No. _____

In The
Supreme Court of the United States

THE INCLUSIVE COMMUNITIES PROJECT, INCORPORATED,

Petitioner,

v.

LINCOLN PROPERTY COMPANY; LEGACY MULTIFAMILY NORTH III, L.L.C.; CPF PC RIVERWALK, L.L.C.; HLI WHITE ROCK, L.L.C.; BRICK ROW APARTMENTS, L.L.C.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case concerns the requirements for pleading a prima facie disparate impact claim under the Fair Housing Act (FHA). The plaintiff is required to first identify the policy being challenged and next prove through statistical evidence that the application of the policy causes a disproportionate adverse effect on a racial group. The FHA disparate impact claim will not be shown unless the plaintiff points to a specific policy and shows that the policy is causing the statistical disparity. This Court referred to this as the "robust causality requirement." *Texas Dept. of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, ___ U.S. ____, 135 S. Ct. 2507, 2523 (2015) (*Texas v. ICP*).

The Inclusive Communities Project's (ICP) complaint showed the policy, the disparate impact statistics, and causation. App. 162a, 169a-171a, 187a, 191a-192a. The Fifth Circuit held robust causation required ICP to additionally show that Defendants' "no voucher" policy caused Blacks to be the "dominant group of voucher holders in the Dallas metro area." App. 29a-30a. One judge dissented from the majority opinion. App. 43a. Seven judges joined in the opinion dissenting from the denial of the petition for rehearing en banc. App. 145a.

The questions presented are:

1. Whether the pleading of an FHA prima facie disparate impact claim must show the identified policy not only has caused the adverse effects on the racial

QUESTIONS PRESENTED – Continued

group identified but also has caused that group to be predominantly Black?

2. Whether the pleading of an FHA prima facie segregative-effect claim version of a disparate impact claim must show the identified policy not only perpetuated racial segregation but also began the existing racial segregation in the community?

3. Whether the pleading of an FHA prima facie disparate impact claim must satisfy a new pleading requirement to show that the impacts are caused by enforcing a previously unenforced policy?

PARTIES TO THE PROCEEDING

Petitioner in this Court is The Inclusive Communities Project, Inc. The respondents are Lincoln Property Company; Legacy Multifamily North III, L.L.C.; CPF PC Riverwalk, L.L.C.; HLI White Rock, L.L.C.; Brick Row Apartments, L.L.C.

CORPORATE DISCLOSURE STATEMENT

There is no parent or publicly held company owning 10% or more of The Inclusive Communities Project, Inc.'s corporation's stock.

RELATED CASES

- *The Inclusive Communities Project, Inc. v. Lincoln Property Company; Legacy Multifamily North III, L.L.C.; CPF PC Riverwalk, L.L.C.; HLI White Rock, L.L.C.; Brick Row Apartments, L.L.C.*, No. 3:17-cv-206-K, U.S. District Court for the Northern District of Texas. Judgment entered August 16, 2017.
- *The Inclusive Communities Project, Inc. v. Lincoln Property Company; Legacy Multifamily North III, L.L.C.; CPF PC Riverwalk, L.L.C.; HLI White Rock, L.L.C.; Brick Row Apartments, L.L.C.*, No. 17-10943, in the United States Court of Appeals for the Fifth Circuit. Judgment entered April 9, 2019.

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PETITION FOR WRIT OF CERTIORARI

Petitioner The Inclusive Communities Project, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the Fifth Circuit is reported at *Inclusive Communities Project, Inc. v. Lincoln Prop. Co.*, 920 F.3d 890 (5th Cir. 2019). App. 1a. The opinion dissenting from the majority opinion is reported. *Id*. at 912. App. 43a. The petition for panel rehearing and for rehearing en banc was denied by a 9 to 7 vote and is reported at 930 F.3d 660 (5th Cir. 2019). App. 144a. The opinion dissenting from the denial of rehearing en banc is reported. *Id*. at 661. App. 145a.

The opinions of the District Court are reported at *Inclusive Communities Project, Inc. v. Lincoln Prop. Co.*, 2017 WL 2984048 (N.D. Tex. 2017), App. 75a, and at *Inclusive Communities Project, Inc. v. Lincoln Prop. Co.*, 2017 WL 3498335 (N.D. Tex. 2017). App. 108a.

JURISDICTION

The judgment of the Court of Appeals was entered on April 9, 2019. App. 73a. The petition for rehearing en banc was treated as a petition for panel rehearing and the petition for panel rehearing was denied on July 16,

2019. App. 144a-145a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1254(1) provides:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. § 1331 provides:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

42 U.S.C. § 3604(a) provides:

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful –

(a) To refuse to sell or rent after the making of a bona fide 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.

42 U.S.C. § 3613(a)(1)(A) provides:

(a) Civil action

> (1)(A) An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement entered into under this subchapter, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

INTRODUCTION

A. The Fifth Circuit added a new requirement to the FHA prima facie disparate impact case that ICP must plead and prove the landlords' "no voucher" policy also caused Black persons to be the dominant group of voucher holders in the Dallas area.

A plaintiff bringing a Fair Housing Act disparate impact claim must challenge policies that have a "disproportionately adverse effect on minorities" and are otherwise unjustified by a legitimate rationale. *Texas v. ICP*, 135 S. Ct. at 2513. Disparate impact liability has always been properly limited in key respects to prevent FHA liability from being imposed based solely on a showing of a statistical disparity. A disparate impact claim relying on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. *Id*. at 2512. This robust causality requirement requires facts at the pleading stage or the production of statistical evidence demonstrating the causal connection between the policy and

the disparate impact. *Id*. at 2523 *citing Wards Cove v. Atonio*, 490 U.S. 642, 653 (1989).

The Fifth Circuit and both dissenting opinions agree that the Fifth Circuit has added a new element to robust causation in addition to the elements specifically set out in *Texas v. ICP*. The *Texas v. ICP* elements of a prima facie case include: a policy, disparate impacts, and causal connection between the policy and the disparate impacts. *Texas v. ICP*, 135 S. Ct. at 2523. The Fifth Circuit added a new requirement that plaintiff must also prove that Lincoln Property's "no voucher" policy caused Black persons to be the dominant group of voucher holders in the Dallas metro area and caused the geographic distribution of all minorities throughout the Dallas area. App. 29a-30a.

