22-1660

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, No. 1:16-cv-00563, Judge Liam O'Grady

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APPELLANTS' OPENING BRIEF

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September 8, 2022

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 22-1660 Caption: Rosy Giron de Reyes, et al. v. Waples Mobile Home Park LP, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Rosy Giron de Reyes, Jose Reyes, Felix Bolanos, Ruth Rivas, Yovana Solis, Esteban Yrapura
(name of party/amicus)

Rosa Amaya Herbert Cruz

who is Plaintiffs-Appellants, 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
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Nicholas M. DiCarlo Date: September 8, 2022

Counsel for: Plaintiffs-Appellants

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INTRODUCTION

This case centers on a discriminatory housing policy that caused four Latino immigrant families to lose their homes in a Virginia mobile home park. The policy that the owners and operators of that park (Appellees "Waples") enforced against Appellants (the "Families") requires all adults living in the park to show documentation of legal immigration status in the United States. Each Family consists of a father with legal status, a mother who is undocumented, and children who are U.S. citizens. The Families' suit asserts that Waples' policy violated the Fair Housing Act ("FHA"), 42 U.S.C. § 3604, by creating a disparate impact against Latinos.

This appeal marks the second time this case is before the Fourth Circuit. The first time, in a published opinion, this Court held that the Families had established a prima facie case of disparate impact by demonstrating—via statistical and other evidence—that the policy was likely to disproportionately cause Latino tenants at the park to be evicted compared to non-Latino tenants. *Reyes v. Waples Mobile Home Park Ltd. P'ship*, 903 F.3d 415 (4th Cir. 2018) ("*Reyes*").

This Court's decision addressed Step One of the three-part burden-shifting framework established for disparate-impact claims in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015) ("*Inclusive Communities*"). Under the *Inclusive Communities* framework, once plaintiffs establish a prima facie case of disparate impact at Step One, as they did here, defendants at Step Two bear the burden of proving that the discriminatory policy was necessary to achieve one or more substantial, legitimate, nondiscriminatory interests. *Id.* at 527. If defendants successfully prove a business necessity at Step Two, Step Three asks whether that business necessity could be accomplished through less discriminatory means. *Id.*

Although the first appeal to this Court addressed Step One, Waples shoehorned in a business necessity argument—which this Court rejected. Waples argued that the Families' disparate impact claim failed as a matter of law because the policy was "necessary to avoid the criminal prohibition on harboring illegal aliens" under 8 U.S.C. § 1324(a)(1)(A)(iii). JA825-827. The Court rejected Waples' "anti-harboring" argument, holding that the Families had established a prima

facie case of disparate impact, and remanded for further proceedings on Steps Two and Three.

On remand, Waples argued again that it could not be held liable under the FHA because it had a "business necessity" to enact the policy: avoiding criminal liability under the anti-harboring statute. The district court—Judge Ellis, who had handled the case from the beginning—followed this Court's rejection of this "business necessity" defense, and denied Waples' motions for summary judgment (JA1275) and reconsideration thereof (JA1316), and allowed the case to go to trial.

After five years of proceedings, Judge O'Grady, to whom the case was reassigned shortly before trial in 2021 (JA1320), made a 180º turn from Judge Ellis and granted summary judgment to Waples on "anti-harboring" grounds (JA1511). The court so ruled even though there was no evidence that Waples had adopted or enforced the policy because of the anti-harboring statute or any concern about harboring.

Judge O'Grady's decision should be reversed because it misinterprets housing and immigration laws, disregards material factual

disputes about Waples' purported "business necessity," and violates this Court's mandate.

STATEMENT OF JURISDICTION

The district court entered final judgment on May 6, 2022 when it granted summary judgment to Waples. JA1511. On June 1, 2022, the Families timely noticed an appeal pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A). JA1528.

The district court had federal-question jurisdiction under 28 U.S.C. § 1331 because the Families asserted an FHA claim. This Court has jurisdiction under 28 U.S.C. § 1291 because the district court entered final judgment.

STATEMENT OF THE ISSUES

1. Is screening all adults seeking to live in a mobile home park for their immigration status, purportedly to avoid criminal liability under the federal anti-harboring statute, 8 U.S.C. § 1324(a)(1)(A)(iii), a "business necessity" for mobile home park operators under the Fair Housing Act?

