No. 19-497

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondents do not believe petitioner has stated the questions properly and provide this alternate statement:

1. Did the Fifth Circuit properly reject ICP's attempt to obtain a judicial edict mandating participation in the Section 8 program for landlords across the country in defiance of congressional intent that participation remain voluntary?

2. Is this case a proper vehicle for reviewing the standard to plead causation in a disparate-impact claim under the FHA where—

- ICP failed to allege that any African American voucher holders want to move to respondents' complexes or that respondents have rejected any African American applicant (voucher holder or not),

- ICP failed to allege plausibly that its untested pilot programs would address the legitimate business reasons for a landlord's choice not to participate in the Section 8 program, and

- ICP improperly relied on census tracts to allege housing segregation in the areas where respondents' complexes are located?

3. Did the Fifth Circuit properly conclude that ICP failed to allege "robust causality" where it did not allege that respondents created the statistical disparities at issue and instead alleged only a correlation between being African American and eligible for vouchers in the Dallas area?

4. Is there a circuit split over the standard to plead causation in a disparate-impact case under the FHA, or is ICP's allegation of such a split speculative?

PARTIES TO THE PROCEEDING

Petitioner is The Inclusive Communities Project, Incorporated.

Respondents are Lincoln Property Company, Legacy Multifamily North III, L.L.C., CPF PC Riverwalk, L.L.C., HLI White Rock, L.L.C., and Brick Row Apartments, L.L.C.

CORPORATE DISCLOSURE STATEMENT

Lincoln Property Company has no parent company and no publicly-held company owns ten percent or more of its stock.

Brick Row Apartments, L.L.C. has no parent company and no publicly-held company owns ten percent or more of its stock.

Legacy Multifamily North III, L.L.C. is wholly owned by PRIT Core Realty Holdings, L.L.C. That entity has no parent company and no publicly-held company owns ten percent or more of its stock.

CPF PC Riverwalk, L.L.C. has no parent company and no publicly-held company owns ten percent or more of its stock. Its sole member is Cornerstone Patriot Holding, L.L.C. That entity has no parent company and no publicly-held company owns ten percent or more of its stock.

HLI White Rock, L.L.C. is wholly owned by HLI REIT, L.L.C. That entity has no parent company and no publicly-held company owns ten percent or more of its stock.

TABLE OF CONTENTS

Page

Questions Presented i

Parties to the Proceeding iii

Corporate Disclosure Statement iii

Table of Contents iv

Table of Authorities vi

Introduction 1

Statement 3

Reasons to Deny the Writ 7

1. The Fifth Circuit correctly rejected ICP's attempt to override the congressional mandate that participation in the Section 8 program remain voluntary 7

2. This case is a poor vehicle for reviewing the standard to plead causation in FHA disparate-impact cases 9

   A. ICP did not allege that its voucher clients seek to move to respondents' complexes 9

   B. ICP failed to allege plausibly that respondents' legitimate concerns about vouchers can be addressed by a less discriminatory alternative 14

   C. ICP's reliance on census tracts was improper 15

3. The Fifth Circuit correctly concluded that ICP failed to allege "robust causality" 16

A. A correlation between being African American and eligible for vouchers does not allege that respondents caused any housing disparity .. 16

B. The Fifth Circuit correctly concluded that landlords cannot be liable for housing disparities they did not create 19

C. ICP's allegation of a circuit split is speculative 22

D. ICP's Heartland cases precede this Court's application of "robust causality" and, in any event, are distinguishable..... 25

Conclusion 26

TABLE OF AUTHORITIES

Page

Cases

Ave. 6E Inv., LLC v. *City of Yuma, Ariz.*,
818 F.3d 494 (9th Cir. 2016)..... 16

Bonasera v. *City of Norcross*,
342 Fed. Appx. 581 (11th Cir. 2009) 11

Cinnamon Hills Youth Crisis Ctr. v. *Saint George City*,
685 F.3d 917 (10th Cir. 2012)..... 18

Dothard v. *Rawlinson*,
433 U.S. 321 (1977)..... 11

Ellis v. *City of Minneapolis*,
860 F.3d 1106 (8th Cir. 2017)..... 23–24

Espinoza v. *Farah Mfg. Co.*,
414 U.S. 86 (1973)..... 17–18

Gallagher v. *Magner*,
619 F.3d 823 (8th Cir. 2010)..... 7

Graoch Assoc. #33, L.P. v. *Louisville/Jefferson Metro Human Relations Comm'n*,
508 F.3d 366 (6th Cir. 2007)..... 8, 9, 14

Greater New Orleans Fair Hous. Ctr. v. United States,
639 F.3d 1078 (D.C. Cir. 2011)..... 18

Griggs v. *Duke Power Co.*,
401 U.S. 424 (1971)..... 13, 19

Hallmark Developers, Inc. v. *Fulton Cnty.*,
466 F.3d 1276 (11th Cir. 2006)..... 11, 16

Huntington Branch, NAACP v. *Huntington*,
844 F.2d 926 (2d Cir. 1988) 11, 12, 13, 25, 26

