No. 23-1340

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court should review an issue it already declined to review after the court of appeals' first interlocutory decision (*Reyes I*)—addressing a prima facie case of disparate impact under the Fair Housing Act (FHA)—when Petitioners did not argue, and the court below did not decide, that issue in its second interlocutory decision (*Reyes II*)?

2. Whether the Court should review a separate question—addressing the FHA's "business necessity" standard—when the articulation of that standard would have no impact on the Fourth Circuit's reversal of summary judgment and, in any event, its articulation of the standard is identical to that of its sister circuits?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

FEDERAL CASES

OTHER AUTHORITIES

INTRODUCTION

The Court has already denied Waples' petition for a writ of certiorari to review the Fourth Circuit's 2018 decision (*Reyes* v. *Waples Mobile Home Park Ltd. P'ship*, 903 F.3d 415 ("*Reyes I*"), *cert. denied*, 139 S. Ct. 2026). Pet. 14. Waples' new petition does not identify any development since that denial that would make *Reyes I* now worthy of this Court's review. But even if it did, the Fourth Circuit's 2024 interlocutory decision reversing a grant of summary judgment in favor of Waples on other grounds (91 F.4th 270; Pet. App. 1a-16a ("*Reyes II*")) is not an appropriate vehicle for Waples to file a second petition to review *Reyes I*.

In the order on appeal in *Reyes II*, Waples did not seek, and the district court did not grant, summary judgment on the basis that plaintiffs had failed to establish a prima facie case of disparate impact under Step One of the burden-shifting framework described in *Texas Department of Housing & Community Affairs* v. *Inclusive Commnities Project, Inc.*, 576 U.S. 519 (2015)—which is the subject of Waples' resubmitted first question presented. And on appeal in *Reyes II*, Waples did not even attempt to argue failure to prove a prima facie case as an alternative basis for affirming the grant of summary judgment in its favor.

Therefore, the appeal in *Reyes II* did not present the first question in Waples' petition. Unlike a final judgment against Waples that would merge all of the prior rulings in the case, an interlocutory ruling overturning a grant of summary judgment on other grounds and remanding for trial is not a proper vehicle

for renewing a challenge to the prima facie case ruling in *Reyes I*.

Reyes II also does not present the second question in the petition. Judge Wilkinson's unanimous opinion addressed whether the district court's interpretation of the federal anti-harboring statute on which the district court based its summary judgment ruling was correct, not about a distinction (that does not even exist in the cases) between whether a policy is "necessary" and/or "significantly serves" a legitimate purpose at Step Two of the disparate-impact analysis. *See* Pet. i.

As explained in *Reyes II*:

> The [district] court found that Waples met its burden at Step Two because 'implementing a policy to avoid increased criminal liability under the anti-harboring statute is a valid and necessary interest.' The district court found it 'unimportant' whether Waples's Policy was actually motivated by avoiding a harboring prosecution—it was sufficient that Waples was 'presumed to have knowledge of the law at the time the Policy was implemented and enforced.' And at Step Three, the district court ruled that the Families' proposed reasonable alternative of allowing tenants to [identify themselves using Individual Taxpayer Identification Numbers issued by the Internal Revenue Service] would not 'allow [Waples] to limit [its] criminal liability under the anti-harboring statute.'

Pet. App. 7a (citing Pet. App. 32a-34a) (cleaned up).

The district court's ruling was based on a misreading of an unpublished Fourth Circuit decision in a criminal case (*U.S.* v. *Aguilar*, 477 Fed. Appx. 1000 (2012)) as treating merely renting without verifying a tenant's immigration status as unlawful "harboring." The Fourth Circuit rejected that understanding of the anti-harboring statute—a question on which the lower courts are in agreement and on which Petitioners did not seek certiorari. Pet. App. 12a-13a (collecting cases). "*Aguilar* did not hold that *housing* was a synonym for *harboring* under the statute, and the case cannot be read to extend the threat of prosecution under the statute to merely renting to an undocumented immigrant." *Id.* at 12a. Once the Fourth Circuit identified Waples' asserted business justification as avoiding criminal liability, and concluded that the anti-harboring law does not apply under the circumstances, it "h[e]ld that Waples did not satisfy its burden at Step Two because its Policy did not serve *in any realistic way* to avoid liability under the anti-harboring statute." *Id.* at 15a (emphasis added).

