No. 18-1217

IN THE
Supreme Court of the United States

WAPLES MOBILE HOME PARK LIMITED PARTNERSHIP; WAPLES PROJECT LIMITED PARTNERSHIP; AND A.J. DWOSKIN & ASSOCIATES, INC.,
Petitioners,

v.

ROSY GIRON DE REYES; JOSE DAGOBERTO REYES; FELIX ALEXIS BOLAÑOS; RUTH RIVAS; YOVANA JALDIN SOLIS; ESTEBAN RUBEN MOYA YRAPURA; ROSA ELENA AMAYA; AND HERBERT DAVID SARAVIA CRUZ,
Respondents.

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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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May 6, 2019

RULE 29.6 STATEMENTS

Pursuant to this Court's Rule 29.6, petitioners Waples Mobile Home Park Limited Partnership, Waples Project Limited Partnership, and A.J. Dwoskin & Associates, Inc. state the following:

Waples Mobile Home Park Limited Partnership is not a publicly held corporation and has no parent company. No publicly held corporation owns 10% or more of Waples Mobile Home Park Limited Partnership.

Waples Project Limited Partnership is not a publicly held corporation and has no parent company. No publicly held corporation owns 10% or more of Waples Project Limited Partnership.

A.J. Dwoskin & Associates, Inc. is not a publicly held corporation and has no parent company. No publicly held corporation owns 10% or more of A.J. Dwoskin & Associates, Inc.

TABLE OF AUTHORITIES

Petitioners respectfully submit this supplemental brief pursuant to Supreme Court Rule 15.8 to call attention to a new case that was not available when the petition for a writ of certiorari was filed.

1. On April 9, 2019, the Fifth Circuit decided *Inclusive Communities Project, Inc. v. Lincoln Property Co.*, 920 F.3d 890 (5th Cir. 2019). That case confirms that the federal circuits are divided over how disparate-impact claims can be pursued under the Fair Housing Act ("FHA").

Like petitioners' case, *Lincoln Property* involved a disparate-impact claim under the FHA. *See id.* at 895. The plaintiff alleged that a group of apartment complexes in the greater Dallas, Texas area have a policy of refusing to accept public-housing vouchers, and the plaintiff challenged that policy on the ground that it disparately impacts black households. *See id.* at 895-97. Much like respondents in the instant case, the plaintiff in *Lincoln Property* supported its disparate-impact challenge only by alleging that the population affected by the "no vouchers" policy – housing-voucher recipients in the Dallas area – is disproportionately black. *See id.* at 897 (81% of voucher households in Dallas metro area and 87% of voucher households in City of Dallas are black).

The district court dismissed the plaintiff's disparate-impact claim on a motion to dismiss for failure to state a claim, holding that the plaintiff "had not adequately alleged facts demonstrating the necessary causation" under this Court's decision in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015). *Lincoln Property*, 920 F.3d at 906. The Fifth Circuit affirmed that dismissal on the same rationale as the district court: that the plaintiff's "complaint regarding [the] 'no

vouchers' policies fail[s] to allege facts sufficient to provide the robust causation necessary for an actionable disparate impact claim." *Id.* Specifically, the Fifth Circuit held that the demographic statistics alleged by the plaintiff did not "support[] an inference that the implementation of [the] blanket 'no vouchers' policy, or any change therein, caused black persons to be the dominant group of voucher holders in the Dallas metro area." *Id.* at 907. It similarly observed that the plaintiff "pleads no facts showing Dallas's racial composition before the Defendants-Appellees implemented their 'no vouchers' policy or how that composition has changed, if at all, since the policy was implemented." *Id.* Thus, the Fifth Circuit held, the plaintiff had alleged "no facts supporting a reasonable inference that Defendants-Appellees bear any responsibility for the geographic distribution of minorities throughout the Dallas area prior to the implementation of the 'no vouchers' policy." *Id.*

Absent some factual allegation linking the challenged policy to a "*diminish*[*ment*]" in "the amount of rental opportunities for African American or Black prospective tenants previously available," the Fifth Circuit held that "it is entirely speculative whether the 'no vouchers' policy, as opposed to some other factor, *not* attributable to Defendants-Appellees, caused there to be less minority habitation in individual census tracts after the policy was implemented." *Id.* The court observed that such a link is required by this Court's decision in *Inclusive Communities* because, otherwise, "any landlord who did not accept vouchers would be vulnerable to a disparate impact challenge any time a less than statistically proportionate minority population lived in that landlord's census tract," which "cannot be the correct result." *Id.*

In arriving at its disparate-impact holding, the Fifth Circuit summarized this Court's decision in *Inclusive Communities* and the "varying views" among the courts of appeals about what allegations are required to satisfy the requirement of "robust causality." *See id*. at 901-05. Two of those "varying views" came from the majority and dissenting opinions in the present case. *See id*. at 904-05. The other two views came from the Eighth Circuit's decision in *Ellis v. City of Minneapolis*, 860 F.3d 1106 (8th Cir. 2017), and the Eleventh Circuit's unpublished decision in *Oviedo Town Center II, L.L.L.P. v. City of Oviedo*, 759 F. App'x 828 (11th Cir. 2018) (per curiam).

