22-1660

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOSE REYES, *ET AL.*,
Plaintiffs–Appellants

v.

WAPLES MOBILE HOME PARK LIMITED PARTNERSHIP, *ET AL.*,
Defendants–Appellees.

Appeal from the United States District Court
for the Eastern District of Virginia

BRIEF OF AMICI CURIAE NATIONAL FAIR HOUSING ALLIANCE, AMERICAN CIVIL LIBERTIES UNION, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, EQUAL RIGHTS CENTER, HOUSING OPPORTUNITIES MADE EQUAL OF VIRGINIA, INC., HABITAT FOR HUMANITY OF GREATER CHARLOTTESVILLE, AND PIEDMONT HOUSING ALLIANCE IN SUPPORT OF PLAINTIFFS–APPELLANTS' REQUEST FOR REVERSAL

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

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No. 22-1660 Caption: Jose Reyes, et al., v. Waples Mobile Home Park Limited P'ship et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Fair Housing Alliance, Inc.
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
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Signature: /s/ Reed Colfax Date: 9/15/2022

Counsel for: National Fair Housing Alliance, Inc

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No. 22-1660 Caption: Jose Reyes, et al., v. Waples Mobile Home Park Limited P'ship et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

The American Civil Liberties Union
(name of party/amicus)

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Signature: /s/ Reed Colfax Date: 9/15/2022

Counsel for: The American Civil Liberties Union

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No. 22-1660 Caption: Jose Reyes, et al., v. Waples Mobile Home Park Limited P'ship et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

The Lawyers' Committee for Civil Rights Under Law
(name of party/amicus)

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Signature: /s/ Reed Colfax Date: 9/15/2022

Counsel for: The Lawyers' Committee for Civil Rights Under Law

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No. 22-1660 Caption: Jose Reyes, et al., v. Waples Mobile Home Park Limited P'ship et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

The Equal Rights Center
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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Signature: /s/ Reed Colfax Date: 9/15/2022

Counsel for: The Equal Rights Center

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No. 22-1660 Caption: Jose Reyes, et al., v. Waples Mobile Home Park Limited P'ship et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Housing Opportunities Made Equal of Virginia ("HOME")
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Signature: /s/ Reed Colfax Date: 9/15/2022

Counsel for: HOME

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Habitat for Humanity of Greater Charlottesville ("Habitat of Charlottesville")
(name of party/amicus)

who is amicus, makes the following disclosure:
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Signature: /s/ Reed Colfax Date: 9/15/2022

Counsel for: Habitat of Charlottesville

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Piedmont Housing Alliance
(name of party/amicus)

who is amicus, makes the following disclosure:
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Signature: /s/ Reed Colfax Date: 9/15/2022

Counsel for: Piedmont Housing Alliance

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AMICI STATEMENT OF INTEREST[1]

A. Fair Housing and Civil Rights Organization Amici

Amicus the National Fair Housing Alliance ("NFHA") is a national organization dedicated to ending discrimination and ensuring equal opportunity in housing for all people. Founded in 1988, NFHA is a consortium of more than 200 private, non-profit fair housing organizations, state and local civil rights agencies, and individuals. NFHA and its members engage in systemic investigations of housing discrimination when they believe that fair housing laws are being violated. Such investigations often require probing inquiries into the policies and practices of housing providers to determine whether those policies have an unlawful discriminatory disparate impact.

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization with more than four million members, activists, and supporters dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Since its founding in 1920, the

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(2), all parties have consented to the filing of this brief. In addition, pursuant to Appellate Rule 29(a)(4)(E), Amici certify that no party's counsel authored this brief in whole or in part, that no party or party's counsel contributed money intended to fund the preparation or submission of the brief, and that no person other than Amici and Amici's counsel contributed money intended to fund the preparation or submission of the brief.

ACLU has litigated numerous cases and appeared frequently as amicus curiae in cases aimed at ending segregation and housing discrimination on the basis of race and membership in other protected classes.