Moreover, and further undercutting the suitability of this case as a vehicle to address the second question, the Fourth Circuit reversed the summary judgment ruling on an alternative ground. "There is a further infirmity in Waples's position specific to this case[,]" the court stated. Pet. App. 15a. "The record here is simply too thin to support a business necessity defense. * * * On a record this thin, Waples cannot have met its burden to establish that the Policy served a legitimate interest. Proof schemes depend on record evidence and the record here falls short of anything approaching business necessity. For this reason too, the district court erred in granting summary judgment to Waples."

Id. at 15a-16a; *see* Pet. 15 (summarizing rulings). Deciding the second question would thus have no effect on either the Fourth Circuit's primary or alternative holding on the business necessity issue.

Review of *Reyes II* is not warranted to address either of the questions in the petition. The petition fails to demonstrate a conflict among the Circuits on "the same important matter," Sup. Ct. R. 10(a), or any other ground for issuing the writ. Notably, the Court has again (after it did so in *Reyes I*) denied review of the first question following the Fifth Circuit's *Lincoln Property* decision. Pet. 20; 140 S. Ct. 2506 (2020). The petition does not point to any new development since then creating an urgent need for review. *See* Pet. 21 (citing a single new decision from the Ninth Circuit noting "some debate" on the articulation of the prima facie causation standard and affirming dismissal on summary judgment). And the petition fails to identify any tension whatsoever among the circuits with respect to the second question, which appears to be a transparent effort to bootstrap the first question back into this Court's consideration before trial.

STATEMENT

In *Reyes I*, the Fourth Circuit reversed the dismissal of plaintiffs' FHA disparate-impact claim under a Fed. R. Civ. P. 12(b)(6) standard. 903 F.3d at 421-23. The case addressed whether the plaintiff families had adequately alleged a prima facie case of disparate impact under Step One of the burden-shifting analysis described in *Texas Department of Housing & Community Affairs* v. *Inclusive Commnities Project, Inc.*, 576 U.S. 519 (2015). Because the district court had

declined to address the second (business necessity) and third (less discriminatory alternative) steps of the disparate-impact analysis in ruling on Waples' motion for summary judgment, the court of appeals "remand[ed] to allow the district court to consider the cross-motions for summary judgment under Plaintiffs' disparate-impact theory of liability in a manner consistent with this opinion." *Id.* at 433.

On remand, Waples filed a summary judgment motion disputing whether plaintiffs' expert testimony was sufficient to establish a prima facie case at Step One, as well as disputing the second and third prongs of the disparate-impact analysis. ECF 248. The district court (Ellis, J.) denied summary judgment and Waples' motion for clarification and/or reconsideration of that order. ECF 283, 298.

After the case was reassigned to another district judge, the court issued an order, sua sponte, directing supplemental briefing in light of arguments made in connection with pretrial motions in limine. ECF 413 (O'Grady, J.). In keeping with the scope of the order, Waples briefed an evidentiary question about what policies were in effect when the families filed suit, and renewed their motion for summary judgment with regard to the second and third prongs of the disparate-impact standard. ECF 416. In its briefing, Waples did not urge the district court to reconsider the denial of its motion for summary judgment on the first step, foregoing any further pretrial challenge to the legal sufficiency of plaintiffs' prima facie case.

Although it had not ordered supplemental briefing to revisit the sufficiency of plaintiffs' prima facie case,

the district court sua sponte held that "[t]he disagreement between the Parties' experts shows that there is a genuine dispute of material fact as to whether the statistical analysis of the Plaintiffs can support a prima facie case of disparate impact." Pet. App. 27a. The district court thus left the sufficiency of the prima facie case as a matter to be determined at trial.

