No. 23-1340

IN THE
Supreme Court of the United States

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

v.

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

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

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September 11, 2024

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RULE 29.6 STATEMENTS

Petitioners' Statements pursuant to Rule 29.6 were set forth at page iii of the petition for a writ of certiorari, and there are no amendments to those Statements.

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The judgment below rests on the Fourth Circuit's cramped reading of two "safeguards" that limit FHA disparate-impact liability under *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 544 (2015). Treating its decision in a prior appeal as the law of the case, the court below held that respondents can carry their prima facie burden with statistical evidence of preexisting racial disparities that petitioners did not create. It also rejected petitioners' "business necessity" defense as a matter of law by second-guessing the challenged policy's purpose and means-end fit nearly a decade after petitioners implemented it. Both holdings conflict with other appellate judgments. Only this Court can provide the clarity that courts and potential disparate-impact defendants need about when policies adopted without discriminatory intent can be condemned many years later based on alleged discriminatory effects.

Respondents object (at 1-2) that the Fourth Circuit decided the prima facie question in a prior appeal in this case, rather than in this appeal. But this Court still remains free to take up the issue now. It should do so: the prima facie question is intertwined with the rebuttal question decided in this appeal, and respondents have a triable case only because the Fourth Circuit decided both questions in their favor (reversing the district court both times).

Respondents admit (at 12) that the lower courts have yet to adopt a common standard on the prima facie question, but they deny (at 12-17) that the distinctions in their standards make much difference in individual cases. The plenitude of reversals and dissents (including in this very case) and HUD's repeated changes of position (which respondents ignore) show otherwise. Respondents also contend (at 17-19) that

the court below inoculated its decision from review by reciting the rebuttal standard a different circuit adopted. But as petitioners explained (at 22-24), the court's application of that standard hollows out FHA defendants' "leeway to state and explain the valid interest served by their policies," *Inclusive Cmtys.*, 576 U.S. at 541, in ways incompatible with the law in other circuits.

The Court should decide both questions now. Respondents' account of this case's eight-year tortuous route to trial (at 4-9) only confirms that the chaos below frustrates *Inclusive Communities*' instruction that "prompt resolution of these cases is important." 576 U.S. at 543. Further, as *amici* explain, waiting for another case will only allow overbroad "disparate-impact liability" to continue to "displace valid governmental and private priorities, rather than solely 'removing artificial, arbitrary, and unnecessary barriers.'" *Id.* at 543-44 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)) (cleaned up). The Court therefore should grant the petition and reverse the Fourth Circuit's judgment.

ARGUMENT

I. THIS CASE IS AN EXCELLENT VEHICLE FOR RESOLVING BOTH QUESTIONS PRESENTED

Respondents deny (at 1-2, 9-10, 12 n.2) that the "robust causality" question is presented on the ground that it was decided in *Reyes I*. But this Court has the "authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals." *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 & n.1 (2001) (per curiam); *see Mercer v. Theriot*, 377 U.S. 152, 153 (1964) (per curiam) ("We now consider all of the substantial

federal questions determined in the earlier stages of the litigation, for it is settled that we may consider questions raised on the first appeal, as well as those that were before the court of appeals upon the second appeal.") (citation omitted; cleaned up). Further (*contra* BIO 10), petitioners fully preserved their position on the prima facie question in *Reyes I*; petitioners had no duty to press a futile argument against the law of the case as an alternative basis for affirmance in *Reyes II*. *Cf. United States v. Vonn*, 535 U.S. 55, 58 n.1 (2002) (noting that the Court can consider a claim "made by the current litigant in 'the recent proceeding upon which the lower courts relied for their resolution of the issue, and [the litigant] did not concede in the current case the correctness of that precedent'") (quoting *United States v. Williams*, 504 U.S. 36, 44-45 (1992)) (brackets in *Vonn*).[1]

Respondents also observe (BIO 1) that the Court denied a certiorari petition in *Reyes I*. But the fact that the Court declined to consider the case in 2019 – when it presented a narrower question,[2] and on the

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[1] The fact that petitioners pressed, and the Fourth Circuit considered, the prima facie question in *Reyes I* distinguishes this case from respondents' mine-run forfeiture cases (*see* BIO 10 n.1). As for *Dupree v. Younger*, 598 U.S. 729 (2023) (cited in BIO 9), the decision supports petitioners, not respondents. The Court held there "that a post-trial motion under Rule 50 is not required to preserve for appellate review a purely legal issue resolved at summary judgment" because that prior "resolution of a pure question of law . . . is unaffected by future developments in the case." *Id.* at 736. That reasoning counsels in favor of reviewing the prima facie holding from which the court below "start[ed]" (App. 9a), not ignoring it.