Amicus the Lawyers' Committee for Civil Rights Under Law is a nonpartisan, nonprofit civil rights organization formed in 1963 by the leaders of the American bar, at the request of President Kennedy, to secure and defend the civil rights of African Americans, other racial and ethnic minorities, and the poor. The Fair Housing and Community Development Project works with communities across the nation to combat, protest, litigate, and remediate discriminatory housing practices in order to promote greater opportunity for lower-income people of color. The Fair Housing and Community Development Project has extensive expertise in litigating disparate impact claims under the Fair Housing Act ("FHA"), including within the Fourth Circuit.

Amicus the Equal Rights Center is a civil rights organization that identifies and seeks to eliminate unlawful and unfair discrimination in housing and other contexts throughout the Greater Washington, D.C. area. The Equal Rights Center uses civil rights testing and other investigative tools to investigate allegations of discrimination. When the Equal Rights Center identifies discrimination, it seeks to eliminate it through various mechanisms, including education, policy advocacy,

counseling, and, if necessary, enforcement. Disparate impact claims under the FHA have served as an important means for the Equal Rights Center to further its mission of ensuring equal access to housing for all.

Amicus Housing Opportunities Made Equal of Virginia, Inc. ("HOME") is a non-profit organization with a purpose of ensuring equal access to housing for all people. The organization is dedicated to addressing housing-related systemic inequities that perpetuate segregation, concentrations of poverty, and wealth inequality in Virginia. HOME addresses divisive housing practices through fair housing enforcement, research, advocacy, and statewide policy work. The organization has and continues to use FHA disparate impact claims as part of its multi-faceted approach furthering fair housing in Virginia.

Fair Housing and Civil Rights Organization Amici ("Civil Rights Amici") regularly litigate fair housing violations under a disparate impact theory of liability and submit this brief to address the legal errors in the district court's application of the disparate impact framework under the FHA.

B. Housing Provider Amici

Amicus Habitat for Humanity of Greater Charlottesville ("Habitat of Charlottesville") is a non-profit organization based in Charlottesville, Virginia with a mission of providing individuals and families in the Greater Charlottesville area

with a safe and affordable place to live. Habitat of Charlottesville seeks to maximize the impact of its limited resources through a holistic approach, including homebuilding operations, neighborhood partnerships, housing market innovation, and the provision of rental housing.

Amicus Piedmont Housing Alliance is a non-profit organization that operates in Charlottesville, Virginia and five nearby counties with a mission of creating affordable housing opportunities and fostering community through education, lending, and equitable development. It seeks to achieve its mission through several mechanisms, including housing counseling, lending, development, and the provision of rental housing.

Housing Provider Amici submit this brief to provide additional information regarding the operational burdens they would face and the detrimental impact the district court's decision would have on their ability to provide safe and affordable housing if it were affirmed.

SUMMARY OF ARGUMENT

This case arrives at this Court at the summary judgment stage, when all disputed issues of fact must be resolved in favor of the non-moving party. To carry their burden at the second step of the well-established framework for a disparate impact claim under the FHA, Appellees must (1) state a substantial, legitimate, and

nondiscriminatory interest in their policy to require proof of legal immigration status for all adult residents and (2) explain how the policy serves their interest in a significant way. The district court erred on both dimensions of the step-two analysis, and improperly granted judgment to Appellees.

First, even though Appellants adduced evidence showing a genuine dispute of material fact as to whether Appellees' proffered interest of avoiding criminal liability was a genuine interest that actually motivated their policy, the court dismissed the dispute as "unimportant"—a holding antithetical both to the disparate impact framework and the summary judgment framework. Second, in evaluating whether Appellees' policy significantly served their interest of avoiding criminal liability under the "anti-harboring"[2] statute, the court below relied on an expansive definition of the word "harbor" that would criminalize a broad swath of innocuous activities. Every Court of Appeals that has considered the issue has rejected the district court's definition of harboring, and this Court should do the same.

