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 Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND CATO INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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.

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INTEREST OF AMICI CURIAE[1]

Pacific Legal Foundation and the Cato Institute respectfully submit this brief amicus curiae in support of Petitioner, Waples Mobile Home Park Limited Partnership.

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF challenges programs covering public contracting, public education, and public employment that grant special preferences to a select few on the basis of race and sex. PLF litigates to assure a color-blind society and against attempts that undermine the Constitution's Equal Protection guarantee.

The Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato advocates for society where all people, regardless of color, enjoy equal protection of the law. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty.

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief.

Pursuant to Rule 37.6, Amici Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or its counsel made a monetary contribution to its preparation or submission.

Toward those ends, Cato publishes books and studies, files amicus briefs with courts, conducts conferences, and publishes the annual *Cato Supreme Court Review*.

PLF and Cato were co-*amici* supporting the petitioners in *Texas Department of Housing v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015), the case at the center of the instant petition.

INTRODUCTION AND SUMMARY OF ARGUMENT

The scope of disparate impact liability is one of the most contested issues in American law. Since this Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), courts and commentators have debated the extent to which governments, employers, and landlords bear responsibility for disparate racial *outcomes* absent proof of discriminatory intent. The disagreement often centers on whether a particular statute has authorized disparate impact liability. But scholars[2]—and even members of this Court—have cautioned that disparate impact statutes might run afoul of the Equal Protection Clause by requiring race-based decisionmaking.

This case involves the Fair Housing Act (FHA). Four years ago, after years of litigation in the lower courts and two scuttled attempts to resolve the issue, a majority of this Court held that the FHA encompasses disparate impact liability. *Inclusive*

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[2] *See, e.g.*, Richard A. Primus, *Equal Protection & Disparate Impact: Round Three*, 117 Harv. L. Rev. 493 (2003) (describing how the conflict between disparate impact statutes and the Equal Protection Clause came to be recognized in the wake of this Court's racial-preference decisions).

Communities, 135 S. Ct. at 2525. But the Court emphasized that "[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.* at 2523. One important safeguard is the "robust causality" requirement, which protects defendants from liability for racial imbalances that their policies did not cause. *Id.*

Unfortunately, the robust causality requirement has spawned confusion among the circuits. *See* Petition at 23–27. This case is a prime example. Waples Mobile Home Park is a mobile home park in Fairfax County, Virginia. It rents primarily to Hispanic tenants, but, in order to avoid violating federal immigration policy, it maintains a policy that screens out individuals not legally present in the United States. Several current and former tenants alleged that this policy violates the FHA because it disproportionately affects Hispanic tenants. Because most undocumented people in Fairfax County are Hispanic. A divided Fourth Circuit panel agreed that the tenants stated a disparate impact claim under the FHA based solely on that fact that most undocumented people in Fairfax County are Hispanic. *Reyes v. Waples Mobile Home Park Ltd. P'ship*, 903 F.3d 415, 428–29 (4th Cir. 2018). According to the panel, a mere showing of statistical disparity is sufficient to make out a *prima facie* disparate impact claim under the FHA.

But as Judge Keenan recognized in dissent, robust causality requires more. Waples is not

responsible for the geographic distribution of undocumented individuals within the United States, so its policy cannot have "caused" a disparate impact on any particular racial group based solely on that distribution. *See id.* at 434 (Keenan, J., dissenting). Instead, that racial balance is best described as a "pre-existing condition[] . . . not brought about by the challenged policy." *Inclusive Communities*, *Proj.*, *Inc. v. Lincoln Prop. Co.*, No. 17–10943, _ F.3d _, 2019 WL 1529692, at *10 (5th Cir. Apr. 9, 2019). Permitting disparate impact claims to survive solely based on this sort of "happenstance" would eviscerate the *Inclusive Communities* safeguards. By shifting the burden to defendants to prove the absence of discrimination, it would encourage race-based decisions and exacerbate the inevitable conflict between disparate impact and equal protection.

Failure to enforce the limitations on disparate impact liability will have implications far beyond the FHA. If a bare statistical showing suffices to show disparate impact, school districts, legislatures considering election regulations, and employers might all have to employ race-based decisionmaking to "correct" racially disparate outcomes that they did not cause. Under the guise of ferreting out racial discrimination, unfettered disparate impact liability promises to increase race consciousness in many areas and thus move the nation even further from the ideal that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

This Court's review is necessary to preserve the vital safeguards discussed in *Inclusive Communities*.

