NO. 17-10943

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THE INCLUSIVE COMMUNITIES PROJECT, INC.
Plaintiff-Appellant,

v.

LINCOLN PROPERTY CO.; LEGACY MULTIFAMILY NORTH III LLC; CPF PC RIVERWALK LLC; HLI WHITE ROCK LLC; JIK FIELDS EXCHANGE LLC & JIK MAINE EXCHANGE LLC & JIK MCKINNEY LLC
Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Texas, Dallas Division

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF APPELLANT

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SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel certifies that the following listed persons and entities, in addition to those already listed in the parties' briefs, have an interest in the outcome of this case.

Amicus

Lawyers' Committee for Civil Rights Under Law

Counsel for Amicus
Jon M. Greenbaum
Joseph D. Rich
Thomas Silverstein

Respectfully submitted,

/s/ Jon M. Greenbaum
Jon M. Greenbaum
Attorney for Amicus Curiae

MOTION OF *AMICUS CURIAE* TO FILE BRIEF IN SUPPORT OF APPELLANT

The Lawyers' Committee for Civil Rights Under Law ("The Lawyers' Committee") respectfully moves this Court for leave to file a brief *Amicus Curiae* in support of the Appellant and reversal of the decision of the U.S. District Court for the Northern District of Texas granting the Defendants' motions to dismiss the Appellant's complaint for failure to state a claim. The proposed brief is attached to this Motion as Attachment A. The Lawyers' Committee states as follows:

1. The Lawyers' Committee is a nonpartisan, nonprofit organization that was formed in 1963 at the request of President John F. Kennedy to involve the private bar in providing legal services to address racial discrimination. The principal mission of the Lawyers' Committee is to secure, through the rule of law, equal justice under law, including working with communities across the nation to combat and seek to remediate state statutes that were enacted with the intent to discriminate on the basis of race. The Lawyers' Committee's major objective is to use the skills and resources of the bar to obtain equal opportunity for minorities by addressing factors that contribute to racial justice and economic opportunity. Given our nation's history of racial discrimination, de jure segregation, and the de facto inequities that persist, the Lawyers' Committee's primary focus is to represent the interests of African Americans in particular, other racial and ethnic minorities, and other victims of discrimination, where doing so can help to secure justice for all racial and ethnic

minorities. The Lawyers' Committee has litigated numerous discrimination claims under the Fair Housing Act involving both disparate treatment and disparate impact claims.

2. *Amicus* is committed to the vigorous enforcement of the Fair Housing Act and statutes prohibiting racial discrimination and has been counsel in several challenges to policies and practices that both have an unjustified discriminatory effect or result and for which discriminatory intent was motivating factor. *See, e.g.*, *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016); *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581 (2d Cir. 2016).

3. This Court has the discretion to accept a brief *amicus curiae* where the filing of the brief "is desirable and…the matters asserted are relevant to the disposition of the case." FED. R. APP. P. 29(a)(3)(b).

4. In the attached proposed brief, *Amicus* seeks to expand upon the arguments made by the Appellant by examining the Appellant's disparate treatment and disparate impact claims in the context of the types of cases that are at the heartland of Fair Housing Act jurisprudence.

5. The Appellant consents to this filing. The Appellees did not respond to the request for consent.

WHEREFORE, the Lawyers' Committee respectfully requests the Court grant this Motion for Leave to File the attached *Amicus Curiae* brief in the above matter.

Respectfully submitted,

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Dated November 7, 2017

CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2017, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF system for filing and that service to the participants in this appeal, all of whom are registered CM/ECF users, will be accomplished by the appellate CM/ECF system. Seven paper copies of the Motion and Proposed Brief will be mailed to the court, upon approval.

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ATTACHMENT A

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INTEREST OF AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law ("The Lawyers' Committee"), a nonpartisan, nonprofit organization, was formed in 1963 at the request of President John F. Kennedy to involve the private bar in providing legal services to address racial discrimination. The principal mission of the Lawyers' Committee is to secure, through the rule of law, equal justice under law. Given our nation's history of racial discrimination, de jure segregation, and the de facto inequities that persist, the Lawyers' Committee's primary focus is to represent the interests of African Americans and other racial and ethnic minorities where doing so can help to secure justice for all racial and ethnic minorities.