The district court granted Waples' motion for summary judgment with regard to the second and third steps. Pet. App. 27a-35a. Relying entirely on its understanding of criminal harboring liability under the Fourth Circuit's non-precedential decision in *U.S.* v. *Aguilar*, "the Court finds the Defendants could be found liable under the anti-harboring statute. Therefore, implementing a policy to avoid increased criminal liability under the anti-harboring statute is a valid and necessary interest that satisfies the second step of the burden shifting framework." *Id.* at 32a-33a. Turning to Step Three, the district court rejected the alternative of verifying identities using Individual Taxpayer Identification Numbers: "There is no evidence that the proposed reasonable alternative would allow the Defendants to limit their criminal liability under the anti-harboring statute." *Id.* at 34a. The district court entered summary judgment for Waples on the second and third steps of the disparate-impact standard. *Id.* at 34a-35a.

On appeal, Waples did not argue for affirmance of the summary judgment order on the alternative ground that plaintiffs had not established a prima facie case of disparate impact as a matter of law. As a Step Two justification for its Policy, Waples pointed to its interest in "avoiding a criminal harboring prosecution and

conviction," in light of the district court's reading of *U.S.* v. *Aguilar*. C.A. ECF 40, at 25; *see also id.* at 2, 6, 16, 27-28, 53-57. Waples noted that the district court had left the validity and sufficiency of plaintiffs' statistical evidence to establish a prima facie case as a dispute to be resolved at trial. *Id.* at 13 n.5.

The Fourth Circuit reversed the grant of summary judgment because Waples had not established a Step Two "business necessity" justification related to the criminal anti-harboring statute. The court of appeals acknowledged that "[a]voiding criminal liability can certainly serve as the basis for a business necessity defense." Pet. App. 11a. "But it also cannot be the case that defendants can claim business necessity by rattling off inapplicable statutes as their justification for promulgating a challenged policy." *Ibid.* Moreover, a legitimate Step Two defense "cannot be a phony"; "[o]therwise defendants could manufacture business necessity based on speculative, or even imagined liability." *Ibid.* The Fourth Circuit clarified that although this Court had used the phrase "business necessity" to describe Step Two in *Inclusive Communities*, a defendant "need not demonstrate that the challenged policy is 'essential or indispensable' to its business—only that the policy 'serves in a significant way,' its legitimate interests." *Id.* at 10a-11a (citing *Southwest Fair Housing Council, Inc.* v. *Maricopa Domestic Water Imrpovement Dist.*, 17 F.4th 950, 967 (9th Cir. 2021)).

The Fourth Circuit identified two independent reasons why Waples' Policy of requiring all adult tenants to provide a Social Security card or other documents only available to individuals with legal

immigration status did not serve its asserted interest of avoiding criminal liability. Pet. App. 11a-16a. *First*, "the anti-harboring statute simply does not apply to landlords merely leasing to undocumented immigrants[.]" *Id.* at 11a. The court of appeals analyzed the text of the anti-harboring statute, "every precedential appellate decision to address" the issue, federal housing regulations, and the position of the U.S. Department of Justice to conclude that "the anti-harboring statute does not plausibly put Waples at risk for prosecution simply for leasing to families with undocumented immigrants." *Id.* at 11a-15a. The district court had simply misread the unpublished *U.S.* v. *Aguilar* decision—on which the author of *Reyes II* (Judge Wilkinson) had served on the panel—in ruling otherwise. *Id.* at 12a. Having concluded that the anti-harboring statute does not apply, the Fourth Circuit "h[e]ld that Waples did not satisfy its burden at Step Two because its Policy did not serve in any realistic way to avoid liability under the anti-harboring statute." *Id.* at 15a.

Second, the factual record "[wa]s simply too thin to support a business necessity defense." Pet. App. 15a. In particular, the record showed that "the circumstances surrounding Waples's enforcement of the Policy were dubious"—as "the Policy seemed to come out of nowhere[,]" was not enforced for years, and the decision to begin enforcing it had nothing to do with immigration matters. *Ibid.* "Even more puzzling," the court observed, was "how Waples proceeded when it discovered that there were undocumented individuals living at the Park." The Policy was not to remove the tenants as quickly as possible, but to "increase [] the rent payments that noncompliant tenants were

charged every month." *Id.* at 15a-16a. Hence, "[i]f Waples were at risk for prosecution under the anti-harboring statute, it would have a difficult time explaining to a prosecutor why, instead of evicting known undocumented immigrants, it opted to implement a surcharge instead." *Id.* at 16a. "On a record this thin," the court concluded, "Waples cannot have met its burden to establish that the Policy served a legitimate interest." *Ibid.*

REASONS FOR DENYING THE PETITION

I. *Reyes II* Is Not An Appropriate Vehicle For A Second Attempt To Obtain Review Of The Same Question The Court Declined To Review After *Reyes I*.