This case was dismissed on Fed. R. Civ. P. Rule 12(b)(6) motions to dismiss. App. 109a-110a. The Complaint that was the subject of the motions is in the appendix. App. 161a-247a. The complaint sets forth the following facts. App. 161a-247a.

B. ICP helps voucher families obtain desegregated housing. ICP's assistance to voucher families is part of the Fifth Circuit's recommended remedy for intentional segregation of public housing.

ICP is a fair housing focused nonprofit organization working with households seeking access to housing in predominantly non-minority locations in the Dallas area. ICP's mission includes "counseling,

financial assistance, and other services to Black or African-American households participating in the Section 8 Housing Choice Voucher Program administered by the Dallas Housing Authority (DHA)."

The federal Housing Choice Voucher program provides a subsidy for part of the rent to private landlords who lease to low-income voucher families. Local public housing agencies operate the program under statutes and HUD regulations. App. 161a. Voucher families are responsible for finding a willing landlord. App. 171a. The voucher is the document issued by the agency to show that the family is eligible for the subsidy. *Open Communities All. v. Carson*, 286 F. Supp. 3d 148, 152 (D.D.C. 2017).

ICP's housing mobility assistance to its DHA voucher clients is part of the relief recommended by the Fifth Circuit to remedy the intentional segregation of public housing by the federal government, the City of Dallas, and DHA, as described in *Walker v. City of Mesquite*, 169 F.3d 973, 984-88 (5th Cir. 1999). The Fifth Circuit stated that the use of vouchers as a remedy for racial segregation "demands that the public agencies implement a vigorous mobility plan that serves the relocation needs and concerns of black families, reaches out to white landlords, affords adequate fair market rent exceptions, and combats illegal private discrimination." *Walker*, 169 F.3d at 988. As part of this remedy, ICP has been "providing housing mobility services to its DHA voucher clients since 2005." App. 147a-148a, 163a-165a.

C. There is a widespread refusal to rent units in high opportunity areas to voucher families even though the units are available at voucher program rents.

There is a widespread refusal to rent units in high opportunity areas to voucher households by Lincoln Property and other multifamily landlords. App. 161a-162a, 167a. These high opportunity areas are disproportionately located in majority White areas. App. 172a. The rents that can be paid under the voucher program are high enough to afford the rents charged for thousands of units in these areas. App. 172a-173a.

D. Even though ICP negotiated alternatives to the "no voucher" policy with the local apartment association, Lincoln Property continued the "no voucher" policy.

In order to increase the housing available for voucher families, ICP negotiated with the local apartment landlord association for alternatives to the policy. The resulting ICP sublease/guarantor proposal includes both financial incentives and favorable lease concessions for the landlord association members willing to lease units at market rents that ICP would then sublease to voucher families. App. 175a, 178a-179a. ICP also offered to use the alternative of standing as a guarantor for the voucher family or paying a higher security deposit, both of which are terms that the landlords already offered to the landlords' higher risk, non-voucher tenants. App. 179a-180a.

The local apartment landlord association stated that it had worked with ICP to identify roadblocks to landlord participation in the voucher program and that ICP had done a good job addressing those roadblocks. The association encouraged its members to consider the ICP sublease/guarantor proposal. App. 175a. Despite this recommendation, Lincoln Property continued its "no voucher" policy refusing to rent to voucher tenants in higher opportunity, predominantly White neighborhoods. App. 176a.

E. The complaint pleaded specific facts showing the "no voucher" policy was arbitrary, artificial, and unnecessary.

The complaint set out the facts showing that the "no voucher" policy is arbitrary, artificial, and unnecessary. Lincoln Property's "no voucher" policy is arbitrary because Lincoln Property only applies the "no voucher" policy in White areas and not in Black areas. App. 182a. It is also arbitrary because Lincoln Property applies the "no voucher" policy even at complexes that have units available at voucher rents. The complaint specifically set out Lincoln Property's apartment complexes in White areas with units available at the voucher rents where Lincoln Property enforced its "no voucher" policy. App. 183a-186a. Both ICP and the Dallas Housing Authority have longstanding programs to provide landlord financial incentives for landlords to rent to voucher families. App. 193a, 195a-198a. It is arbitrary to refuse financial incentives and keep the "no voucher" policy in place.

The facts in the complaint show that the "no voucher" policy is artificial. A landlord's decision not to allow voucher households to rent through the use of programs such as third party guarantors or sublease arrangements that are used for higher risk non-voucher households is both arbitrary and an artificial distinction between tenants who are otherwise equally eligible and can pay the rent. App. 197a-198a.

The complaint sets forth the facts that the "no voucher" policy is unnecessary. The policy is unnecessary when the available alternative contractual and financial arrangements eliminate the stated business reasons for the policy. App. 175a-180a, 183a-186a, 193a, 195a-198a. In addition, the fact that Lincoln successfully manages apartment complexes located in minority areas without using the "no voucher" policy supports the showing that the policy was arbitrary, artificial, and unnecessary. App. 198a.

F. ICP pleaded the policy, the disparate impact, and the clear causal connection between the policy and the disparate impact.

ICP pleaded that the undisputed "no voucher" policy caused a disparate impact on a predominantly Black group based on the clear causal connection between the policy and the disparate impact. The policy was an unequivocal refusal to negotiate with or rent units to voucher families. App. 182a-186a. The policy was advertised. App. 200a-204a. Over 80% of the voucher households in the Dallas Metropolitan area are Black.

App. 170a, 190a. The "no voucher" policy caused an adverse discriminatory impact by refusing to rent available units to a predominantly Black group, voucher holders, even though the requested rents could be paid. App. 190a-192a. The non-voucher population that is not excluded by the policy is 19% Black and 53% White. App. 192a. The "no voucher" policy excludes a disproportionately Black group and selects a disproportionately White group.