For over fifty years, the Lawyers' Committee has been at the forefront of many of the most significant cases involving race and national origin discrimination, including numerous fair housing cases under the Fair Housing Act, Title VIII of the Civil Rights Act of 1968. 42 U.S.C. §§ 3601-31 (2012) (hereinafter "FHA"). These fair housing cases have included both disparate treatment and disparate impact claims, and, in its nationwide civil rights litigation practice, the Lawyers' Committee has participated in precedent-setting litigation invoking both types of claims in order to deter discrimination by state and private actors, increase access to housing opportunity, and promote residential integration. *See, e.g.*, *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct.

2507 (2015) (holding that disparate impact claims are cognizable under the FHA); *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581 (2d Cir. 2016) (affirming a district court decision holding that a predominantly non-Hispanic White municipality violated the FHA when it refused to zone a parcel of land for multi-family housing because of intentional discrimination and unjustified disparate impact on African Americans and Latinos). We have seen firsthand that both intentional discrimination and unjustified disparate impact discrimination claims under the FHA are essential to meeting its central goals of providing equal opportunity to housing for protected classes and integrating our communities.

The Lawyers' Committee submits this brief with the foregoing motion for leave to file, pursuant to Federal Rule of Appellate Procedure 29 in support of the Plaintiff-Appellant, Inclusive Communities Project (ICP). It does not submit this brief to repeat arguments made by ICP, but instead to highlight the well-established precedent that has applied an analytical framework for both intentional discrimination and unjustified disparate impact claims under the FHA that the District Court for the Northern District of Texas (hereinafter "District Court") ignored and/or misapplied in dismissing the case.[1]

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), Amicus certifies that this brief was not authored in whole or part by either party's counsel; that neither party nor their counsel contributed money to fund preparing or submitting this brief; and that no person other than Amicus contributed money to fund preparing or submitting this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case ICP alleges that a property management company and seven owners of multifamily apartment complexes located in high opportunity, predominantly non-Hispanic white areas of Dallas (hereinafter "Defendants") have violated the FHA by refusing to rent or negotiate to rent and otherwise making housing unavailable to persons who hold Housing Choice Vouchers because of their race. The complaint alleges both disparate treatment claims pursuant to Section 804(a), 42 U.S.C. § 3604(a), of the FHA and 42 U.S.C. § 1982, and a disparate impact claim pursuant to 42 U.S.C. § 3604(a) . ROA. 45-46.[2]

The District Court rejected ICP's claims and granted Defendants' 12(b) (6) Motion to Dismiss. ROA. 430. In dismissing ICP's disparate treatment claims, the District Court asserted that the claims were "mislabeled" as disparate impact claims because ICP had not alleged that the Defendants applied their policy of not renting to holders of Housing Choice Vouchers in a subjective or discretionary manner whereby they considered the race of individual voucher holders. ROA. 485-88. In dismissing ICP's disparate impact claims, the District Court concluded that ICP had not alleged facts demonstrating a causal connection between Appellees' policy and

[2] ICP also claims that Defendant Lincoln Property Company's advertising of its policy of refusing to rent to housing choice voucher holders indicates a preference for non-Black tenants and perpetuates stereotypes in violation of 42 U.S.C. § 3604(c). We do not address that claim.

the "statistical disparities" set forth in its Complaint. ROA. 491-94. The District Court found "no information" in the Complaint to show how Defendants' policy has caused the racial disparity. ROA. 493.

Initially, because the District Court appears to conflate ICP's disparate treatment and disparate impact claims, ROA. 486-88, it is important to recognize that it is well-settled that a violation of the FHA can be shown either by proof of intentional discrimination or by proof of disparate impact. *Inclusive Communities Project v. Texas Dep't of Housing and Community Affairs,* 747 F.3d 275, 280 (5th Cir. 2014), *aff'd, Texas Dep't of Housing and Community Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507 (2015), citing *Artisan/Am. Corp. v. City of Alvin, Tex.,* 588 F.3d 291, 295 (5th Cir. 2009) ("We have recognized that a claim brought under the Act 'may be established not only by proof of discriminatory intent, but also by proof of a significant discriminatory effect.'"); *Simms v. First Gibraltar Bank,* 83 F.3d 1546, 1555 (5th Cir. 1996) ("We agree that a violation of the FHA may be established not only by proof of discriminatory intent, but also by a showing of significant discriminatory effect.").