[2] *See* Pet. i (No. 18-1217) ("Whether a plaintiff can allege a *prima facie* case of disparate-impact discrimination on the basis of race or national origin under the FHA against a landlord's leasing policy that screens out undocumented aliens, where the

pleadings – is no bar to granting review five years of compounding confusion later, and at summary judgment. On the contrary, because the two questions presented are related (*see* Pet. 31), considering them together is "'essential to analysis of the Court of Appeals' [decision].'" *Missouri v. Jenkins*, 515 U.S. 70, 84 (1995) (quoting *Procunier v. Navarette*, 434 U.S. 555, 560 n.6 (1978)) (brackets in *Jenkins*) (addressing question on which the Court previously had denied certiorari).

There thus is no obstacle to deciding either question in this case, and there is every reason to address both of them together.

II. THE COURTS OF APPEALS AND HUD INTRACTABLY DISAGREE ABOUT BOTH QUESTIONS PRESENTED

Petitioners showed that, after *Inclusive Communities,* HUD (Pet. 8-11) and the lower courts have failed to settle on common standards for either an FHA plaintiff's prima facie burden (Pet. 16-22) or a defendant's rebuttal burden (Pet. 22-24). Respondents fail to show otherwise.

A. Respondents Ignore HUD's Repeated Changes Of Position On The Questions Presented

Respondents ignore HUD. They never cite its key regulation. *See* 24 C.F.R. § 100.500. They never acknowledge that HUD has changed its position on the questions presented twice since this case last was before this Court. *See* Pet. 8-11 (describing this

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landlord predominantly rents to Latino tenants, and the only factual allegation of disparate impact is that undocumented aliens in the geographic vicinity of the landlord's property happen to be disproportionately Latino.").

regulatory see-saw). They also never address that HUD squarely has taken sides on questions disputed in this case. *See*, *e.g.*, Final Rule, *Reinstatement of HUD's Discriminatory Effects Standard*, 88 Fed. Reg. 19,450, 19,459 (Mar. 31, 2023) ("HUD believes that to the extent that some courts have attempted to impose limitations greater than those described in the 2013 Rule, they have misread *Inclusive Communities*."); *id.* at 19,491 (rejecting requirement that an alternative proposed at step three be "equally effective" as the challenged practice in serving the asserted interest); *see also* Br. for Appellees 9 n.5, 42-43 & n.12, *National Ass'n of Mut. Ins. Cos. v. U.S. Dep't of Hous. & Urb. Dev.*, No. 23-5275 (D.C. Cir. July 3, 2024) (acknowledging and endorsing *Reyes I* while rejecting Fifth Circuit's contrary view).

That HUD has repeatedly changed its position since the case was last before the Court would be enough to warrant review on its own: FHA defendants cannot comply with disparate-impact standards fated to change with different presidential administrations.

B. The Courts Of Appeals Are In Open Conflict About An FHA Disparate-Impact Plaintiff's Prima Facie Burden

Respondents admit (at 12, 17) that the circuits have adopted differing standards to decide whether a plaintiff has shown "robust causality," as *Inclusive Communities* requires. Pet. 16-22. Respondents nevertheless contend that the Court should deny review because (they say) "the two most recent Circuit decisions" – the Fifth Circuit's in *Inclusive Communities Project, Inc. v. Lincoln Property Co.*, 920 F.3d 890 (2019), and the Ninth Circuit's in *Southwest Fair Housing Council, Inc. v. Maricopa Domestic Water Improvement District*, 17 F.4th 950 (2021) – have avoided "debating among

ways to articulate the prima facie standard." BIO 16-17.