Finally, affirming the district court would risk pushing every housing provider within the Circuit to affirmatively screen potential and existing tenants

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[2] 8 U.S.C. § 1324(a)(1)(A)(iii). This provision is part of the Immigration Reform and Control Act ("IRCA").

and refuse housing to all who may lack legal status. Such screening is extremely rare and not standard industry practice. Introducing the possibility of criminal liability for housing providers where none now exists would significantly interfere with the ability of housing providers to make housing available because they would have to become or hire experts in federal immigration law. This would increase the already high number of unhoused individuals and families in the Circuit.

ARGUMENT

I. The District Court Misapplied the Second Step of the Fair Housing Act Disparate Impact Framework

A. The Framework for Determining Disparate Impact Liability Under the Fair Housing Act is Well-Settled

Civil Rights Amici have extensive experience litigating disparate impact cases under the FHA. The Supreme Court recently held that disparate impact claims are cognizable under the FHA and reiterated the decades-old framework for determining disparate impact liability under the statute. *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015); *see also Reyes v. Waples Mobile Home Park Ltd. P'ship*, 903 F.3d 415 (4th Cir. 2018).[3]

[3] Prior to the Supreme Court's decision in *Inclusive Communities*, every Circuit addressing the issue had determined that disparate impact claims were

Under that well-established three-part test, a plaintiff must first make a prima facie showing by demonstrating "a robust causal connection between the defendant's challenged policy and the disparate impact on the protected class." *Reyes*, 903 F.3d at 424; *see also Inclusive Communities*, 576 U.S. at 542–43. Second, the defendant must "'state and explain the valid interest served by their policies.'" *Reyes*, 903 F.3d at 424 (quoting *Inclusive Communities*, 576 U.S. at 541). If a defendant makes this showing, the burden returns to the plaintiff to prove that the "defendant's asserted interests 'could be served by another practice that has a less discriminatory effect.'" *Reyes*, 903 F.3d at 424 (quoting *Inclusive Communities*, 576 U.S. at 527).

B. The District Court Erred in Applying Step Two of the Disparate Impact Framework

The Civil Rights Amici regularly assess complaints that a facially neutral policy is having a disparate impact, and also commonly investigate and assess the justification for the policy. Accordingly, the Civil Rights Amici are familiar with the second step of the disparate impact framework, which requires a defendant to make two distinct showings: (1) state a "substantial, legitimate, [and]

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cognizable under the FHA. *See Inclusive Communities*, 576 U.S. at 535–36 (collecting cases).

nondiscriminatory" interest and (2) explain how the challenged policy serves that interest. *Inclusive Communities*, 576 U.S. at 527, 541; *see also Sw. Fair Hous. Council, Inc. v. Maricopa Domestic Water Improvement Dist.*, 17 F.4th 950, 968 (9th Cir. 2021) ("[I]t is defendant's burden at [step two] to show (1) a legitimate business interest, and (2) that the practice or policy serves in a significant way that legitimate interest."). To be entitled to summary judgment, therefore, Appellees must show that there is no genuine dispute of material fact as to whether they have carried both aspects of their burden at step two of the framework. *See, e.g.*, *Foster v. Univ. of Maryland-E. Shore*, 787 F.3d 243, 248 (4th Cir. 2015) ("Summary judgment is appropriate when there is no genuine dispute as to any material fact . . . ." (quotations omitted)).

In granting judgment to Appellees, the District Court erred in its application of both parts of the second step. First, it characterized as "unimportant" the material dispute regarding whether Appellees' late-proffered interest of avoiding liability under IRCA was a genuine interest of Appellees. Second, it incorrectly determined that Appellees' policy to require proof of legal status from all adult residents significantly served that interest. Each of these errors independently merits reversal; together they demand it.

i. *A trier of fact could find that Appellees' proffered interest was not legitimate*