The scope of disparate impact liability is an issue of great national importance and has caused a circuit split on the proper application of the robust causality requirement. *See Inclusive Communities*, 2019 WL 1529692, at *8–10 (describing "Four Views of 'Robust Causation'"). If the safeguards cannot be preserved, then the Court should grant certiorari to overrule *Inclusive Communities* and eliminate disparate impact liability under the FHA.

ARGUMENT

I
INCLUSIVE COMMUNITIES' SAFEGUARDS ARE NECESSARY TO CONTAIN DISPARATE IMPACT LIABILITY

In *Griggs*, this Court held for the first time that an employer may be liable for discrimination under Title VII of the Civil Rights Act of 1964 absent proof of discriminatory intent. 401 U.S. at 432. Since then, often through this Court's decisions, disparate impact has become a fixture in employment, housing, and voting rights law. *See Smith v. City of Jackson*, 544 U.S. 228, 240 (2005) (Age Discrimination in Employment Act); *Inclusive Communities*, 135 S. Ct. at 2525 (Fair Housing Act); *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986) (recognizing amendment to Voting Rights Act "to make clear that a violation could be proved by showing discriminatory effect alone"). The proliferation of disparate impact amplifies the need for a limiting principle to ensure that "'[r]acial imbalance … does not, without more, establish a prima facie case of disparate impact' and thus protect[] defendants from being held liable for racial disparities they did not create." *Inclusive*

Communities, 135 S. Ct. at 2523 (quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653 (1989)).

While it expanded disparate impact liability into the Fair Housing Act, the *Inclusive Communities* Court understood the innate conflict between disparate impact and equal protection. *Id.* "[D]isparate-impact provisions place a racial thumb on the scales, often requiring [decisionmakers] to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes." *Ricci v. DeStefano*, 557 U.S. 557, 594 (2009) (Scalia, J., concurring). A decision made "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group" is discriminatory. *Personnel Adm'r of Mass., Inc. v. Feeney*, 442 U.S. 256, 279 (1979). Without a "robust causality" requirement, the mere existence of disparate impact statutes would encourage race-based decisionmaking, if only to create a racial balance that would not subject covered entities to potential liability.

Unfortunately, as the petition demonstrates, the lower courts are confused about what "robust causality" entails. *See Inclusive Communities*, 2019 WL 1529692, at *8–10. In direct conflict with the decision below, the Ninth Circuit recently reaffirmed its pre-*Inclusive Communities* precedent requiring more than a bare showing of statistical disparity to establish a *prima facie* disparate impact case under the Fair Housing Act. *City of Los Angeles v. Wells Fargo & Co.*, 691 F. App'x 453, 454–55 (9th Cir. 2017). In that case, Los Angeles argued that Wells Fargo's policies of (1) encouraging, through its compensation scheme, loan officers to issue higher amount loans;

and (2) marketing to low-income borrowers, disparately impacted minority borrowers. *Id.* But the panel held that "[t]he City failed to demonstrate how the first two policies were causally connected in a 'robust' way to the racial disparity, as they would affect borrowers equally regardless of race." *Id.* at 455; *see also Oviedo Town Center II, L.L.L.P. v. City of Oviedo*, No. 17-14254, _ F, App'x _, 2018 WL 6822693, at *4 (11th Cir. Dec. 28, 2018) ("If a disparate impact claim could be founded on nothing more than a showing that a policy impacted more members of a protected class than nonmembers of protected classes, disparate-impact liability undeniably would overburden cities and developers.").

This Court's intervention is particularly necessary because the Fourth Circuit's reasoning, if adopted wholesale, threatens to inject race-based decisionmaking into various areas of the law. Should courts continue to permit disparate impact claims to proceed past the *prima facie* stage based on mere racial imbalances, covered entities will have an incentive to avoid these imbalances lest they be saddled with the burden of proving their neutral policies are not discriminatory. In short, proliferation of this analysis promises more consideration of race in every area where disparate impact liability exists. *Amici* here focus on three particular areas with which they have particular experience: education, voting rights, and employment law. The significant dispute about the proper role of race in the decisionmaking of school districts, state legislatures, and employers in these areas shows no signs of abating. If disparate impact liability continues to exist, this Court must intervene to ensure it does not violate individuals' constitutional right to equal protection of the laws.

