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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In their brief in opposition, respondents attempt to rewrite the majority's decision and Emigrant's petition to suggest that the questions presented reflect a "factbound challenge" and raise only "case-specific arguments." Opp. 8, 13. Not so. Although Emigrant highlights some relevant facts—such as one respondent filing her claim *ten* years after defaulting on her loan—to explain the tangible impact of the majority's decision, Emigrant does not ask this Court to weigh the facts or wordsmith jury instructions. Emigrant's petition only requests that the Court assess whether the Second Circuit majority adopted the correct legal standards concerning Fair Housing Act ("FHA") claims.

Because all three questions presented raise important legal issues on which the circuits are divided, Emigrant's petition should be granted. At a minimum, the Court should call for the views of the Solicitor General given the implications of the Second Circuit's decision on the scope of the FHA and the Executive Branch's recent statements on it. *See* Pet. 4.

I. The First Question Presented Warrants Review.

The Second Circuit's majority opinion split with multiple circuits when it created a new "fairness" rule for equitably tolling discrimination claims that relieved respondents of their burden to prove diligence. Respondents' efforts to avoid review of this split only underscore why review is warranted.

Respondents assert (at 13) that the Second Circuit majority "applied the traditional test for equitable tolling

articulated in this Court's decisions." Far from it. The majority did not cite *a single one* of this Court's precedents on equitable tolling, including the case, *Holland* v. *Florida*, 560 U.S. 631 (2010), on which respondents rely (at 12). As Emigrant (Pet. 15-16) and Judge Park (App. 69a-76a) noted, this Court has made clear that equitable tolling is available *only* where a plaintiff establishes *two* separate and independent elements: (i) diligence, and (ii) extraordinary circumstances.

Instead of applying that two-element test and reversing the district court for failing to make *any* factual findings on diligence, the majority applied, as Judge Park put it, a "novel and wrong" "fairness-based" test for equitable tolling. App. 71a, 80a. Respondents criticize what they call Judge Park's "demonstrably erroneous characterization" of the majority's decision, arguing that the majority "expressly disclaimed the dissent's assertion that it had adopted a novel fairness-based rule." Opp. 7-8, 13. To the contrary, the Second Circuit majority *embraced* that label, contending that "equitable tolling has always been based on principles of fairness and equity." App. 27a. The majority described "fairness" as the "*core inquiry*" of equitable tolling and held that "[a]voiding *unfairness* to the plaintiff is *reason enough* to equitably toll a statute of limitations." App. 27a, 29a n.7 (emphases added).

Respondents are correct that the majority noted that it was "not 'rely[ing] *solely* on notions of fairness to conclude that equitable tolling is appropriate.'" Opp. 13-14 (quoting App. 27a-28a) (emphasis added). But the majority rejected the traditional two-element test for equitable tolling by excusing respondents as a matter of law from their diligence obligation based on the supposedly "self-concealing" nature of discrimination impact claims. App. 32a. Indeed, like the district court and the Second Circuit majority, *see* Pet. 19-20, respondents' opposition

does not identify *any* exercise of diligence by *any* respondent, *see* Opp. 4. That silence speaks volumes and confirms that the Second Circuit majority did not apply the traditional test.

As Judge Park further noted, applying a special rule for equitable tolling in the discrimination context "breaks with other circuits," App. 62a—seven circuits, in fact, all of which have expressly required that a plaintiff meet this Court's traditional two-element test when asserting discrimination claims, *see* Pet. 18 (collecting cases). Recognizing this consistent authority requiring diligence, respondents effectively concede that the application of a special fairness-based rule for equitable tolling would create a circuit split. *See* Opp. 14. Instead of disputing the split, respondents make several efforts to downplay it, all of which fail.

First, respondents (at 14) observe that the cases from other circuits do not involve the FHA. That is a distinction without a difference. All those cases involve discrimination claims brought under anti-discrimination statutes and reject the application of a special rule for those claims. *See* Pet. 17-18. In any event, this Court's two-element equitable tolling test has also been applied to FHA claims. *See, e.g.*, *Smithrud* v. *City of St. Paul*, 746 F.3d 391, 396 (8th Cir. 2014).

Next, respondents make the odd argument (at 14) that the cases from other circuits involve disparate treatment rather than disparate impact claims. That argument has no relevance here because, given the general jury verdict, the Second Circuit equitably tolled the statute of limitations for both types of claims. App. 4a-5a.