Waples cannot use an interlocutory decision reversing a grant of summary judgment to relitigate in this Court an issue that Waples did not argue and that the court of appeals below did not decide. Like a district court ruling denying summary judgment, the court of appeals' judgment reversing the grant of summary judgment is an interlocutory decision that does not incorporate earlier rulings. As this Court explained in *Dupree* v. *Younger*, 598 U.S. 729, 734 (2023), "the general rule is that a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated." *See also* 15A Charles Alan Wright et al., *Federal Practice and Procedure* § 3905.1 (3d ed. 2022) (generally, "an appeal from final judgment opens the record and permits review of all rulings that led up to the judgment"). Unlike an adverse final judgment, which would merge for

purposes of appellate review all of the earlier rulings including *Reyes I*, the only issues *Reyes II* presents are the Step Two and Step Three issues the district court resolved in Waples' favor.

Waples did not argue the insufficiency of plaintiffs' prima facie case as an alternative ground for affirmance in the court of appeals. Waples will have a second bite at *Reyes I* if it loses at trial, at which point the Court will have before it a complete factual record. But *Reyes II* did not consider Step One of the disparate-impact analysis, which remains a matter for trial.

The petition acknowledges that the Fourth Circuit "did not revisit" *Reyes I* in *Reyes II*. Pet. 14. And Waples did not ask it to. Indeed, Waples did not make any Step One argument in its supplemental summary judgment briefing or its appellate brief. ECF 416; C.A. ECF 40. Waples cannot ask this Court to overturn the Fourth Circuit's decision on a ground it did not raise in connection with the district court's summary judgment order on appeal here, or in the appeal itself.[1]

[1] This Court "normally decline[s] to entertain" arguments that the parties "failed to raise ... in the courts below." *Kingdomware Techs., Inc.* v. *United States*, 579 U.S. 162, 173 (2016); *see, e.g., Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 56 n.4 (2002). "[I]t is quite a different matter to allow a petitioner to assert new substantive arguments attacking, rather than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it." *United States* v. *United Foods, Inc.*, 533 U.S. 405, 417 (2001).

II. *Reyes II* Is Not An Appropriate Vehicle To Decide Question Two, Which Has No Bearing On The Outcome Of The Business Necessity Inquiry In This Case.

The Fourth Circuit reversed the district court's summary judgment ruling on Step Two of the disparate-impact framework because the district court misunderstood circuit precedent on criminal harboring. *Reyes II* flatly rejected the district court's interpretation of *U.S.* v. *Aguilar*, an unpublished opinion issued by a panel that included Judge Wilkinson, the author of *Reyes II*. Pet. App. 9a-15a. The distinction drawn in Petitioners' second question between a policy that "significantly serves" a legitimate business purpose, and one that is "necessary to serve that purpose," would make no difference because the Fourth Circuit held that Waples' Policy did not serve the asserted purpose of avoiding harboring prosecution "in any realistic way." *Id.* at 15a. Moreover, as an independent, alternative ground for reversal, the Fourth Circuit held that the factual record was "too thin" to support summary judgment in favor of Waples "that the policy served a legitimate interest." *Id.* at 15a-16a. This case is not an appropriate vehicle to address the second question in the petition because the answer would have no bearing on the Fourth Circuit's decision.

III. The Petition Fails To Show That Minor Differences In How Circuits Articulate The Step One Causation Standard Means Different Circuits Would Reach Different Outcomes On The Same Facts.

The Petitioners cannot be right that "[t]he Fourth

Circuit's decision deepen[ed] division in the lower courts about an FHA disparate-impact plaintiff's prima facie burden." Pet. 16-22.[2] *Reyes II* "did not revisit *Reyes I*," *id.* 14; rather, it "start[ed] from th[e *Reyes I*] holding" that the "Families had satisfied their burden at Step One to show a causal connection between the Policy and an attendant disparate impact on Latino residents" at the Park, and proceeded to address only Steps Two and Three, Pet. App. 9a. In fact, no new case has "deepened" any perceived differences among the circuits' prima facie causation standards since this Court denied certiorari of the Fifth Circuit's *Lincoln Property* decision. And the minor differences in how the circuits describe their standards do not establish that the circuits would reach different outcomes on the same facts.