A. Unconstrained Disparate Impact Encourages Race-Based Decisionmaking in Education

In the wake of this Court's decisions in *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Brown II*, 349 U.S. 294 (1955), the nation's racially segregated school districts were finally ordered to integrate. However, the long process of integration raised as many questions as it answered. For example, the courts struggled with what to do about housing patterns that tended to produce local schools that were *de facto* separate. To what extent could a federal court order busing of children based on race to achieve integration? This proved to be one of the most consequential questions the Court would answer in the 20th century.

In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), the Court affirmed an order that required significant intra-district busing and race-based re-zoning to integrate Charlotte schools. Yet even there, the Court cautioned about going too far, noting that "legislative history of Title IV [of the Civil Rights Act] indicates that Congress was concerned that the Act might be read as creating a right of action under the Fourteenth Amendment in the situation of so-called 'de facto segregation.'" *Id.* at 17. That is, no cause of action exists "where racial imbalance exists in the schools but with no showing that this was brought about by discriminatory action of state authorities." *Id.* at 18. But Charlotte was a *de jure* segregated school district, so the extraordinary race-based remedy the district court ordered to integrate the district was justified. *See Parents*

Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720–21 (2007).

Milliken v. Bradley, 418 U.S. 717 (1974), was categorically different because the lower court ordered a "multidistrict, areawide remedy" even though only one district had actually operated a segregated school system. *Id.* at 721. The Court held such a remedy was inappropriate because the plaintiffs had failed to show that any government actions "have been a substantial cause of interdistrict segregation." *Id.* at 745. It directly follows that school districts may only consider race-based remedies where "the harm . . . is traceable to segregation." *Parents Involved*, 551 U.S. at 721. In short, "the Constitution is not violated by racial imbalance in schools, without more." *Milliken v. Bradley*, 433 U.S. 267, 280 n.14 (1977) (*Milliken II*). The "more" required is a showing akin to the "robust causality" required under *Inclusive Communities*.

Without the causation requirement, school districts would risk violating the Constitution simply by failing to "remedy" a naturally occurring racial imbalance. As this Court has said many times, a racial outcome which is "a product not of state action but of private choices" need not be remedied. *Id.* "Societal discrimination," by definition done by private actors, not the government, "is too amorphous a basis for imposing a racially classified remedy." *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 276 (1986) (plurality opinion). Indeed, requiring school districts to "remedy" racial imbalances they did not cause "would 'effectively assur[e] that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminating entirely from governmental decisionmaking such irrelevant factors as a human

being's race will never be achieved.'" *Parents Involved*, 551 U.S. at 730 (plurality opinion) (citing *Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 495 (1989) (plurality opinion)).

Unfortunately, this distinction is still relevant today. Although the era of school segregation is thankfully over, school districts throughout the country have begun treating *de facto* racial imbalance as if it were *de jure* segregation. *Amicus* PLF represents parents in several active cases challenging these policies under the Equal Protection Clause. *See Christa McAuliffe Intermediate Sch. PTO, Inc. v. de Blasio*, No. 18 CIV. 11657 (ER), 2019 WL 1119871 (S.D.N.Y. Mar. 4, 2019); *Robinson v. Wentzell*, No. 3:18-cv-00274, 2019 WL 1207858 (D. Conn. Mar. 14, 2019); *Connecticut Parents Union v. Wentzell*, No. 3:19-cv-00247 (D. Conn. 2019) (filed Feb. 20, 2019). In Connecticut, Black and Hispanic enrollment at the state's world-class magnet schools is capped at 75%; these schools are often forced to leave seats empty rather than admit eligible students. *See Robinson*, 2019 WL 1207858, at *1. And New York City wants to remedy the "overrepresentation" of Asian-American students at its prestigious specialized high schools in part by attempting to disproportionately exclude them from a program designed to admit low-income students. *Christa McAuliffe*, 2019 WL 1119871, at *6–7. The City has also put forth a plan explicitly designed to make these schools "look" more like New York as a whole.[3]

[3] NYC Dep't of Educ., Specialized High Schools Proposal at 12, https://cdn-blob-prd.azureedge.net/prd-pws/docs/default-source/default-document-library/specialized-high-schools-proposal.

