No. 23-1340

In The
Supreme Court of the United States

WAPLES MOBILE HOME PARK LIMITED PARTNERSHIP, et al.,
Petitioners,

v.

ROSY GIRON DE REYES, et al.,
Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, MANHATTAN INSTITUTE, AND HAMILTON LINCOLN LAW INSTITUTE IN SUPPORT OF PETITIONERS

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Questions Presented

1. Whether a plaintiff relying on a disparate impact theory of liability under the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, carries her prima facie burden by showing only a preexisting statistical disparity within the affected population that the defendant did not create.

2. Whether a defendant carries its burden to rebut such a case by showing the challenged policy significantly serves a legitimate business purpose, or instead must further show that the policy is necessary to serve that purpose.

Table of Contents

Table of Authorities

Cases

Statutes

Regulations

Rules

Other Authorities

Interest of *Amici Curiae*[1]

Pacific Legal Foundation (PLF) is the nation's oldest public interest legal foundation that seeks to vindicate the principles of individualism, property rights, and separation of powers. PLF attorneys litigate in federal courts, including before the United States Supreme Court and the United States Courts of Appeals, on issues including race and sex discrimination, the right to earn a living free from government overreach, property rights, and the separation of powers. *See, e.g.*, *Tyler v. Hennepin County*, 598 U.S. 631 (2023); *Wilkins v. United States*, 598 U.S. 152 (2023); *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021); *Knick v. Township of Scott*, 588 U.S. 180 (2019); *Minnesota Voters Alliance v. Mansky*, 585 U.S. 1 (2018).

The Manhattan Institute (MI) is a nonprofit public policy research foundation whose mission is to develop and disseminate new ideas that foster economic choice and individual responsibility. Drawing on research, reporting, and analysis of the highest caliber, MI works to improve the quality of life, overcome ethnic and cultural divides, promote educational excellence, and expand economic freedom in America and its great cities. To that end, it has historically produced scholarship and filed amicus briefs supporting the rule of law and opposing government overreach.

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[1] Counsel of record for all parties received timely notice of Amici's intention to file this brief. Sup. Ct. R. 37.2. No person or entity, other than Amici and their counsel, authored the brief in whole or in part or made any monetary contribution intended to fund the preparation or submission of the brief. Sup. Ct. R. 37.6.

Hamilton Lincoln Law Institute (HLLI) is a public-interest law firm dedicated to protecting free markets, free speech, limited government, and separation of powers, and against regulatory abuse and rent-seeking. In its litigation practice HLLI has directly confronted, and unsuccessfully sought, this Court's intervention to halt the pervasive expansion of race-conscious decisionmaking. *See Martin v. Blessing*, 571 U.S. 1040 (2013).

Introduction and Summary of Argument

Any housing-related practice has a disparate impact on some group covered by the Fair Housing Act. Therefore, without guardrails, disparate impact liability gives federal housing authorities (and plaintiffs' attorneys) a tool to wield virtually unlimited power over the nation's housing policy. The text of the FHA does not support such government veto power over housing transactions. Its text only prohibits discrimination in race, color, national origin, religion, sex, familial status, and disability. *See* 42 U.S.C. § 3604. Robust enforcement of limits on disparate impact—including causality and housing necessity—is not just essential to prevent disparate impact from transforming the Fair Housing Act into a general housing regulation statute. It is also the textually correct reading of the Act.

To avoid disparate impact liability, regulated entities often must resort to overt race-conscious decisions in order to ensure the proportionate demographic outcomes. But, of course, if a federal statute encourages such racial discrimination, it would violate the Equal Protection Clause: "if the Federal Government is prohibited from discriminating on the basis of race, *Bolling v. Sharpe*,

347 U.S. 497, 500 . . . (1954), then surely it is also prohibited from enacting laws mandating that third parties—*e.g.*, employers, whether private, State, or municipal—discriminate on the basis of race." *Ricci v. DeStefano*, 557 U.S. 557, 594 (2009) (Scalia, J., concurring).