Knapp v. *Eagle Prop. Mgmt. Corp.*,
54 F.3d 1272 (7th Cir. 1995)..... 3, 7, 8

Macone v. *Town of Wakefield*,
277 F.3d 1 (1st Cir. 2002) 11

Mhany Mgmt., Inc. v. *Cnty. of Nassau*,
819 F.3d 581 (2d Cir. 2016) 12, 25, 26

New York City Transit Auth. v. *Beazer*,
440 U.S. 568 (1979)..... 10–11

Oviedo Town Ctr., II, L.L.L.P. v. *City of Oviedo, Fla.*,
759 Fed. Appx. 828 (11th Cir. 2018) 22–23

Parents Involved in Cmty. Schools v. *Seattle School Dist. No. 1*,
551 U.S. 701 (2007)..... 12

Reyes v. Waples Mobile Home Park Ltd. P'ship,
903 F.3d 415 (4th Cir. 2018)..... 24

Salute v. *Stratford Greens Garden Apts.*,
136 F.3d 293 (2d Cir. 1998) 3, 7, 8, 14

Teamsters v. *United States*,
431 U.S. 324 (1977)..... 12

Tex. Dept. of Housing & Cmty. Affairs v. *Inclusive Cmty's Project, Inc.*,
135 S. Ct. 2507 (2015).....*passim*

United States v. *City of Black Jack, Mo.*,
508 F.2d 1179 (8th Cir. 1974)..... 12

Ward's Cove Packing Co. v. *Atonio*,
490 U.S. 642 (1989)..... 13, 18, 20

Watson v. *Fort Worth Bank & Trust*,
487 U.S. 977 (1988)..... 13, 19, 20

Statutes and Regulations

42 U.S.C. 3601–3631 4

26 U.S.C. 42 7

42 U.S.C. 1437f..... 7

24 C.F.R. 982.302 7

26 C.F.R. 1.42-5 7

Tex. Loc. Govt. Code Ann. § 250.007 (West Supp. 2019) 3

Other Authorities

Rigel C. Oliveri, *Vouchers and Affordable Housing: The Limits of Choice in the Political Economy of Place,* 54 Harv. Civ. Rights-Civ. Lib. L. Rev. 795 (2019) 8

INTRODUCTION

ICP challenges respondents' congressionally-authorized decision not to participate in the voluntary Section 8 housing program. Animated by financial and administrative burdens of participation in that program, Congress chose to make participation voluntary for all landlords other than those receiving governmental assistance. Congress has adhered to this voluntariness, repeatedly rebuffing efforts to mandate participation.

In recognition of this congressional intent to keep participation voluntary, the circuit courts have held that a landlord's decision not to participate in the Section 8 program cannot support disparate-impact liability under the FHA. The Fifth Circuit reached the same conclusion here, rejecting ICP's effort to execute a judicial end-run around Congress. This alone justifies denial of ICP's petition.

Additionally, if this Court intends to review the standard to plead causation in FHA disparate-impact claims, this particular case presents a poor vessel for doing so. ICP failed to allege that its African American voucher holders actually seek to move into respondents' complexes, or that any respondent has rejected a single African American applicant—voucher holder or not. Under entrenched case law, this failure dooms ICP's disparate-impact claim.

Similarly, ICP failed to make any plausible allegation addressing the legitimate business reasons landlords have for not participating in the Section 8 program. ICP alleged that it offered respondents the opportunity to participate in two programs designed to alleviate these concerns. But, as the lower courts

properly noted, ICP did not allege any track record for these programs or its ability to fund them for any length of time. Indeed, ICP's complaint makes clear that both programs are in the pilot stage.

Finally, ICP's argument of a circuit split is at best speculative. Of the decisions that ICP alleges create this conflict, one does not address causation and another reaches the same result as this case. As to the third decision, its scope remains unclear—a narrow reading of the decision avoids any circuit split.

In the end, this case presents exactly the type of FHA lawsuit this Court strived to prevent when it recognized disparate-impact claims under the FHA: a lawsuit seeking to impose disparate-impact liability "based solely on a showing of a statistical disparity." *Tex. Dept. of Hous. & Cmty. Affairs* v. *Inclusive Cmty's Project, Inc.*, 135 S. Ct. 2507, 2522 (2015) (in this brief, respondents refer to this Court's decision as *ICP*).

This Court warned ICP that such a claim could not succeed. Instead, the Court instructed that a plaintiff bringing a disparate-impact claim under the FHA must plead and prove a "robust" causal connection between the defendant's challenged policy and the statistical disparity about which the plaintiff complains—so that "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." *Id.* at 2523. This Court's warning was prescient—ICP now seeks to impose liability on just this type of claim. This Court should deny ICP's petition.

STATEMENT

ICP seeks to assist African Americans participating in the federal Housing Choice Voucher program—a voluntary program known as Section 8—in securing housing in "high opportunity areas" with higher median incomes and better schools. (Pet. App. 163a).[1]

Due to administrative burdens and financial uncertainties related to the program, acceptance of vouchers is—and always has been—voluntary, "and non-participating owners routinely reject Section 8 voucher holders." *Knapp* v. *Eagle Prop. Mgmt. Corp.*, 54 F.3d 1272, 1280 (7th Cir. 1995). This voluntariness "reflects a congressional intent that the burdens of Section 8 participation are substantial enough that participation should not be forced on landlords . . . ." *Salute* v. *Stratford Greens Garden Apts.*, 136 F.3d 293, 300 (2d Cir. 1998).