The "no voucher" policy also caused a distinct form of discriminatory impact, perpetuating racial segregation, by excluding a predominantly Black group, voucher holders, from predominantly White areas. App. 182a-189a. The causal connection between the policy of refusing to negotiate with or rent to voucher families who are predominantly Black and the exclusion of voucher families from Lincoln Property's units in White areas was indisputable. The policy said Lincoln Property would not negotiate with or rent to vouchers. Lincoln Property did not negotiate with or rent to voucher tenants in White areas. The "no voucher" policy caused the complete exclusion of vouchers from Lincoln Property's complexes in White areas. App. 183a-186a, 187a-189a. There are vouchers in the Lincoln Property complexes in minority areas. Lincoln Property does not apply the "no voucher" policy in minority areas. App. 198a.

G. The requirement that ICP must also show that Lincoln Property's "no voucher" policy caused the Dallas area voucher population to be predominantly Black imposes an insurmountable obstacle to showing disparate impact.

The requirement that ICP must also show that Lincoln's "no voucher" policy caused the Dallas area voucher population to be predominantly Black imposes an insurmountable obstacle to showing a disparate impact prima facie case. The predominantly Black voucher group is not a disparity that ICP alleged the "no voucher" policy caused. App. 155a. ICP alleged the "no voucher" policy had a disparate and adverse effect on a Black group of renters compared to effects on White renters. App. 190a-192a. ICP also alleged that the "no voucher" policy kept a predominantly Black group out of Lincoln Property's complexes in White areas. App. 188a-190a. It would be impossible to show that the "no voucher" policy caused the voucher population to be predominantly Black. Lincoln Property does not have any connection with the voucher program except where it rents to voucher families in the affordable rental housing or other complexes it manages in minority areas. The "no voucher" policy is not used to set guidelines for or determine eligibility for the voucher program, to place persons on the voucher waiting list, or to issue vouchers to specific persons. These are functions of the local housing authority, not Lincoln Property. 24 C.F.R. § 982.51; 24 C.F.R. Part 982. The existence of robust causality between the "no

voucher" policy and the housing authority's determination of which persons are on the voucher program which causes the overall racial composition of that group cannot be plausibly pleaded or proven. The requirement to show the existence of robust causality between the private defendants' "no voucher" policy and the underlying reasons for the racial composition of persons on the voucher program is not supported by any precedent of this Court. App. 46a, 63a. The three cases this Court found to be at the "heartland of disparate-impact liability" did not require showing that the defendants caused the low income population using affordable housing to be predominantly Black. *Texas v. ICP*, 135 S. Ct. at 2522. The new requirement will render disparate impact liability under the FHA "a dead letter." App. 71a.

The Fifth Circuit's additional prima facie case elements conflict with the robust causation standard set out in *Texas v. ICP*, 135 S. Ct. at 2513.

STATEMENT OF THE CASE

1. The robust causality requirement for FHA disparate impact claims set out in *Texas v. ICP* requires a policy, a significant disparate impact, and a causal connection between the policy and the disparate impact.

In *Texas v. ICP*, this Court relied on its prior precedents of *Griggs v. Duke Power Co.* and *Wards Cove v. Atonio* to set the pleading and proof requirements for

the disparate impact claim held to be cognizable under the Fair Housing Act. *Texas v. ICP* states the robust causality requirement in the context of the requirement for the identification of a policy and showing that the policy caused the disparate impact. App. 62a-63a.

> In a similar vein, 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" and thus protects defendants from being held liable for racial disparities they did not create. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653, 109 S. Ct. 2115, 104 L.Ed.2d 733 (1989).

Texas v. ICP, 135 S. Ct. at 2523.

In holding FHA disparate impact claims cognizable, this Court began its discussion of the precedent for disparate impact liability with *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). *Texas v. ICP*, 135 S. Ct. at 2516-20. The *Griggs* plaintiffs asserted claims of racial discrimination in employment under Title VII of the Civil Rights Act of 1964 (Title VII). Duke Power Co. had adopted a policy requiring a high school education or the passing of a standardized general intelligence test as a condition of employment in the company. 401 U.S. at 426-28. The evidence showed that White people "register[ed] far better on [these] requirements than" Black people. *Id*. at 430. In discussing the reasons why Whites fared better, this Court noted: "In North Carolina, 1960 census statistics show[ed] that, while 34% of

[W]hite males had completed high school, only 12% of [Black] males had done so." *Id*. at 430 n.6. Moreover, with respect to the standardized tests required by the defendant-employer, the Court noted evidence that "58% of [W]hites pass[ed] the tests, as compared with only 6% of [B]lacks." *Id*. This Court held in *Griggs* that because the two requirements operated to render ineligible a markedly disproportionate number of Blacks, they were unlawful under Title VII unless shown to be job related. *Id*. at 431. Emphasizing that Title VII condemned discriminatory preference for any group, whether minority or majority, the Court stated: "What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Id*. In addition, "[i]f an employment practice which operates to exclude [Black people] cannot be shown to be related to job performance, the practice is prohibited." *Id*. Because the defendant-employer was unable to show that its requirements of a high school education and the passing of standardized intelligence tests were related to job performance, this Court held that the requirements were unlawful under Title VII. *Id*. at 433-35. There was no mention of any requirement to show that the challenged employment policies caused the Black persons to have disparate high school graduation rates.

After discussing *Griggs*, the *Texas v. ICP* decision cited language from the disparate impact employment case, *Wards Cove v. Atonio*, 490 U.S. 642 (1989). *Texas*

v. ICP, 135 S. Ct. at 2523. The *Wards Cove* plaintiffs sued their employer under Title VII based on statistics showing higher paid, skilled positions were filled by predominantly White employees while lower paid unskilled positions were filled by predominantly minority employees. While the Ninth Circuit determined that this racial imbalance within the employer's own workforce was enough to make out a prima facie case, this Court reversed, holding that this racial imbalance in the employer's workforce was not enough to state a prima facie case without more. *Wards Cove*, 490 U.S. at 652.

