 'numerical quotas,' and serious constitutional questions then could arise." *Id*. (quoting *Wards Cove*, 490 U.S. at 653); *see also id*. at 2524 ("Difficult questions might arise if disparate-impact liability under the FHA caused race to be used and considered in a pervasive and explicit manner to justify governmental or private actions that, in fact, tend to perpetuate race-based considerations rather than move beyond them. Courts should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision.").

B. Congress chose to not impose disparate impact liability through the Fair Housing Act.

Another reason the Court should revisit and overrule *Inclusive Communities* is that it gives inexcusably short shrift to the role and intent of Congress.

Put simply, the *Inclusive Communities* majority employed an outdated and unsound method of

statutory interpretation. Its reliance on *Griggs v. Duke Power*, 401 U.S. 424 (1971), and the plurality opinion in *Smith v. City of Jackson*, 544 U.S. 228 (2005), embraces "the triumph of an agency's preferences over Congress' enactment and of assumption over fact." *See Inclusive Cmtys.*, 135 S. Ct. at 2526. In both *Griggs* and *Smith*, the Court justified its interpretation of the statutes at issue by pointing to the way the Court's interpretation furthered the underlying statute's imputed purposes. The effect is to give emphasis to some parts of the statutory text over others and to force the Court to backfill limitations on the scope of disparate impact claims.

As a result, after opening the door to disparate impact claims, this Court has had to explain that the door is open only so far. In that way, *Griggs* and the *Smith* plurality opinion "teach that disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system." *See id.* at 2518. Thus, in *Griggs*, the Court "put important limits on its holding." *Id*. at 2517. Because "not all employment practices causing a disparate impact" could violate Title VII, it allowed defendants to interpose a defense of business necessity. *Id*.

Similarly, in *Inclusive Communities*, the Court warned "[c]ourts [to] avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision." *Id*. at 2524. Housing authorities and private developers

needed "leeway to state and explain the valid interest served by their policies." *Id*. at 2522. Because the "FHA does not decree a particular vision of urban development," it should not "put housing authorities and private developers in a double bind of liability, subject to suit whether they choose to rejuvenate a city core or to promote new low-income housing in suburban communities." *Id*. at 2523. And a private developer's decision "to construct a new building in one location rather than another" may not be a "one-time decision" or a "policy" that can be challenged "at all." *Id*. at 2524. Finally, the Court warned that reliance on a statistical disparity alone would not be sufficient to establish a *prima facie* case of liability.

The Court had to impose these limitations and others like them because they are constitutionally necessary. *See* Clegg & von Spakovsky, at 4 (explaining that defendants must have "a rebuttal opportunity to show that they have legitimate, nondiscriminatory reasons for the challenged practice"). Even so, this backfilling is necessary only because this Court found that the Fair Housing Act supported a cognizable claim for disparate impact.

Indeed, the best way out of the disagreement between the *Inclusive Communities* majority and dissent over how to interpret the Fair Housing Act is by returning to a more firmly grounded appreciation for the respective constitutional roles of Congress and this Court. The Constitution does not charge this Court

with furthering the design and purposes of the statutes Congress enacts, as *Griggs* would have it do. Instead, it should let Congress do the work of legislating.

Congress, we know, "does not . . . hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). As a result, there should be no need for this Court to use a statute's purpose to construe it to mean something that Congress could have said but didn't.[5] In fact, Congress knows how to provide for disparate impact claims in the language of a statute, having done so twice in response to decisions of this Court.

