No. 25-229

IN THE

Supreme Court of the United States

EMIGRANT MORTGAGE COMPANY, INC., AND EMIGRANT BANK,

Petitioners,

v.

JEAN ROBERT SAINT-JEAN, et al.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners ran a predatory lending scheme that deliberately targeted and disproportionately harmed Black and Latino homeowners. A jury found that the scheme violated both federal and state anti-discrimination laws. Petitioners do not ask this Court to review the state-law basis for that verdict, which independently supports the entire damages award. And even as to federal law, petitioners attack strawman holdings that the Second Circuit did not adopt. Properly framed, the questions presented are:

1. Whether the Second Circuit adopted a "special 'fairness-based' test for equitable tolling" (Pet. I), even though the court recognized that a plaintiff must prove "that some extraordinary circumstance stood in her way" and "that she has been pursuing her rights diligently." Pet. App. 25a (citation omitted).

2. Whether the Second Circuit allowed disparate-impact plaintiffs to prevail without proving that the challenged practice is "disproportionately bad" for a protected class (Pet. I), even though the court "agree[d]" with petitioners about "the requirement of a disproportionate or disparate effect." Pet. App. 43a.

3. Whether the Second Circuit "embraced a jury instruction that had *no causation instruction at all*" (Pet. 30), even though the court held that the "causation language in the charge" was "sufficient to convey" the requirement set forth in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2016). Pet. App. 47a.

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STATEMENT OF THE CASE

From 1999 to 2008, petitioners Emigrant Mortgage Company and Emigrant Bank operated the STAR NINA program, a discriminatory lending scheme designed to strip homeowners of their home equity. An industry veteran described the program's loan terms as "the worst [she] had ever seen"; New York banking regulators ultimately forced Emigrant to abandon it; and Congress has now banned its key features. Pet. App. 9a-10a; *see* 15 U.S.C. § 1639c(a). In this case, a jury instructed on disparate-treatment and disparate-impact theories found that the STAR NINA program also violated federal and state antidiscrimination laws. Pet. App. 2a-4a.

1. Emigrant's STAR NINA program deliberately targeted Black and Latino homeowners. At the height of the program, Emigrant spent 76% of its total advertising budget on ads in four newspapers that "cater[ed] to Black and Hispanic" communities: *Mi Zona Hispana*, *Black Star News*, *Caribbean Life*, and *Hoy*. Pet. App. 11a-12a; *see id.* 216a. Once the program ended, so did the targeted ads: Emigrant's spending on those newspapers plummeted from $25,000 a year to just $100. *Id.* 11a-12a. Emigrant's Vice President for Marketing admitted that Emigrant used minority models in its ads to present an "ethnic image" for readers of those "ethnic publication[s]." C.A. J.A. 1269. And Emigrant's CEO testified that he knew it targeted specific ethnic groups. *Id.* 994-95.

The targeting worked: STAR NINA loans disproportionately went to Black and Latino borrowers. Pet. App. 11a. In neighborhoods where fewer than 10% of residents were minorities, only 23% of Emigrant's refinancing loans were STAR NINA loans. *Id.* But in

neighborhoods where 80% of residents were Black or Latino, the percentage of STAR NINA loans nearly doubled to 45%. *Id.* Another analysis found statistically significant racial disparities after controlling for a variety of non-race factors, including credit score, income, and education: Even where neighborhoods were otherwise comparable, a racial disparity persisted. *Id.* And "Emigrant's internal communications and policies showed that Emigrant was aware of race-based disparities in its STAR NINA loan-writing." *Id.* 12a.

2. The STAR NINA program relied on two unorthodox features to strip homeowners of their equity.

First, Emigrant targeted homeowners with high equity in their homes but a demonstrated inability to repay a loan. Pet. App. 9a-10a. Emigrant ensured that STAR NINA borrowers had substantial home equity by requiring a loan-to-value ratio of less than 50%; that is, the borrower's home had to be worth at least twice as much as the loan. *Id.* 9a. Emigrant did not, however, look at borrowers' income or other assets—"NINA" stands for "no income, no asset." *Id.* 3a. Other lenders restricted no income, no asset loans to borrowers "with credit scores in the 800 range." *Id.* 212a. But rather than seeking out such borrowers with "extremely high" credit, Emigrant did the opposite: "a credit score below 600 was *required*." *Id.* 9a. In other words, Emigrant "was looking for the borrowers that had the least likelihood to be able to repay the debt." *Id.* 212a.

Second, when borrowers inevitably fell behind, STAR NINA loans made default abnormally costly for borrowers and profitable for Emigrant. Pet. App. 10a. If a borrower missed even a single payment, the

interest rate shot up to 18%—highly irregular in an industry where late payments ordinarily do not change the interest rate. *Id.* 9a, 212a. The 18% rate dramatically increased homeowners' monthly payments, all but guaranteeing that they would never catch up on their snowballing debt. *Id.* 9a. Meanwhile, Emigrant collected more and more interest. *Id.* 10a. And it knew that it would be paid in full when it ultimately foreclosed on the homes: the loan-to-value requirement guaranteed a "sufficient equity cushion" to cover not only the original loan, but also accumulated interest and fees. *Id.* (citation omitted).

Put another way, "Emigrant made these loans *because* it was likely the borrowers would default." Pet. App. 9a-10a. As designed, STAR NINA loans failed at a staggering clip, reaching delinquency rates "as high as 50%"—as compared to just 6% for subprime loans generally. *Id.* 213a. Yet precisely because of those defaults, the loans were "highly profitable" for Emigrant, "generat[ing] $50 million in interest revenue in 2008 alone." *Id.* 9a-10a. As Yale University Professor Ian Ayres explained, STAR NINA loans were engineered to keep borrowers on the hook just long enough for Emigrant to "eat up" their equity through interest and fees, ensuring the borrowers would receive little or nothing from an eventual foreclosure sale. C.A. J.A. 941.

