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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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INTRODUCTION

The Fifth Circuit decision in this case is in direct conflict with the decision of the Fourth Circuit and four other Circuit Courts of Appeal on an important matter, the pleading of robust causation in a Fair Housing Act (FHA) prima facie disparate impact case. Lincoln and the other landlord respondents (Lincoln) chose not to address the questions presented in the petition and chose to argue from their own questions without filing their own petition. Opp. i.[1] Lincoln asserts that the conflict between the Fifth Circuit decision and the Fourth Circuit *Reyes v. Waples*[2] decision is speculative. The assertion is based on an inaccurate citation to the procedural history of *Reyes*. Lincoln also omits any discussion of several other Circuit conflicts.

Lincoln's brief does not address the conflict between *Texas Dept. of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2525 (2015) (*Texas v. ICP*) providing for disparate impact liability and the Fifth Circuit opinion which makes disparate impact liability under the Fair Housing Act (FHA) a "dead letter." App. 71a.[3] The complaint in this case plausibly pleads the uncontested facts to show a prima facie case and provides the adequate basis for review. The dissenting opinions show the lack of authority for the Fifth Circuit opinion. App. 43a-72a, 145a-160a.

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[1] "Opp." refers to Respondents' Brief in Opposition.

[2] *Reyes v. Waples Mobile Home Park Ltd. P'ship*, 903 F.3d 415 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 2026 (2019).

[3] "App." refers to the Appendix filed with the Petition.

Judge Haynes' argument for the restoration of FHA disparate impact liability in the three states of the Fifth Circuit that include three of the top ten most populous cities in the country emphasizes the importance of this case and supports the grant of certiorari. App. 159a.

ARGUMENT

I. The Court should resolve the conflict in the Circuits created by the Fifth Circuit's adoption of the dissent in a Fourth Circuit case as the controlling precedent in this case.

Each of the three questions presented in the petition for certiorari has been answered in the affirmative in one and only one Circuit, the Fifth Circuit. No other Circuit has held that the FHA prima facie disparate impact claim must show that the challenged policy caused the underlying demographic characteristics of the relevant comparison groups in addition to showing the robust causation required by *Texas v. ICP*. No other Circuit has added any elements to the *Texas v. ICP* FHA prima facie disparate impact claim. Pet. 33-38.[4]

[4] "Pet." refers to the Petition for Writ of Certiorari filed in this case.

A. Lincoln misrepresents the *Reyes* case history in order to argue that any conflicts are speculative.

Lincoln states that the *Reyes* opinion was not the subject of either a motion for rehearing en banc in the Fourth Circuit or a petition for writ of certiorari by this Court. Lincoln asserts this lack of review makes the conflict between the *Reyes* opinion and the Fifth Circuit speculative Opp. 25. Lincoln misrepresents the *Reyes* case history. The case was reviewed. The landlords in *Reyes* filed a motion for rehearing and a motion for rehearing en banc of the opinion. Both motions were denied by the Fourth Circuit on December 19, 2018. *Reyes*, 903 F.3d 415 (USCA4 Appeal No. 17-1723 Doc. No. 91, Order). The landlords in *Reyes* filed a petition for certiorari in this Court. The petition was denied. *Reyes*, 139 S. Ct. 2026 (2019). The two-to-one majority opinion in *Reyes* is as binding in the Fourth Circuit as the two-to-one majority opinion is binding in the Fifth Circuit. The *Reyes* case history does not make the conflict speculative.

B. The conflict between this case and *Reyes* is clear.

The conflict between this case and *Reyes* is obvious. The *Reyes* majority opinion unequivocally rejects the reasoning cited in the *Reyes* dissent. *Reyes*, 903 F.3d at 429-432. The Fifth Circuit in this case explicitly rejects the *Reyes* majority opinion. "Absent a contrary ruling by the Fourth Circuit, we believe a narrower construction of the opinion is warranted." The Fifth

Circuit then adopts the definition of robust causation in the *Reyes* dissent. App. 28a-29a.