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[5] Congress didn't just not provide for disparate claims when it enacted the Fair Housing Act, it consciously targeted intentional discrimination. Because the Fair Housing Act was offered as a floor amendment in the Senate, there are no committee reports. *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 147 n.29 (3d Cir. 1977). The legislative history thus consists of statements on the floor of the House and the Senate that provide evidence that Congress intended to address only disparate treatment, not disparate effect. *See Brock v. Pierce Cty.*, 476 U.S. 253, 263 (1986). Senator Walter Mondale, a leading sponsor of the Fair Housing Act, explained, "The bill simply reaches the point where there is an offering to the public and the prospective seller refuses to sell to someone *solely on the basis of race*." 114 Cong. Rec. 4974 (Mar. 4, 1968) (emphasis added); *see also id*. at 5643 (Mar. 7, 1968) (Senator Mondale said an owner can do anything "except refuse to sell it to a person *solely on the basis of his color or his religion*) (emphasis added); *id*. (Senator Mondale explained that the bill "does not confer any right. It simply removes the opportunity to insult and discriminate against a fellow American *because of his color*.") (emphasis added); *id*. at 2528 (Feb. 7, 1968) (Senator Joseph Tydings spoke of "purposeful exclusion").

In 1980, a plurality of the Court held that the Fifteenth Amendment, and thereby Section 2 of the Voting Rights Act, "prohibits only purposefully discriminatory denial or abridgement by government of the freedom to vote 'on account of race, color, or previous condition of servitude.'" *Mobile v. Bolden*, 446 U.S. 55, 65 (1980). In response, Congress amended the Voting Rights Act in 1982 to provide for disparate impact claims. As subsequently recodified, Section 2 of the Voting Rights Act bars the imposition of any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . in a manner which *results in* a denial or abridgement of the right . . . to vote . . . on account of race or color." 52 U.S.C. § 10301(a) (emphasis added).

And in 1991, Congress also expressly recognized disparate impact claims in Title VII. In so doing, it sought "to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964." Civil Rights Act of 1991, Pub. L. No. 102-166 § 3(3), 105 Stat. 1071, 1071. It also disagreed with this Court's decision in *Wards Cove*. *Id*. at § 3(2). Congress specifically provided, "An unlawful employment practice based on disparate impact is established . . . only if a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin. . . ." 42 U.S.C. § 2000e-2(k)(1)(A)(i).

The Fair Housing Act stands in marked contrast to these examples. In the *Inclusive Communities* oral argument, Justice Ginsburg asked, " . . . If we're going

to be realistic about this, . . . in 1968, when the Fair Housing Act passed, nobody knew anything about disparate impact." *See id*. 135 S. Ct. at 2537 (Alito, J., dissenting) (quoting Tr. of Oral Arg. 15). As Justice Alito observed, "It is anachronistic to think that Congress authorized disparate-impact claims in 1968 but packaged that striking innovation so imperceptibly in the FHA's text." *Id*.; *see also id*. at 2531 (Thomas, J., dissenting) ("We should not incorporate [the reasoning of *Griggs*] into statutes such as the Fair Housing Act and the ADEA, which were passed years before Congress had any reason to suppose that this Court would take the position it did in *Griggs*.").

In 1988, though, disparate impact was well known. As the Court explained in *Inclusive Communities*, when Congress acted in 1988, it both "accepted and ratified the unanimous holdings of the Courts of Appeals finding disparate-impact liability" and made changes that "presupposed disparate impact under the FHA as it had been enacted in 1968." *Id*. at 2520 (majority op.). Still, in 1988, Congress did not expressly provide for disparate impact claims in the statute as amended, much less change the text of §§ 3604(a) and 3605(a). Moreover, "*this* Court had not addressed that question [, and w]hile we always give respectful consideration to interpretations of statutes that garner wide acceptance in other courts, this Court has 'no warrant to ignore clear statutory language on the ground that other courts have done so,' even if they have 'consistently' done so for '30 years.'" *Id*. at 2538 (Alito, J., dissenting) (quoting *Miner v. Dep't of Navy*, 562 U.S.

562, 575-76 (2011)). Finally, "[s]hortly *before* the 1988 amendments were adopted, the United States formally argued in this Court that the FHA prohibits only intentional discrimination." *Id*.

In sum, Congress, not this Court, should decide whether the Fair Housing Act allows for disparate impact claims. If it believes it disparate impact in the housing context is wise policy, it should legislate accordingly.