Finally, respondents argue that the other circuits' cases do not reflect "misleading conduct by the defendant." Opp. 14-15. Although "misleading conduct by the

defendant" may matter for other equitable doctrines (equitable estoppel or fraudulent concealment), it is *not* an element of equitable tolling—the basis for the Second Circuit's holding that respondents' claims are timely. As Justice Sotomayor has explained, "while equitable tolling extends to circumstances outside both parties' control, the related doctrines of equitable estoppel and fraudulent concealment may bar a defendant from enforcing a statute of limitation when its own deception prevented a reasonably diligent plaintiff from bringing a timely claim." *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 164 (2013) (Sotomayor, J., concurring). Respondents argue in essence that by "muddling" the fraudulent concealment and equitable tolling doctrines, they are entitled to tolling even if they did not "prove each element" of equitable tolling. App. 75a n.5. That argument departs from this Court's numerous decisions squarely holding that failure to prove either extraordinary circumstances or diligence is fatal to obtaining equitable tolling. Pet. 16 (collecting cases).

The Second Circuit's novel equitable tolling standard eviscerates the FHA's two-year statute of limitations for discrimination claims and will have serious consequences in the future. Respondents attempt to minimize the real-world consequence of the Second Circuit's test by characterizing it as a "fact-specific holding." Opp. 17. There is nothing "fact-specific" in the Second Circuit's decision that would limit its reach to other cases. The Second Circuit's analysis was not individualized and instead treated all respondents as a "unitary block." Pet. 20. The participation as *amici curiae* of five leading associations representing both bank and non-bank lenders further undermines any claim that the impact of the Second Circuit's new equitable tolling standard will be limited. The Lenders explain that the erroneous new test will result in a

"steep cost to residential mortgage industry participants" and create "uncertainty" with "cascading consequences in the primary and secondary mortgage markets." Lenders Br. 17.

II. The Second Question Presented Warrants Review.

Respondents concede (at 17) that this Court requires that plaintiffs prove a "disproportionately adverse effect" to sustain a disparate impact claim. *Texas Dep't of Hous. & Cmty. Affs.* v. *Inclusive Communities Project, Inc.*, 576 U.S. 519, 524 (2015). Respondents also concede that the Second Circuit majority adopted a disjunctive test that requires that a plaintiff demonstrate "adverse *or* disproportionate impact." Opp. 17-18 (emphasis added). Respondents do not dispute that no other circuit applies a disjunctive test similar to the Second Circuit's. Pet. 22-23. Nor do respondents dispute that the Fourth and Eleventh Circuits apply a "disproportionately adverse effect" test and the Ninth Circuit applies a "significant, adverse, *and* disproportionate effect" test. *Id.* (emphasis added). Review is plainly warranted to resolve the circuit split on the appropriate standard for disparate impact claims.

In arguing that the split is illusory, respondents make two baffling arguments.

First, respondents argue (at 19) that the "adverse *or* disproportionate" test is "interchangeabl[e]" with the "adverse *and* disproportionate" test—that "and" and "or" are the same. As any grade schooler knows, "and" and "or" mean entirely different things. *Oxford English Dictionary* (3rd ed. 2025) ("Or" is "used to coordinate two … sentence elements between which there is an alternative," whereas "and" is used to "introduc[e] a word … which is to be taken side by side with, along with, or in addition to, that which precedes it"). Moreover, "or" is not typically

used to link words, like "disproportionate" and "adverse," that are not alternatives but rather separate, distinct requirements. *See* Pet. 24. Respondents point (at 19) to *Ohio House, LLC* v. *City of Costa Mesa* for support, but that case does not say that "or" is interchangeable with "and," and clearly states that a successful disparate impact claim requires a showing of "a significant, adverse, *and* disproportionate effect on a protected class." 135 F.4th 645, 667 (9th Cir. 2025) (emphasis added). Contrary to respondents' reading, the Ninth Circuit later used the phrase "adverse or disproportionate" to highlight that the plaintiff had "failed to prove" *either* requirement. *Id.*

Next, respondents hint (at 19) that a split may not really exist because decisions in other circuits sometimes cite Second Circuit decisions favorably. Respondents do not identify a single case from another circuit endorsing the Second Circuit's disjunctive legal test. Respondents' lead example, *Schwarz* v. *City of Treasure Island*, 544 F.3d 1201 (11th Cir. 2008), predates *Inclusive Communities* by nearly seven years and does not mention the Second Circuit's test *at all*.