Respondents are mistaken. The notion that *Lincoln Property* decided the causality question without "debating" the topic would confound the dissenting panel member and the six other circuit judges that voted to rehear it en banc. *See* Pet. 20 (citing 920 F.3d at 921-22 (Davis, J., concurring in part and dissenting in part), and 930 F.3d 660, 661 (5th Cir. 2019) (Haynes, J., dissenting from denial of rehearing en banc)). And the Ninth Circuit hardly read *Lincoln Property* to layer some unifying "gloss on the jurisprudence," as respondents suggest (at 17). The Ninth Circuit instead treated *Lincoln Property* as "describing four different views among the Fourth, Eighth, and Eleventh Circuits" (in the former case, relying on *Reyes I*). *Southwest Fair Hous. Council*, 17 F.4th at 966. The fact that the Ninth Circuit was so reluctant to deepen the split that it avoided weighing in on the question is a reason to grant review and provide the uniformity the lower courts cannot. *See* Pet. 22; *see also*, *e.g.*, *Property Cas. Insurers Ass'n of Am. v. Todman*, 2024 WL 1283581, at *24 (N.D. Ill. Mar. 26, 2024) (noting that disagreement on prima facie burden creates a potentially dispositive defense in some jurisdictions, but not in others), *appeal pending*, No. 24-1947 (7th Cir.).[3]

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[3] Respondents note (at 16) that the Court denied the *Lincoln Property* plaintiffs' certiorari petition, but the very brief in opposition they cite (*id.*) shows why the Court should grant this petition. In that brief, the *Lincoln Property* defendants argued that the Fourth Circuit might abandon or limit *Reyes I* in light of *Lincoln Property* and aligned authorities; that is why they argued the split was "speculative." Br. in Opp. at 22-25, *Inclusive Cmtys. Project, Inc. v. Lincoln Prop. Co.*, 140 S. Ct. 2506 (2020) (No. 19-497 (Feb. 11, 2020)) (quoted in BIO 16). Almost five years later,

Respondents also assert (at 12-17) that this case comes out the same way under any standard. Petitioners disagree. *See* Pet. 16-22. If the Court were to harbor doubts about that question, however, that still would be no reason to leave courts, HUD, businesses, and governments to guess about the applicable FHA standard in future cases. Instead, the Court should grant the petition and clarify *Inclusive Communities*' "robust causality" standard, then determine whether it is necessary to remand for the application of that standard here.

C. The Decision Below Conflicts With Those Of Other Circuits About An FHA Defendant's Rebuttal Burden

1. Turning to the rebuttal question (about the "business necessity" defense), respondents emphasize (at 17-19) that the Fourth Circuit did not openly break from other courts and even recited the standard the Ninth Circuit announced in *Southwest Fair Housing Council*. But as petitioners explained (at 22-24), the substance of the Fourth Circuit's analysis departs from that of other circuits in a way that narrows the "leeway" *Inclusive Communities* properly grants FHA defendants "to state and explain the valid interest served by their policies." 576 U.S. at 541.

Despite agreeing that "criminal liability can certainly serve as the basis for a business necessity defense" (App. 11a), the court below found that petitioners lacked legally sufficient rebuttal proof for reasons that no other circuit would have credited. As respondents recount (at 3, 6-8, 11), the court below held that the

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the split instead is entrenched. The *Lincoln Property* defendants also pointed to independent pleading deficiencies that made the case a poor vehicle for resolving the causality issue. *See id.* at 9-22. As this case comes to the Court, there are no such obstacles.

conduct the Policy avoids does not, without more, violate the harboring statute, 8 U.S.C. § 1324(a)(1)(A)(iii). But *Inclusive Communities* does not make narrow means-end tailoring the standard for an FHA defendant's rebuttal burden. The Policy gives petitioners a strong defense to potential harboring liability. Under other circuits' law (*see* Pet. 22-24), that is enough to trigger respondents' burden "not only to present potential alternatives, but to provide evidence that equally effective and less discriminatory alternatives exist," after accounting for "the costs and burdens of proposed alternatives." *Southwest Fair Hous. Council*, 17 F.4th at 970-71.

Yet "[n]ow," as *amici* States explain, "a justification defense premised on fears of legal liability must effectively come off the table if there's a chance a federal court will second guess that fear down the road." Br. of *Amici* States 11. More remarkably still, under the decision below, that judicial "second guess[ing]" may turn on prosecutors' *ex post* assurances that it "ordinarily" would not prosecute in similar circumstances, U.S. C.A. Amicus Br. 11, and that a conviction would have required them to prove a culpable mental state (not just an unlawful act precluded by a challenged policy). That holding offers cold comfort to businesses aiming to stay firmly on the right side of the law amid shifting exercises of enforcement discretion. *See* Pet. 14-15 & n.5.