Yet we already see this happening in both education and employment. This Court should grant certiorari to reaffirm limits on disparate impact and avoid such constitutional conflicts with the Fair Housing Act.

Argument

I. Limits on Disparate Impact Liability Are Necessary To Prevent Constitutional Conflicts.

Every run-of-the-mill housing practice will have a disparate impact on some group. For example, a landlord's pre-rental credit check will mathematically have a disparate impact on Native Americans (average credit score: 612) relative to Hispanic Americans (average credit score: 667) despite no discriminatory intent.[2] "No pets" policies have a disparate impact on whites, the racial group most likely to own companion animals.[3] A "no smoking" rule has a disparate impact on Hispanic Americans

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[2] Data showing average credit score by age, race, state, and income is available at https://finmasters.com/average-credit-score/ (last visited Aug. 23, 2024).

[3] *See* Hal Herzhog, *The Odd Demography of Loving Pets: Sex, Money, and Race*, Psychology Today, Mar. 13, 2020, https://www.psychologytoday.com/us/blog/animals-and-us/202003/the-odd-demography-loving-pets-sex-money-and-race.

relative to Asian Americans.[4] Tobacco Use in Racial and Ethnic Populations, American Lung Association, available at Tobacco Use in Racial and Ethnic Populations | American Lung Association.[5] Occupancy limits have a disparate impact on Hispanic Americans, the racial/ethnic group most likely to live in a multigenerational household. Demographics of multigenerational households | Pew Research Center.[6] Sometimes disparate impact reflects past or present bias or invidious discrimination. But as these examples suggest, the causes of the disparate impact are typically more benign.

The Fair Housing Act was not intended to prevent these common, nondiscriminatory decisions that result in a disparate impact. Justice O'Connor observed that it is "unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces," *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 992 (1988), and it is similarly unrealistic to ask housing providers to do the same. Unrestrained by this Court, government and plaintiffs' attorneys can use these common practices to target cases of disparate impact.

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[4] American Lung Association data on tobacco use by race and ethnicity is available here: https://www.lung.org/quit-smoking/smoking-facts/impact-of-tobacco-use/tobacco-use-racial-and-ethnic (last visited Aug. 23, 2024).

[5] https://www.lung.org/quit-smoking/smoking-facts/impact-of-tobacco-use/tobacco-use-racial-and-ethnic (last visited Aug. 23, 2024).

[6] https://www.pewresearch.org/social-trends/2022/03/24/the-demographics-of-multigenerational-households/ (last visited Aug. 23, 2024).

These disparate impact "violations" will reflect the ideological priorities of the enforcers rather than non-discrimination principles.

Instead of tolerating this Damoclean sword constantly swinging over their heads, landlords are sure to resort to race-based decisionmaking to avoid such disparate-impact liability. In *Ricci v. DeStefano*, for example, the New Haven fire department used a standardized test to determine firefighter promotions. *See* 557 U.S. at 564–65. The city employed standardized validation procedures to ensure the test measured only job-related knowledge and skills and that racial bias did not unfairly contaminate the questions. *See id.* at 588. Despite these efforts, the exam yielded a disproportionate number of white candidates for promotion. *Id.* at 566. In large part because it was concerned about disparate impact liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(2), New Haven threw out the test results. *See* 557 U.S. at 572–74. A group of white (and one Hispanic) firefighters who had passed the test then brought a disparate treatment suit challenging the City's abandonment of the test results. *Id.* at 574.