Appellees have failed to show, as a matter of law, that they had a legitimate—rather than a speculative or hypothetical—interest in maintaining the challenged policy. On this point, HUD's regulation codifying the framework for determining disparate impact liability provides useful guidance for assessing a defendant's articulated interest.[4] *See Implementation of the Fair Housing Act's Discriminatory Effects Standard*, 78 Fed. Reg. 11459 (Feb. 15, 2013) (codified at 24 C.F.R. § 100.500 (2103)) (hereinafter "Final Rule").[5] The Final Rule defines the relevant terms: "[a] 'substantial' interest is a core interest of the organization that has a direct relationship to the function of that organization." 78 Fed. Reg. at 11470. "[L]egitimate" means "that a justification [must be] genuine and not false," and "nondiscriminatory . . . ensure[s] that the justification for a challenged practice does not itself discriminate based on a protected characteristic." *Id.* A proffered interest must satisfy all three conditions. It cannot serve as a justification for a challenged practice if, for example, it is substantial and nondiscriminatory but *not legitimate*. Finally, the regulation requires that the defendant's proffered interest "be supported by evidence" and not "be hypothetical or speculative." § 100.500(b)(1)(ii) (2013).[6]

In sum, a defendant is not entitled to summary judgment on a disparate impact claim unless the undisputed evidence establishes that the defendant had a legitimate interest—meaning "genuine and not false"—that justified the challenged practice. 78 Fed. Reg. at 11470; s*ee also Charleston Hous. Auth. v. U.S. Dep't of Agric.*, 419 F.3d 729, 741 (8th Cir. 2005) (affirming district court's decision to,

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[4] As this Court recognized in *Reyes*, "[t]he HUD regulation is similar to the framework the Supreme Court ultimately adopted in *Inclusive Communities*, and indeed, some courts believe the Supreme Court implicitly adopted the HUD framework altogether." 903 F.3d at 424 n.4. Without deciding whether the Supreme Court adopted the HUD framework, *Reyes* held that "[t]o the extent the two conflict, *Inclusive Communities* controls, but we also afford the HUD regulation and guidance the deference it deserves." *Id.* at 432 n.10.

[5] HUD issued a revised rule in 2020. *See HUD's Implementation of the Fair Housing Act's Disparate Impact Standard*, 85 Fed. Reg. 60288 (Sept. 24, 2020). The revised rule was enjoined by *Massachusetts Fair Hous. Ctr. v. United States Dep't of Hous. & Urb. Dev.*, 496 F. Supp. 3d 600 (D. Mass. 2020), which instructed HUD to continue to apply the 2013 Final Rule, *see id.* at 611. In 2021, HUD proposed a rule to formally reinstate the 2013 Final Rule. *See Reinstatement of HUD's Discriminatory Effects Standard*, 86 Fed. Reg. 33590 (proposed June 25, 2021). Because the 2013 Final Rule continues to be the operative rule, this brief will cite to the provisions of 24 C.F.R. § 100.500 as set forth by that rule.

[6] These provisions are not in conflict with *Inclusive Communities* and are thus entitled to deference. *See Reyes*, 903 F.3d at 432 n.10 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 433–34 (1971) for proposition that HUD's interpretation of the FHA, as the enforcing agency, "is entitled to great deference."). Indeed, *Inclusive Communities* cited with approval that HUD's rulemaking analogized step two under the FHA to the business necessity standard under Title VII. *See* 576 U.S. at 541.

after a bench trial, "determine[] as a matter of fact that [the defendants'] justifications were pretextual because they were unsupported by evidence").

Appellees did not make such a showing. The evidence adduced in discovery indicates that avoiding liability under IRCA was *not* a genuine interest held by Appellees, but instead was an after-the-fact explanation crafted in the context of the litigation. In their sworn interrogatory response, Appellees described their "reasons for creating the policy" as to "confirm the identity of" applicants, "perform credit checks, minimize identity fraud, . . . perform criminal background checks, and minimize loss from eviction." JA463–64. Concern over IRCA liability is notably absent from this otherwise-exhaustive list.

Further, Appellees' employees testified that they did not believe that renting to individuals without legal status would lead to liability under IRCA. JA513–14. Finally, as recognized by the district court, Appellees testified that the reason they decided to apply the policy to all adult residents was to ensure they were aware of all adult residents' criminal histories after an incident at another mobile home park in which management was unaware when a resident with a criminal history turned 18—in other words, the decision had nothing to do with IRCA liability. JA1513 n.2.