C. *Stare decisis* does not require this Court to adhere to its recent *Inclusive Communities* decision.

Stare decisis should not serve as a barrier for the Court to correct a wrong made only four years ago. Although the Court "approach[es] the reconsideration of [its] decisions with the utmost caution, *stare decisis* is not an inexorable command." *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2096 (2018) (quoting *Pearson v. Callahan*, 555 U.S. 223, 233 (2009)). The special justifications to overcome *stare decisis* are present here. As already discussed, this Court's decision in *Inclusive Communities* is seriously flawed and it was wrong when decided.

As Justice Kennedy has written for the Court, "*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (quotation marks and citation omitted). The Court has repeatedly shown its willingness to overrule

a prior decision "where the necessity and propriety of doing so has been established." *Id.*; *see also Adarand Constrs., Inc. v. Pena*, 515 U.S. 200, 232-33 (1995) (opinion of O'Connor, J.) (collecting times when the Court overruled erroneous decisions).

As this Court has also noted, *stare decisis* considerations are "at [their] weakest when we interpret the Constitution." *Agostini v. Felton*, 521 U.S. 203, 235 (1997). This case may look like it involves statutory interpretation, but there are significant constitutional overtones to it. First, there is the structural consideration of who should make the laws. As *amici* noted above, Congress knows how to recognize disparate impact claims legislatively; this Court doesn't have to do Congress' work for it, nor should it. In addition, unless limited, opening the door to disparate impact claims "might cause race to be used and considered in a pervasive way and would almost inexorably lead governmental or private entities to use numerical quotas, and serious constitutional questions then could arise." *Inclusive Cmtys.*, 135 S. Ct. at 2523 (internal quotation omitted). In short, constitutional considerations are embedded in the underlying statutory ruling.

The *Inclusive Communities* majority's reliance on *Griggs* and the plurality opinion in *Smith* is misplaced. The days for this Court to interpret statutes to further the design and purposes of Congress are gone. In the context of § 3604(a), the meaning of "because of" should be "no mystery." *Id.* at 2533 (Alito, J., dissenting). "The link between the actions [identified in § 3604(a)] and the protected characteristics is 'because

of,'" and "[w]hen English speakers say that someone did something 'because of' a factor, what they mean is that the factor was a reason for what was done." *Id*. at 2533-34. The better view is that the Fair Housing Act prohibits only intentional discrimination.

Despite this Court's warning that disparate impact claims are not suited to every housing decision, there is no indication that litigants have heeded it. *Inclusive Communities* involved the siting for the construction of low-income housing in Dallas. This case involves the eligibility for living in a community. The recently decided Fifth Circuit case brought by Inclusive Communities Project claims that the owners and managers of Dallas area apartment complexes are liable under disparate treatment and disparate impact theories for their refusal to participate in the (voluntary) federal Section 8 housing voucher program. *Inclusive Cmtys. Project v. Lincoln Prop. Co.*, No. 17-10943, 2019 U.S. App. LEXIS 10480 (5th Cir. Apr. 9, 2019). The variety of claims made suggests "perpetua[l] give-it-a-try litigation," which should not be encouraged. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 551 (1991) (Scalia, J., concurring in part and dissenting in part).

Claims like these also represent a massive federal intrusion into state and local decisionmaking. That raises more constitutional problems here by altering the state-federal balance in far-reaching ways, by rendering race-neutral rules suspect. As the Court has said, "Unless Congress conveys its purpose clearly, it

will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971). For example, *Inclusive Communities* renders race-neutral rules – like rules for preserving order in public-housing projects – suspect; the approach will also result in the federal micromanagement of insurance practices, which is at odds with the McCarran-Ferguson Act. Cases such as *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988), show that, even when an agency like HUD would otherwise receive great deference in interpreting a statute, it will not receive that deference when its interpretation would raise potential constitutional problems.

Those claims are only the tip of an iceberg that establishes future difficulties in applying disparate impact in the housing context. What should decision-makers do if a practice has a disparate impact in one location but not in another? Or, if the impact ebbs and flows over time? What should landlords do if a policy (for instance, excluding felons as tenants) has an unfavorable disparate impact on potential tenants of a particular race, but is welcomed by the incumbent tenants who are predominately of that same race?