The District Court purports to analyze ICP's claims pursuant to well-established pleading standards requiring it to accept the facts alleged in a complaint as true and construe them in the light most favorable to the plaintiff. *Ferrer v. Chevron Corp.*, 484 F.3d 776, 780 (5th Cir. 2007); ROA. 483. It states that it is

further guided by decisions requiring that a complaint allege facts that state a "plausible" claim for relief. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 553-56 (2007). The factual content of the allegations in the complaint must allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 663 (2009). But the District Court erred in applying these principles to ICP's complaint by ignoring the detailed allegations in the complaint.

More basically and central to this appeal, its analysis of ICP's claims (1) ignores the well-established analytical framework for proving disparate treatment claims first set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); and (2) misapplies the Supreme Court's criteria for pleading a prima facie case of disparate impact liability set forth in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project* in cases like this where unlawful practices and "housing restrictions function unfairly to exclude minorities from certain neighborhoods without any sufficient justification." 135 S. Ct. at 2523. Indeed, application of the Supreme Court's evidentiary framework to this case demonstrates that ICP's disparate impact claim exemplifies the type of case that resides at the "heartland" of disparate impact liability.

For these reasons, this Court should reverse the District Court's granting of Defendants' Motion to Dismiss and remand the case to the District Court for further proceedings.

ARGUMENT

I. The District Court Erred in Ignoring Well-Established Law Concerning the Requirements for a Prima Facie Case of Disparate Treatment Under the Fair Housing Act, and Allegations by ICP that Meet Those Requirements

A. The Analytical Framework for Disparate Treatment Claims

The District Court dismissed ICP's disparate treatment claim by concluding that it was mislabeled as a disparate impact claim aimed at challenging Defendants' policy. ROA. 488. This cursory conclusion ignores the long established analytical framework for disparate treatment claims.

For decades, the Supreme Court has recognized that there is rarely direct proof of racial discrimination. Accordingly, when considering discrimination claims, courts must consider circumstantial evidence of discrimination. The basic framework for a circumstantial case of disparate treatment was established in *McDonnell-Douglas v. Green*, 411 U.S. 792 (1972), a Title VII employment discrimination case. The Court held that to establish a *prima facie* case of racial discrimination a plaintiff must show "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after

his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U.S. at 802. A plaintiff's burden under this framework "is not onerous." *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

Once a *prima facie* case is made, the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for the action. *See id.* at 802–03. Even if the defendant meets that burden, the plaintiff may still prevail if the defendant's offered reasons are pretexts for discrimination. *Id.* at 805; *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 143, 147-48 (2000). Proof that the defendant's explanation is unworthy of credence is the type of circumstantial evidence that is especially probative of whether the explanation is pretextual. *St. Mary's Honor System v. Hicks,* 509 U.S. 502, 517 (1993) ("[P]roving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination").

This Court and other Circuit Courts of Appeals have long applied this evidentiary framework to disparate treatment claims brought under the FHA. For example, this Court in *Petrello v. Prucka*, 484 Fed. App'x 939, 942 (5th Cir. 2012) (per curiam), citing *Lindsay v. Yates*, 498 F.3d 434, 438-39 (6th Cir. 2007) and *Mitchell v. Shane,* 350 F.3d 39, 47 (2d Cir. 2003), held that a plaintiff who alleges intentional discrimination in an FHA case may meet its burden of establishing a

prima facie case by showing: (1) the plaintiff is a member of a racial minority or other protected class; (2) the plaintiff applied for and was qualified to rent or purchase the unit involved; (3) the plaintiff was rejected by defendant; and (4) the housing opportunity remained available thereafter. A defendant may then offer proof of "some legitimate, nondiscriminatory reason for the . . . rejection." *Marable v. H. Walker & Assocs.*, 644 F.2d 390, 394, 396 (5th Cir. 1981). But the plaintiff may still prevail by rebutting the reason asserted by defendant by showing that it is a pretext for discrimination. This is often the key issue in this kind of analysis of disparate treatment. Especially relevant to determining whether a defendant's asserted reason for its action is pretext in a fair housing case is evidence that the application of the defendant's rental criteria is different depending on race. *See McDonnell-Douglass,* 411 U.S. at 804; *Marable*, 644 F.2d at 396.