The District Court nonetheless granted judgment to Appellees, erroneously concluding that it was "unimportant" whether Appellees' interest in avoiding IRCA liability was genuine:

> [I]t is unimportant whether the Defendants can provide evidence that they possessed the valid interest at the time the Defendants adopted the challenged policy. The anti-harboring statute was in effect at the time the challenged policy was implemented. . . . The Defendants are presumed to have knowledge of the law at the time the Policy was implemented and enforced.

JA1524–25. Civil Rights Amici agree with Appellants that a defendant cannot rely on a post-hoc rationale to justify the challenged policy, *see* Appellants' Op. Br. (Dkt. 21) at 32, but the district court also failed to grapple with the stark absence of any evidence indicating that avoiding criminal liability was *ever* a genuine interest of Appellees. This is antithetical to the disparate impact framework. Step two requires a defendant to make a showing that is "supported by evidence" that it had a nonspeculative, not hypothetical, and genuine interest to justify its policy. *See* 24 C.F.R. § 100.500(b) (2013). In other words, analysis of the sincerity of a defendant's proffered interest is quite important to any assessment of whether a plaintiff has presented sufficient evidence to support a finding that a defendant's policy has an unjustified disparate impact on a protected class in violation of the FHA.

The district court's conclusion is also antithetical to the summary judgment framework. It is hornbook law that "courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment." *Tolan v. Cotton*, 572 U.S. 650, 656 (2014). Nor may a court declare that a genuine dispute of fact is unimportant and grant summary judgment despite the dispute. Through discovery, Appellants adduced significant evidence demonstrating a dispute of material fact as to whether Appellees' proffered interest of avoiding liability under IRCA was legitimate. It is for a jury—not a district court—to make the factual determination of whether Appellees' purported concern about criminal liability under IRCA was a genuine interest of Appellees or a mid-litigation brainchild of Appellees' counsel.

ii. The rental of housing to undocumented individuals does not create criminal liability under IRCA

The district court also misapplied the second dimension of a defendant's step-two burden in the FHA disparate impact analysis: The defendant must show that the challenged policy actually serves the stated interest. *See, e.g.*, *Inclusive Communities*, 576 U.S. at 527. This step is "analogous to the business necessity standard under Title VII." *Id.* at 541. Courts have described this burden with slight

variations,[7] but a defendant must, at a minimum, explain how their valid interest is served by the challenged practice. *Reyes*, 903 F.3d at 424 (quoting *Inclusive Communities*, 576 U.S. at 541); *see also*, *Sw. Fair Hous. Council*, 17 F.4th at 968 (describing the step-two burden as requiring defendants to show that the "practice or policy serves in a significant way [their] legitimate interest.").

The district court held that Appellees met their burden based on the court's determination, as a matter of law, that IRCA "holds liable any person who houses an unauthorized alien knowingly or in reckless disregard of their immigration status." JA1522; *see also id.* at 1523–24 (finding it "clear" that "the Department of Justice will pursue criminal charges against a lessor of housing who does not take

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[7] *See Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 988 (4th Cir. 1984) ("[W]hen confronted with a showing of discriminatory impact, defendants must prove a business necessity sufficiently compelling to justify the challenged practice."); s*ee also, e.g.*, *Mhany Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581, 617 (2d Cir. 2016) (at step two, "the defendant or respondent may rebut the prima facie case by proving that the 'challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant.'" (quoting 24 C.F.R. § 100.500(c)(1)–(2) (2013)); *Reinhart v. Lincoln Cnty.*, 482 F.3d 1225, 1229 (10th Cir. 2007) ("Once plaintiffs establish a prima facie case of disparate impact, the burden shifts to the defendant to produce evidence of a genuine business need for the challenged practice." (quotation omitted)); *Charleston Hous. Auth.*, 419 F.3d at 741 ("Under the second step of the disparate impact burden shifting analysis, the Housing Authority must demonstrate that the proposed action has a manifest relationship to the legitimate non-discriminatory policy objectives and is justifiable on the ground it is necessary to the attainment of these objectives." (quotation omitted)).

affirmative steps to verify the authorization" of its tenants). The district court reasoned that because renting to tenants without legal status exposes a landlord to criminal liability under IRCA, Appellees' policy of requiring all tenants to provide proof of legal status is "necessary" to Appellees' interest of avoiding criminal liability. The district court's premise is incorrect. IRCA does not criminalize the act of renting housing to an undocumented individual, and thus Appellees' policy is untethered from their proffered interest of avoiding criminal liability.