Respondents Riverwalk, Legacy III, White Rock, and Brick Row each own an apartment complex in a "high opportunity area." Respondent Lincoln manages those complexes. (Pet. App. 168a).

According to ICP, Lincoln "will not negotiate with, rent to, or make units available to voucher households … in White non-Hispanic areas" including at respondents' complexes (Pet. App. 169a). No law requires respondents to accept vouchers. Texas law prohibits localities from requiring acceptance. Tex. Loc. Govt. Code Ann. § 250.007 (West Supp. 2019).

ICP alleged that it sent letters to Lincoln asking respondents to reconsider this purported

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[1] References are to ICP's appendix.

voucher policy. (Pet. App. 168a).[2] In the letters, ICP proposed two alternatives that it claimed would ease the burdens associated with vouchers. First, ICP offered a guaranty of its clients' lease obligations. Alternatively, ICP offered to lease units from respondents and sublease them to voucher clients. Under this proposal, ICP offered to pay the agreed rent, respond to tenant issues, and evict tenants if needed. (Pet. App. 176a–180a).

But ICP did not allege any proven track record for either program, nor did it allege the successful use of any similar program by other non-profit housing groups. ICP also did not allege any facts concerning its financial ability to sustain either program for any length of time, nor did it provide any hint about the number of tenants it could support under either program. (Pet. App. 176a–180a).

ICP did not allege to whom at Lincoln—a global company with 8,000 employees—it sent the letters, or that Lincoln received them. ICP alleged only that it got no response. (Pet. App. 168a–169a).

ICP filed this lawsuit under the Fair Housing Act (FHA), 42 U.S.C. 3601–3631. Among other claims,[3] ICP alleged that respondents' decision not to participate in the Section 8 program violates the FHA by disproportionately affecting African Americans. To

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[2] Respondents disputed the existence of this policy in the district court but recognized the court—like this one—had to assume its existence. Respondents' references in this brief to the policy are not a concession of its existence.

[3] Those claims were dismissed and are not at issue.

support this disparate-impact theory of liability, ICP alleged that—

- 81 percent of voucher households in the Dallas area are African American (Pet. App. 171a–172a);
- voucher households in the Dallas area are located in 74-percent-minority census tracts (Pet. App. 187a);
- African American renters occupy between 0 and 14 percent of units in census tracts where respondents' complexes are located (Pet. App. 187a–189a); and
- Lincoln accepts voucher holders at complexes where federal law requires it to do so (Pet. App. 182a).

ICP alleged that it had some undisclosed number of African American voucher clients, and that some respondents had some unspecified number of units available in some unspecified complexes at rent amounts capable of being paid by vouchers. (Pet. App. 199a). But ICP never alleged—

- which respondents or complexes had these units;
- how many units were available at rents within the voucher amounts;
- that any ICP clients qualified for the units even with vouchers; or

- how many of ICP's African American voucher clients sought to move to respondents' complexes.

(Pet. App. 188a–189a, 199a–200a).

Respondents filed motions to dismiss ICP's complaint for failure to state a claim upon which relief can be granted. (Record.108, 112, 139, 227, 251, 348). The district court granted those motions and entered final judgment. (Pet. App. 75a, 108a, 142a).

The district court held that ICP relied on statistical disparities without linking their cause to any policy by respondents and thus failed to allege causation. (Pet. App. 101a–104a, 126a–131a).

In granting Brick Row's motion, the district court also rejected ICP's reliance on census tracts to allege an absence of minority households in specific areas. Taking judicial notice of census data,[4] the district court held that using zip codes rather than census tracts revealed many minority households near Brick Row's complex (App.99a–101a). The district court concluded that this prevalence of minority households independently precluded ICP from pleading causation (Pet. App. 101a).

The Fifth Circuit affirmed in a divided panel opinion (Pet. App. 1a–72a), holding that ICP failed to meet its burden to allege "robust causality." (Pet. App. 22a–35a). Judge Davis dissented as to ICP's disparate-impact claim. (Pet. App. 43a–72a). By a vote of 9–7, the full court denied a motion for rehearing (Pet. App. 144a–160a).

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[4] On appeal, ICP did not challenge the district court's reliance on this data.

REASONS TO DENY THE WRIT

The Fifth Circuit properly recognized that *ICP* applied a stringent pleading standard for causation in FHA disparate-impact claims. It also correctly recognized ICP's lawsuit as exactly the type of disparate-impact claim this Court sought to prevent in *ICP*: one "based solely on a showing of a statistical disparity." *ICP*, 135 S. Ct. at 2522.

If any doubt existed concerning the stringency of this standard, this Court removed it by noting that the Eighth Circuit had decided a 2010 case "without the cautionary standards announced in this opinion." *Id*. at 2524 (citing *Gallagher* v. *Magner*, 619 F.3d 823 (8th Cir. 2010)).

1. The Fifth Circuit correctly rejected ICP's attempt to override the congressional mandate that participation in the Section 8 program remain voluntary.