The Fifth Circuit stated that its disparate-impact holding was "warranted under any of the analyses of robust causation," including both the majority and dissenting opinions in the present case. *Lincoln Prop.*, 920 F.3d at 906. In reconciling its holding with those opinions, the Fifth Circuit gave a "narrower construction" to the Fourth Circuit majority opinion, concluding that opinion should not be read "to support a finding of robust causation any time that a defendant's policy impacts a protected class more than others." *Id*. To avoid that reading, the Fifth Circuit found "it significant that the disproportionate impact upon Latinos that the *Reyes* majority held satisfied robust causation was the consequence of a *change* in the defendant's enforcement of its policy that increased the number of Latinos facing eviction from the park than before." *Id*.

A separate opinion by Judge Davis criticized the *Lincoln Property* majority's attempt to square its holding with the Fourth Circuit's judgment. He stated that "the majority does not explain why enforcement of a previously unenforced policy is different from enforcement of a new policy" and contended that "the

Reyes decision supports ICP's traditional disparate-impact claim here." *Id.* at 921 & n.6 (Davis, J., concurring in part and dissenting in part). In particular, Judge Davis pointed out that the Fourth Circuit majority had found the "robust causation" requirement to be satisfied merely because "the challenged policy 'was likely to cause Latino tenants at [defendant's property] to be disproportionately subject to eviction compared to non-Latinos at [defendant's property].'" *Id.* at 921-22 (quoting App. 22a) (alterations in original).

2. The Fifth Circuit's judgment in *Lincoln Property* confirms the error by the Fourth Circuit in the present case. The Fifth Circuit concluded correctly that the happenstance of a non-protected group's demographic makeup is insufficient, by itself, to raise the inference that a policy targeting the non-protected group has caused a disproportionate diminishment of housing opportunities. Just as petitioner Waples did not cause undocumented aliens in Fairfax County to be disproportionately Latino, the defendants in *Lincoln Property* did not "cause[] black persons to be the dominant group of voucher holders in the Dallas metro area." 920 F.3d at 906-07.

Dismissing disparate-impact claims based only on demographic correlation is the correct result, as the Fifth Circuit concluded, because "robust causation" requires a plaintiff to plead facts showing that the challenged policy has disproportionately *reduced* housing opportunities for a protected group. *Id.* at 906. Absent some relative diminishment in housing opportunities for a protected class that is caused by the challenged policy, a plaintiff cannot satisfy the requirement of robust causation. Thus, as the Fifth Circuit explained, when the protected characteristic is race, a plaintiff must allege facts showing the

impacted area's "racial composition before" the policy was implemented and "how that composition has changed, if at all, since the policy was implemented." *Id.* at 907. In the present case, that causation principle required respondents to allege, at a minimum, how the racial composition of the Park changed following implementation of the Policy, but they failed to do so. Without such before-and-after facts, "it is entirely speculative" whether the challenged policy "as opposed to some other factor . . . caused there to be less minority habitation . . . after the policy was implemented." *Id.*

3. The Fifth Circuit's decision further confirms that the courts of appeals are in conflict about this Court's "robust causation" standard and how that requirement must be applied to test the sufficiency of an FHA disparate-impact claim. *See* Pet. 23-28. *Lincoln Property* and the present case are the same in all relevant respects: in both cases, the plaintiffs alleged that a housing policy targeted at a non-protected group (undocumented aliens in the present case and voucher holders in *Lincoln Property*) had an unlawful disparate impact based only on the allegation that the non-protected group is composed disproportionately of a protected group. Yet the two cases came out differently. The Fourth and Fifth Circuits apply different standards for "robust causation," and the present case would have been decided differently if it had been litigated in the Fifth Circuit rather than the Fourth Circuit.

The Fifth Circuit's attempt to reconcile its approach with that of the Fourth Circuit is laudable but ultimately unpersuasive. The Fifth Circuit claims its decision aligns with a "narrower construction" of the Fourth Circuit's opinion, but that construction

effectively re-writes the Fourth Circuit's reasoning. The Fifth Circuit concluded that one could not read the Fourth Circuit's decision "to support a finding of robust causation any time that a defendant's policy impacts a protected class more than others," *Lincoln Prop.*, 920 F.3d at 906, but it overlooked that the Fourth Circuit applied that very rule to reach the result in this case. The Fourth Circuit held that respondents here "satisfied the robust causality requirement by asserting that the specific Policy . . . was likely to cause Latino tenants at the Park to be disproportionately subject to eviction compared to non-Latino tenants at the Park." App. 22a; *see also* App. 22a n.8 (finding robust causation due to comparison of impact on "Latinos that are subject to the Policy" and "non-Latinos that are subject to the Policy").

Nor is the Fifth Circuit's focus on the "*change* in [Waple's] enforcement of its policy," *Lincoln Prop.*, 920 F.3d at 906, a way to avoid the reality of a circuit split. As Judge Davis pointed out in his partial dissent, "enforcement of a previously unenforced policy" is no different than "enforcement of a new policy." *Id.* at 921 n.6 (Davis, J., concurring in part and dissenting in part). The effect of *broadening* a prohibition on undocumented aliens residing at the Park is indistinguishable from the effect of *implementing* a policy in the first instance that prohibits voucher holders from renting at the apartment complexes in *Lincoln Property*.

The need to resolve the conflict between the approaches of the Fourth and Fifth Circuits is a further reason to grant the petition in this case.

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The petition for a writ of certiorari should be granted.

Respectfully submitted,

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