1. Like the Fourth Circuit, the Eighth Circuit requires plaintiffs alleging disparate impact to identify the housing *policy* causing unlawful disparate outcomes. *See Ellis* v. *City of Minneapolis*, 860 F.3d 1106, 1114 (8th Cir. 2017) ("Under *Inclusive Communities*, a plaintiff must, at the very least, point to an artificial, arbitrary, and unnecessary policy

[2] Waples' amici are similarly misleading in describing only one Fourth Circuit "decision." *See* States Amicus Br. 3 (summary of argument asserting that "[t]he decision below was egregiously wrong," and if allowed to stand, the "Fourth Circuit's decision will harm the States"). The "decision" these amici appear to address is 2018's *Reyes I*. *See generally id.* (seventeen of 21 pages covering issue addressed in *Reyes I*—not *Reyes II*). Notably, none of the bad outcomes amici warn about should this case proceed to trial have transpired in the six years since *Reyes I*. *Compare id.* at 12-20 (predicting "deleterious effects" to states if *Reyes I* is "[l]eft untouched"), *with id.* at 20-21 ("The Fourth Circuit's approach to justification [in *Reyes II*] will hurt the [s]tates, too.").

causing the problematic disparity.") (cleaned up).[3] The plaintiffs in *Ellis* failed to meet this modest threshold by not identifying the relevant policy complained of. *See id.* at 1112-14 (plaintiffs argued "that they were not required to plead facts supporting a prima facie case of disparate impact," "mount[ed] no serious challenge to the housing code itself[,]" and "[t]he City's misapplication of the housing code is likewise insufficient to support the Ellises' allegations of a City policy").

The Eighth Circuit's approach in *Ellis* aligns with threshold requirements described in *Reyes I:*

> To establish causation in a disparate-impact claim, the plaintiff must begin by identifying the specific practice that is challenged. The plaintiff must also demonstrate that the disparity they complain of is the result of one or more of the practices that they are attacking, specifically showing that each challenged practice has a significantly disparate impact on the protected class. In other words, 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.

Reyes I, 903 F.3d at 425 (citations omitted and cleaned up). The plaintiffs' threadbare allegations in *Ellis*

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[3] As they did in their (denied) petition after *Reyes I*, Petitioners try again to tie *Ellis* to a pre-*Inclusive Communities* decision, *Keller* v. *City of Fremont*, 719 F.3d 931 (8th Cir. 2013), *cert. denied*, 572 U.S. 1101 (2014). But *Keller* does not provide a precedential Eighth Circuit majority on the prima facie disparate-impact standard—as the petition acknowledges. Pet. 16 n.6. *Ellis* neither cited nor applied the reasoning of Judge Loken's *Keller* opinion.

would be dismissed in either circuit. Conversely, the allegations in *Reyes I* would surpass either circuit's requirements. *See Reyes I*, 903 F.3d at 429 (Plaintiffs established that "the specific Policy requiring all adult Park 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.").[4]

2. In an unpublished decision, the Eleventh Circuit applied other threshold requirements described in *Reyes I*—ensuring that plaintiffs furnish statistics showing that the percentage of members of the protected class affected by the policy was higher than the percentage of nonmembers impacted. *Oviedo Town Ctr. II, L.L.L.P.* v. *City of Oviedo, Fla.*, 759 Fed. Appx. 828 (11th Cir. 2018) (per curiam). The Eleventh Circuit observed that in a pre-*Inclusive Communities* decision, it had held that "the plaintiff must provide evidence comparing members of the protected class affected by the ordinance with non-members affected by the ordinance," and "[i]f the percentage of members of the