3. Respondents are eight Black and Latino homeowners victimized by the STAR NINA program. All of them lost hundreds of thousands of dollars in home equity. Four of them lost their homes entirely.

Felipe Howell, for example, purchased a home in Jamaica, Queens in 1979 and spent the next three decades paying down his mortgage. Pet. App. 5a-6a;

see C.A. J.A. 807. By 2008, his home was worth $430,000 with only a $6,000 lien, meaning that Mr. Howell had amassed $424,000 in equity. Pet. App. 3a, 6a. But that year, a contractor and broker persuaded Mr. Howell, a retiree, to take out a $200,750 STAR NINA loan to build a rental unit. *Id.* 6a. Predictably, Mr. Howell fell behind on payments, and the 18% interest rate caused his debt to balloon. *Id.* Less than 18 months after extending the loan, Emigrant took Mr. Howell's home in a foreclosure auction and evicted him. *Id.* Despite having had more than $400,000 in equity before receiving an Emigrant loan—and more than $200,000 in equity even after that—Mr. Howell got nothing from the sale. *Id.*

The other seven respondents had likewise owned their homes for years and built substantial equity before receiving a STAR NINA loan. Pet. App. 7a-8a. But "[e]ventually, and generally soon after closing," respondents fell into default and "were subject to the 18% interest rate." *Id.* 7a. Today, all respondents have either lost their homes or are facing foreclosure. *Id.*

4. Respondents sued Emigrant under three separate statutes: the Fair Housing Act (FHA), 42 U.S.C. § 3601 *et seq.*; the Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691 *et seq.*; and the New York City Human Rights Law (NYCHRL), N.Y.C. Admin. Code § 8-107. The NYCHRL does not simply mirror federal antidiscrimination law. Instead, it was amended to create a "one-way ratchet" whereby federal law is "a floor below which the [NYCHRL] cannot fall." *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 278 (2d Cir. 2009). The NYCHRL directs that its terms be "construed liberally" in favor of

plaintiffs "regardless of whether" parallel federal laws "have been so construed." N.Y.C. Admin. Code § 8-130.

Respondents asserted that Emigrant violated the FHA, ECOA, and NYCHRL by engaging in both disparate treatment and disparate impact discrimination. Those claims proceeded to a six-week trial in which respondents showed "not only that Emigrant's STAR NINA loan was designed to fail, but also that Emigrant targeted Black and Latino borrowers." Pet. App. 5a. The jury found that Emigrant violated the FHA and ECOA and separately found that Emigrant violated the NYCHRL. *Id.* 198a-99a. The verdict form did not ask the jury to specify whether those findings relied on disparate treatment, disparate impact, or both. *Id.* After a retrial limited to damages, a second jury awarded respondents $722,044. *Id.* 15a-16a.

5. The Second Circuit affirmed. Pet. App. 1a-87a.

a. As relevant here, the Second Circuit first upheld the district court's finding that respondents' claims were timely under the doctrine of equitable tolling. Pet. App. 20a-35a. The court explained that equitable tolling is appropriate if a plaintiff shows "that some extraordinary circumstance stood in her way" and that "she has been pursuing her rights diligently." *Id.* 25a (citation omitted). The court found that traditional test satisfied because, "through no fault of their own," respondents "did not learn of their cause of action" within the limitations period and "could not reasonably [have been] expected to do so with the exercise of due diligence." *Id.* 27a. Among other things, the court emphasized that "Emigrant took steps to conceal" its scheme, including by rushing respondents to sign documents, hiding the 18% interest rate, and misleading respondents into

believing that Emigrant's attorneys represented their interests. *Id.* 27a; *see id.* 7a, 10a, 29a, 34a n.8. The court held that given all the circumstances, "the district court did not abuse its discretion in applying the doctrine of equitable tolling." *Id.* 35a.

b. The Second Circuit next rejected Emigrant's challenges to the disparate-impact jury instructions. Pet. App. 37a-48a.

First, Emigrant argued that the instructions failed to require the jury to find that the STAR NINA program had a disproportionate effect on minority borrowers. Pet. App. 38a-39a. The Second Circuit rejected that argument because the charge as a whole "sufficiently described the requirement that the adverse impact be disproportionate on a protected class." *Id.* 44a. The court also emphasized that the record contained "substantial evidence adduced at trial from which a jury could (and did) find that Black borrowers were disproportionately affected by the predatory STAR NINA loans." *Id.* 45a.

Second, Emigrant argued that the instructions failed to convey the causation element of a disparate-impact claim. Pet. App. 45a. In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, 576 U.S. 519 (2015), this Court explained that "a disparate impact claim must fail if the plaintiff cannot point to a defendant's policy or policies causing the disparity"—a showing the Court described as a "robust causality requirement." *Id.* at 542. The Second Circuit found that the instruction given here captured that requirement because "[a] plain reading of the instruction makes clear that [respondents] were required to demonstrate a causal link between the STAR NINA loans and the

discriminatory effect." *Id.* 46a. The court also observed that "[t]here was ample evidence presented at trial" showing that Emigrant's conduct "caused a disproportionate number of STAR NINA loans to be written to Black borrowers." *Id.*

c. Judge Park dissented. Pet. App. 62a-87a. He would have held that respondents' claims were untimely and that the jury instructions did not adequately convey the disproportionality element of a disparate-impact claim. *Id.* Judge Park did not endorse Emigrant's causation argument.