IRCA creates criminal liability for a person who:

> [K]nowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation[.]

8 U.S.C. § 1324(a)(1)(A)(iii). The Courts of Appeals that have considered the question have uniformly decided that IRCA's proscription of harboring does not include the simple act of renting lodging to an undocumented individual, even where the landlord knows of the tenant's status. *See*, *e.g.*, *DelRio-Mocci v. Connolly Props. Inc.,* 672 F.3d 241, 247 (3d Cir. 2012) ("We do not know of any court of appeals that has held that knowingly renting an apartment to an alien lacking immigration status constitutes harboring."). The Second Circuit's opinion in *United States v. Vargas-Cordon*, 733 F.3d 366 (2d Cir. 2013) is instructive.

Applying the canon of *noscitur a sociis* to the list of words "conceals, harbors, or shields from detection," *Vargas-Cordon* notes that "conceals" and "shields from detection," "both carry an obvious connotation of secrecy and hiding," which "suggest[s] that 'harbors,' as the third and only other term in subparagraph (A)(iii), also shares this connotation, which easily fits into its ordinary meaning." *Id.* at 381. Because of this, the Court concluded that "[t]o 'harbor' under § 1324, a defendant must engage in conduct that is intended both to substantially help an unlawfully present alien remain in the United States . . . and also is intended to help prevent the detection of the alien by the authorities." *Id.* at 382.

The Seventh Circuit came to the same conclusion in *United States v. Costello*, 666 F.3d 1040, 1044 (7th Cir. 2012). *Costello* considered whether a defendant who allowed her boyfriend to live with her, knowing he did not have legal status, could be convicted of harboring. The government contended, as the district court held below, that "'to harbor' just means to house a person," but the Court soundly rejected this argument:

> It is apparent . . . that 'harboring,' as the word is actually used, has a connotation—which 'sheltering,' and *a fortiori* 'giving a person a place to stay'—does not, of deliberately safeguarding members of a specified group from the authorities, whether through concealment, movement to a safe location, or physical protection.

Id. at 1043, 1044; *see also Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 529 (5th Cir. 2013) ("[W]e have interpreted the statutory phrase harbor, shield, or conceal to imply that something is being hidden from detection." (quotations omitted)).

Ignoring the consensus of the circuit court decisions to the contrary, the district court concluded that "[t]he language of the statute indicates that housing and collecting rent from unauthorized aliens are predicates of the criminal act for which the Defendants could face liability." JA1524. The district court's statutory analysis begins and ends with the meaning of the word "harbor," and it applies an expansive definition of the word that, if adopted by this Court, would criminalize a broad swath of innocuous actions. If the mere act of providing an individual without legal status with a place to stay equates to harboring, then "a hospital emergency room that takes in a desperately ill person whom the hospital staff knows to be [undocumented] would be guilty of harboring."[8] *Costello*, 666 F.3d at

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[8] *Costello* provides another example:

> [A]lthough generally it is not a crime to be an illegal alien . . . , an illegal alien becomes a criminal by having a wife, also an illegal alien, living with him in the United States; if they have children, born abroad and hence illegal aliens also, living with them, then each

1044. Under the district court's interpretation, a hotel would be guilty of harboring for allowing an undocumented individual to purchase a night's stay in one of its rooms. If the hosts of a party allowed their inebriated guests to sleep in a spare bedroom rather than drive under the influence, they too would be criminally liable if they knew or had reason to believe that one of their guests did not have legal status.