B. ICP's Complaint Pleads Facts Sufficient to Demonstrate Disparate Treatment

ICP's complaint sets forth factual allegations that carefully follow the *McDonnell-Douglas* evidentiary framework and are sufficient to establish a *prima facie* case of disparate treatment. ICP alleged (1) that 86 percent of Dallas Housing Authority voucher holders -- ICP's clients -- are Black, ROA. 29; (2) that ICP made a bona fide offer to Defendants to negotiate for and to lease units located in nonminority, high opportunity areas and was eligible to enter into subleases for

available units on behalf of its clients, ROA. 24; (3) Defendants refused to negotiate with or rent to ICP on behalf of its clients and provided no reason for this refusal, ROA. 44, and; (4) Defendants continued to offer housing units at rents that remain affordable for voucher holders under the voucher program. ROA. 44.

The Complaint alleges that Defendants never offered a reason for the rejection. ROA. 24, 26, 39, 44. Nonetheless, ICP anticipated the expected business practice explanation -- that Defendants' policy of not renting to persons with housing choice vouchers was for business related reasons. ROA. 37-38. Based on this premise, ICP alleged that its sublease and guarantor proposals would fulfill these business interests. ROA. 20-25. Importantly, ICP also asserted that that any reasons set forth by Defendants would constitute pretext for intentional discrimination by alleging that, while Defendants employ a policy of refusing to rent to holders of Housing Choice Vouchers in predominantly non-minority, high opportunity areas, they do not follow this policy in complexes located in minority- and poverty-concentrated areas and do rent to voucher holders. ROA. 38, 44, 45. These allegations plainly demonstrate that Defendant Lincoln Property's reasons for rejecting ICP's offers are pretexts for racial discrimination because Defendant Lincoln Property was treating voucher holders in predominantly minority communities differently from those in high opportunity areas. Furthermore, pretext

is shown by the fact that Lincoln Property was able to rent to voucher holders in conformity with good business practices.

The District Court never analyzes ICP's claim pursuant to this well-settled analytical approach because it erroneously labels the claim to be disparate impact claim. By ignoring well-established principles governing disparate treatment claims first established in *McDonnell Douglas* and failing to assess or even acknowledge the clear factual allegations in the ICP complaint setting forth the disparate treatment claims, the District Court erred in its dismissal of these claims, and its decision granting Defendants' motions to dismiss should be reversed.

II. The District Court Erred in Dismissing the ICP's Disparate Impact Claim

Disparate impact claims under the FHA are now a well-established part of housing discrimination law. Such claims have been recognized by the lower courts since the 1970s, and the Supreme Court endorsed these claims in 2015 in *Texas Dep't of Housing and Community Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507 (2015). In its decision, the Supreme Court noted the "unanimous precedent" recognizing disparate impact liability in all nine circuit courts of appeals that had addressed the issue at the time the FHA was amended in 1988. 135 S. Ct. at 2519.

The Court in *Texas Department of Housing and Communities Affairs v. Inclusive Communities* viewed disparate impact claims as a way of bolstering the FHA's "role in moving the Nation toward a more integrated society," 135 S. Ct. at

2525-26, and found that recognition of disparate impact claims is consistent with the FHA's central purpose – the eradication of discriminatory housing practices. These unlawful practices include zoning laws and housing restrictions that "function unfairly to exclude minorities from certain neighborhoods without any sufficient justification." *Id.* at 2521-22. Moreover, the Court found that cases "targeting such practices reside at the heartland of disparate-impact liability." *Id.* at 2521-22. This case is just such a "heartland" case. ICP challenges Defendants' policy of refusing to rent to Housing Choice Voucher holders in high opportunity areas while renting to voucher holders in predominantly minority areas. ROA. 26-28, 43-45. This housing restriction "unfairly excludes minorities" from high opportunity areas, resulting in the denial of housing opportunities to minority households and the perpetuation of residential segregation.[3]

The standards that govern FHA disparate impact claims are set forth in in *Texas Department of Housing and Community Affairs v. Inclusive Communities* and in HUD's 2013 disparate impact regulation. Both use the same basic three part burden-shifting analytical framework, and their articulations of the applicable standards are nearly identical. Under both, disparate impact cases are subject to a

[3] HUD's 2013 regulation endorsing discriminatory-effect claims under the FHA recognized that a challenged practice may have an illegal effect in either of two ways: "(1) harm to a particular group of persons by a disparate impact; and (2) harm to the community generally by creating, increasing, reinforcing, or perpetuating segregated housing patterns."

three-step burden-shifting framework. First, the plaintiff has the initial burden of establishing a prima facie case of disparate impact.[4] Second, if the plaintiff proves a prima facie case, the burden shifts to the defendant to prove that its challenged policy is "necessary to achieve a valid interest."[5] Third, if the defendant satisfies this burden, then the plaintiff may still establish liability by proving that the defendant's interest could be served by a policy that has a less discriminatory effect.[6] The District Court recognized this framework. ROA. 488-89.