REASONS FOR DENYING THE WRIT

Emigrant's petition is written as if this case involved only a disparate-impact claim under the FHA. The petition scarcely acknowledges the jury's specific finding that Emigrant also violated the NYCHRL—an independent state-law basis for the verdict that would stand even if this Court were to agree with Emigrant on all of the questions presented. Emigrant also fails to grapple with the overwhelming evidence that it intentionally discriminated by targeting minority borrowers, which would make any error in the disparate-impact instructions harmless. Those threshold problems should be fatal to the petition.

What is more, each of Emigrant's questions presented is premised on a demonstrably erroneous characterization of the decision below:

- Emigrant says that the Second Circuit adopted a "fairness-based test" for equitable tolling that omits diligence. Pet. I. In fact, the court applied the traditional two-part test and found that respondents filed outside the limitations

period "through no lack of diligence of their own." Pet. App. 28a.

- Emigrant says that the Second Circuit allowed "disparate impact claims to proceed without a showing of disproportionality." Pet. 25. In fact, the court "agree[d]" with Emigrant on the law, but held that the instructions conveyed "the requirement of a disproportionate or disparate effect." Pet. App. 43a.
- Emigrant says that the Second Circuit "jettisoned" the causation requirement from *Inclusive Communities* and "embraced a jury instruction that had *no causation instruction at all*." Pet. I, 30. In fact, the court "agree[d]" with Emigrant that causation is required and held that the "causation language" in the jury instructions was consistent with *Inclusive Communities*. Pet. App. 47a.

Emigrant's real gripe is not with any of the legal principles on which the Second Circuit relied, but only with the court's application of those principles to the circumstances of this case. The Second Circuit correctly rejected those case-specific arguments, and its decision does not conflict with any decision of this Court or another court of appeals. The petition for a writ of certiorari should be denied.

I. Emigrant ignores multiple independent bases for the verdict and damages award.

Emigrant's petition focuses exclusively on disparate-impact liability under the FHA. But the jury's verdict also rested on the NYCHRL, an independent state-law ground. And even as to the FHA, respondents proved that Emigrant engaged in

disparate treatment. Resolving the questions presented in Emigrant's favor thus would not alter the judgment below.

A. The jury's finding that Emigrant violated the NYCHRL is an independent state-law ground for the verdict and damages award.

The jury found that Emigrant violated the FHA, ECOA, and NYCHRL. Pet. App. 198a-99a. The jury made separate findings on federal and state law, each of which independently supported the full award of damages. *Id.* 198a-200a. To escape liability, Emigrant thus must show errors affecting both the federal- and state-law findings. But Emigrant's questions presented address only the FHA—they ignore the NYCHRL.

Indeed, Emigrant mentions the NYCHRL only in a single errant footnote. Emigrant's entire argument is one sentence: "Because all of those claims"—that is, the three disparate-impact claims—"are inherently linked, the Second Circuit analyzed them together and reversing or vacating [the] Second Circuit's decision as to the FHA claim will also apply to the ECOA and NYCHRL claims as well." Pet. 14 n.9 (citation omitted). But even if that were true of the FHA and ECOA, respondents' NYCHRL claim is not "inherently linked" to those federal laws.

To begin, the statute of limitations for the NYCHRL claim is three years, not two—and two respondents filed suit within three years after Emigrant filed a foreclosure action against them. Pet. App. 21a, 72a. In addition, the availability of equitable relief from the three-year statute of limitations is governed by New York law, not the federal-law principles on which Emigrant relies. *See Meyer v.*

Seidel, 89 F.4th 117, 130 (2d Cir. 2023). But Emigrant has not asked this Court to consider timeliness under state law.

The NYCHRL also offers broader substantive protections than the FHA. It explicitly prohibits both intentional discrimination and policies that "result[] in a disparate impact." N.Y.C. Admin. Code § 8-107(17); *see id.* § 8-107(5). And those prohibitions must be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible," even if parallel federal laws are read more narrowly. *Albunio v. City of New York*, 947 N.E.2d 135, 137 (N.Y. 2011) (citing N.Y.C. Admin. Code § 8-130). Consistent with that principle, the district court instructed the jury to undertake a "separate inquiry to decide whether [Emigrant] violated the [NYCHRL]," taking into account the law's "uniquely broad purposes." Pet. App. 281a. Emigrant's FHA-specific arguments thus provide no basis for disturbing the jury's verdict under the NYCHRL, which independently supports the full award of damages. *See id.* 198a-201a, 284a.

B. Respondents' disparate-treatment theory independently supports the verdict and damages award.

Even focusing solely on the FHA, Emigrant challenges only the disparate-impact instructions. Emigrant protests that the jury's verdict does not indicate whether it relied on disparate impact, disparate treatment, or both. Pet. 14 n.9. But even if a jury is improperly charged on one theory, a general verdict will stand if there is "adequate evidentiary support" for another theory such that the reviewing court can be "sufficiently confident that the verdict

was not influenced by an error in the charge." *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 746 F.3d 42, 50 (2d Cir. 2014) (citation omitted). Here, the Second Circuit has already concluded that respondents "were entitled to, and did, prove disparate treatment at trial." Pet. App. 52a. Even if this Court were to grant certiorari, find some error in the disparate-impact instructions, and remand, respondents would be entitled to affirmance on that alternative ground.

The district court's instructions on disparate treatment specified that Emigrant is liable if "(1) the STAR NINA loan product was grossly unfavorable to the borrower; and (2) [Emigrant's] effort to make STAR NINA loans in certain communities was motivated, at least in part, by race, color, or national origin." Pet. App. 278a. Emigrant no longer disputes that those instructions correctly state the law. *Cf.* Pet. App. 49a-53a. It cannot plausibly deny that STAR NINA loans were "grossly unfavorable." And the trial record contains overwhelming evidence that Emigrant intentionally targeted Black and Latino homeowners.