Connecticut and New York are not outliers. In Maryland, a school district in Montgomery County changed its admissions policy to balance the racial profile of its magnet middle schools.[4] Again, the students targeted were Asian-American, deemed "overrepresented" in the magnet school program. The enrollment of Asian-American students in the magnet schools has declined by 20% for two consecutive years. *Id.* (noting that "[t]his is the second year of losses in Asian representation in these two middle-school magnet programs, from 113 children enrolled in 2016 to 70 in 2018"). A similar story is unfolding in Austin, Texas, where a school district changed its admission policy to racially balance a magnet high school, explicitly granting a racial preference for Black and Hispanic students for 20 % of the seats.[5] These are but a few examples that demonstrate an expanding trend.

While these school districts may not have been subject to liability for maintaining their previous policies,[6] the Department of Education Office for Civil

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pdf?(asserting that the demographics of the specialized high schools "will mirror NYC demographics more closely").

[4] *See* Jishnu Das, *Magnets for Discrimination? Affirmative Action in Maryland*, Brookings Institution (Sept. 21, 2018), https://www.brookings.edu/blog/future-development/2018/09/21/magnets-for-discrimination-affirmative-action-in-maryland/.

[5] *See* Liberal Arts & Sciences Academy, LASA Acceptance Procedure, https://www.lasahighschool.org/admissions/lasa-acceptance-procedure.

[6] Several organizations filed a complaint against New York City with the Department of Education Office of Civil Rights, alleging that the test-only method of admissions to the specialized high schools was discriminatory. Although City policymakers agree with the complainants that the racial balance at the schools is problematic, a City-commissioned study validated the

Rights retains the power to inforce disparate impact regulation.[7] *See* 34 C.F.R. § 100.3(b)(2)-(3). Even absent any allegation of intentional discrimination, these districts continue to justify race-conscious decisions as a means to remedy racial imbalance that they did not cause. For example, the City of Hartford is not responsible for the racial makeup of the students who want to attend its magnet schools. Rather, that statistic is a "pre-existing condition[]" that Hartford did not cause. *Inclusive Communities*, 2019 WL 1529692, at *10. Nor are New York, Austin, or Montgomery County responsible for the demographics of students admitted through racially neutral admissions systems.

This sort of "remedying" non-existent discrimination is precisely what will happen in each area subject to disparate impact liability if the robust causality safeguards mandated in *Inclusive*

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admissions exam. *See* Tyler Pager, *SHSAT Predicts Whether Students Will Succeed in School, Study Finds*, N.Y. Times (Aug. 3, 2018), https://www.nytimes.com/2018/08/03/nyregion/admissions-test-shsat-high-school-study.html.

[7] The enforcement of these regulations often varies by administration. For example, President Obama's Department of Education issued a "Dear Colleague" letter addressing disparate impact liability in school discipline. Dep't of Educ., *Dear Colleague Letter: Nondiscriminatory Administration of School Discipline* (Jan. 8, 2014), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf. The letter incorporated the burden-shifting standard whereby a mere statistical disparity in discipline rates would shift the burden to the school to prove a policy's necessity. *Id.* at 13. The Trump administration rescinded that letter on December 21, 2018. Dep't of Educ., *Dear Colleague Letter* (Dec. 21, 2018), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201812.pdf.

Communities are not strictly applied. *Amici* believe the actions of the above school districts are unconstitutional under *Milliken* and its progeny, but failure to enforce the causality requirement in one disparate impact context will only proliferate attempts to alter disparate outcomes caused by "any number of innocent private decisions, including voluntary housing choices." *Parents Involved*, 551 U.S. at 750 (Thomas, J., concurring).

Despite this Court's repeated admonition that "[r]acial balance is not to be achieved for its own sake," *Freeman v. Pitts*, 503 U.S. 467, 494 (1992), we are moving still further away from the ideal of a color-blind Constitution. Allegations that schools are "segregated" in the absence of any state-imposed discrimination set the nation back further by urging race-based "solutions" for every disparate outcome. This Court can help halt this trend by granting the petition here and clarifying that disparate impact defendants are only liable for racial outcomes that they have caused.