At the same time, the Supreme Court explained that "disparate-impact liability has always been properly limited," *id.* at 2522 and set forth cautionary standards to guard against "abusive" impact claims. *Id.* 2524. At the prima facie stage of the case, the Supreme Court emphasized 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." *Id.* at 2523. In short, a plaintiff who fails to allege this causal connection at the pleading stage, including statistical data demonstrating the causal connection, cannot make out a prima facie case of disparate impact. It is this issue that is front and center in this case, because the primary basis for the District Court's dismissal of ICP's disparate impact claim was its conclusion that

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[4] *See* 24 C.F.R. § 100.500(c)(1); *Inclusive Cmtys.*, 135 S. Ct. at 2523.
[5] *See* 24 C.F.R. § 100.500(c)(2); *Inclusive Cmtys.*, 135 S. Ct. at 2523.
[6] *See* 24 C.F.R. § 100.500(c)(3); *Inclusive Communities.*, 135 S. Ct. at 2515.

"Plaintiff ICP has not proved that Defendants' policy caused a 'robust,' or any statistical disparity." ROA. 491.

This holding is error. First, the analysis ignores basic pleading requirements set forth in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), and *Ashcroft v. Iqbal,* 556 U.S. 662 (2009). These cases do not require ICP to "prove" a causal connection at the pleading stage. Rather, the Court "must accept as true all of the factual allegations contained in the complaint." *Swierkiewicz,* 534 U.S. at 508, n. 1. Further, to defeat a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), a plaintiff must only allege facts that render its claim for relief plausible. *Twombly,* 550 U.S. at 556. The plausibility requirement is not akin to a probability requirement. In *Iqbal* the Court held that a complaint is facially plausible if it includes "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," emphasizing that it was not requiring probability at the pleading stage. *Iqbal,* 556 U.S. at 678.

The allegations in the ICP complaint plainly meet *Twombly/Iqbal* plausibility requirements. The District Court's misapplication of these pleading requirements makes victims of discriminatory policies less likely to prevail in civil rights litigation and deters aggrieved parties from bringing their claims to court in the first place.

Secondly, a close examination of ICP's complaint demonstrates that it contains extensive allegations that establish a close causal connection between the Defendants' policy of not renting to holders of housing choice vouchers and the resulting statistical disparity, thus meeting the causality requirement for establishing a prima facie case of disparate impact. Recently, in *National Fair Housing Alliance v. Travelers Insurance*, No. 16-928 (JDB), 2017 WL 3608232, at *7 (D.D.C. Aug. 21, 2017), the court there stated that the robust causality requirement "does not require courts to abandon common sense or necessary logical inferences that follow from the facts alleged." Common sense and logical inferences from the facts alleged in this case demonstrate that when a landlord denies a unit to a prospective tenant based on its policy of refusing to rent to tenants who use government vouchers, causation is direct and immediate. Indeed, in this case, ICP "attacks a policy that "function(s) unfairly to exclude minorities from certain neighborhoods without any sufficient justification," and, as such, is a case which "reside(s) at the heartland of disparate impact liability." 135 S. Ct. at 2521-22.

In *Travelers' Insurance,* on facts similar to those here, the plaintiff attacked a policy of denying homeowners' insurance to landlords who rent to holders of Housing Choice Vouchers. In denying the motion to dismiss, the district court rejected defendant's causation argument, stating that plaintiff "did not just allege that some voucher recipients are members of a protected class, but rather pleaded

facts that show that voucher recipients are significantly more likely to be members of a protected class than is true for the . . . population as a whole." *Id.* at *9. Similarly, in *Rhode Island Commission for Human Rights v. Graul,* 120 F. Supp. 3d 110, 124 (D.R.I. 2015), the court found plaintiffs had established a prima facie case of disparate impact, stating that "disparate impact is proven by presentation of evidence compar[ing] those affected by the policy with those unaffected by the policy." [7]