The prima facie disparate impact claim elements stated in the *Wards Cove* opinion started with the requirement that the plaintiff must "identify[ ] the specific employment practice that is challenged." *Wards Cove*, 490 U.S. at 656 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988)). Next, the plaintiff had to "demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack." *Wards Cove*, 490 U.S. at 657. In proving such causation, "the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Watson*, 487 U.S. at 994. The "statistical disparities must be sufficiently substantial that they raise such an inference of causation." *Id*. at 995. In *Texas v. ICP*, this Court held the same elements of a prima facie

case constituted robust causation. *Texas v. ICP*, 135 U.S. at 2523.

This Court relied on the *Griggs* and *Wards Cove* precedents in its *Texas v. ICP* holding that the FHA encompasses disparate impact claims and setting the standards that apply to such claims. *Texas v. ICP*, 135 S. Ct. at 2518-24. Nowhere does this Court hold there is a requirement that a defendant's policy be the cause of the racial characteristics of the area's pool of qualified applicants.

Neither *Griggs* nor *Wards Cove* required pleading and proof that the challenged policy had caused the racial composition of the protected group. Imposing the burden on ICP to make such a showing was "akin to requiring the plaintiffs in *Griggs* to show that their employer's policy caused Black persons not to have a high school education." App. 65a. (Judge Davis' dissent).

The U.S. Department of Justice agrees that robust causation under *Texas v. ICP* is not based on determining whether the challenged policy also caused the underlying racial characteristics of the relevant demographic group. In 2017, the Department analyzed the effect of the robust causation requirement for disparate impact liability under the FHA. The Department of Justice emphasized the importance of "a robust causality requirement" in ensuring entities are not "held liable for racial disparities they did not create" citing *Texas v. ICP*, 135 S. Ct. at 2523 (citing *Wards Cove*, 490 U.S. at 653). The Justice Department made it clear that the causation issue does not involve a

determination that the challenged policy also causes the relevant minority group excluded by the policy to be predominantly minority.

> Regardless of the statistical significance measure used, the Supreme Court has emphasized the importance of "a robust causality requirement" in ensuring entities are not "held liable for racial disparities they did not create." *Inclusive Communities*, 135 S. Ct. at 2523 (citing *Wards Cove*, 490 U.S. at 653). Investigating agencies must carefully evaluate the causal connection between the challenged policy and any adverse disparate impacts identified. Yet, it is important to remember that the causation element is not a fault-based inquiry; **the proper analysis is not about whether there are actual differences among applicants or beneficiaries of different races or why those differences exist**. **Rather, the sole question at this phase of the case should be whether the recipient's policy in fact affects people of different races disproportionately**. Causation is established where the evidence establishes that the recipient's policy or practice operates in this manner; there is no need for understanding why the policy results in the disparity at this step of the inquiry.
>
> • Where a requirement that applicants have high school diplomas disproportionately excludes African Americans from the hiring process, it does not matter that the recipient is not at fault for African Americans not having high school diplomas at the same rate as whites. The causation inquiry does not involve consideration of whether societal factors external to the hiring process caused the

> disparate high school diploma rates. *Griggs*, 401 U.S. at 430-31.
>
> • Where the denial of language assistance excludes individuals from meaningful access to the recipient's program based on national origin, it does not matter that the recipient did not cause students to lack English proficiency. The causation inquiry does not involve consideration of factors external to the education process that caused children not to know English. *Lau*, 414 U.S. at 568.

U.S. D.O.J. Title VI Manual VII.C.1.d, TITLE VI LEGAL MANUAL VII. Proving Discrimination- Disparate Impact C. Proving a Violation of the Disparate Impact Standard 1. Establishing an Adverse Disparate Impact d. Establishing causation, 2017 WL 1712170 (emphasis added).

2. The Fifth Circuit added a new pleading and proof requirement that plaintiff must now show the "no voucher" policy caused the voucher group to be predominantly Black in order to show a prima facie disparate impact claim.

The Fifth Circuit added a new requirement to the robust causation elements stated in *Texas v. ICP*, 135 S. Ct. at 2523. The Fifth Circuit held that ICP had the obligation to plead and to prove that the challenged "no voucher" policy not only causes the disparate impact disadvantaging or segregating the disproportionately Black voucher group but also causes the voucher group to be predominantly Black.

> Neither the aforementioned "city-level data" nor the "census-level data" cited by ICP supports an inference that the implementation of Defendants-Appellees' blanket "no voucher" policy, or any change therein, caused black persons to be the dominant group of voucher holders in the Dallas metro area (or any of the other census areas discussed by ICP). Similarly, ICP alleges 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. App. 29a-30a.

The addition of this new requirement eliminates FHA disparate impact liability. App. 62a-65a (Judge Davis' panel dissent); 154a-155a (Judge Haynes' dissent from denial of rehearing en banc).

3. Judge Davis' dissent shows the Fifth Circuit requires a new burden of pleading and proof for a prima facie disparate impact claim that is in conflict with this Court's *Texas v. ICP* decision that disparate impact claims are cognizable under the Fair Housing Act.

The prima facie case requirement set out in *Texas v. ICP* requires a policy, a significant disparate impact, and a robust causal connection between the policy and the disparate impact. *Texas v. ICP*, 135 S. Ct. at 2523. The Fifth Circuit added the new requirement that plaintiffs must also show the challenged policy was the cause of both the voucher group being predominantly

Black and the pre-existing racial segregation in the Dallas area. Specifically, ICP was required to plead and prove that the Lincoln Property "no voucher" policy not only caused the disparate impacts but also caused Black persons to be the dominant group of voucher holders in the Dallas metro area (or any of the other census areas discussed by ICP). Similarly, the Fifth Circuit has added the requirement to plead and prove that Lincoln Property caused the geographic distribution of minorities throughout the Dallas area prior to the implementation of the "no voucher" policy. App. 29a-30a, 65a.