For example, 96% of the images Emigrant used in its ads were of minorities. Pet. App 12a. At the height of the STAR NINA program, Emigrant devoted 76% of its advertising dollars to four newspapers aimed at Black and Latino readers: *Mi Zona Hispana*, *Black Star News*, *Caribbean Life*, and *Hoy*. *Id.* 11a-12a; *see id.* 216a. Yet when the STAR NINA program ended, Emigrant's spending in those papers plummeted from

tens of thousands of dollars per year to just $100. *Id.* 12a.[1]

Emigrant's "internal communications and policies" confirmed that it "encouraged race-based targeting." Pet. App. 12a. Emigrant carefully tracked advertising aimed at "ethnic parts of the community" but "did not similarly track advertising targeted at White neighborhoods or readerships." *Id.* 13a. And Emigrant's Vice President for Marketing admitted that it used minority models in its ads to present an "ethnic image" in "ethnic publication[s]." C.A. J.A. 1269. There is thus no doubt that Emigrant targeted STAR NINA loans "at least in part, by race." Pet. App. 278a.

II. The first question presented does not warrant review.

To benefit from equitable tolling, a plaintiff must show "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Holland v. Florida*, 560 U.S. 631, 649 (2010) (citation omitted). The essential premise of Emigrant's first question presented is that the Second Circuit departed from that traditional test and split with other circuits by adopting a "new fairness-based tolling rule for discrimination claims." Pet. 19 (quoting Pet. App. 70a (Park, J., dissenting)); *see* Pet. I, 3, 14, 15, 17, 19. In reality, the Second Circuit quoted and applied the same two-part test Emigrant advocates. Emigrant's objection thus reduces to an assertion that the court misapplied the

[1] It is irrelevant that respondents themselves did not see these publications. *Cf.* Pet. 12. The disparate-treatment claim turns on Emigrant's intent, and Emigrant's advertising choices are powerful evidence of that intent.

agreed-upon test to the particular circumstances of this case. But under this Court's Rule 10, the "misapplication of a properly stated rule of law" is not a basis for certiorari. And even if it were, Emigrant's factbound challenge lacks merit.

A. The Second Circuit applied the traditional two-part test for equitable tolling.

The Second Circuit applied the traditional test for equitable tolling articulated in this Court's decisions. Echoing Emigrant's preferred formulation, the court explained that a plaintiff must demonstrate "that some extraordinary circumstance stood in her way" and "that she has been pursuing her rights diligently." Pet. App. 25a (citation omitted); *see* Pet. 15-16 (same). Applying that test here, the court held that "extraordinary facts" prevented respondents from learning essential elements of their claim "through no lack of diligence of their own." Pet. App. 27a-28a. Among other things, the Second Circuit emphasized that "Emigrant took steps to conceal the discriminatory nature of the STAR NINA loan." *Id.* 27a; *see id.* 29a, 34a & n.8, 35a.

Emigrant ignores those aspects of the Second Circuit's opinion. Instead, it relies on the characterization in Judge Park's dissent. *See* Pet. I, 3, 15, 17. But "dissents are just that—dissents. Their glosses do not speak for the Court." *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 389 n.4 (2023) (plurality opinion). And here, the Second Circuit expressly disclaimed the dissent's assertion that it had adopted a novel fairness-based rule, emphasizing that although "equitable tolling has always been based on principles of fairness and equity," the court "[o]f course" did not "rely solely on notions of fairness to

conclude that equitable tolling is appropriate." Pet. App. 27a-28a.

B. The Second Circuit's decision does not conflict with any decision of another court of appeals.

Emigrant asserts that the Second Circuit's decision conflicts with decisions of the Third, Fifth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits applying the traditional two-part test to discrimination claims. Pet. 17-18. But as just explained, the Second Circuit applied the same test. No split exists—and there is no need for any further examination of the other decisions Emigrant cites.

In any event, those decisions are far afield from this case. None involved the FHA, ECOA, or a disparate-impact claim; none involved any misleading conduct by the defendant; and most are not precedential. *See Grant v. Sec'y of DHS*, 698 Fed. Appx. 697, 699-701 (3d Cir. 2017) (Title VII disparate-treatment claim); *Strunk v. Methanex USA, L.L.C.*, 2024 WL 366173, at *1-3 (5th Cir. Jan. 31, 2024) (same); *Lee v. Cook County*, 635 F.3d 969, 971-73 (7th Cir. 2011) (same); *Aquino v. Mayorkas*, 2022 WL 18919, at *1-2 (9th Cir. Jan. 3, 2022) (same); *Panicker v. Compass Grp. U.S.A. Inc.*, 712 Fed. Appx. 784, 785, 787-88 (10th Cir. 2017) (same); *Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 961, 972-73 (11th Cir. 2016) (en banc) (Age Discrimination in Employment Act disparate-treatment claim); *Dyson v. District of Columbia*, 710 F.3d 415, 417, 421-22 (D.C. Cir. 2013) (Title VII disparate-treatment claim).

Nor has Emigrant provided any reason to think that any other court of appeals would have found an

abuse of discretion in the district court's grant of equitable tolling in this case. None of the decisions cited by Emigrant found an abuse of discretion in the district court's tolling decision. And all of the circuits on which Emigrant relies acknowledge that the traditional two-part test may be satisfied where, as here, the defendant actively misled the plaintiffs about facts relevant to their claims. Take Emigrant's "[m]ost notabl[e]" evidence of a purported split (Pet. 17), the Eleventh Circuit's decision in *Villarreal*. There, the court held that the plaintiff was not entitled to tolling because he "did not allege or attempt to allege that [the defendant] actively misled him"—and the court specifically distinguished a decision granting tolling based on such misleading behavior. *Villarreal*, 839 F.3d at 972; *see Grant*, 698 Fed. Appx. at 701; *Lewis v. Danos*, 83 F.4th 948, 955 (5th Cir. 2023); *Newbold v. Wis. State Pub. Def.*, 310 F.3d 1013, 1015-16 (7th Cir. 2002); *Aquino*, 2022 WL 18919, at *2; *Panicker*, 712 Fed. Appx. at 787; *Dyson*, 710 F.3d at 422.