A majority of this Court threaded the needle, holding that the city needed a "strong basis in evidence" that certifying the test results would have led to disparate impact liability before it could lawfully "engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact." *Id.* at 585. That was enough to resolve *Ricci*, but it has not prevented what Justice Scalia called "the war between disparate impact and equal protection." *Id.* at 595 (Scalia, J.,

concurring). As he explained, a disparate impact provision "not only permits but affirmatively *requires*" race-based action to avoid disparate-impact liability. *Id.* at 594. Disparate-impact liability places "a racial thumb on the scale, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes." *Id.* This is exactly the type of decisionmaking this Court has found suspect. *See id.* at 579 (majority op.); *see also Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

This Court has understood the need to place guardrails on disparate-impact liability under the Fair Housing Act. When the Court initially held that the Fair Housing Act countenanced disparate-impact liability, it cautioned lower courts not to interpret the Act "to be so expansive as to inject racial considerations into every housing decision." *Tex. Dep't of Housing & Cmty. Affairs v. Inclusive Cmtys. Proj., Inc.*, 576 U.S. 519, 543 (2015). One important limitation it recognized was a "robust causality requirement" that "protects defendants from being held liable for racial disparities they did not create." *Id.* at 542. As the Court explained, "[w]ithout adequate safeguards at the prima facie stage, disparate-impact liability might cause race to be used and considered in a pervasive way and 'would almost inexorably lead' governmental or private entities to use 'numerical quotas,' and serious constitutional questions then could arise." *Id.* (quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653 (1989)).

The lower courts have not been uniform in recognizing these important safeguards, resulting in the circuit split described in the petition. Petition 22–

29. The Fourth Circuit here is one of the more egregious examples. If courts permit disparate-impact claims to proceed based on mere statistical imbalances, covered entities will have an incentive to discriminate to avoid litigation. By looking to how disparate-impact liability has affected education and employment, we can easily predict how the Fourth Circuit's interpretation results in increased consideration of race in American housing.

A. A Focus on Disparate Impact Encourages Race-Based Decisionmaking in Education.

As this Court has said many times, a racial outcome which is "a product not of state action but of private choices" need not be remedied. *Freeman v. Pitts*, 503 U.S. 467, 495 (1992); *see also Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 721 (2007) ("the Constitution is not violated by racial imbalance in the schools, without more" (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 n.14 (1977))). In the same vein, "[s]ocietal discrimination . . . is too amorphous a basis for imposing a racially classified remedy." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion). Indeed, were Title VI interpreted to require school districts to remedy racial imbalance they did not cause, it would "effectively assure that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race' will never be achieved." *Parents Involved*, 551 U.S. at 730 (plurality opinion) (quoting *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 495 (1989) (plurality opinion)).

Although the era of school segregation is thankfully over, school districts across the country have been treating *de facto* racial imbalance as if it were *de jure* segregation. Take the story of Thomas Jefferson High School (TJ) in Fairfax County, Virginia. TJ is an academic magnet high school specializing in mathematics, science, and technology education for gifted students. Until 2020, standardized test scores played a significant part in determining admission. Yet in fall 2020, the Fairfax County School Board replaced the test requirement with a new system that allocated most slots at TJ to students in the top 1.5% of their middle schools. *See Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 23-170, 2024 WL 674659, at *3, *2 n.6 (U.S. Feb. 20, 2024) (Alito, J., dissenting).

As a Board resolution explained, the new plan was adopted to correct what in the Board's view was the unfair racial adverse effect of the testing requirement. Yet other than the bare statistical impact on certain racial groups, there was no evidence that the standardized tests were biased or discriminatory. Nor is there any evidence that the new admissions procedures have improved academics or community cohesion at TJ. On the contrary, achievement test scores for current TJ students dropped since the new procedures went into effect, while student attrition rates increased. *See* Amicus Curiae Brief of the American Civil Rights Project, et al., in *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 23-170, at 22–26, https://www.supremecourt.gov/DocketPDF/23/23-170/280041/20230920162541109_Amicus%20Brief%20-%20SCOTUS%20-%20Petition%20Stage.pdf.