Judge Davis' dissent shows the additional and new prima facie case element is not required by *Texas v. ICP* or by any of the authoritative sources considered by this Court in holding disparate impact claims to be cognizable under the Fair Housing Act. *Texas v. ICP*, 135 S. Ct. at 2525. *See* App. 43a-72a. The Fifth Circuit admits that the element is not delineated anywhere in the text of *Texas v. ICP*. App. 22a.[1]

The new additional element is not in any of the authorities upon which this Court held that disparate impact claims are cognizable: the results oriented language of the Fair Housing Act, the Court's interpretation of similar language in Title VII and the Age Discrimination in Employment Act of 1967 (ADEA), the Congressional ratification of disparate impact claims, the unanimous holdings of nine Courts of

[1] " . . . the Court did not clearly delineate its meaning or requirements." App. 22a.

Appeals, and the statutory purpose. *Texas v. ICP*, 135 S. Ct. at 2525.

The new element is not found in any of the disparate impact liability requirements established for federal employment discrimination claims under Title VII of the 1964 Civil Rights Act. App. 46a-51a. The new element is not found in the disparate impact liability requirements established under the ADEA. *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 240, 243 (2005).

The additional requirement to show that the challenged policy also caused the differences between Blacks' and Whites' incomes or the racial difference in participation in affordable housing programs is not found in the "heartland" case cited by *Texas v. ICP*, 135 S. Ct. at 2522. *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988), *aff'd in part sub nom. Town of Huntington, N.Y. v. Huntington Branch, NAACP*, 488 U.S. 15 (1988). App. 51a-55a (analysis of *Huntington*).

4. Judge Haynes' dissent from the denial of rehearing en banc was joined by six other Judges. The dissent shows the Fifth Circuit requires a new burden of pleading and proof for a prima facie disparate impact claim that is in conflict with this Court's decision that disparate impact claims are cognizable under the Fair Housing Act in *Texas v. ICP*.

Judge Haynes' dissent from the denial of rehearing en banc adopts and adds to Judge Davis' panel

dissent. Judge Haynes shows that the Fifth Circuit renders this Court's decision that disparate impact claims are cognizable "almost meaningless by crafting an impossible pleading standard." App. 146a. Judge Haynes joins Judge Davis in showing that, without the new pleading standard added by the Fifth Circuit, ICP properly pleaded a disparate impact claim adversely affecting a disproportionately Black group – voucher families. App. 59a-61a (Judge Davis); App. 152a-153a. (Judge Haynes). Judge Haynes also shows that the complaint properly pleaded a segregative effect version of the disparate impact claim. App. 158a-159a.

Judge Haynes' dissent cites the four cases decided since *Texas v. ICP* that found robust causation based on the existence of a policy causally connected to the disparate impact. App. 153a, n.6. *Hous. All. v. Fed. Nat'l Mortg. Assn ("Fannie Mae")*, 294 F. Supp. 3d 940, 944, 947-48 (N.D. Cal. 2018); *Nat'l Fair Hous. All. v. Travelers Indent. Co.*, 261 F. Supp. 3d 20, 30, 34 (D.D.C. 2017); *Ave. 6E Invs., LLC v. City of Yuma, Ariz.*, 217 F. Supp. 3d 1040, 1047-48 (D. Ariz. 2017); *R.I. Comm'n for Human Rights v. Graul*, 120 F. Supp. 3d 110, 123-24, 127 (D.R.I. 2015). None of these cases included the added pleading requirement to show causation of the underlying group's demographic characteristics. All of these cases followed the robust causality requirement in *Texas v. ICP*.

5. Federal jurisdiction was present in the initial instance.

The Complaint was filed in the United States District Court for the Northern District of Texas alleging jurisdiction pursuant to 42 U.S.C. § 3613(a)(1)(A) and 28 U.S.C. § 1331. App. 163a.

REASONS FOR GRANTING THE PETITION

I. The Court should grant certiorari to correct the Fifth Circuit's imposition of additional new elements for Fair Housing Act disparate impact liability that conflict with this Court's decision in *Texas v. ICP*.

Texas v. ICP used this Court's Title VII and ADEA disparate impact decisions as precedents for the cognizability of FHA disparate impact liability and for the prima facie case standards. The Fifth Circuit's new requirement conflicts with that decision and precedent. The conflict is clearly shown by the relevant text from this Court's *Texas v. ICP* decision and the text of the Fifth Circuit. This Court ruled in *Texas v. ICP* that:

> In a similar vein, 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" and thus protects defendants from being held liable for racial disparities they did not

> create. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653, 109 S. Ct. 2115, 104 L.Ed.2d 733 (1989).

Texas v. ICP, 135 S. Ct. at 2523. The racial imbalance at issue in *Wards Cove* was not that in the general population but rather that between the skilled and unskilled workers already in the employ of Wards Cove. App. 48a-50a.

The Fifth Circuit stated its new requirement:

> Neither the aforementioned "city-level data" nor the "census-level data" cited by ICP supports an inference that the implementation of Defendants-Appellees' blanket "no vouchers" policy, or any change therein, caused black persons to be the dominant group of voucher holders in the Dallas metro area (or any of the other census areas discussed by ICP). Similarly, ICP alleges 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. App. 29a-30a.

This Court should grant certiorari to correct the conflict with *Texas v. ICP* created by the Fifth Circuit.

A. This Court's precedents relied on in *Texas v. ICP* do not include the Fifth Circuit's additional and new requirements it inserted into the FHA prima facie case.

Griggs did not require proof that the employer's high school degree or testing requirements had caused the underlying lack of schooling and high school degrees in the Black population compared to the White population. In addition, this Court rejected the relevance of the causes for the comparative education characteristics of the Black and White populations. Even if those causes included discrimination by schools or others against Blacks as a group, the only question for disparate impact was not whether the challenged policy had caused the school discrimination but only whether the employer was giving a discriminatory preference for any group, majority or minority. *Griggs*, 401 U.S. at 430-31.[2]

In *Wards Cove* the only relevant question was whether the policy itself had caused "the exclusion of applicants for jobs or promotions because of their membership in a protected group." Causation was focused on the exclusion of applicants for jobs because of their membership in a protected group. *Wards Cove*,

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[2] "In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." *Griggs*, 401 U.S. at 430-31.

490 U.S. at 657. There was no requirement to determine if the policies had caused the characteristics of that protected group. The inquiry in a disparate impact case is whether the comparison between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs shows that any significant differences were caused by the challenged practice. *Id*. at 650-51, 653.