The conflict is shown by the hypothetical application of the Fifth Circuit majority opinion standard in this case to the facts in the *Reyes* majority holding. The Fifth Circuit standard would require the *Reyes* plaintiffs to have shown that the eviction policy had caused the percentage of all Latinos in Virginia without legal documentation and had caused the percentage of all non-Latinos in Virginia without legal documentation. There would be no disparate impact prima facie case because the *Reyes* plaintiffs had not pleaded that the trailer park landlords' eviction policy had caused the differences in documentation status for the racial and ethnic comparison groups statewide. Under the Fifth Circuit standard, the *Reyes* plaintiffs would have to show that the eviction policy in the mobile home park caused:

- Latinos to constitute 64.6% of the total undocumented immigrant population in Virginia,
- 36.4% of the Latino population in Virginia to be undocumented, and
- only 3.6% of the non-Latino population in Virginia to be undocumented. *See Reyes*, 903 F.3d at 428 (demographics of the comparison groups).

Under the Fifth Circuit standard, unless the eviction policy at one mobile home park had caused the statewide undocumented immigrant characteristics of the Latino and the non-Latino populations, the undisputed robust causation between the eviction policy and

the disparate impact at the mobile home park would not establish a prima facie case. The Fourth Circuit did not require the additional showing of the connection between the policy and the statewide documented immigration status by ethnicity. The robust causation between the policy and the disparate impact on the Latino tenants was sufficient for pleading a prima facie case of disparate impact. *Reyes*, 903 F.3d at 428-429. The different results from the application of the conflicting standards shows the conflict.

Reyes follows this Court's analysis of robust causation as set out in *Texas v. ICP* and *Wards Cove*. When this Court affirmed the use of disparate impact under the FHA, it relied on the Title VII causation principle in *Wards Cove v. Atonio*, 490 U.S. 642 (1989). *Texas v. ICP*, 135 S. Ct. at 2523. The *Reyes* majority opinion directly applies this causation principle from *Texas v. ICP* and *Wards Cove*. *Reyes*, 903 F.3d at 426,428. The Fourth Circuit did not add elements to the prima facie case.

C. The Fifth Circuit mistakenly elevates a background fact in *Reyes* – a change from an earlier policy to the challenged policy – into a required element of the prima facie case.

The fact that the landlords' previous eviction policy had changed from the current challenged policy was mentioned only as a background fact in both the *Reyes* Fourth Circuit majority opinion and the district

court opinion. *Reyes*, 903 F.3d at 419-420; *De Reyes v. Waples Mobile Home Park Ltd. P'ship*, 205 F. Supp. 3d 782, 785-786 (E.D. Va. 2016). Neither the *Reyes* District Court opinion nor the Fourth Circuit majority opinion used the change as the basis for any legal conclusion on the existence of a prima facie case of disparate impact liability. The change is simply a noted fact.

Enforcement of a previously unenforced policy is no different than enforcement of a new policy as part of a prima facie case. App. 64a n.6. The requirement that the challenged policy must be a change from a previous policy eliminates disparate impact liability for those who implement a discriminatory policy at the outset. App. 156a.

D. Lincoln admits the conflict between the Fifth Circuit case and the *Texas v. ICP* "heartland" cases endorsed by this Court in *Texas v. ICP*.

Lincoln's brief explicitly notes the conflict between the Fifth Circuit majority opinion and the FHA prima facie liability standards in the "heartland" cases endorsed by this Court in *Texas v. ICP*, 135 S. Ct. at 2521-2522. Opp. 25. Lincoln asserts that these prior, endorsed cases are not relevant to the circuit conflicts because the opinions predate this Court's opinion endorsing the opinions. Opp. 25-26. This Court's endorsement of the decisions does not eliminate the conflict with the Fifth Circuit. App. 51a-55a.

Lincoln makes no response to three of the six cases in conflict with the Fifth Circuit listed in the Petition at pages 36-38. Opp. 22-25.

II. The Court should review the Fifth Circuit's insertion of additional prima facie case elements that nullify this Court's prima facie disparate impact standards set in *Texas v. ICP*.