No circuit court has adopted this untenable reading of § 1324(a)(1)(A)(iii). Most have interpreted harboring to require an affirmative action to prevent detection of an unauthorized individual, active concealment, or safeguarding. *See United States v. McClellan*, 794 F.3d 743, 750 (7th Cir. 2015); *Vargas-Cordon*, 733 F.3d at 382; *Parkside Partners*, 726 F.3d at 529; *United States v. Ozcelik*, 527 F.3d 88, 100 (3d Cir. 2008), *as amended* (June 19, 2008). The Ninth Circuit requires the government to prove that "the defendant intended to violate the law" to obtain a harboring conviction. *United States v. Tydingco*, 909 F.3d 297, 304 (9th

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> parent has several counts of criminal harboring, on the government's interpretation of the statute.

Id. at 1047. This case presents a twist on this example. The children of all four families are citizens. According to the District Court, if, as adults, they choose to care for their aging parents and bring their parents into their homes, this act of filial duty is in fact criminal conduct.

Cir. 2018). Upholding the district court's analysis of the anti-harboring statute would require this Circuit to be the first to interpret § 1324 as criminalizing a wide array of everyday activities.

Beyond its superficial textual analysis of § 1324, the district court relied on this Court's nonprecedential decision in *United States v. Aguilar*, 477 F. App'x 1000 (4th Cir. 2012) to hold that Appellees "could be found liable under the anti-harboring statute." JA1522–25. This reliance is misplaced. First, the court in *Aguilar* acknowledged that this Circuit had not decided the statutory scope of the word "harbor" and refused to consider the issue on plain error review. *Id.* at 1002. Second, *Aguilar* is factually distinguishable from Appellees' situation, and the district court's declaration that "the facts of the *Aguilar* case make it clear that the Department of Justice will pursue criminal charges against a lessor of housing who does not take affirmative steps to verify the authorization" of its tenants, JA5123–24, is flatly incorrect.

The defendant in *Aguilar* "took no steps to ascertain the status of her tenants *even after repeatedly being warned by officials that numerous of her tenants were not properly documented*." 477 F. App'x at 1003 (emphasis supplied). There is no indication that Appellees had been warned (at all, let alone repeatedly) by immigration officials that some of their tenants were not properly documented.

Additionally, "the vast majority of the individuals living" with the defendant in *Aguilar* were undocumented, which "support[ed] an inference" that the defendant knew undocumented individuals were "especially attract[ed]" to her home. *Id.* The record in this case does not provide a basis for any such inference.

Finally, as Appellants' brief notes, the defendant in *Aguilar* loaned money to one of her tenants to facilitate smuggling the tenant into the country. *See United States v. Aguilar*, 4th Cir. No. 11-4961, ECF 31 at 8 (Brief of U.S. Gov't) (citing district court record). This is precisely the type of affirmative conduct that other circuits have required for a harboring conviction, affirmative conduct that is entirely missing in this case.

The facts of *Aguilar* are entirely distinct from the facts at hand, and that case cannot bear the weight the district court places on it. *Aguilar* does not compel the district court's conclusion that this Circuit has decided to stand as an outlier to every other circuit to consider the issue and hold that the mere act of renting housing to an undocumented individual, without more, creates criminal liability under IRCA.

The district court's decision that Appellees carried their step-two burden was entirely dependent on its conclusion that Appellees faced liability under IRCA: "[T]he Court finds the Defendants could be found liable under the anti-harboring

statute. Therefore, implementing a policy to avoid increased criminal liability under the anti-harboring statute is a valid and necessary interest that satisfies the second step of the burden shifting framework." JA1525. Because IRCA does not criminalize the simple act of renting lodging to an individual without legal status, Appellees' policy of requiring proof of legal status does not serve Appellees' stated interest of avoiding criminal liability. *Reyes*, 903 F.3d at 424; *Sw. Fair Hous. Council*, 17 F.4th at 968. The district court's "business necessity" analysis is fundamentally flawed and must be reversed.

* * *

The summary judgment order below fundamentally misapplies the disparate impact framework. The district court ignored a clear dispute of material fact as to whether Appellees' asserted interest in implementing the policy was legitimate and anchored its "business necessity" analysis on a superficial and facially incorrect interpretation of the scope of IRCA. Each of these errors, standing alone, is sufficient to merit reversal. Together, they compel this Court to reverse and vacate the district court's grant of summary judgment.