This Court similarly interpreted the prima facie case for disparate impact under the ADEA. The plaintiff is "responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities." *Smith*, 544 U.S. at 241 (following *Wards Cove*). The policy was a uniform raise without regard to seniority. The ADEA prima facie case did not include any element requiring that the challenged policy also be the cause of the fact that older officers tended to have more years of seniority on the job. *Id*. at 242.

The unanimous holding that disparate impact claims were cognizable under the Fair Housing Act by all nine of the Circuits considering the issue was crucial for determining the intent of Congress enacting the 1988 amendments to the FHA. Congress was aware of this unanimous precedent and chose to retain the statutory text. *Texas v. ICP*, 135 S. Ct. at 2519. None of those nine cases included the additional prima facie case elements newly required by the Fifth Circuit. *See Texas v. ICP*, 135 S. Ct. at 2519 citing cases in order by circuit: *Huntington Branch*, 844 F.2d at 935-36; *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 146

(3d Cir. 1977); *Smith v. Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982); *Hanson v. Veterans Administration*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Arthur v. Toledo*, 782 F.2d 565, 574-75 (6th Cir. 1986); *Metropolitan Housing Development Corp. v. Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977); *United States v. Black Jack*, 508 F.2d 1179, 1184-85 (8th Cir. 1974); *Halet v. Wend Investment Co.*, 672 F.2d 1305, 1311 (9th Cir. 1982); *United States v. Marengo Cty. Comm'n*, 731 F.2d 1546, 1559, n.20 (11th Cir. 1984).

This Court described two of these nine decisions as being "at the heartland of disparate-impact liability." *Texas v. ICP*, 135 S. Ct. at 2511. The "heartland" cases included those challenging "housing restrictions that unfairly excluded minorities from certain neighborhoods without sufficient justification." *Id*.

The first "heartland" case this Court discussed was *Huntington Branch*, 844 F.2d 926 (2d Cir.). *Texas v. ICP*, 135 S. Ct. at 2522. The plaintiffs sought to build a multi-family subsidized apartment in a White part of Huntington. The town refused to rezone and allow the use. The Second Circuit held that disparate impact claims were cognizable under the FHA following *Griggs*. *Huntington Branch*, 844 F.2d at 935. The claims included both disparate impact adverse effect on a minority group and perpetuation of segregation claims. *Id.* at 937. The disparate impact of the zoning ordinance was shown by the statistics demonstrating the percentage of all Black families that occupied and were in need of subsidized housing because of their income. These statistics were compared to the statistics

showing the much smaller percentage of all White families that occupied and were in need of subsidized housing because of their income. *Id*. at 938. In addition, if the planned housing was occupied by 25% minorities, it would have begun desegregating a 98% White neighborhood. *Id*. at 937. The causal relation between the policy and the impact was clear. *Town of Huntington, N.Y. v. Huntington Branch*, 488 U.S. 15, 18 (1988). There was no requirement that the plaintiffs show the zoning ordinance had caused the lower income status and the other relevant demographic characteristics of the Black population.

The second "heartland" case cited by this Court was *Black Jack*, 508 F.2d at 1181-82. *Texas v. ICP*, 135 S. Ct. at 2522. In *Black Jack*, the policy was a zoning ordinance which prohibited the construction of any new multiple-family dwellings. This policy precluded construction of a low-to-moderate income integrated townhouse development. The effect of the policy was to exclude 85% of the Blacks in the metropolitan area (40% of whom were in substandard conditions) from living in the proposed development in the White area of Black Jack. *Black Jack*, 508 F.2d at 1181-82. There was no evidence that the policy causing the disparate impact had also caused the concentration of Blacks living in the metropolitan area or caused the concentration of Blacks living in overcrowded or substandard conditions in the other parts of the St. Louis metropolitan area. Producing such evidence would have been an insurmountable burden. When the ordinance was passed in 1970, the racial demographics of Black Jack

and the St. Louis Metropolitan area were already fixed. *Id*. at 1183. The policy could not have caused those demographics.

The third "heartland" case noted by this Court was not one of the nine appellate court FHA disparate impact cases but was a more current District Court case, *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish*, 641 F. Supp. 2d 563, 566, 577-78 (E.D. La. 2009). *Texas v. ICP*, 135 S. Ct. at 2522. There were two challenged policies in *St. Bernard Parish*, 641 F. Supp. at 566, 577-78. One policy prohibited the rental or occupancy of a single-family residence to someone other than a blood relative without first obtaining a permissive use permit. After this ordinance was enjoined, the Parish enacted a 2008 moratorium on multifamily housing with more than 5 units. The disparate impact caused by the policy was the disproportionate exclusion of African-American households in the New Orleans metropolitan area compared to the exclusion of Caucasian households. The disparity was shown by the statistic that African-American households were 85% more likely to live in structures with more than 5 units than Caucasian households. *Id*. at 566. There was no requirement to show that the 2008 moratorium had caused these pre-existing metropolitan area demographic characteristics. The burden of the Fifth Circuit's new and additional pleading and proof requirement would have been an insurmountable barrier to showing a prima facie case in *St. Bernard Parish*.

The Fifth Circuit requires another pleading requirement beyond what was adopted by this Court in *Texas v. ICP*. The Fifth Circuit requires a showing that the disparate impacts of a policy are caused by a change in the policy or a change in the enforcement of a policy. App. 29a. This pleading and proof requirement eliminates disparate impact claims for policies that are "artificial, arbitrary, and unnecessary" from the beginning of the adoption of the policy. There is no precedent to support the inclusion of this element as part of robust causation. App. 155a-156a.

The Fifth Circuit adds another new element for the pleading and proof of segregative effect claims that is not mentioned by *Texas v. ICP*. The Fifth Circuit requires pleading and proof that the identified policy not only perpetuated the existing segregation but actually caused the segregation in the first instance. App. 29a-30a. The segregative effect cases cited by *Texas v. ICP* do not require such a showing. *See*, *e.g.*, *Huntington Branch*, 844 F.2d at 937-38. The Fair Housing Act prohibits perpetuating or maintaining racial segregation as well as initiating racial segregation. App. 158a-159a.