B. The Same Circuit Split Exists in Voting Rights Act Cases

Section 2 of the Voting Rights Act prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . imposed or applied . . . in a manner which *results* in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a) (emphasis added). Congress added the "results" language in response to this Court's holding in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), that Section 2 plaintiffs must prove discriminatory intent. *See Gingles*, 478 U.S. at 35. But the amendment

caused confusion over the meaning of the so-called "results test." Over the years, the division of authority has taken the same form as the post-*Inclusive Communities* circuit split. The big question: does a statistical disparity, without more, raise the specter that an election regulation will violate Section 2 even absent discriminatory intent? Put another way: is the Section 2 results test subject to a "robust causality" requirement?

Just as in the FHA context, the Fourth Circuit failed to properly consider causation under the Voting Rights Act. The majority in *League of Women Voters of North Carolina v. North Carolina*, consisting of the same two judges who formed the majority in the case below, held that regulations repealing same-day voting registration and prohibiting the counting of ballots cast in the wrong voting precinct likely violated Section 2. 769 F.3d 224, 247 (4th Cir. 2014). The panel majority found that statistical disparities in the usage of same-day registration and out-of-precinct ballots sufficed to show that violation because the "disproportionate impacts of eliminating same-day registration and out-of-precinct voting are clearly linked to relevant social and historical conditions." *Id.* at 245. But it identified no state policy which *caused* the statistical disparity; the evidence cited instead involved state-sanctioned discrimination decades ago as well as socioeconomic conditions. *Id.* at 245–46. The panel did not attempt to link the socioeconomic conditions of today to any post-Jim Crow state action.

The Sixth Circuit did much the same thing in *Ohio State Conference of NAACP v. Husted*, 768 F.3d 524 (6th Cir. 2014), *vacated as moot by* 2014

WL 10384647 (6th Cir. Oct. 01, 2014).[8] The plaintiffs there challenged the Ohio General Assembly's reduction of the in-person early voting period from 35 to 28 days, eliminating a period of five days where voters could register and vote early on the same day, combined with the Secretary of State's decision to limit certain evening and weekend voting hours. *Id.* at 532. As in *League of Women Voters*, nobody doubted the statistical disparity: black voters in Ohio use early voting (and used the additional week) more than white voters. *Id.* at 551. And like the Fourth Circuit, the Sixth Circuit concluded that the proper question was whether that disparity was "caused by or linked to 'social and historical conditions' that have or currently produce discrimination against members of the protected class." *Id.* at 554. Again, the court failed to identify any state action that would indicate that Ohio had caused the admitted racial disparities in income, health outcomes, and educational attainment. *See id.* at 556–57. Instead, it simply assumed away causation.

These cases demonstrate how a statistical disparity is often all that is necessary to prove a Section 2 results claim. The type of disparate outcomes described by the Fourth and Sixth Circuits unfortunately exist almost everywhere, even though state-sanctioned discrimination is now rare. If those

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[8] The Sixth Circuit vacated its own opinion after this Court stayed the preliminary injunction which had been granted in that case. *Husted v. Ohio State Conf. of NAACP*, 135 S. Ct. 42 (2014) (mem.). The Fourth Circuit decided *League of Women Voters* on the same day that the Sixth Circuit vacated its opinion. And courts have continued to cite the Sixth Circuit's vacated opinion for persuasive value. *See, e.g.*, *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016).

outcomes are enough to establish the requisite causation, then Section 2 plaintiffs need not do much more than trot out basic statistics. And if causation may be established by pointing to state-sanctioned discrimination from several decades ago, then many lower courts are ignoring this Court's admonitions that "history did not end in 1965," *Shelby Cnty. v. Holder*, 570 U.S. 529, 552 (2013), and "past discrimination cannot, in the manner of original sin, condemn governmental action that is not in itself unlawful," *Bolden*, 446 U.S. at 74. A robust causality requirement, on the other hand, would ensure that "a bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the § 2 'results' inquiry." *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997).

Judge Easterbrook explained this well in *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014), a challenge to Wisconsin's requirement that voters show a valid photo ID. The district court had invalidated the voter ID law on much the same grounds used in *League of Women Voters* and *Husted*, finding that "the reason Blacks and Latinos are disproportionately likely to lack an ID is because they are disproportionately likely to live in poverty, which in turn is traceable to the effects of discrimination in areas such as education, employment, and housing." *Frank v. Walker*, 17 F. Supp. 3d 837, 878 (E.D. Wis. 2014). But, unlike the Fourth and Sixth Circuit panels, Judge Easterbrook noted that "[t]he judge did not conclude that the state of Wisconsin has discriminated in any of these respects." *Frank*, 768 F.3d at 753. Without the state's causing those disparities, he found no cause of action because "Section 2(a) forbids discrimination by

'race or color' but does not require states to overcome societal effects of private discrimination that affect the income or wealth of potential voters." *Id.* "Robust causality" requires courts to "distinguish discrimination by the defendants from other persons' discrimination." *Id.* at 755.