C. The Second Circuit correctly held that the district court did not abuse its discretion in tolling the statute of limitations.

The Second Circuit correctly held that "the district court did not abuse its discretion in equitably tolling the statutes of limitation." Pet. App. 24a. Tolling calls for "an 'equitable, often fact-intensive' inquiry." *Holland*, 560 U.S. at 654 (citation omitted). And this Court has emphasized that, under the traditional two-part test, "the equities in favor of tolling are compelling" when "'secretive conduct prevents plaintiffs from knowing of a violation of rights.'" *Bowen v. City of New York*, 476 U.S. 467, 480-81 (1986) (citation omitted). That is what happened here.

The Second Circuit emphasized that Emigrant "misle[d] [respondents]" and "took steps to conceal its discriminatory scheme." Pet. App. 35a. For example, Emigrant and its brokers forged signatures on key disclosures, misled respondents into believing that Emigrant's own counsel represented their interests, and hid the default interest rate of 18% in an obscure rider. Pet. App. 7a, 10a, 29a; C.A. J.A. 1121, 1488-97, 1582-95, 1713-22, 1771-75. And even after respondents learned about their loan terms, they did not know each other; lacked access to Emigrant's lending and advertising data; and had no other way of knowing that Emigrant had targeted them because of their race. Pet. App. 28a-29a. After all, "there is a difference between being aware that you got a bad deal and being aware that you were discriminated against in a systematic fashion." *Id.* 22a (brackets and citation omitted). Taking all the circumstances together, the Second Circuit correctly held that the district court did not abuse its discretion because respondents, "through no lack of diligence of their own, were unaware of the facts of discrimination." *Id.* 28a.

Emigrant asserts that the Second Circuit did not sufficiently analyze respondents' diligence. Pet. 19-20. But in the Second Circuit, Emigrant's primary argument about diligence was premised on its assertion that respondents had received "written documentation of the full set of loan terms" at closing. Emigrant C.A. Br. 40. The Second Circuit squarely rejected that view of the facts. Pet. App. 29a, 34a n.8. The court was not obligated to spill additional ink on arguments Emigrant did not make.

D. Emigrant vastly overstates the potential impact of the Second Circuit's decision.

Emigrant claims that the Second Circuit's decision "will have dramatic implications for housing market participants of all stripes" by purportedly "eliminating the statute of limitations" for disparate-impact cases. Pet. 21. But that assertion rests on Emigrant's strawman characterization of the Second Circuit's decision, not the court's actual fact-specific holding. Indeed, the only decisions that have relied on the Second Circuit's equitable-tolling holding have used it to *deny* tolling, not grant it. *See Simon v. N.Y.C. Dep't of Educ.*, 2025 WL 2256593, at *5 (E.D.N.Y. Aug. 7, 2025); *Solomon v. Conn. Bd. of Med.*, 2025 WL 2234016, at *2 (D. Conn. July 9, 2025).

III. The second question presented does not warrant review.

A disparate-impact claim "challenges practices that have a 'disproportionately adverse effect on minorities' and are otherwise unjustified by a legitimate rationale." *Tex. Dep't of Cmty. Affs. v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 524-25 (2015). The Second Circuit has long described that concept by referring to an "adverse or disproportionate impact." Pet. App. 40a (citation omitted). Emigrant asserts that by using that disjunctive phrase, the Second Circuit has—for decades—allowed "disparate impact claims to proceed without a showing of disproportionality." Pet. 25. The Second Circuit has done no such thing. As with the first question presented, Emigrant's asserted circuit split evaporates once the decision below is properly understood. Emigrant's objection to the particular jury instruction

given here is both wrong and lacking in broader significance. And any error in that instruction would have been harmless in light of the overwhelming evidence that STAR NINA loans went disproportionately to Black and Latino borrowers.

A. The Second Circuit required a showing of disproportionality.

Even a cursory review of the Second Circuit's decision makes clear that the court recognized that a disparate-impact claim "require[s]" that "the adverse impact" of the challenged practice "be disproportionate on a protected class." Pet. App. 44a. The court described that "comparison" as lying "at the core of disparate impact liability." *Id.* 40a. And it specifically "agree[d]" with Emigrant "that disparate impact claims must apprise the jury of the requirement of a disproportionate or disparate effect on a protected class." *Id.* 43a.

The earlier decisions on which Emigrant relies confirm that understanding of Second Circuit law. For instance, in *Tsombanidis v. West Haven Fire Department*, 352 F.3d 565 (2d Cir. 2003), the court emphasized that "[t]he basis for a successful disparate impact claim involves a comparison between two groups—those affected and those unaffected by the facially neutral policy." *Id.* at 575. In fact, the court used the word "comparison" eleven times. *Id.* at 574-78. There is thus no plausible argument that the Second Circuit allows disparate-impact plaintiffs to prevail without proving a disproportionate effect.

B. Emigrant's asserted circuit split does not exist.

Emigrant asserts that the Second Circuit's approach splits with the decisions of other circuits. Pet. 22-23. But that assertion rests on the mistaken premise that the Second Circuit has dispensed with the disproportionality requirement. In reality, there is no conflict about what disparate impact requires.