Not one of the FHA cases challenging housing restrictions that unfairly exclude minorities from certain neighborhoods without sufficient justification and that are "at the heartland of disparate-impact liability" include the Fifth Circuit's new additional elements for a prima facie case.

B. The Fifth Circuit has rendered FHA disparate impact liability meaningless.

A recent District Court opinion confirms Judge Davis' and Judge Haynes' position that the Fifth Circuit decision will cause this Court's holding that disparate impact claims are cognizable to be "meaningless" in the Fifth Circuit. The Fifth Circuit decision has already been followed and applied in *Inclusive Communities Project, Inc. v. Heartland Cmty. Assn., Inc.*, 2019 WL 3716442, at *2 (N.D. Tex. 2019). In the *Heartland Cmty. Assn., Inc.* case, property owners in a large subdivision had already been renting single-family houses to voucher families. The Heartland Community Association (HCA) subsequently enacted a deed restriction that prohibited all property owners from renting to voucher families but allowed rentals to non-voucher families. *Id.* at *1. The complaint in the case set out disparate impacts based on the disproportionate number of Black families that needed vouchers to pay the rent and would be excluded from Heartland compared to the disproportionate number of White families that did not need vouchers to pay the rent in Heartland and would not be excluded from Heartland. In addition, the Black population included a higher percentage of voucher families than the percentage of White voucher families in the total White population of the metropolitan area. *Id.* at 2. Heartland gave no reason for the prohibition against private property owners using their own property to rent to voucher families. *Id.* at *3.

The District Court dismissed the disparate impact claim following the precedent of the Fifth Circuit decision in this case. The disparate impact claim was dismissed because ICP had not alleged that the Heartland policy had either: (1) caused the all Black racial makeup of the 96 current rental tenants using Section 8 vouchers, or (2) caused the racial makeup of the Section 8 voucher waiting list. *Id.* at **6-7. Compliance with the Fifth Circuit's new pleading and proof standard imposed an insurmountable burden on the plaintiff. A policy enacted to prohibit renting to voucher families could not have caused the racial makeup of the voucher tenants renting in Heartland before the policy was enacted. The number of voucher households renting in Heartland had been increasing when the policy was enacted. *Id*. at *2. Nor could the challenged policy affecting the 96 current voucher tenants in Heartland possibly have any effect on the existing 80% plus Black voucher waiting list. *Id*.

One of the recognized achievements of disparate impact liability has been the protection of the property rights of rental property developers and owners by stopping the enforcement of arbitrary and discriminatory ordinances barring certain types of housing units. *Texas v. ICP*, 135 S. Ct. at 2522. While the Heartland owners are single-family landlords, the developers of multifamily and other forms of affordable housing will be similarly barred by the added requirement to prove that the policy prohibiting multifamily and affordable rental housing also causes the racial makeup of the population groups living in multifamily and affordable

rental housing throughout the relevant metropolitan area.

The Fifth Circuit ruling is an insurmountable barrier to the application of this Court's determination that disparate impact liability claims are cognizable under the FHA. *Texas v. ICP*, 135 S. Ct. at 2525. Even if the new burden was logically possible to meet, it would be so factually complicated as to be insurmountable. There is no logical, practical, or programmatic connection that can be pleaded or shown whereby Lincoln Property's "no voucher" policy caused the group of voucher holders to be predominantly Black or that it caused the age-old racial segregation in the Dallas metropolitan area. App. 71a, 158a-159a. *See Flowers v. Mississippi*, ___ U.S. ___, 139 S. Ct. 2228, 2241-43 (2019) (in the context of racial bias in jury selection, the obligation to prove the history of past jury pools, jury composition, and peremptory challenges over the years was an insurmountable burden preventing proof of racial bias).

The ruling hampers enforcement of the FHA and moves us backwards on the pathway to equality and integration. App. 159a-160a (Judge Haynes' dissent).

II. The Court should grant certiorari to resolve the Circuit split between the Fifth Circuit and all of the other Circuits that have ruled on the content of this Court's robust causation requirement without imposing the insurmountable pleading and proof requirements.

None of the other Circuits that have considered FHA disparate impact claims pursuant to *Texas v. ICP* have required the additional pleading and proof now mandated by the Fifth Circuit. This Court should grant certiorari to resolve the split in Circuit decisions created by the Fifth Circuit decision in this case.

A. The split in the Circuits is so complete that the Fifth Circuit conflicts with all three Circuit decisions it cites as support for its addition of the insurmountable pleading requirement.

The Fifth Circuit cites both the majority opinion and the dissent in the Fourth Circuit case *Reyes v. Waples Mobile Home Park Ltd. P'ship*, 903 F.3d 415, 428-29. (4th Cir. 2018), *cert. denied sub nom. Waples Mobile Home Park Ltd. P'ship v. de Reyes*, ___ U.S. ___, 139 S. Ct. 2026 (2019). App. 18a, 22a-26a. The *Reyes* majority opinion rejects the new prima facie case element proposed by the *Reyes* dissent and adopted by the Fifth Circuit decision. The majority opinion in *Reyes* held robust causality was satisfied by pleading that the specific policy requiring all adult tenants to provide certain documents proving legal status was likely to

cause Latino tenants at the Park to be disproportionately subject to eviction compared to non-Latino tenants at the Park. The statistics pleaded were:

> Latinos constitute 64.6% of the total undocumented immigrant population in Virginia, and that Latinos are ten times more likely than non-Latinos to be adversely affected by the Policy, as undocumented immigrants constitute 36.4% of the Latino population in Virginia compared with only 3.6% of the non-Latino population.

Reyes, 903 F.3d at 428-29.

The *Reyes* dissent argued for a new theory of robust causation that would require proof that the policy was adversely affecting the minority group solely because the group was minority. The *Reyes* dissent would not have allowed disparate impact liability to be based on a relevant characteristic that a disproportionate number of minorities shared compared to Whites. *Id*. at 430, 434. The Fifth Circuit relied on the dissent's position in *Reyes* as support for the creation of additional and new requirements for pleading and proof of FHA disparate impact liability. App. 22a-23a, 28a.