II. Affirming the District Court Would Disrupt the Operations of Housing Providers Throughout the Circuit

The trial court's decision was premised on its determination that receiving "a financial benefit" in the form of "rental payments in exchange for housing" is in

and of itself enough to expose a landlord to criminal liability for harboring an undocumented individual. JA1523; *see also id.* at 1522–24 (finding it "clear that the Department of Justice will pursue criminal charges against a lessor of housing who does not take affirmative steps to verify the authorization" of its tenants). The district court's unprecedented interpretation of IRCA, therefore, creates a scenario where housing providers face a risk of criminal liability as they carry out their everyday activities. Housing providers would face the unworkable choice of either (1) spending the time and effort to screen potential and existing tenants and refuse housing to all who may lack legal status or (2) risk exposure to possible IRCA liability and face up to 10 years in prison. *See* 8 U.S.C. §1324(a)(1)(B)(i).

As a result, the district court's decision would prevent and disrupt housing providers, like the Housing Provider Amici here, from fulfilling their missions of helping to ensure safe, affordable, and accessible housing for all individuals and families. In the context of an extremely tight housing market with few affordable housing options, the housing provided by organizations like Housing Provider Amici is the only housing opportunity available for many individuals and families. Fairfax County, for example found that 1,191 people in the county were experiencing homelessness as of the 2022 Point-in-Time Count. Fairfax County Office to Prevent and End Homelessness, *Point-in-Time Count*,

https://www.fairfaxcounty.gov/homeless/point-in-time-count-2022, (last visited Sept. 14, 2022). HUD found that more than 326,000 people across the nation were experiencing homelessness on a single night in 2021. U.S. Department of Housing and Urban Development Press Release, *HUD Releases 2021 Annual Homeless Assessment Report Part 1* (Feb. 4, 2022), https://www.hud.gov/press/press_releases_media_advisories/hud_no_22_022. If Amici are deterred from providing such housing under the threat of criminal prosecution, the already high numbers of unhoused individuals and families will only increase.

The standard industry practice for most housing providers does not include affirmatively screening the immigration status of potential tenants. Indeed, in the course of the litigation, Appellees were unable to identify another landlord that required proof of legal status as a condition of renting housing.[9] The district court's decision upends the status quo and would push housing providers to become experts in federal immigration law. Assessing an applicant's immigration statutes can be extremely difficult and complicated for several reasons. As one scholar has

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[9] Additionally, courts have struck down local ordinances that required landlords to screen potential tenants for legal immigration status. *See Villas at Parkside Partners*, 726 F.3d at 526; *Lozano v. City of Hazleton*, 724 F.3d 297, 300 (3d Cir. 2013).

explained, "[t]here are multiple types of legal status and dozens of documents that can demonstrate legal status," and an individual's status may change because of the passage of time or a change in circumstances. Rigel C. Oliveri, *Between A Rock and A Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 Vand. L. Rev. 55, 77 (2009) (citations omitted). Housing providers are ill-equipped to make these decisions. The district court's opinion would likely result in many providers revising their application procedures to include screening applicants' immigration status, assessing the immigration status of their current residents, and training property managers on federal immigration law in order to reduce the perceived risk of criminal liability. Other housing providers may opt to retain immigration attorneys to review the documentation of all tenant applicants. Most housing providers have neither the time nor resources to become or hire experts on determining immigration status and review the many forms of documents that can establish legal status.

CONCLUSION

The district court's decision is contrary to the FHA and against the consensus of the Courts of Appeals that have decided this issue. It additionally creates a substantial risk of disrupting the operations of housing providers

throughout the Circuit. For the reasons stated above, the district court's grant of summary judgement should be vacated, and the case remanded for trial.

Dated: September 15, 2022

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 22-1660 **Caption:** Jose Reyes, et al. v. Waples Mobile Home Park Ltd. P'ship, et al.

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Party Name Amici NFHA et al.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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