As Justice Scalia's *Ricci* concurrence predicted, Fairfax County's actions led to discrimination against Asian-American students. Board members understood the likely impact of their proposal on Asian-American applicants to TJ: "there has been an anti [A]sian feel underlying some of this, hate to say it lol," they wrote in private text messages to one another, and they acknowledged that Asian students had been "discriminated against in this process." *See Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864, 901 (4th Cir. 2023) (Rushing, J., dissenting). They observed that the district superintendent "ha[d] made it obvious" with "racist" and "demeaning" remarks and that he "[c]ame right out of the gate blaming" Asian students and parents. They reasoned that the proposals would "whiten our schools and kick ou[t] Asians" and concluded that "Asians hate us." *See id.* A parent group called the Coalition for TJ sued, represented by *amicus* Pacific Legal Foundation. They won in the district court, which found that "[t]he discussion of TJ admissions changes was infected with talk of racial balancing from its inception." *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 1:21cv296, 2022 WL 579809, at *9 (E.D. Va. Feb. 25, 2022).

Yet the Fourth Circuit reversed. And in considering the plan's disparate impact, the panel majority found that a proper analysis "necessitate[d] a relative inquiry among racial groups." 68 F.4th at 881. In other words, even though nobody tried to show that the old TJ admissions criteria were actually discriminatory, the Fourth Circuit permitted the Board to discriminate against Asian Americans to "correct" the criteria's supposed disparate impact and move towards racial balance. This Court declined review, and so the new policy stands.

A similar process played out in the First Circuit in a case involving Boston Public Schools' three "Exam Schools." The oldest and most famous of these, Boston Latin School, is the alma mater of a veritable Who's Who of individuals prominent in American history, politics, and letters, including Samuel Adams, Benjamin Franklin and Ralph Waldo Emerson. *See* Boston Latin School "Notable Alumni," https://tinyurl.com/5jpfjr5d (last visited Aug. 23, 2024). Until recently, most students were admitted to these schools based on a combination of GPA and exam scores. *See Boston Parent Coal. for Academic Excellence v. Sch. Cmte. for City of Boston*, 89 F.4th 46, 51 (1st Cir. 2023). As in Fairfax County, nobody tried to show these criteria were discriminatory.

Nonetheless, the Boston School Committee was unhappy with their disparate impact on African American applicants. In fall 2020, it replaced the exam with a system that gave out most seats to students with the highest GPAs in each zip code. *See id.* at 52–53. The district court and the First Circuit recognized that this was done "precisely to alter racial demographics," *id.* at 63, and three School Committee members who voted to implement it eventually had to resign due to racially insensitive text messages and behavior toward white and Asian-American students, *see id.* at 53–54. Largely because white and Asian-American students live disproportionately in zip codes that lost seats under the plan, it worked as intended. As in Fairfax County, a group of parents represented by *amicus* Pacific Legal Foundation sued.

The First Circuit upheld the plan anyway because "the School Committee chose an alternative that created less disparate impact, not more." *Id.* at 58.

According to the First Circuit, disparate impact analysis "encourages the use of the criterion expected to create the least racial disparity," or "the one that reduces under-representation (and therefore over-representation as well)." *Id.* at 57–58. Because the Boston School Committee chose a selection method (zip code quotas) that had less of a disparate impact on African Americans than the previous selection method (which included a test), the First Circuit upheld it despite the evidence of intentional discrimination against white and Asian-American students.

Like the Fourth Circuit, the First Circuit indulged the central assumption of disparate-impact liability—that absent discrimination, the results of a competitive process would be racially balanced. *See Inclusive Communities*, 576 U.S. at 554 (Thomas, J., dissenting) (noting the "unsubstantiated . . . assumption that, in the absence of discrimination, an institution's racial makeup would mirror that of society"). In so doing, these courts upheld admissions criteria targeted to reduce the representation of certain groups for the benefit of others. Put differently, the courts permitted disparate treatment to remedy a mere statistical disparity. Were disparate-impact statutes interpreted to impose legal liability for failing to achieve racial balance, one would expect more entities to engage in the same type of race-based decisionmaking as the school boards in those cases. This is precisely what Justice Scalia warned about in his *Ricci* concurrence.