Congress chose to make participation in the Section 8 program voluntary. See 42 U.S.C. 1437f(a); 24 C.F.R. 982.302; see also *Knapp*, 54 F.3d at 1280; *Salute,* 136 F.3d at 300.

This voluntariness is purposeful. Congress requires participation by landlords who receive governmental assistance for their properties. See, *e.g.*, 26 U.S.C. 42(h)(6)(B)(iv); 26 C.F.R. 1.42-5(c)(1)(xi) (barring discrimination against voucher holders in the Low Income Housing Tax Credit Program). Congress knows how to make participation mandatory—and chose not to do so for respondents.

Indeed, Congress has rebuffed repeated efforts to add "source of income" as a protected class under

the FHA and thereby make Section 8 participation mandatory. "Although legislation to this end has been introduced in Congress, most recently in the bipartisan Fair Housing Improvement Act of 2018, it routinely fails." Rigel C. Oliveri, *Vouchers and Affordable Housing: The Limits of Choice in the Political Economy of Place*, 54 Harv. Civ. Rights-Civ. Lib. L. Rev. 795, 800 (2019) (citation omitted).

As an end-run around this congressional intent that participation in the Section 8 program remain voluntary, ICP seeks to mandate participation for urban landlords like respondents. ICP's proposed ruling would require every landlord in an area where the majority of voucher holders are African American—in other words, almost every metropolitan area in the country—to accept vouchers or face FHA liability. As the Fifth Circuit noted, the program would cease to be voluntary in any meaningful way for these landlords. (Pet. App. 34a).

But this is not the Section 8 program that Congress created. Just as "[t]he FHA is not an instrument to force housing authorities to reorder their priorities," *ICP*, 135 S. Ct. at 2522, neither is it a means of requiring landlords to participate in a voluntary program.

In addition to the Fifth Circuit's holding here, three other circuit courts have held that a landlord's decision not to participate in the Section 8 program cannot support disparate-impact liability. *Salute*, 136 F.3d at 300; *Knapp*, 54 F.3d at 1280; *Graoch Assoc. #33, L.P.* v. *Louisville/Jefferson Metro Human Relations Comm'n*, 508 F.3d 366, 377 (6th Cir. 2007).

The circuit courts disagree about whether withdrawal after participation can support liability.[5] But even the Sixth Circuit—which holds that it can—agrees that "a landlord should ***never*** face disparate-impact liability" simply for non-participation. *Graoch Assoc.,* 508 F.3d at 377 (emphasis added).

The circuit courts' refusal to impose liability under these circumstances make perfect sense—a landlord's decision merely to exercise the non-participation right granted to it by Congress cannot be "arbitrary" as required to support disparate-impact liability under the FHA. See *ICP*, 135 S. Ct. at 2522 (FHA mandates "removal of artificial, arbitrary, and unnecessary barriers").

Congress chose to specify the landlords for whom participation in the Section 8 program is mandatory—and to leave it voluntary for all others. If the burden and expense of mandatory participation is to be thrust upon countless landlords across the country, that decision should come from Congress—not the Judiciary.

2. This case is a poor vehicle for reviewing the standard to plead causation in FHA disparate-impact cases.

A. ICP did not allege that its voucher clients seek to move to respondents' complexes.

In *ICP*, this Court viewed ICP's theory of liability as "novel." *ICP*, 135 S. Ct. at 2522. The theory here is well beyond novel. ICP seeks to impose

[5] That is not the situation here—none of the complexes at issue ever participated in the Section 8 program.

disparate-impact liability on landlords without alleging that any African Americans seek (or ever sought) to move to respondents' complexes, or that any respondent has turned away even one African American applicant—voucher holder or not.

Eschewing any reference to voucher holders actually seeking to move to respondents' complexes, ICP instead based its allegations on statistics about the general population. But this Court—and several circuit courts—have rejected this approach in alleging disparate impact.

ICP alleged that it had "Black voucher clients … with whom ICP would have entered into subleases for available units." (Pet. App. 199a). This single reference falls woefully short of any plausible allegation that there are African American renters seeking to move into any specific complex owned by any respondent.

This lack of any link to respondents' complexes renders the allegation of a disproportionate effect inherently speculative. ICP did not plausibly allege that voucher holders would seek to rent from respondents' complexes—or otherwise meet any individual complex's qualifications for renting—even without the alleged discriminatory policy.

This Court's most fulsome explanation of this principle occurred in *New York City Transit Authority* v. *Beazer*, 440 U.S. 568 (1979). There, city transit employees and applicants challenged an employment policy excluding methadone users. *Id.* at 570. The plaintiffs cited statistics showing that the majority of people receiving methadone treatment in New York City were minorities. *Id.* at 585.

This Court rejected that method of proving disparate impact in part because it did not reflect "how many of these persons ever worked at or sought to work for" the transit authority. *Id*. at 569. The statistic said "nothing about the class of otherwise-qualified applicants and employees" excluded by the policy. *Id*. at 585–586. As the Court noted, the statistic based on the general population left open the possibility that many people who might be excluded had found employment elsewhere. *Id*. at 586.