To avoid review by this Court, respondents characterize Emigrant's position that *disparate* impact requires proof of a *disparate* or *disproportionate* (and not simply negative) impact as "semantic, not substantive" and without "broader significance." Opp. 18, 20. Not so. The Second Circuit's erroneous disjunctive legal test impacted the decision below. Respondents do not dispute that the Second Circuit majority cited the disjunctive test as a basis for affirming a verdict for disparate impact liability based on jury instructions that did not include "disproportionality" in the instruction. Pet. 13. Indeed, the majority expressly blessed the jury instruction, in part, because, in their words, the charge's "substantial adverse impact" language is not "significantly different from our Circuit's

settled 'significantly adverse or disproportionate impact' language." App. 42a-43a. According to the majority, including the word "disproportionate" was optional. There is no reason to think that the disjunctive nature of the Second Circuit's test will not continue to cause erroneous instructions in future cases.

III. The Third Question Presented Warrants Review.

Although respondents suggest (at 26) that no circuit split exists as to application of the "robust causality requirement" imposed for FHA disparate impact claims by this Court in *Inclusive Communities*, 576 U.S. at 521, the Fourth, Fifth, Eighth, Ninth, and Eleventh Circuits have all held that proof of "robust causality" is required, while the Second Circuit rejected a heightened causation requirement. Pet. 29. Departing from its sister circuits, the Second Circuit majority squarely held that it "disagreed" that *Inclusive Communities* "require[d] 'robust' causation," App. 46a, and described this Court's "robust causality" language as "non-binding." App. 47a. By doing so, the Second Circuit rejected a key portion of this Court's holding in *Inclusive Communities* and deepened the existing circuit split.

Respondents also wrongly contend that no split exists because "the causation inquiry is materially the same across circuits." Opp. 26. That would be news to the judges on those circuits. Because this Court "did not clearly delineate" the "meaning or requirements" of robust causality, *Inclusive Communities Project, Inc.* v. *Lincoln Prop. Co.*, 920 F.3d 890, 903-05 (5th Cir. 2019), "debate has developed about the contours of the robust causality requirement" in the lower courts, *Sw. Fair Hous. Council, Inc.* v. *Maricopa Domestic Water Improvement Dist.*, 17 F.4th 950, 966 (9th Cir. 2021). Indeed, the Fifth Circuit noted at least four "varying views" of the

meaning of robust causality. *Lincoln Prop. Co.*, 920 F.3d at 903-05; *see* Pet. 27-30 (summarizing differing standards). Regulated parties have also repeatedly called for this Court to review the question presented and provide clarity on the "robust causality requirement." *See Waples Mobile Home Park Ltd. P'ship* v. *Reyes*, No. 23-1340 (U.S. June 21, 2023); *Inclusive Cmtys. Project, Inc.* v. *Lincoln Prop. Co.*, No. 19-497 (U.S. Oct. 14, 2019).

The Second Circuit's decision further entrenches the existing circuit split. Compare, for example, the Second Circuit's and Fifth Circuit's approaches to HUD's regulations. The Second Circuit embraced HUD's regulations as support for its view that "standard causation" was appropriate. App. 47a & n.13. The Fifth Circuit took the opposite view, noting that the Court's use of "robust causality" imposed "stricter" causation requirements than those set forth in HUD's regulations. *Lincoln Prop. Co.*, 920 F.3d at 902-03 & n.6 (noting that *Inclusive Communities* "modifi[ed]" the "HUD standard"); Pet. 28.[1]

Respondents' final argument (at 23)—that Emigrant's petition would be a "particularly bad vehicle" because it addressed the robust causality requirement in the context

[1] The Second Circuit's reliance on HUD's regulation to interpret the *Inclusive Communities* standard was erroneous. HUD has announced a proposed rule to "amend HUD's interpretation of [FHA's] disparate impact standard to better reflect the Supreme Court's 2015 ruling in [*Inclusive Communities*] and additional rulings since 2015." HUD, Abstract, Proposed Rule 2529-AB09, https://tinyurl.com/HUDDispImpRule. In addition to HUD, the OCC, CFPB, and NCUA have all proposed amending their regulations to not authorize disparate impact liability, consistent with President Trump's directive. Pet. 4, 8, 29; *see also* Equal Credit Opportunity Act (Regulation B), 90 Fed. Reg. 50901 (CFPB); NCUA Letter No. 25-CU-04 (Sept. 2025).

of a jury verdict—is hard to understand.[2] The jury's verdict, based on an erroneous instruction, in no way alters the need to correct the Second Circuit's erroneous *legal* holding that "standard" causation applies and that "robust causality" is "non-binding language." App. 46a-47a. Emigrant's petition does not ask this Court to do more than resolve the split over that legal question.