Similar efforts to correct supposed disparate impact have led to intentional discrimination in other cities as well. Perhaps most prominently, former New

York City Mayor Bill de Blasio sought to abolish the admissions exam for the city's eight test-in Specialized High Schools. Although—much like the firefighters test in *Ricci*—the test had been validated as measuring what it was intended to measure[7]—de Blasio proceeded on the theory that the exam disparately impacted black and Hispanic applicants.[8] His schools chancellor Richard Carranza spoke derisively about the Asian-American students at those schools, saying "I just don't buy into the narrative that any one ethnic group owns admission to these schools."[9] Although de Blasio and Carranza failed to push their test-abolition plan through the state legislature, they unilaterally altered admission criteria for a portion of the class to accomplish that

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[7] *See* Tyler Pager, *SHSAT Predicts Whether Students Will Succeed in School, Study Finds*, N.Y. Times, Aug. 3, 2018, https://www.nytimes.com/2018/08/03/nyregion/admissions-test-shsat-high-school-study.html.

[8] *See* New York City DOE, *Specialized High Schools Proposal* at 6–7, 12, https://cdn-blob-prd.azureedge.net/prd-pws/docs/default-source/default-document-library/specialized-high-schools-proposal.pdf?sfvrsn=c27a1e1c_9 (last visited Apr. 23, 2024); *see also* Bill de Blasio, *Our specialized schools have a diversity problem. Let's fix it.*, Chalkbeat (June 2, 2018), https://www.chalkbeat.org/newyork/2018/6/2/21105076/mayor-bill-de-blasio-our-specialized-schools-have-a-diversity-problem-let-s-fix-it/.

[9] *See* Elizabeth A. Harris & Winnie Hu, *Asian Groups See Bias in Plan to Diversify New York's Elite Schools*, N.Y. Times, June 5, 2018, https://www.nytimes.com/2018/06/05/nyregion/carranza-specialized-schools-admission-asians.html.

same purpose.[10] *Amicus* Pacific Legal Foundation represents the challengers in that case as well.

While these school districts may not have been subject to liability for maintaining their previous policies, the Department of Education's Office for Civil Rights retains the power to enforce disparate impact rules. *See* 34 C.F.R. § 100.3(b)(2)–(3).[11] Even absent any allegation of intentional discrimination, these districts continue to justify race-conscious decisions as a means to remedy racial imbalance that they did not cause. Fairfax County, Boston, and New York City are not responsible for the demographics of the students who attained high standardized test scores that qualified to attend magnet programs there.

Outside of magnet schools, the Department of Education has relied on disparate impact to stamp out disciplinary practices it dislikes in the name of remedying what is largely phantom race discrimination. *See generally* Gail Heriot & Alison

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[10] *See* Office of the Mayor, *Mayor de Blasio and Chancellor Carranza Announce Plan to Improve Diversity at Specialized High Schools* (June 3, 2018), https://www.nyc.gov/office-of-the-mayor/news/281-18/mayor-de-blasio-chancellor-carranza-plan-improve-diversity-specialized-high#/0; *see Christa McAuliffe Intermediate Sch. PTO v. de Blasio*, 627 F. Supp. 3d 253 (S.D.N.Y. 2022), *appeal pending* No. 22-2649 (2d Cir.).

[11] This rule is best interpreted as establishing a "narrow kind of disparate impact liability" involving "certain characteristics that are so overwhelmingly identified with race, color, or national origin as to be virtual stand-ins for them." *See* Gail Heriot & Alison Somin, *The Department of Education's Obama-Era Initiative on Racial Disparities in School Discipline: Wrong For Students and Teachers, Wrong on the Law*, 22 Tex. Rev. L. & Politics 471, 547, 552 (2018). But the Department of Education has long wrongly interpreted this language more broadly.