Similarly, the circuit courts have held consistently that the statistical disparity alleged in an FHA claim must bear some relationship to the actual applicant flow at the implicated properties. See, *e.g.*, *Bonasera* v. *City of Norcross*, 342 Fed. Appx. 581, 585 (11th Cir. 2009) (citation omitted); *Hallmark Developers, Inc.* v. *Fulton Cnty.*, 466 F.3d 1276, 1286 (11th Cir. 2006); *Huntington Branch NAACP* v. *Huntington*, 844 F.2d 926, 938 n.11 (2d Cir. 1988); *Macone* v. *Town of Wakefield*, 277 F.3d 1, 8 (1st Cir. 2002) ("[T]here is no information that any minorities would actually move into the … project").

To be sure, "[t]here is no requirement … that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants." *Dothard* v. *Rawlinson*, 433 U.S. 321, 330 (1977). But the cases in which this Court has declined to impose such a requirement generally involve situations where (1) proof of applicant flow is impeded by the policy's deterrence of applicants, and (2) nothing suggests that statistics from the general population might differ from the actual applicants. See, *e.g.*, *ibid.*

These concerns do not apply here. The policy at issue does not impede ICP's ability to attract African American clients. And it is ICP's failure to allege the existence of its own clients seeking to move into the complexes that dooms the pleading.

With regard to the relationship between general statistics and the actual applicant flow, no one could seriously dispute that African Americans—like everyone else—make decisions about where to live based on many factors. Thus, racial imbalance in a complex or neighborhood may result "from any number of innocent private decisions . . . ." *Parents Involved in Cmty. Schools* v. *Seattle School Dist. No. 1*, 551 U.S. 701, 750 (2007) (Thomas, J., concurring).

The usefulness of statistics "depends on all the surrounding facts and circumstances." *Teamsters* v. *United States*, 431 U.S. 324, 340 (1977). Here, ICP's allegations fail to link its population statistics to African Americans seeking to move to respondents' complexes.

The absence of any allegation relating to applicant flow distinguishes this case from the Heartland cases cited by ICP. Those cases involved proof of the number of minorities that would have moved into the areas at issue absent the discriminatory policies under attack. See, *e.g.*, *Mhany Mgmt.* v. *Cnty. of Nassau*, 819 F.3d 581, 597–598 (2d Cir. 2016) (expert testimony of number of anticipated minority inhabitants); *United States* v. *City of Black Jack, Mo.*, 508 F.2d 1179, 1186 (8th Cir. 1974) ("ample proof" that many African Americans would live in the complex); *Huntington Branch*, 844 F.2d at 938 & n.11 (evidentiary finding that "a 'significant' percentage" of residents would be minorities).

This concern did not arise in *Griggs* or *Ward's Cove* because those cases concerned denials of promotions to existing or former employees. See *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 432 (1971); *Ward's Cove Packing Co.* v. *Atonio*, 490 U.S. 642, 647–648 (1989). But this Court referred to the exclusion of actual applicants in *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977 (1988), noting that once a practice is identified, "causation must be proved; that is, the plaintiff must … show that the practice in question has caused the exclusion ***of applicants*** . . . ." *Id.* at 994 (emphasis added).

ICP's failure to allege the existence of voucher holders seeking to move into respondents' complexes is fatal to its ability to allege a disparate-impact claim based on the purported no-voucher policy.

The same defect dooms ICP's allegation that respondents perpetuate segregation. Assuming this claim is cognizable under the FHA, ICP failed to make any plausible allegation of segregation caused by respondents' purported policy. Lacking any allegation that a substantial number of African Americans would move into the complexes without the policy, ICP failed to plead causation.

Again, the Heartland cases offer a telling contrast. *Huntington Branch* involved a factual finding that a "significant percentage of the tenants" in the disputed complex would have belonged to minority groups, making the challenged policy's "segregative impact" substantial. 844 F.2d at 937, 938. ICP did not allege any similar substantial impact on segregation in the areas where respondents' complexes are located.

B. ICP failed to allege plausibly that respondents' legitimate concerns about vouchers can be addressed by a less discriminatory alternative.

In addition to holding that ICP failed to allege causation, the lower courts found that ICP failed to allege plausibly that respondents' legitimate business concerns about participating in the Section 8 program can be addressed adequately by a less discriminatory alternative. (Pet. App. 104a–107a, 131a–134a, 27a–28a). See *ICP*, 135 S. Ct. at 2514.

Again, Congress has recognized the administrative and financial burdens associated with accepting vouchers—that is why Congress made participation voluntary. *Salute,* 136 F.3d at 300. Thus, "[a] non-participating landlord presumptively can appeal to his interests in not wanting to spend time learning about the program and not wanting to become entangled in government bureaucracy . . . ." *Graoch Assoc.*, 508 F.3d at 377. Even ICP referred in its complaint to administrative and financial concerns related to participation (Pet. App. 174a).

To overcome these legitimate business concerns, ICP alleged that it offered respondents the opportunity to participate in ICP's guaranty and sublease programs, and that doing so would ease the burdens associated with vouchers. But as the district court noted: "ICP's proposals, while laudable, do not show how or if the proposed programs have performed, or if Plaintiff ICP can financially support the programs." (Pet. App. 133a). And, as the district court noted, the programs could expose respondents to further litigation. (Pet. App. 133a–134a).