In short, the Fourth Circuit has shrunk the business necessity defense in a way that collapses into the very thing *Inclusive Communities* warned against: "an attempt to second-guess which of" multiple "reasonable approaches" an FHA defendant "should follow in the sound exercise of its discretion in" pursuing legitimate ends. 576 U.S. at 541; *see also Southwest Fair Hous. Council*, 17 F.4th at 969-70 (similar). That departure

from other circuits' readings of *Inclusive Communities* warrants review.

2. Echoing the Fourth Circuit, respondents also question petitioners' proof. But petitioners put forth sworn testimony showing that they feared the potential legal consequences of knowingly providing housing to undocumented persons. *See*, *e.g.*, Waples C.A. Br. 49-50 (citing, *e.g.*, JA511, JA515). Respondents (again like the Fourth Circuit) cannot square their invitation to weigh the evidence with basic summary-judgment law entitling petitioners to the benefit of all reasonable inferences. *See* Fed. R. Civ. P. 56(a).

Respondents nevertheless contend that this proof is too "thin" because – rather than immediately evict them – petitioners allowed them to become month-to-month tenants, paying the increased rent that (as is typical) applies to such tenants. BIO 19 & n.6 (quoting App. 16a). But respondents (once again like the Fourth Circuit) ignore the fact that state law limited petitioners' discretion to evict tenants immediately. *See* Pet. 12 (discussing district court's explanation of that law). *Inclusive Communities* did not put petitioners to the choice of risking federal criminal liability, evicting undocumented-alien tenants immediately in contravention of state law, or allowing respondents to remain indefinitely on rent terms more favorable than those available to U.S. citizen tenants.

At any rate, again, if the Court is unsure which side has the better of the evidence, the Court still should grant review to clarify the contours of an FHA defendant's rebuttal burden and remand, rather than leave the lower courts, HUD, and FHA defendants to continued confusion.

III. THE QUESTIONS PRESENTED ARE IMPORTANT

Respondents make no effort to explain how the decision below follows from the best reading of the FHA and *Inclusive Communities*. They offer no supporting account of this Court's past encounters with disparate-impact liability. *Cf.* Pet. 3-8. They do not cite *Bank of America Corp. v. City of Miami*, 581 U.S. 189 (2017), much less try to square this case with it. *See* Pet. 25. The same is true of *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973). *See* Pet. 25-26, 27-29; *see also* Br. of *Amici* States 8-10 (explaining adverse immigration-related consequences of the decision below). Nor do they account for *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). *See* Pet. 26-27; *see also* Br. of *Amici* States 20-21 (cataloging harm to States of the decision below's "near[] insist[ence] that landlords be indifferent to the federal harboring statute and similar laws").

Respondents also fail to answer petitioners' showing (at 30-31) that the Fourth Circuit's decision will bring about what *Inclusive Communities*' "safeguards" aimed to prevent – "caus[ing] race to be used and considered in a pervasive and explicit manner to justify governmental or private actions that, in fact, tend to perpetuate race-based considerations rather than move beyond them." 576 U.S. at 543-44. That, "in turn, would set our Nation back in its quest to reduce the salience of race in our social and economic system," *id.* at 544 – contrary to the fundamental purpose of the FHA and similar statutes.

Moreover, as *amici* have underscored, there is no principled way to limit the decision below to the FHA or to the facts of this case. Instead, the Fourth Circuit's reading of *Inclusive Communities* is sure to

creep into many other areas of concern to both private and public actors alike. *See* Br. of *Amici* PLF et al. 7-18; Br. of *Amici* States 12-21. This expansion of disparate-impact liability will set not only the FHA, but parallel statutes, on a collision course with the "serious constitutional questions" that *Inclusive Communities*' safeguards sought to "avoid." 576 U.S. at 540; *see also* Br. of *Amici* States 17-18 ("Lurking in the shadows of every disparate impact case is the question: '[w]hether, or to what extent, are the disparate-impact provisions . . . consistent with the Constitution's guarantee of equal protection?'") (quoting *Ricci v. DeStefano*, 557 U.S. 557, 594 (2009) (Scalia, J., concurring)) (alterations in States Br.); *see* Br. of *Amici* PLF et al. 3-15 (similar).

Rather than invite those consequences, the Court should grant the petition, clarify *Inclusive Communities*' "safeguards," and reverse the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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