The circuits on the other side of Emigrant's purported split certainly do not perceive any disagreement. To the contrary, they favorably cite Second Circuit decisions, finding that the Second Circuit "correctly" explains "the relevant comparison for disparate impact purposes." *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1217 (11th Cir. 2008); *see, e.g.*, *Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly,* 658 F.3d 375, 382-83 (3d Cir. 2011); *Reyes v. Waples Mobile Home Park Ltd. P'ship*, 903 F.3d 415, 427 (4th Cir. 2018); *Darensburg v. Metro. Transp. Comm'n*, 636 F.3d 511, 519-20 (9th Cir. 2011); *Boykin v. Fenty*, 650 Fed. Appx. 42, 44 (D.C. Cir. 2016).

Like the Second Circuit, other circuits have also used the phrases "adverse or disproportionate" and "adverse and disproportionate" interchangeably. *See Ohio House, LLC v. City of Costa Mesa*, 135 F.4th 645, 667 (9th Cir. 2025) ("Here, the district court concluded that [the plaintiff] failed to prove the second requirement—a significantly adverse *or* disproportionate impact on a protected group. We agree. An FHA plaintiff must present evidence of an adverse *and* disproportionate impact." (emphasis added)); *see also, e.g.*, *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment*, 284 F.3d 442, 467 (3d Cir. 2002). That further

underscores that Emigrant's objection to the Second Circuit's longstanding formulation is semantic, not substantive.

C. The Second Circuit correctly declined to disturb the jury's verdict based on Emigrant's asserted instructional error.

Emigrant also renews its contention that the jury instructions in this case did not adequately convey the disproportionality requirement. Pet. 23-24. The Second Circuit correctly rejected that case-specific argument.

1. Emigrant's argument is based on the absence of the word "disproportionate" from a single sentence of the charge requiring the jury to find "a substantial adverse impact on African-American or Hispanic borrowers." Pet. 24 (quoting Pet. App. 280a). But the instructions as a whole plainly captured respondents' burden to show that the STAR NINA program disproportionately harmed minority borrowers.

"[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973). In the first substantive paragraph of the charge, the court framed the parties' dispute in terms of disproportionality, explaining that respondents claimed that Emigrant "violated their rights" by "allegedly making [STAR NINA] loans disproportionately in African American and Hispanic neighborhoods." Pet. App. 257a; *see id.* ("Defendants also deny that the STAR NINA loan product disproportionally impacted African-American and Hispanic borrowers").

Emigrant protests that those statements about disproportionality appeared earlier in the charge than the specific instruction on disparate impact. Pet. 23-24 n.12. But the district court emphasized the comparative element of the claim throughout the charge. It used the term "discriminatory effect" nine separate times, including in each of the two sentences immediately preceding the sentence Emigrant challenges. *See* Pet. App. 273a, 278a, 280a-81a. A program has a "discriminatory" effect only if it weighs more heavily on one group than another. Even Emigrant's counsel thus agreed at the charge conference that using "discriminatory effect" instead of their original proposed language "may be another way" to capture the comparative aspect of a disparate-impact claim. C.A. J.A. 2247.

2. The whole context of the trial further underscored the comparative nature of a disparate-impact claim. "Often isolated statements taken from the charge, seemingly prejudicial on their face, are not so when considered in the context of the entire record of the trial." *United States v. Park*, 421 U.S. 658, 674-75 (1975) (citation and emphasis omitted). Here, the full record confirms that "the jury could not have failed to be aware" that the instructions required it to find disproportionality. *Id.* at 675.

Respondents spent much of the trial proving that Emigrant disproportionately issued STAR NINA loans to minority borrowers. *See, e.g.*, C.A. J.A. 887-923, 1239-40, 1838-59, 1984, 2057-65, 2074-75. And in closing arguments, counsel for both sides agreed that respondents "ha[d] to show that the STAR NINA loans disproportionately affected African-Americans or Hispanics." *Id.* 2363 (respondents); *accord id.* 2388 (Emigrant). The jurors who sat through that trial

surely understood that respondents had to show disproportionality.

D. Any instructional error would have been harmless.

Emigrant's objection to the jury instructions does not warrant review for another reason: Even if the instructions had failed to require disproportionality, the error would have been harmless. Indeed, there is no serious dispute that STAR NINA loans went disproportionately to minority borrowers.

An instructional error is harmless if a reviewing court is convinced that the error "did not influence the jury's verdict." *Callahan v. Wilson*, 863 F.3d 144, 152 (2d Cir. 2017) (citation omitted). Here, respondents' experts showed that the proportion of Emigrant's refinance loans that were STAR NINA loans nearly doubled as the percentages of African-Americans and Hispanics in a census tract increased. Pet. App. 11a, 214a; C.A. J.A. 1850. A statistically significant disparity persisted even when controlling for non-race factors. Pet. App. 11a. Emigrant itself bluntly acknowledged those disparities in its internal communications. Its Vice Chairman, for example, explained that Black borrowers' disproportionate enrollment in STAR NINA loans was the "very simple answer to why the pricing of loans to blacks is higher than to whites." *Id.* 12a (brackets and citation omitted).

Even now, Emigrant does not seriously dispute that STAR NINA loans disproportionately went to minority borrowers. Instead, it focuses on the *absolute* numbers of white and minority borrowers. *See* Pet. 9. But the whole point of a disproportionality analysis is that it is *proportional*. "By relying on absolute

numbers rather than on proportional statistics," Emigrant fundamentally misunderstands the nature of the inquiry it insists was lacking. *Huntington Branch, NAACP v. Township of Huntington*, 844 F.2d 926, 938 (2d Cir. 1988).[2]

IV. The third question presented does not warrant review.

Emigrant asserts that the Second Circuit "jettisoned" the causation requirement described in *Inclusive Communities* and deepened a circuit split on the meaning of this Court's decision. Pet. I. Once again, the Second Circuit did nothing of the kind. This Court has already denied petitions raising the same issue, relying on the same cases, and asserting a similar split. *See Waples Mobile Home Park Ltd. P'ship v. Reyes*, 145 S. Ct. 172 (2024) (No. 23-1340); *Inclusive Cmtys. Project, Inc. v. Lincoln Prop. Co.*, 140 S. Ct. 2506 (2020) (No. 19-497). It should do the same here. Indeed, this case would be a particularly bad vehicle for taking up the question presented: The decision below appears to be the first by any court of appeals to consider how to convey the causation requirement set forth in *Inclusive Communities* to a jury; Emigrant forfeited the issue below; and any error in the instructions would have been harmless.