Contrary to respondents' assertion (at 28), Emigrant has never asserted that the magic words "robust causality" must appear in a jury instruction. Indeed, Emigrant's own proposed instruction did not include the words "robust causality," *see* C.A. Dkt. 105 at JA0571. Instead, what Emigrant has maintained is that there must be an instruction that adequately conveys the heightened causation requirement. Whether the instruction was "sufficient to convey" the principle of basic causation, Opp. 24, misses the point. In defending the instruction, the Second Circuit majority ruled that the single word "had" in the instruction was sufficient to "make clear" that there needed to be a "causal link." App. 47a. Here, respondents now argue for the first time (at 28) that the word "impact" does the trick. But the assertion that "impact" or "had" clearly conveys "standard causation" is irrelevant to the question presented: whether merely "standard" causation suffices (as the Second Circuit held), or heightened causation is required (as the other circuits have held).

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[2] Respondents also attempt to manufacture a vehicle issue by arguing that Emigrant "forfeited" the issue. Opp. 23. Emigrant's proposed instructions included an express and separate causation instruction, C.A. Dkt. 105 at JA0572, and Emigrant objected to the proposed charge's failure to "incorporate the concept of causation, which was an essential part of the Supreme Court's decision [in *Inclusive Communities*]." C.A. Dkt. 112 at JA2249.

IV. Respondents' Other Efforts To Avoid Review Fail.

Respondents make a series of last-ditch arguments that any legal errors by the Second Circuit are "harmless" and would not otherwise affect the jury verdict to avoid this Court's review. Each fails.

Respondents wrongly argue (at 9-10) that the existence of the ECOA and NYCHRL claims weighs against review. That is wrong: otherwise, litigants could avoid review by this Court simply by asserting claims from overlapping state and federal statutes. In this case, the district court did not provide a separate instruction on the elements required to establish liability under the ECOA or NYCHRL, nor did the respondents request such instructions. D.C. Dkt. 486 at 6. The Second Circuit did not embrace this argument when respondents made it below, *see* C.A. Dkt. 132 at 51-53, but instead conducted one legal analysis for all three claims.[3] Moreover, because Emi-

[3] Respondents also point to the NYCHRL's three-year statute of limitations and that equitable tolling of that claim "is governed by New York law." Opp. 9. True, but irrelevant. There is no practical difference between a two- and three-year statute of limitations in this case, given respondents' delay in asserting their claims. Assuming the statute of limitations runs from the time of the adverse lending activity, respondents' claims would all still be time-barred. App. 62a. Even if the statute of limitations did not run until foreclosure, only two respondents (the Saint-Jeans) would have timely NYCHRL claims, *id.*, and they were each awarded only $1 in nominal damages, App. 252a.

Application of the New York standard for equitable tolling also would not change the analysis. As the district court held, the standard under New York and federal law for equitable tolling is "substantially similar," App. 176a-77a, and the Second Circuit applied the same analysis for equitable tolling for all claims, App. 25a-26a.

grant's petition does not ask this Court to evaluate the legal standards for either the ECOA or NYCHRL claims, the existence of those claims is irrelevant to the petition.

Respondents also argue (at 10-12, 22, 30) that legal errors on the disparate impact and causation instruction would be "harmless" and would not have disturbed the jury's verdict. Because Emigrant's petition does not ask this Court to craft appropriate jury instructions or weigh the evidence as a properly instructed jury would, respondents' "harmless error" speculations are irrelevant. That said, there is every reason to believe that Emigrant will prevail on these issues under the correct legal standard given the factual record that was presented at trial: the evidence showed that the majority of borrowers were white, C.A. Dkt. 127, at EA45, Emigrants' minimal advertising catered to a variety of community groups, C.A. Dkt. 112 at JA2414, and respondents' own expert contended that the loans were "not ... disproportionately bad for minorities," C.A. Dkt. 106, at JA0924. The fact that the jury issued a general verdict and declined to award any punitive damages makes speculation as to the adequacy of the evidence presented to the jury even more inappropriate.

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The petition should be granted. At a minimum, the Court should call for the views of the Solicitor General.

Respectfully submitted.

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DECEMBER 2025