Somin, *The Department of Education's Obama-Era Initiative on Racial Disparities in School Discipline: Wrong for Students and Teachers, Wrong on the Law*, 22 Tex. Rev. L. & Politics 471 (2018). African American, Hispanic, and Native American students are more likely to be suspended from school than white or Asian-American students. If students are being punished differently for the same conduct because of race, that would be a very serious problem. The available evidence suggests that disparities are not caused by intentional discrimination, however, but by different rates of misbehavior. *Id.* at 514–25. By trying to correct nonexistent discrimination, such disparate impact enforcement causes schools to mete out discipline *based on* racial quotas. In turn, this enforcement by the Department of Education has made American schools less safe and orderly. *Id.* at 495–506. Unfortunately, the students who are most harmed by the new discipline policies—those trying to learn in the midst of chaos—are often themselves racial or ethnic minorities. *Id.* at 495–96.

This "remedying" of non-existent discrimination is predictable when disparate impact liability lacks the robust causality safeguards mandated in *Inclusive Communities*. The failure to enforce the causality requirement in disparate impact *liability* will cause a disparate impact from the intentional discrimination that follows.

Despite this Court's repeated admonition that "racial balance is not to be achieved for its own sake," *Freeman*, 503 U.S. at 494, we are moving still further away from the ideal of a colorblind Constitution. Allegations that schools are "segregated" in the absence of any state-imposed discrimination set the

nation back further by urging race-based "solutions" for every disparate outcome. As Justice Alito observed in his dissent from the denial of certiorari in *Coalition for TJ*, the Fourth Circuit's reasoning in that case is "a virus that may spread if not properly eliminated." *Coal. for TJ*, 2024 WL 674659, at *5. This Court can quell the virus by granting the petition here and clarifying that disparate impact defendants are only liable for racial outcomes that they have caused and when not justified by necessity.

B. Threat of Disparate Impact Liability Encourages Race-Based Employment Decisions.

Although the conflict between Title VII's prohibition on equal protection and the Constitution's equal protection command had simmered for decades, it reached this Court's attention in 2009 in *Ricci*.

In the absence of any causation requirement, the Black firefighters applying for promotion could surely have pleaded disparate impact; they could show how a device employed by New Haven (the promotion exam) produced statistically disparate results by race. *See Reyes v. Waples Mobile Home Park Ltd. P'ship*, 903 F.3d 415, 428–29 (4th Cir. 2018). Likewise, by linking the test results to socioeconomic disparities, the disparate impact claim could potentially succeed without demonstrating causation. *See, e.g.*, *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 245–46 (4th Cir. 2014); *Ohio State Conf. NAACP v. Husted*, 768 F.3d 524, 554, 556–57 (6th Cir. 2014). Given the split of authority on causation that persists to this day, New Haven had every reason to be concerned about a disparate impact lawsuit. Yet this Court held that New Haven's fear was not sufficient

justification for its actions because it "lacked a strong basis in evidence to believe that it would face disparate-impact liability if it certified the examination results." *Ricci*, 557 U.S. at 592.

Shortly after *Ricci*, the Equal Employment Opportunity Commission rolled out important new guidance for employers about the disparate impact of using arrest and conviction records in employment.[12] The guidance notes the adverse effects of criminal background checks on African American applicants and strongly discourages employers from using criminal background checks in almost any context.

Looking at the EEOC's enforcement of this guidance, the showing of statistical disparity is sufficient to target an employer for investigation. Shortly after issuing the guidance, it opened an extensive investigation into G4S, a company that contracts security guards to private businesses. Because security guards often carry guns, and persons with criminal convictions are especially high-risk for misusing guns, G4S would seem to have an unusually strong case of business necessity. *See* Testimony of Julie Payne, Senior Vice President and General Counsel of G4S Secure Solutions in United States Commission on Civil Rights, *in* Assessing the Impact of Criminal Background Checks and the Equal Employment Opportunity Commission's Conviction

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[12] U.S. Equal Employment Opportunity Commission, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964* (Apr. 25, 2012), https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions.