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[2] Imagine a town with 100 residents, 90 white and 10 Black. If 10 white residents and 9 Black residents received STAR NINA loans, the absolute number of white borrowers would be larger. But the program obviously would have had a disproportionate impact: It affected 90% of Black residents and only 11% of white residents. *Cf.* C.A. J.A. 2431 (respondents' counsel using a similar example to debunk Emigrant's focus on absolute numbers in closing argument).

A. The Second Circuit did not abandon the *Inclusive Communities* causation standard.

The Second Circuit did not "jettison[]" *Inclusive Communities'* causation standard (Pet. I). To the contrary, the court emphasized that plaintiffs must show that "a defendant's policy or policies caused a disparity." Pet. App. 47a (quoting *Inclusive Cmtys.*, 576 U.S. at 542) (brackets omitted). The court "agree[d]" with Emigrant "that a defendant may not be held liable for racial disparities it did not cause." *Id.* The court simply held that *Inclusive Communities* did not "set forth a new rule requiring use of the words 'robust causality'" in jury instructions. *Id.* 47a-48a n.13. And the court added that "the instructions in this case" were consistent with that language "in any event." *Id.*

Nor did the Second Circuit "embrace[] a jury instruction that had *no causation instruction at all*." Pet. 30. To the contrary, the court held that the "causation language in the charge [was] sufficient to convey" the causation principles outlined in *Inclusive Communities*. Pet. App. 47a. Once again, Emigrant's arguments rest on a mischaracterization of what the Second Circuit actually did.

B. The Second Circuit's causation analysis does not conflict with any decision of another court of appeals.

1. Emigrant asserts that the decision below deepens a circuit split on the causation requirement described in *Inclusive Communities*. Pet. 26-27. But no other circuit has even had occasion to consider how to translate that requirement into jury instructions—much less insisted on using the term "robust" to

convey the necessary nexus to the jury. That by itself is sufficient reason not to take up the question here: The Court's "ordinary practice" is to "deny[] petitions insofar as they raise legal issues that have not been considered by additional Courts of Appeals." *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 587 U.S. 490, 493 (2019) (per curiam).

2. Nor is there any other disagreement warranting this Court's review. The circuits Emigrant cites merely use different words to articulate the same rule: All require a plaintiff to specify an underlying policy and identify a statistical disparity, then prove that the policy caused the disparity—just as the Second Circuit did here.

The Fourth Circuit requires plaintiffs to "demonstrate that the disparity they complain of is the result of one or more of the practices that they are attacking." *Reyes*, 903 F.3d at 425 (brackets and citation omitted). The court has explained that "robust causality" simply requires a plaintiff to show that "each challenged practice has a significantly disparate impact." *Id.* (citation omitted).

The Fifth Circuit specifically declined to adopt a causation rule in *Inclusive Communities Project, Inc. v. Lincoln Property Co.*, 920 F.3d 890, 906 (5th Cir. 2019). Instead, the court walked through what it saw as four different standards before deciding that the plaintiffs failed to satisfy any of them. *Id.* at 903-09. And a later Fifth Circuit decision interpreted *Lincoln Property* to mean that a plaintiff can satisfy the causation requirement by showing that "a challenged policy 'caused the relevant minority group to be the dominant group' of those affected by the policy." *Inclusive Cmtys. Project, Inc. v. Heartland Cmty.*

Ass'n, Inc., 824 Fed. Appx. 210, 217 (5th Cir. 2020) (brackets and citation omitted). That is simply another way of saying that plaintiffs must identify a policy that causes a disparate impact.

The Eighth Circuit, too, requires plaintiffs to identify the "policy causing the problematic disparity." *Ellis v. City of Minneapolis*, 860 F.3d 1106, 1114 (8th Cir. 2017). To be sure, the Eighth Circuit also requires plaintiffs to plead that the policy is "artificial, arbitrary, and unnecessary." *Id.* at 1112 (quoting *Inclusive Cmtys.*, 576 U.S. at 540). But that separate requirement is not part of the causation analysis. Instead, it goes to whether the challenged policy is "necessary to achieve a valid interest"—an element that is not at issue here. *Inclusive Cmtys.*, 576 U.S. at 541.

The Ninth Circuit requires plaintiffs to show, "beyond mere evidence of a statistical disparity, that the challenged policy, and not some other factor or policy, caused the disproportionate effect." *Sw. Fair Hous. Council, Inc. v. Maricopa Domestic Water Improvement Dist.*, 17 F.4th 950, 962 (9th Cir. 2021). And the Ninth Circuit has found that requirement satisfied where, as here, "statistical evidence demonstrat[es] a causal connection." *Id.* at 961, 966.[3]

In short, the causation inquiry is materially the same across circuits. Tellingly, even Emigrant has not explained how the formulations it quotes differ in substance. Nor has Emigrant shown that any circuit's

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[3] The Eleventh Circuit's nonprecedential decision in *Oviedo Town Ctr. II, L.L.L.P. v. City of Oviedo*, 759 Fed. Appx. 828 (11th Cir. 2018), is more of the same: The court simply recognized that plaintiffs must establish a "causal connection" between the challenged policy and a disparate impact. *Id.* at 834 (citation omitted).

formulation would have led to a different result when applied to the jury instructions at issue here—and it could not do so, since none of the decisions on which Emigrant relies addressed jury instructions at all.