Several allegations in the ICP complaint allege facts that demonstrate the required causal connection in a manner very similar to that in *Travelers Insurance* and *Graul*. For example, the ICP complaint alleges that Defendants' policy of refusing to negotiate with or rent to voucher households excludes a disproportionately Black population – voucher holders in the Dallas-Plano-Irving metropolitan area are 81% Black and only 10% white. ROA. 31, 33. Thus, as the plaintiff alleged in *Travelers' Insurance,* voucher recipients excluded from Defendants' apartment complexes are significantly more likely to be members of a

[7] Two other "heartland" cases, addressing zoning laws that disproportionately excluded minorities from high opportunity areas, have also been decided since *Inclusive Communities.* Both held, like *Graul,* that statistical evidence comparing the impact of the challenged and alternative zoning proposals which demonstrated a significant adverse impact on the protected class, established the required causal connection. See *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 619-20 (2d Cir. 2016) (upholding district court analysis at 843 F.Supp. 2d 287, 329 (E.D.N.Y. 2012); *Avenue 6E Investments, LLC v. City of Yuma*, 217 F.Supp.3d 1040, 1050 (D. Ariz. 2017). The *Mhany* decision also held that statistical evidence demonstrating that the challenged zoning rule would perpetuate segregation also met the causality requirement for disparate impact claims. Similar to the facts alleged here, the policy decision decreased the availability of housing to minorities in a municipality that was overwhelmingly non-Hispanic White.

protected class than is true for the population as a whole. Furthermore, like the *Graul* case, the ICP complaint contains allegations that compare the impact of the policy on the population adversely affected by the policy with the group unaffected. It alleges that the Defendants' policy of refusing to negotiate with or rent to voucher households excludes rentals to a disproportionately Black population but permits rentals to a disproportionately non-Hispanic White population. More specifically, the voucher population that is excluded by Defendants' policy is 81% Black and 10% White non-Hispanic, while the unaffected population that can afford the rents because of their higher incomes is 19% Black and 53% White. ROA. 33.

While the District Court describes in some detail much of the statistical information alleged in the ICP complaint, ROA 491-93, it then inexplicably concludes this information is "conclusory rather than descriptive of how Defendants' policy actually caused a disparate impact." ROA. 493. There is no explanation for this conclusion, and it defies common sense. The allegations in ICP's complaint are extensive and descriptive in demonstrating the required causal connection.

In the end, this case exemplifies what the Supreme Court described as a "heartland" case because the policy of refusing to rent to voucher holders "functions unfairly to exclude minorities from certain neighborhoods without any sufficient justification," *Inclusive Communities*, 135 S. Ct. at 2521, and poses an "artificial,

arbitrary, and unnecessary barrier" to housing opportunity that disparate impact liability is suited to address. *See* 135 S. Ct. at 2524.[8]

The District Court erred in ignoring well-established law and the allegations in Petitioner's Complaint that demonstrate a causal connection sufficient for establishing a prima facie case of disparate impact.

CONCLUSION

ICP has pled facts more than sufficient to establish prima facie claims of both disparate treatment and disparate impact in violation of the Fair Housing Act. The District Court's failed to consider well-established law governing disparate treatment claims and misapplied, and indeed ignored, the extensive pleadings in ICP's complaint which are more than adequate to meet the robust causality requirement of *Inclusive Communities.* It poses a significant threat to the ability of victims of discrimination to vindicate their fair housing rights. The Court should reverse and remand the case to District Court for further proceedings.

/s/ Jon M. Greenbaum
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[8] The District Court also granted the Motion to Dismiss on the basis that ICP failed to meet the requirements of the third prong of disparate impact analysis – demonstrating a less discriminatory alternative. Yet, ICP's complaint includes allegations of three less discriminatory alternatives. ROA 34-36. The District Court's dismissal of the Complaint on grounds it does not demonstrate a less discriminatory alternative, like its analysis of the allegations of a prima facie case, reads more like a decision on the merits than a consideration of whether ICP's allegations meet the *Twombly/Iqbal* plausibility requirements. See *infra,* p.5. This too is error.

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Dated November 7, 2017

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) 32(a)(7)(B) because this brief contains 4,610 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and the Rules of this Court. I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

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Dated November 7, 2017

CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2017, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF system for filing and that service to the participants in this appeal, all of whom are registered CM/ECF users, will be accomplished by the appellate CM/ECF system. Seven paper copies of the Motion and Proposed Brief will be mailed to the court, upon approval.

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