The Fifth Circuit's conflict with this Court's decision in *Texas v. ICP* is not rebutted by Lincoln's brief. Lincoln does not base its defense of the Fifth Circuit opinion on the full holding of this Court in *Wards Cove*. Lincoln and the Fifth Circuit cite the text in *Wards Cove* that a racial imbalance not caused by the employer does not provide the basis for a prima facie disparate impact case. This text in *Wards Cove* is referring to a racial imbalance in the workforce of the specific employer. *Wards Cove* held that this racial imbalance in the proportion of non-white workers hired for a position likely would not be considered a disparate impact on non-white workers as long as the proportion of non-white workers hired was similar to the proportion of non-white workers qualified for the job, and **"[a]s long as there are no barriers or practices deterring qualified nonwhites from applying. . . ."** 490 U.S. at 653 (emphasis added). This is the *Wards Cove* holding applied by this Court in *Texas v. ICP*, 135 S. Ct. at 2523, citing *Wards Cove Packing Co.*, 490 U.S. at 653.

The Fifth Circuit and Lincoln ignore the "as long as there are no barriers or practices deterring qualified nonwhites from applying" holding and shift the racial imbalance analyzed from the specific workplace to the general demographics of the relevant comparison groups. *Id*. The case against Lincoln challenges the legality of just such an absolute barrier deterring qualified Black voucher renters from applying. ICP has clearly identified the specific policy that causes the exclusion of the predominantly Black group of voucher participants from Lincoln's apartment complexes in predominantly White areas. The Lincoln landlords' "no voucher policy" is the reason why an 81% Black group (the group with vouchers) cannot rent at respondents' complexes while a 53% White, 19% Black group (renters without vouchers) can rent the apartments. App. 59a, 61a. The Lincoln policy excludes voucher families even though ICP has voucher clients who want to live in the apartments, who meet the landlord's rental criteria, and who can pay the rent using the voucher. App. 199a, 206a. ICP's statistical data plausibly shows that Lincoln's no voucher policy excludes more Black renters than White renters from Lincoln's apartments. App. 59a, 61a, 64a.

III. The complaint plausibly pleaded a prima facie disparate impact case under the FHA making this case suitable for the Court's review.

A. The complaint plausibly pleads that the challenged policy has a disparate impact based on the policy adversely affecting the predominantly Black group of voucher families.

Lincoln claims that since all voucher holders, including White voucher holders, are excluded by the policy, there is no disparate impact. Opp. 17-18. This assertion is not the law. For example, the disproportionately high percentage, 60%, of minorities in the group of voucher holders showed a substantial adverse impact on minorities from a ban on affordable housing even though the ban also disadvantaged Whites in *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 938 (2d Cir.), *aff'd in part sub nom. Town of Huntington, N.Y. v. Huntington Branch, N.A.A.C.P.*, 488 U.S. 15 (1988). Lincoln's ban on voucher families falls more heavily on Black families than

on White families than did the comparable ban in *Huntington*. Black families are 81% of all Dallas area voucher families. App. 186a, 190a-192a. In addition, ICP specifically alleged that the policy excluding the predominantly Black voucher group was part of a preference for the predominantly White renter non-voucher group. The Black voucher group included ICP's clients and others who could, with the voucher,

pay the same rent and meet the same rental criteria. App. 59a, 61a, 192a.

B. Lincoln's challenged policy to refuse to accept applications from voucher families and the resulting lack of applications supports review by this Court.

Lincoln asserts the lack of applicant flow data as a reason to deny the petition. Opp. 10-13. There is no applicant flow data because Lincoln has implemented its policy refusing to even negotiate with ICP's voucher clients or any voucher families since at least 2013. App. 181a-186a. Lincoln's policy is an absolute barrier to voucher families applying and leasing Lincoln's units pursuant to *Wards Cove*. 490 U.S. at 653. The names of the Lincoln officials refusing to negotiate with or rent to voucher families after being requested to do so by ICP are stated in the complaint and in the exhibits to the complaint. App. 181a, 211a-238a. The relative absence of any actual voucher applicants is plausibly explained by the Lincoln policy that totally excludes leasing to voucher families at its complexes in White areas and by the accompanying advertisements that forcefully ban voucher families from Lincoln's properties as not authorized to be tenants. App. 162a, 169a, 201a.