[4] Waples asserts, without citation, that the Eighth Circuit's standard "would require judgment in petitioners' favor, because respondents have no basis to claim that the Policy is artificial, arbitrary, and unnecessary." Pet. 18. But the Eighth Circuit's decision was based on the absence of any identified policy, not whether the policy was sufficiently wrong-headed. In any event, plaintiffs have consistently argued that Waples' Policy *is* arbitrary and unnecessary—as it imposes artificial barriers to them and other Latino families obtaining housing in the Park and in northern Virginia. *See also* Pet. App. 14a-15a (noting that "[a] policy that discouraged or prohibited landlords from housing any undocumented individual would lead to homelessness on an even greater scale than we are presently experiencing"; the "circumstances surrounding Waples's enforcement of [its] Policy were dubious"; and "[t]he Policy seemed to come out of nowhere").

protected class . . . affected was higher than the percentage of nonmembers impacted, this disproportionality could form the basis for a prima facie case of disparate impact." *Id.* at 835 (citing *Schwarz* v. *City of Treasure Island*, 544 F.3d 1201 (11th Cir. 2008)). The court likewise stated that if such comparative statistics had been furnished, "a prima facie case of disparate impact might have been presented, and we would then proceed to consider the causal relation." *Id.* at 836; *accord Reyes I*, 903 F.3d at 425 ("Additionally, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion [complained of] because of their membership in a protected group.").

The plaintiffs in *Oviedo* failed to meet the threshold comparative statistics requirement. They offered only the racial demographics of one solitary residential building subject to a citywide policy. The court concluded that a citywide comparative analysis would be necessary "because, since the policy impacts the whole city, the whole city would need to be evaluated before we could determine that the claimed impact might have disparately fallen on certain insular groups." *Oviedo*, 759 Fed. Appx. at 836. "But since all the appellants have shown us is that the [one building's] residents are disproportionately racial minorities, we need go no further because this necessarily fails to make out a prima facie case." *Ibid.* No conflict exists (even if this were a published decision), as the *Reyes* plaintiffs met this shared threshold of providing statistics comparing members of the protected class affected by the Policy with non-members affected by the Policy. *See Reyes I*, 903 F.3d at 429.

3. The petition acknowledges that the Fifth Circuit's decision in *Inclusive Communities Project, Inc.* v. *Lincoln Prop. Co.*, 920 F.3d 890 (5th Cir. 2019), also does not produce a conflict. Pet. 20. Indeed, the Fifth Circuit offered a harmonizing interpretation of the jurisprudence on a common set of facts—affirming dismissal of a disparate-impact claim "under any of the analyses of robust causation discussed" in *Ellis, Oviedo*, and *Reyes I*—even the *Reyes I* dissent. *Lincoln Prop. Co.*, 920 F.3d at 906, *see also Reyes I*, 903 F.3d at 426 ("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.").

This Court denied the certiorari petition in *Lincoln Property*, which argued, among other things, that the Fifth Circuit's standard conflicts with that of other circuits. 140 S. Ct. 2026; *see also* Inclusive Comm. Pet., 2019 WL 5290790, at *33-*37 (arguing conflict); Lincoln Prop. Br. in Opp., 2019 WL 8267232, at *25 ("any split among the circuit courts is speculative at best").

4. Since this Court denied certiorari in *Lincoln Property*, the only subsequent case cited in this petition is *Southwest Fair Housing Council, Inc.* v. *Maricopa Domestic Water Improvement District*, 17 F.4th 950 (9th Cir. 2021). That decision did not "deepen[]" any alleged circuit split, as the petition acknowledges. Pet. 22. Nor did it "confirm[] that the split is entrenched," as the petition asserts. *Id.* at 21.

Rather than identifying any "split," the Ninth Circuit merely noted that "some debate has developed about the contours of the robust causality requirement"—citing the Fifth Circuit's gloss on the jurisprudence in *Lincoln Property*. 17 F.4th at 966. The Ninth Circuit opted not to "enter that debate," because it addressed "a simple case" in which "[t]he clarity of that causal relationship sets it apart from other cases." *Ibid.*[5] Those decisions by the Fifth and Ninth Circuits narrow rather than widen any disagreement about precisely how to express the causation standard.