ICP says these are "longstanding programs." (Pet. 7). But ICP's complaint acknowledged the programs lack any track record: "One landlord has agreed to participate in the ICP sublease program. ICP currently subleases four units under the sublease program to voucher households with this landlord." (App. 180a).

ICP's allegations about its programs—which its complaint conceded are in the formative stages—fail to allege plausibly that respondents' concerns can be addressed by a less discriminatory alternative. As a result, ICP failed to plead a claim for disparate impact under the FHA. See *ICP*, 135 S. Ct. at 2515.

C. ICP's reliance on census tracts was improper.

The district court properly concluded that ICP's use of census tracts to establish racial housing disparities was improper. Using a publication from the United States Census Bureau—one that ICP itself provided in its response to Brick Row's motion—the district court noted that the use of a census tract is just one of several options to define a "neighborhood" or "community"—and not even the primary option. (Pet. App. 99a–100a).

In reliance on this publication, the district court noted that expanding the examined area by using a ZIP Code rather than census tract resulted in a substantial increase in the voucher households in Brick Row's area. (Pet. App. 100a–101a).

The district court was correct. ICP's cherry-picked statistics ignore the prevalence of low-income housing available in the same area as Brick Row's

complex.[6] The circuit courts have recognized that if "truly comparable housing is available in close proximity to a proposed development, such a showing would be a relevant factor in determining whether its zoning decision had a disparate impact in that circumstance." *Ave. 6E Inv., LLC* v. *City of Yuma, Ariz.*, 818 F.3d 494, 512 (9th Cir. 2016); see also *Hallmark Developers*, 446 F.3d at 1282–1283. As the district court concluded, that is the situation here.

3. The Fifth Circuit correctly concluded that ICP failed to allege "robust causality."

A. A correlation between being African American and eligible for vouchers does not allege that respondents caused any housing disparity.

ICP argues the only disparate impact it had to allege was that African Americans comprise the majority of Dallas-area voucher holders. But the Fifth Circuit properly concluded that ICP had to allege causation of the housing disparities on which ICP's claim was based; simply alleging a correlation between being African American and eligible for vouchers was insufficient.

ICP seeks to collapse the requirement to allege both (1) a policy and (2) a causal link between that policy and a disparity into one inquiry, where an alleged racial imbalance becomes both the cause and effect of a violation. But this Court made clear in *ICP* the requirement for ***both*** a policy ***and*** robust

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[6] As the Fifth Circuit noted, even ICP's complaint was not consistent in its reference to geographical areas. (Pet. App. 4a n.2).

causality. See *ICP*, 135 S. Ct. at 2523. A defendant cannot be liable for having a policy if factors other than the policy caused the complained-of disparity.

Simply deciding not to participate in a voluntary program cannot magically be interchanged with a demonstration of causation as to a disparate impact necessary for ICP's complaint to meet the requirement for "robust causality."

This Court's decision in *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86 (1973) demonstrates the deficiency in ICP's analysis. There, a Mexican citizen living in the United States sued for employment discrimination after being denied employment under a company's policy not to hire undocumented immigrants. *Id.* at 87. The Court acknowledged that such a policy might be used as a pretext for national-origin discrimination, but rejected the discrimination claim because the company had hired employees of Mexican origin provided they had become American citizens. *Id.* at 92–93. The Court concluded that the plaintiff was denied employment because of her citizenship status rather than her national origin. *Id.* at 93.

Under *Espinoza*, when a policy is based on a permissible characteristic (such as citizenship or, here, Section 8 qualification), a connection between that characteristic and a protected status (such as being of Mexican origin or, here, being African American) is not enough to conclude that an adverse impact occurred ***because of*** the protected status. Instead, a court must evaluate whether the impact can be explained by membership in the protected group. Otherwise, a plaintiff could—just as ICP seeks

to do—bootstrap correlation into causation and evade the requirement for "robust causality" entirely.

More important, *Espinoza* demonstrates the problem with ICP's allegation that respondents caused a statistical disparity. In *Espinoza*, the Court concluded the proper comparison for purposes of disparity was the policy's impact on American citizens of Mexican origin to American citizens of other origins—not, as the plaintiff sought, of all persons of Mexican origin to all persons of other origins. *Id.* at 95. The same was true in *Ward's Cove*, where the Court compared the policy's effect on qualified minority candidates to qualified white candidates—not all minority candidates to all white candidates. 490 U.S. at 650–651.

Here, the analysis in *Espinoza* and *Ward's Cove* means comparing (1) Section 8 African American applicants with (2) Section 8 non-African American applicants—a comparison yielding no difference; respondents do not accept vouchers from ***anyone.***

Respondents' policy falls no more heavily on minority voucher holders than non-minority voucher holders. See *Greater New Orleans Fair Housing Ctr.* v. *United States*, 639 F.3d 1078, 1086 (D.C. Cir. 2011) (phrasing inquiry as whether policy has disproportionate impact on minorities within the affected group). And minority voucher holders are entitled only to the same opportunities as other voucher holders—not to better ones. See *Cinnamon Hills Youth Crisis Ctr.* v. *Saint George City*, 685 F.3d 917, 923 (10th Cir. 2012).