Records Policy, 54–56 (2013).[13] That the EEOC nonetheless persisted with its investigation into G4S demonstrates that it sees bare statistical effect as sufficient to open an expensive investigation into a private firm's practices.

This EEOC guidance also states that the existence of a state or local law requiring an employer background check (e.g., laws that regulate in-home health care workers or daycare centers) is not sufficient to demonstrate business necessity. That compliance with state law does not necessarily establish business necessity in the EEOC's view suggests that it understands this defense as virtually impossible to establish. The message to employers is clear: statistical evidence of disparate impact is enough to get you investigated by the EEOC, and business necessity will not do much to help.

If lower courts continue to permit plaintiffs to establish a *prima facie* case of disparate impact without a showing of robust causality, it is inevitable that employers will continue to use race in the same manner as the New Haven Fire Department. The EEOC will also feel emboldened to continue to issue sweeping guidance and to conduct costly investigations into employers based on mere statistical disparities. That will hasten the day when this Court will have to tackle the thorny question of "[w]hether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?" *Ricci*, 557 U.S. at 594 (Scalia, J.,

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[13] https://www.govinfo.gov/content/pkg/GOVPUB-CR-PURL-gpo46835/pdf/GOVPUB-CR-PURL-gpo46835.pdf

concurring). After all, a federal law that requires employers to "place a racial thumb on the scales . . . evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes" raises significant constitutional concerns. *See id.* This Court's intervention in this case could serve to de-escalate these tensions.

II. If the Causation Standards Necessary to Constitutional Disparate-Impact Claims Cannot Be Enforced, the Court Should Consider Overruling *Inclusive Communities*.

There is another option: if the robust causality and legitimate-purpose requirements that would avoid constitutional conflict cannot be maintained, the Court should consider overruling *Inclusive Communities*. Whether the FHA encompasses disparate impact liability was hotly contested before *Inclusive Communities*, as the Court granted certiorari twice only to have the parties settle before the case could be decided. *Gallagher v. Magner*, 619 F.3d 823 (8th Cir. 2010), *cert. granted*, 565 U.S. 1013 (2011); *dismissed*, 565 U.S. 1187 (2012); *Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mt. Holly*, 658 F.3d 375 (3d Cir. 2011), *cert. granted*, 570 U.S. 904 (2013). When the Court finally held that the FHA permitted disparate impact liability, four justices dissented. Now, as the petition ably demonstrates, the decision is causing substantial confusion in the Courts of Appeals. If the dissenters were correct and the opinion is too difficult to implement, overruling the decision is warranted. *See, e.g.*, *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 280–81 (2022) ("Our precedents counsel that

another important consideration in deciding whether a precedent should be overruled is whether the rule it imposes is workable—that is, whether it can be understood and applied in a consistent and predictable manner.").

As the dissenters (and *amici*) noted at the time, the decision in *Inclusive Communities* was "inconsistent with what the FHA says" and would "have unfortunate consequences." *Inclusive Communities*, 576 U.S. at 584 (Alito, J., dissenting); *see also* Brief for Pacific Legal Foundation, et al., as Amici Curiae in *Inclusive Communities*, 2014 WL 6706836, at *13 (U.S. Nov. 24, 2014). Lower courts' failure to adhere to the robust causality safeguard only makes these consequences worse. The *Inclusive Communities* decision without the safeguard creates a presumption that "any institution with a neutral practice that happens to produce a racial disparity is guilty of discrimination until proved innocent." *Inclusive Communities*, 576 U.S. at 554 (Thomas, J., dissenting). As *amici* argue here, such a presumption is likely to lead to more race-based decisionmaking.

This Court should intervene either to clarify the strength of the "robust causality" and "legitimate business purpose" safeguards in FHA cases or simply to overrule *Inclusive Communities*.

Conclusion

For the above reasons, and those stated by the Petitioners, the Court should grant the petition for certiorari.

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