The Fifth Circuit also stated that the Eighth Circuit decision in *Ellis v. City of Minneapolis*, 860 F.3d 1106 (8th Cir. 2017), supported the new and additional pleading and proof requirements. App. 22a, 23a-28a. However, the Eighth Circuit does not support the Fifth Circuit and is in direct conflict. The Eighth Circuit decision did not require pleading and proof that the challenged policy caused the characteristics of the

minority group that made the group susceptible to the policy. The asserted disparate impact in *Ellis* was alleged to be the high percentage of all African Americans that were in the very low-income category in need of rental housing. *Id*. at 1107-08. Robust causation was not shown because no artificial, arbitrary, or unnecessary policy was alleged. *Id*. at 1114. The Eighth Circuit conflicts with the Fifth Circuit because there was no mention in *Ellis* of any robust causality requirement to prove that a challenged policy caused the high percentage of African Americans in the very low-income category.

The Eighth Circuit *Ellis* opinion noted that the plaintiff had not attempted to show that the housing code was an arbitrary, artificial, and unnecessary policy. *Id*. at 1114. ICP's complaint alleged specific facts showing that the "no voucher" policy was arbitrary, artificial, and unnecessary. App. 66a.

The Fifth Circuit also cited the Eleventh Circuit decision in *Oviedo Town Ctr. II, L.L.L.P. v. City of Oviedo*, 759 F. App'x 828 (11th Cir. 2018), as supporting the new and additional pleading and proof requirements. However, this Eleventh Circuit opinion directly conflicts with the Fifth Circuit. While the Eleventh Circuit held in *Oviedo* that robust causation was not shown, the holding was not based on and did not mention the new requirements added by the Fifth Circuit. The prima facie case failed in *Oviedo* because no facts were alleged to show a disparate impact on racial minority households compared to White households. *Oviedo Town Ctr.*, 759 F. App'x at 835-36. *Oviedo* made

no requirement to show that the policy caused the income characteristics of the racial groups.

In *Oviedo*, the Eleventh Circuit ruled that robust causality was not shown because the plaintiff did not show the comparison between (a) the percentage of racial minorities occupying multifamily properties impacted by the policy throughout the City and (b) the percentage of non-minorities living in such properties affected by the policy throughout the City. If this citywide comparison had demonstrated that a disproportionate percentage of racial minorities in multifamily properties were impacted across the city, a prima facie case of disparate impact could have proceeded to the robust causality question. *Oviedo Town Ctr.*, 759 F. App'x at 835-36. The Eleventh Circuit made no holding that the plaintiff's burden was to show that the policy had caused the percentage of low-income tenants in the project or in the City who were minority. *Id*. at 830.

B. None of the other appellate decisions to consider FHA disparate impact liability under *Texas v. ICP* have required the new and additional pleading and proof requirements added by the Fifth Circuit.

The Fifth Circuit decision conflicts with decisions in five other Courts of Appeals.

The Ninth Circuit followed *Texas v. ICP* without requiring any new and additional requirements for robust causality in *Ave. 6E Investments, LLC v. City of Yuma, Ariz.*, 818 F.3d 493, 502-503, 510 (9th Cir. 2016),

cert. denied, 137 S. Ct. 295 (2016). The Ninth Circuit, citing *Texas v. ICP*, held that zoning prohibiting affordable housing had a disproportionate effect on Hispanics. The plaintiff produced evidence showing a direct relationship between housing density and costs, and demonstrating a significant disparity (29%) between the median income of Yuma households headed by Hispanics and households headed by Whites. *Id*. at 508. The Ninth Circuit did not require pleading and proof that the zoning had caused the disparity in the median incomes of Yuma households headed by Hispanics compared to households headed by Whites.

The Second Circuit followed *Texas v. ICP* without requiring any new and additional requirements for robust causality. *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 619 (2d Cir. 2016). In *Mhany*, the policy was a single family zoning ordinance excluding low-income affordable housing. The disparate impact caused by the policy was the exclusion of the county's low-income population that was disproportionately African American and Hispanic. The population not excluded was disproportionately White. *Id*. at 588, 597-98. The policy and the disparate impacts caused by the policy established a prima facie case without regard to whether the policy caused the underlying demographics of the minority and White populations. *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 620 (2d Cir. 2016).

In another Eleventh Circuit FHA case after *Oviedo*, the Eleventh Circuit followed *Texas v. ICP* and did not require additional and new elements for FHA disparate impact. In *City of Miami Gardens v. Wells*

Fargo & Co., 931 F.3d 1274, 1296 (11th Cir. 2019), the Eleventh Circuit interpreted robust causality to require a policy that caused a significant statistical disparity as shown by the comparison between the effects on minorities and the effects on non-minorities. There was no added requirement to show that the policy caused the underlying differences in minority and non-minority group characteristics that made the minority group more susceptible to the effects of the policy.

The conflict between the Fifth Circuit and the other Courts of Appeals considering the issue of robust causation is clearly apparent to the District Courts considering FHA disparate impact cases. *Fortune Soc'y v. Sandcastle Towers Hous. Dev. Fund Corp.*, 388 F. Supp. 3d 145, 175 (E.D.N.Y. 2019).

The Fifth Circuit decision conflicts with all of the other Circuits that have considered FHA disparate impact cases since *Texas v. ICP*. The Fifth Circuit decision conflicts with five other Circuit Courts of Appeals. The Fifth Circuit opinion conflicts with two cases from the Eleventh Circuit (*Oviedo Town Ctr. II v. City of Oviedo* and *City of Miami Gardens v. Wells Fargo*), the Fourth Circuit *(Reyes v. Waples*), the Eighth Circuit (*Ellis v. City of Minneapolis*), the Ninth Circuit (*Ave. 6E Investments, LLC v. City of Yuma*), and the Second Circuit (*Mhany Mgmt., Inc. v. Cty. of Nassau*). This Court should resolve the serious conflict created by the Fifth Circuit.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari.

Respectfully submitted,

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