Given the myriad vehicle issues here, *see supra* at I, II, the successful efforts of the two most recent Circuit decisions to resolve cases without debating among ways to articulate the prima facie standard, and the absence of the dire consequences forecast in Waples' first petition (2019 WL 1294668, at *2-*3, *30) in the six years since *Reyes I* was decided, there is even less reason to grant certiorari now than there was when the Court denied certiorari in *Reyes I* and *Lincoln Property*.

IV. The Petition Fails To Show A Conflict Over The Step Two Business Necessity Defense.

Petitioners are flatly wrong that the Fourth

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[5] *Southwest Fair Housing Council* does not conflict with *Reyes I*. As in *Reyes I*, the Ninth Circuit analyzed whether plaintiffs had identified the policy that caused the disparate impact, furnished statistics establishing a disproportionate adverse effect on a protected class, and met a robust causality standard showing the "outcomes that arose after a challenged policy was implemented can be traced to the policy rather than to other potential causes or factors." *Id.* at 962-66. There is no question that the Plaintiffs and other Latino families lost their homes in the Park due to Waples' sudden enforcement of the Policy.

Circuit's "business necessity" standard conflicts with those of the Ninth and Second Circuits. Pet. 22-24 (citing *Sw. Fair Hous. Council, supra*; *Mhany Mgmt., Inc.* v. *County of Nassau*, 819 F.3d 581 (2d Cir. 2016)). In fact, the Fourth Circuit announced a legal standard identical to (and citing) its sister circuits, and the outcome in *Reyes II* would be the same in any circuit.

Petitioners contend that in the Second and Ninth Circuits, the question at Step Two is whether a challenged housing policy "serves, in a significant way, [Defendants'] legitimate interests." Pet. 23-24. The decision below announces the same standard—adopting identical language because the Ninth Circuit "put it well" in *Southwest Fair Housing Council*:

> A business necessity need not be a do-or-die matter. A necessitous policy can be, but need not be, one that spells the difference between solvency and bankruptcy. **The Ninth Circuit has put it well:** "Although the Supreme Court in *Inclusive Communities* used the phrase 'business necessity' to describe this step of the analysis, that term is somewhat of a misnomer ... **the defendant need not demonstrate that the challenged policy is 'essential or indispensable' to its business—only that the policy 'serves, in a significant way,' its legitimate interests."** *Sw. Fair Hous. Council, Inc. v. Maricopa Domestic Water Improvement Dist.*, 17 F.4th 950, 967 (9th Cir. 2021).

Pet. App. 10a-11a (emphasis added).

Because the Fourth Circuit adopted and applied the same standard as its sister circuits, all three courts

would reach the same result in *Reyes II*. The Fourth Circuit spent fourteen paragraphs analyzing whether Waples' Policy served, in a significant way, its asserted interest in avoiding criminal prosecution under the federal anti-harboring statute. Pet. App. 11a-16a. That is exactly, in Petitioners' own words, what is required. *See* Pet. 24 ("The only remaining issue for Waples under *Southwest Fair Housing Council* would have been whether the Policy serves that . . . legitimate interest in a significant way."). Having conducted that legal and factual analysis, the Fourth Circuit concluded that the Policy not only failed to serve the interest "in a significant way"—the Policy "did not serve *in any realistic way* to avoid liability under the anti-harboring statute." Pet. App. 15a. Moreover, "[o]n a record this thin, Waples cannot have met its burden to establish that the Policy served a legitimate interest." *Id.* at 16a.[6]

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[6] Petitioners assert, without citation, that Waples' Policy serves its interest in reducing its risk of criminal liability because it provides "an unambiguous defense to any anti-harboring prosecution." Pet. 24. That baseless contention ignores both the Fourth Circuit's consensus interpretation of the anti-harboring statute and the factual record. As Judge Wilkinson explained, every court of appeals to address the issue and the U.S. Department of Justice has agreed that the anti-harboring law does not apply to merely renting to undocumented individuals. Pet. App. 12a-13a. Moreover, Waples implemented a "surcharge" on undocumented individuals when it discovered they were living at the Park. *Id.* at 15a-16a. Hence, far from providing a defense to an anti-harboring prosecution, the Policy "meant that while Waples was representing that it could not house undocumented immigrants without facing criminal penalties, it was knowingly housing such immigrants and charging them a premium to stay." *Id.* at 16a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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