This stark circuit split presents much the same issue as the instant petition: should defendants be required to account for circumstances outside their control when crafting race-neutral policies without discriminatory intent? As *League of Women Voters* and *Husted* demonstrate, an affirmative answer to that question requires that the decisionmakers, at the very least, be race conscious in order to avoid potential Section 2 liability. On the other hand, adhering to the "robust causality" requirement allows significant latitude for truly race-blind decisionmaking. Like other civil rights statutes, Section 2 of the Voting Rights Act should be read as "an equal-treatment requirement" rather than an "an equal outcome command." *Id.* at 754. A strong causation requirement is the key to making that possible.

Justice Thomas once remarked that "few devices could be better designed to exacerbate racial tensions than the consciously segregated districting system currently being constructed in the name of the Voting Rights Act." *Holder v. Hall*, 512 U.S. 874, 907 (1994) (Thomas, J., concurring in the judgment). He was particularly referring to the prohibition of so-called "vote-dilution," which, through its *de facto* requirement that racial groups be "assured their 'just,' share of seats in elected bodies throughout the Nation," forces the states, "in an attempt to avoid costly and disruptive Voting Rights Act litigation, . . .

to gerrymander electoral districts according to race." *Id.* at 905. A similar thing is happening in other areas, as unrestrained disparate impact liability proliferates among the circuits. Only robust causality can limit the concept of disparate impact before it requires everyone subject to it to make decisions based on race.

C. Threat of Disparate Impact Liability Encourages Race-Based Employment Decisions

It wasn't until 2009 when the inevitable conflict between Title VII's disparate treatment and disparate impact provisions finally bubbled up. The disparate treatment provision, of course, says employers may not "fail or refuse to hire or . . . discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race . . . ." 42 U.S.C. § 2000e-2(a)(1). But what happens when an employer uses a validated test to make promotion decisions but then discovers that the test results were not racially balanced? May the employer scrap the test? May employees bring a disparate impact claim if the employer stands by the results?

Ricci involved just such a scenario. The New Haven, Connecticut, fire department administered an exam to 118 candidates for promotion to the ranks of lieutenant or captain. 557 U.S. at 562. The results showed white candidates outperforming those of other races. *Id.* Public protests ensued. Minority firefighters who scored below the cutoff threatened a disparate impact lawsuit if the fire department used the test results, while others (both white and Hispanic) who had made the cut threatened a disparate treatment lawsuit if the results were thrown out. *Id.* New Haven sided with the former

group and threw out the results. The latter group followed through with their threat and sued the City under a disparate treatment theory. *Id.* at 562–63. In response, the City said it feared disparate impact liability had it certified the test results. *Id.* at 563.

In the absence of any causation requirement, the City's fears would be rational. The firefighters could surely plead *prima facie* disparate impact: they could show that a device employed by the City (the promotion exam) produced statistically disparate results among individuals of different races. *See Reyes*, 903 F.3d at 428–29. Likewise, by linking the test results to socioeconomic disparities, the disparate impact claim could potentially succeed without demonstrating any causality. *See League of Women Voters*, 769 F.3d at 245–46; *Husted*, 768 F.3d at 554, 556–57. Given the split of authority on causation that persists to this day, New Haven had every reason to be worried about a disparate impact lawsuit.

Yet this Court held that the City's fear was not appropriate, because it "lacked a strong basis in evidence to believe it would face disparate-impact liability if it certified the examination results." *Ricci*, 557 U.S. at 592. Although the potential disparate impact plaintiffs could have established a *prima facie* case through "a threshold showing of a significant statistical disparity and nothing more," *id.* at 587, the Court held that no liability could have attached because the test had a business necessity and there was no "equally valid, less-discriminatory testing alternative" that the City "would necessarily have refused to adopt" if it certified the results, *id.* at 588–89. Thus, the *Ricci* Court sided with the firefighters without reaching the causation issue.