ICP did not allege that respondents' policy caused African Americans to be disproportionately excluded in favor of similarly-situated non-African Americans. ICP simply alleged that African Americans are more likely than other groups to be eligible for vouchers in the Dallas area. This is a correlation—not "robust causality."

B. The Fifth Circuit correctly concluded that landlords cannot be held liable for housing disparities they did not create.

ICP criticizes the Fifth Circuit for concluding that the complaint failed to allege "robust causality." This Court drew its "robust causality" analysis in *ICP* from employment-discrimination cases. ICP cites and relies on these cases—but misses the point of why this Court relied on them in *ICP*. The recurrent theme in these earlier decisions was the Court's insistence that defendants not be held liable for circumstances beyond their creation or control. The reasoning in those cases supports the Fifth Circuit's opinion.

This Court first recognized disparate-impact liability in the employment context under Title VII in *Griggs*, 401 U.S. at 431. But the Court cabined this liability in *Watson*, 487 U.S. at 987. There, a plurality of the Court warned against the danger of employers using racial preferences to protect against disparate-impact liability and reasoned that one safeguard against this danger was the burden to establish causation. The Court noted that it would be "unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their workforces." *Id.* at 992, 994.

The Court expanded this stricture in *Ward's Cove*, holding that statistical disparities alone "will *not* suffice to make out a prima facie case of disparate impact." 490 U.S. at 657. Absent a hearty causation requirement, "any employer who had a segment of his work force that was—for some reason—racially imbalanced[] could be haled into court and forced to engage in the expensive and time-consuming task of defending" its policies. *Id*. at 652.

ICP rests on similar concerns. This Court stressed that "disparate-impact liability has always been properly limited in key respects." *ICP*, 135 S. Ct. at 2522. "Without adequate safeguards at the prima facie stage, disparate-impact liability might cause race to be used and considered in a pervasive way" which "would set our Nation back in its quest to reduce the salience of race in our social and economic system." *Id*. at 2523–2524. Echoing *Ward's Cove*, the Court cited "[a] robust causality requirement" as protecting "defendants from being held liable for racial disparities they did not create." *Id*. at 2523.

The causation requirement also derives from the Court's recognition that a "myriad of innocent causes" may result in "statistical imbalances" in work forces (or housing communities). *Watson*, 487 U.S. at 992. Where an imbalance arises "for reasons that are not [an employer's] fault," the employer's policy "cannot be said to have had a 'disparate impact.'" *Ward's Cove*, 490 U.S. at 651–652.

Further reinforcing that defendants cannot be held liable for circumstances beyond their control, the Court provided examples in *ICP* of situations where causation would be lacking or difficult to prove—including where "multiple factors" contribute to a

challenged policy or where "federal law substantially limits [a landlord's] discretion." *ICP*, 135 S. Ct. at 2523–2524. In particular, the Court made clear one salient point that—standing alone—defeats ICP's disparate-impact claim: Defendants are not "liable for racial disparities ***they did not create***." *Id.* at 2523 (emphasis added).

ICP did not allege that respondents' policy excluded African Americans from housing opportunities in favor of other groups, or that it caused any change in the makeup of the relevant communities. ICP simply alleged that most voucher holders are African American, and that few African Americans live where respondents' apartment complexes are located. But "racial imbalance does not, without more, establish a prima facie case of disparate impact." *ICP*, 135 S. Ct. at 2523 (brackets and ellipses omitted). Nowhere in its complaint did ICP ever explain how respondents' decision not to participate in the voluntary Section 8 program ***causes*** these disparities, which by itself means ICP failed to allege a disparate-impact claim under this Court's standard.

Finally, the Fifth Circuit opinion does not engraft any additional requirements onto disparate-impact claimants. ICP misapprehends the opinion's analysis about "before-and-after" comparisons.

In referring to the absence of any before-or-after comparison, the Fifth Circuit was not imposing a pleading requirement; it simply recognized that without an explanation of how individual property owners not accepting vouchers creates the complained-of statistical disparities, there cannot be any causal link. A before-and-after comparison—

whether the challenged policy diminished the amount of rental housing available to African Americans—is probative of robust causality. That is especially true here, where ICP did not allege any change in policy by respondents concerning acceptance of vouchers.

C. ICP's allegation of a circuit split is speculative.

The Fifth Circuit properly concluded that ICP's allegations fall short under all of the recent applications of "robust causality" by other circuit courts. (Pet. App. 22a–27a) (describing other decisions).

The Eleventh Circuit is the most recent court—other than the Fifth Circuit—to address the issue, in an unpublished per curiam opinion in *Oviedo Town Ctr., II, L.L.P.* v. *City of Oviedo, Florida*, 759 Fed. Appx. 828 (11th Cir. 2018). Contrary to ICP's contention, that decision mirrors the Fifth Circuit's analysis.