C. The Second Circuit correctly upheld the causation instruction here.

Emigrant asserts that the particular instructions given in this case failed to convey the causation requirement articulated in *Inclusive Communities*. But even Judge Park, who agreed with Emigrant's other arguments, did not accept this one. And with good reason.

1. At the outset, Emigrant goes badly astray in asserting that the jury charge "had *no causation instruction at all*." Pet. 30. In fact, "the requirement of a causal link between the STAR NINA lending practices and the adverse impact on Plaintiffs is apparent on the face of the instruction." Pet. App. 46a (citation and internal quotations omitted).

The instructions required respondents to prove that Emigrant's STAR NINA loan program "actually or predictably had a substantial adverse impact on African-American or Hispanic borrowers." Pet. App. 280a. That "standard causation language" is a natural way to convey a causation requirement. *Id.* 47a. Indeed, the "leading model federal jury instruction for disparate impact claims" (Pet. 23) uses essentially the same formulation, requiring the jury to find "that the defendant's conduct actually or predictably had a substantial discriminatory impact." 5 Leonard B. Sand et al., Modern Federal Jury Instructions—Civil ¶ 87.02 (2025).

As used here, the word "impact" means "the effective action of one thing or person upon another" or "the effect of such action." Oxford English Dictionary (2d ed. 1989). For the *impact* of a policy to be discriminatory, the challenged policy must have *caused* the discriminatory effect. No juror hearing the instruction, especially in the context of the rest of the trial, could have thought otherwise.

2. At times, Emigrant seems to argue that *Inclusive Communities* requires jury instructions to include the words "robust causation" or some similar formulation. Pet. 29-30. Not so.

Inclusive Communities explained 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." 576 U.S. at 542. In the next sentence, the Court elaborated that this "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." *Id.* (quoting *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 653 (1989)). But this Court's "opinions are not jury instructions, nor are they meant to be." *Noel v. Artson*, 641 F.3d 580, 588 (4th Cir. 2011) (Wilkinson, J.). And in making that single reference to "robust causality," this Court was not discussing—much less prescribing—a jury charge.

Instead, the Court was underscoring the importance of causation in disparate-impact cases and instructing courts to carefully analyze the issue. The Court relied on *Wards Cove*, which does not use the word "robust." *Wards Cove* held that "it is not enough

to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact." *Smith v. City of Jackson*, 544 U.S. 228, 241 (2005) (citing *Wards Cove*, 490 U.S. at 656). Rather, the plaintiff is "responsible for isolating and identifying the specific . . . practices that are allegedly responsible for any observed statistical disparities." *Id.* (quoting *Wards Cove*, 490 U.S. at 656). Here, the Second Circuit ensured that those requirements were met.

D. This would not be an appropriate vehicle to address the question presented.

Even if this Court were otherwise inclined to address the meaning of the *Inclusive Communities* causation requirement, this case would not be an appropriate vehicle in which to do it. Emigrant forfeited the issue by failing to raise it in the district court, and any error in the causation instruction would have been harmless.

1. Emigrant did not object at any point to the instructions' failure to expressly include the phrase "robust causation" or similar language—not in its written objections, not during the charge conference, and not after the jury instructions were read. C.A. J.A. 1950, 2242-51, 2475-77. The Second Circuit did not definitively resolve the forfeiture issue because it held that Emigrant's causation objection would fail "even if Emigrant had preserved [it]." Pet. App. 41a n.9. But the Second Circuit emphasized that "nothing in Emigrant's proposed instruction reference[d] 'robust' causation." *Id.* 45a. Indeed, Emigrant still has not spelled out the instruction it claims is necessary: Neither Emigrant's Second Circuit brief nor its petition to this Court "provide[s] its desired language."

Id. Emigrant has thus forfeited its objection several times over.

2. Any error in the causation instruction would have been harmless. As the Second Circuit has already concluded, "ample evidence presented at trial" proved that Emigrant "caused a disproportionate number of STAR NINA loans to be written to Black borrowers." Pet. App. 47a. Statistical evidence showed that racial disparities in STAR NINA lending persisted even after controlling for a host of non-race factors. *Id.* 11a. And because those disparities resulted from Emigrant's deliberate targeting of Black and Latino borrowers, *see supra* Part I.B, Emigrant cannot plausibly maintain that it is "being held liable for racial disparities [it] did not create," Pet. 26 (quoting *Inclusive Cmtys.*, 576 U.S. at 542).[4]

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[4] In two final gambits, Emigrant suggests in passing that the Court should overrule *Inclusive Communities* or call for the views of the Solicitor General. Pet. 4, 31-32. There is no basis for either step. Because "Congress can correct any mistake it sees" in this Court's statutory decisions, "*stare decisis* carries enhanced force" here. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015). Emigrant's one-paragraph argument does not even begin to establish the sort of "superspecial justification" this Court demands before revisiting a statutory precedent. *Id.* at 458. Nor does President Trump's recent executive order warrant a call for the views of the Solicitor General (CVSG). The order does not rest on any interpretation of the FHA; instead, it reflects the Executive Branch's newfound disapproval of disparate-impact liability in general. Exec. Order No. 14,281, 90 Fed. Reg. 17,537, § 1 (Apr. 23, 2025). Those views have no bearing on the statutory questions presented in the petition. And because Emigrant's petition is plagued by a host of case-specific vehicle problems, it would provide no occasion for a CVSG even if the Court were interested in the Government's views on the broader legal questions Emigrant seeks to raise.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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