Inclusive Communities abrogated *Ricci*'s *prima facie* disparate impact analysis. While the *Ricci* Court assumed that a statistical disparity was sufficient, the *Inclusive Communities* majority emphasized the importance of the "robust causality" safeguard even at the *prima facie* stage. *Inclusive Communities*, 135 S. Ct. at 2523. The Court recognized that the ability to show a mere statistical disparity "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.* That is especially true because proof of a *prima facie* case of disparate impact under Title VII shifts the burden to the *employer* to prove business necessity. *Ricci*, 557 U.S. at 578. That burden-shifting imposes real costs and encourages the use of race in employment decisions to avoid a "suspect" statistical disparity.

If lower courts continue to permit plaintiffs to establish a *prima facie* case of disparate impact without a showing of robust causality, it is inevitable that employers will continue to use race in the same manner as the New Haven fire department. That will hasten the day where the Court will have to tackle the thorny question of "[w]hether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?" *Ricci*, 557 U.S. at 594 (Scalia, J., concurring). After all, a federal law that requires employers to "place a racial thumb on the scales . . . evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes" raises significant constitutional concerns. *Id.* This Court's intervention in this case could serve to deescalate those tensions.

II
IF THE CAUSATION SAFEGUARDS CANNOT BE ENFORCED, THE COURT SHOULD GRANT CERTIORARI TO OVERRULE *INCLUSIVE COMMUNITIES*

There is another option: if the robust causality requirement proves impossible to maintain, the Court should consider overruling *Inclusive Communities*. Whether the FHA encompasses disparate impact liability was a hotly debated issue before *Inclusive Communities*, as the Court granted certiorari twice only to have the parties settle before the case could be decided. *Magner v. Gallagher*, 619 F.3d 823 (8th Cir. 2010), *cert. granted*, 565 U.S. 1013 (2011), *dismissed*, 565 U.S. 1187 (2012); *Township of Mt. Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, 658 F.3d 375 (3d Cir. 2011), *cert. granted*, 570 U.S. 904 (2013), *dismissed,* 570 U.S. 1020 (2013). When the Court finally held that the FHA permitted disparate impact liability, four justices dissented. *Inclusive Communities*, 135 S. Ct. at 2526-32 (Thomas, J., dissenting); *id.* at 2532–51 (Alito, J., dissenting). Now, the Court's decision is causing problems in the lower courts. If the dissenters were correct *and* the opinion is too difficult to implement, overruling the decision is warranted. *See Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992) (considering "whether the rule has proven to be intolerable simply in defying practical workability").

As the dissenters (and *amici*) noted at the time, the decision in *Inclusive Communities* was "inconsistent with what the FHA says" and would have "unfortunate consequences." *Inclusive Communities*, 135 S. Ct. at 2548 (Alito, J., dissenting);

see also Brief for Pacific Legal Foundation, et al., as *Amici Curiae* in *Inclusive Communities* at 13. As Justice Thomas warned in his dissent, the further proliferation of disparate impact liability reflects "the unstated—and unsubstantiated—assumption that, in the absence of discrimination, an institution's racial makeup would mirror that of society." *Inclusive Communities*, 135 S. Ct. at 2530 (Thomas, J., dissenting). Lower courts' failure to adhere to the robust causality safeguard only makes these consequences worse. The *Inclusive Communities* decision without the safeguard creates a presumption that "any institution with a neutral practice that happens to produce a racial disparity is guilty of discrimination until proved innocent." *Id.* As *amici* argue here, such a presumption is likely to lead to more race-based decisionmaking.

Just four years of experience under the *Inclusive Communities* rule have demonstrated that it is unworkable. Right now, no one—including courts, "local governments, private enterprise, and those living in poverty"—knows whether a policy, as benign as one adopted to combat rodent infestation, might shift the burden of proof onto a landlord. *Id.* at 2532 (Alito, J., dissenting) (referencing *Manger*, 619 F.3d at 837–38, which reversed a grant of summary judgment to a landlord in such a situation). The clear circuit split over the strength of the causality requirement in Voting Rights Act cases suggests that this problem is probably not going away.

This Court should intervene either to clarify the strength of the "robust causality" requirement in FHA cases *or* to simply overrule *Inclusive Communities*.

CONCLUSION

The Court should grant the petition for certiorari.

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