Oviedo concerned claims by property owners against the government for skyrocketing utility rates at a low-income housing complex. *Id.* at 830. To allege a disparate impact, the *Oviedo* plaintiffs adopted the same approach used by ICP here—they presented data showing that 75% of households in the complex were headed by racial minorities. *Id.* at 833, 835. The Eleventh Circuit rejected this allegation, citing *ICP* for the proposition that:

> If a disparate impact could be founded on nothing more than a showing that a policy impacted more members of a protected class than non-members of protected

> classes, disparate-impact liability undeniably would overburden cities and developers.

Id., at 834 (citing *ICP*, 135 S. Ct. at 2522–2523). Far from establishing any circuit split, *Oviedo* tracks the Fifth Circuit's reasoning exactly.

The second case cited by ICP as establishing a split is *Ellis* v. *City of Minneapolis*, 860 F.3d 1106 (8th Cir. 2017). But the Eighth Circuit never reached the causation issue. Instead, it found that the plaintiffs failed to allege that the policies in question were "artificial, arbitrary, and unnecessary." *Id.* at 1112 (citing *ICP*, 135 S. Ct. at 2524).

In *Ellis,* landlords of low-income properties alleged that the city's targeting of their complexes for code violations and inspections displaced FHA-protected residents. *Id.* at 1108–1109. The Eighth Circuit rejected that claim because the plaintiffs did not "allege facts plausibly demonstrating that the housing-code standards complained of are arbitrary and unnecessary under the FHA." *Id.* at 1112. The plaintiffs failed to make "factually supported allegations that those provisions are arbitrary or unnecessary to health and safety." *Ibid.*

Ellis is not inconsistent with the Fifth Circuit's decision. Indeed, its analysis of the allegations concerning an arbitrary and unnecessary policy tracks the decision here. Just like the *Ellis* plaintiffs, ICP did not make "factually supported" and plausible allegations that the purported no-voucher policy is arbitrary, artificial, or unnecessary.

That leaves only the Fourth Circuit's divided panel decision in *Reyes* v. *Waples Mobile Home Park Limited P'ship*, 903 F.3d 415 (4th Cir. 2018).

Reyes concerned a facility's policy requiring all occupants to provide documentation evidencing their legal status in the United States. The property owner had enforced the policy only against leaseholders but expanded enforcement to all occupants of the property. The plaintiffs—all present or former occupants—sued alleging a disparate-impact claim under the FHA. *Id.* at 419–420. Like ICP's complaint, the *Reyes* plaintiffs alleged disparate impact based on the predominance of Latinos in the undocumented population where the property was located.

In a divided panel opinion, the Fourth Circuit held the plaintiffs had stated a claim for disparate impact by showing the expanded policy would affect a higher percentage of Latinos than non-Latinos. ICP says that decision conflicts with this one. But that is not nearly so clear as ICP suggests.

As the Fifth Circuit noted, *Reyes* can be read as establishing a rule for claims only where enforcement of the policy changes midstream. The Fifth Circuit distinguished *Reyes* on that very basis, opting to take a narrower reading of the case until the Fourth Circuit clarifies its holding. (Pet. App. 29a).

One judge dissented in *Reyes*, using the same reasoning that the Fifth Circuit used here—that the happenstance of Latino predominance among undocumented aliens in the area never could not support disparate-impact liability under the FHA. *Id.* at 434 (Keenan, J., dissenting).

Neither party in *Reyes* sought en banc review or review by this Court. And the Fourth Circuit has not revisited the issue. Moreover, the Fourth Circuit decided *Reyes* before the Fifth and Eleventh Circuits held that no disparate-impact liability exists under these circumstances. Whether the Fourth Circuit still would follow *Reyes*—and the scope it would attach to that decision—is unresolved. Thus, any split among the circuit courts is speculative at best. This Court should leave the matter in the hands of the lower courts for further development.

D. ICP's Heartland cases precede this Court's application of "robust causality" and, in any event, are distinguishable.

ICP relies on FHA Heartland cases like *Huntington Branch*, 844 F.2d at 935–936 and *Mhany Mgmt.*, 819 F. 3d at 588–598. But those cases did not employ the "robust causality" standard applied by this Court in *ICP*—and properly used by the Fifth Circuit here. *Mhany* explicitly noted the difference between the standard applied in ICP and the one used by "*Huntington Branch* and its progeny . . . ." *Mhany Mgmt.*, 819 F.3d at 617.

This case is "[u]nlike the heartland of disparate-impact suits targeting artificial barriers to housing . . . ." *ICP*, 135 S. Ct. at 2522 (citation omitted). Those cases involved exclusionary zoning decisions by governmental entities with lengthy histories of obstructing the development of any affordable housing. In those cases, the plaintiffs sought to vindicate private property development rights against governmental interference. See, *e.g.*,

Mhany Mgmt., 819 F.3d at 588–598; *Huntington Branch*, 844 F.2d at 928–929.

ICP does not allege that respondents have any lengthy history of excluding minorities. Indeed, the record is silent as to whether respondents' complexes even existed when the racial imbalances at issue were created or when the statistical data on which ICP relies was compiled. The Heartland cases offer little guidance in this lawsuit against private landlords.

CONCLUSION

The Fifth Circuit correctly rejected ICP's attempt to obtain a judicial edict effectively mandating participation in the Section 8 program for countless landlords across the country. The petition should be denied.

Respectfully submitted,

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