ICP voucher families show a substantial demand for units in White areas. App. 161a-162a, 172a. ICP made specific offers on behalf of specific clients to each of the Lincoln apartments. App. 162a, 211a-238a. As

soon as a landlord in a White area agreed to participate in the ICP sublease program, ICP placed voucher clients in the apartment complex. App. 180a. There are voucher tenants eligible for, able to pay the voucher rent for, and that have the desire to rent the Lincoln available units in White areas. App. 199a, 206a. ICP negotiates with landlords for voucher units in White areas. App. 164a-166a, 168a. Lincoln refuses to even negotiate with these voucher tenants or with ICP on behalf of these families. App. 168a-169a.

C. The perpetuation of the racial segregation claim is plausibly pleaded.

In addition to the claim of disparate impact on the predominantly Black voucher group, ICP plausibly pleaded a segregative-effect claim. App. 158a. The complaint sets out the existence of Lincoln's properties in the White areas where Lincoln refuses to negotiate and lease to voucher families and advertises that refusal. App. 183a-186a, 201a-203a. The lack of Black renters and the lack of vouchers in those areas is shown. App. 187a-190a. There are from zero to only a few Black tenants in the census tracts. There are no voucher tenants in any Lincoln White area neighborhood except one. App. 187a-190a. By comparison, the vouchers in the City of Dallas are located on average in 88% minority and 33% poverty census tracts.[5] App. 187a.

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[5] The issue of census tracts versus Zip Codes is an issue of fact for subsequent proceedings including the use of expert opinion rather than a Rule 12(b)(6) matter. App. 158a. *See*, *e.g.*, *McCardell*

The number of units excluded does not determine the existence of disparate impact perpetuating racial segregation. Segregation was perpetuated by the exclusion of 40 units likely to be occupied by minority households in Huntington. *Huntington*, 844 F.2d at 930, 937-938. In a recent case, the exclusion of low-income housing that would have provided 56 to 101 units for minority households in a 96% White suburb perpetuated racial segregation. *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 598, 619–20 (2d Cir. 2016).

D. The complaint plausibly pleads the third stage burden of proof issue of the existence of less discriminatory alternatives.

The existence of a less discriminatory alternative is not part of the prima facie disparate impact case but is the third step in proving a case if the defendants meet their burden to show the practice is necessary to serve legitimate, substantial, and non-discriminatory interests. *Texas v. ICP*, 135 S. Ct. at 2515, 2518. Lincoln has yet to state any such interests. App. 193a. Nevertheless, ICP pleaded several less discriminatory alternatives to the policy. The Apartment Association of Greater Dallas negotiated with ICP on such alternatives and agreed that the ICP sublease program addressed the landlords' reasons for not renting to voucher families. App. 175a. Whether the issues raised

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v. U.S. Dept. of Hous. & Urban Dev., 794 F.3d 510, 518–520, n.66, n.78 (5th Cir. 2015).

in general to the existence of these alternatives is an issue for evidence in subsequent proceedings and not a Rule 12(b)(6) issue. App. 156a-157a.

E. The voluntary nature of landlord participation does not render Lincoln's decision to participate immune to FHA liability.

When Congress amended the voucher statute to clarify that the acceptance of one voucher tenant did not require the landlord to accept all voucher tenants, the Senate intent was clear that the decision to accept vouchers continued to be subject to the Fair Housing Act. S.Rep. No. 105–21, at 86 (1997), 1997 WL 282462 *36. The Fifth Circuit agrees. App. 15a. The only exemptions from the FHA are those set out in the statute. There is no exception for a decision whether to accept a voucher. *See* 42 U.S.C. §§ 3603(a)(2), 3607(b)(1), (4). App. 69a-70a. Simply pleading a prima facie case of disparate impact liability does not force any landlord to take a voucher. App. 156a.

CONCLUSION

Judge Haynes stated the importance of this Court's review of this case. Lincoln is continuing to exclude Black voucher families from majority white neighborhoods and perpetuating and furthering racial segregation. App. 159a-160a.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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