What if a practice is favorable for some racial minority groups (say, Asian Americans) but not for others (say, Latinos) – and, what's more, the opposite is at the same time true for some minority subgroups (thus, unfavorable for Hmong but favorable for Cuban Americans)? And remember, too, that "majority" groups – whites and men and Christians, for example – must be

able to bring these lawsuits, too, or you've added an even greater equal protection problem.

Thus: (a) a foreclosure policy might have had have no disparate impact on a particular group in pre-recession 2006, but a severe one in 2009, and this scenario may well play out again in the future; (b) an income-requirement may have no disparate impact on Latinos in Nashville but a severe one in Denver; this may mean that two companies with identical policies have very different liability risks, or the same company may be liable in one city but not in the other (but should the cities be considered separately if it's the same company?); and (c) the use of credit scoring may have a disparate impact on Latinos but not Asians, but there may be no disparate impact on Cubans and a severe one on the Hmong. *See* Roger Clegg, *Silver Linings Playbook: "Disparate Impact" and the Fair Housing Act*, Cato Sup. Ct. Rev. at 165, 180 (2014-2015); Roger Clegg, *Symposium: The Fair Housing Act doesn't recognize disparate-impact causes of action*, SCOTUSblog (Jan. 7, 2015, 12:10 pm).[6]

Finally, overruling *Inclusive Communities* does not leave the field vacant. The Department of Housing & Urban Development promulgated fair housing regulations and can enforce them. Congress is also free to legislate.

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[6] https://www.scotusblog.com/2015/01/symposium-the-fair-housing-act-doesnt-recognize-disparate-impact-causes-of-action/.

II. This Court should at a minimum, grant the case to reverse the Fourth Circuit's decision.

The Fourth Circuit's decision should be reversed for three reasons. The Fourth Circuit's view of the need for some causal link is doctrinally unsound. As petitioners note, federal criminal law prohibits the harboring of undocumented aliens. Pet. at 13. The Fourth Circuit dismissed this rationale for petitioners' policy, but respondents cannot offer a lawful alternative that can serve the same interest. In addition, as Judge Keenan noted in dissent, the majority's analysis of the disparate impact claim is one step removed from the protected groups. *Waples Mobile Home*, 903 F.3d at 433-34 (Keenan, J., dissenting).

First, as noted above, there must be a link between disparate impact liability and disparate treatment. The Fourth Circuit thought otherwise. It criticized the district court for its "seem[ing] to require an *intent* to disparately impact a protected class in order to show robust causality. *Id*. at 430 (majority op.). From there it went on to criticize the district court for "posit[ing] that courts should reject a disparate-impact claim if the plaintiff is impacted by the allegedly discriminatory policy for reasons that are distinct from the plaintiff's inclusion in a protected class." *Id*. at 429. The Fourth Circuit, thus, read the "because of" language in § 3604(a) to mean correlation, which is far short of causation.

Second, as petitioners note, 8 U.S.C. § 1324(a)(1)(A)(iii) prohibits any person from "harbor[ing] . . . in any place, including any building" with the knowledge or in "reckless disregard of the fact" that the person harbored is an undocumented alien. Pet. at 14. Even if federal law does not require landlords to inquire into the citizenship status of their tenants, those landlords cannot be ostriches and hide their heads in the sand either. Respondents cannot use disparate impact analysis to force petitioners to risk federal criminal liability.

Finally, as Judge Keenan explained, petitioners' policy "disproportionately impacts Latinos not because they are Latino, but because Latinos are the predominant sub-group of undocumented aliens in a specific geographic area." *Waples Mobile Home*, 903 F.3d at 434 (Keenan, J., dissenting). The majority, thus, conflated immigration status with protected status. The majority also converts a "geographical happenstance" into a basis for liability. That cannot be, though, because petitioners are "not responsible for th[at] geographical distribution." *Id*. In short, "because the [petitioners'] policy has not caused Latinos to be the dominant group of undocumented aliens in the park, the policy has not 'caused' a disparate impact on Latinos." *Id*.

CONCLUSION

This Court should grant the petition for writ of certiorari and request that the parties brief the question of whether *Inclusive Communities* should be overturned.

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