2. Must defendants sued for discriminatory housing practices that disparately harm members of a protected class prove that they actually had a valid business necessity at the time they enforced the challenged policy, or may they justify their policy by relying on a *post-hoc* rationalization for the policy devised after they were sued?

3. Given the parties' factual disputes over Waples' purported business necessity, should summary judgment have been denied in any event?

4. Did this Court's prior decision and remand order in this case—holding, among other things, that the anti-harboring statute did not compel judgment for Waples—preclude the district court's grant of summary judgment based on the anti-harboring statute?

STATEMENT OF THE CASE

A. Statement of Facts

The key facts about the Families, Waples, the Waples policy, and Waples' enforcement of the policy against the Families had already been

established by the time this case first reached this Court. *See generally Reyes*, 903 F.3d at 419-20.[1] The following is a summary of those facts.

1. The Families

Plaintiffs-Appellants (the "Families") are four Latino couples of Salvadoran and Bolivian national origin who lived with their children in Waples Mobile Home Park in Fairfax, Virginia (the "Park") during the events precipitating this lawsuit. JA334-335, JA341-342, JA364-365, JA384-385. It is undisputed that the four female Plaintiffs—Rosy Giron de Reyes, Ruth Rivas, Yovana Jaldin Solis, and Rosa Elena Amaya—are undocumented immigrants who possess U.S. government-issued Individual Taxpayer Identification Numbers ("ITINs"), and that all four male Plaintiffs—Jose Dagoberto Reyes, Felix Alexis Bolaños, Esteban Ruben Moya Yrapura, and Herbert David Saravia Cruz—have legal

[1] In the summary judgment briefing on remand, the parties largely incorporated by reference the prior summary judgment record; the only additions were by Waples, and were unrelated to the harboring issue. JA3174-3175, JA3212-3214. As a result, the current factual record is functionally identical to the record before this Court on the earlier appeal.

status in the United States. JA336, JA344, JA366, JA387, JA2246-2252. All of the Families' children are U.S. citizens. JA335, JA341, JA364, JA385. Each of the male Plaintiffs successfully passed a credit and criminal background check as part of their application process to live at the Park, and subsequently entered into yearly leases at the Park. JA1944-1984.

2. Waples

Defendants-Appellees Waples Mobile Home Park Limited Partnership, Waples Project Limited Partnership, and A.J. Dwoskin & Associates, Inc. (collectively "Waples") are Virginia companies. They own and operate the Park, and promulgated and enforced the discriminatory policy (the "Policy") against the Families. *Reyes*, 903 F.3d at 419.

3. The Discriminatory Policy

The Policy requires all adults seeking to live in the Park to present an original Social Security card, or, in the absence of a Social Security card, an original Passport, an original U.S. Visa, and an original Arrival/Departure Form ("I-94 or I-94W"). JA326. The Policy says nothing explicit about immigration status. But as explained below, it has

the undisputed discriminatory *effect* of excluding all families where any adult member of the household is undocumented because it requires all adults to present documents that are only available to people with legal immigration status.

Though the Policy was technically in existence when the Families moved in to the Park, it was rarely enforced. Waples, for example, knowingly allowed the female Plaintiffs to live at the Park for years without submitting one of the specified forms of identification. *See, e.g.*, JA337, JA343, JA366, JA386, JA392, JA2027, JA2038, JA2086, JA2095-2096.

The Policy is far from standard landlord practice. In fact, Waples could not identify a single corporate landlord that maintained and adhered to a similar policy. JA2185-2189.

Beginning in 2015, Waples began strictly applying *all* its written policies—including the Policy—to Park tenants seeking to renew their

annual leases (a process deemed "recertification"). JA524, JA529.[2] That decision stemmed from two incidents occurring at other properties, in which tenants committed sex offenses as minors and then never were asked to disclose those offenses after they turned eighteen—even though one of Waples' policies *did* require all adult applicants to disclose such offenses as part of a background check. JA2106-2108, JA2234-2235. Neither incident involved undocumented immigrants or had anything to do with immigration or the Policy. Hence, the sole reason Waples suddenly reversed course and began requiring that its tenants submit the specified forms of identification—and by extension prove lawful status—had nothing to do with concerns about "harboring," or indeed with immigration status at all.

Once it was sued, and called to account for the fact that its Policy had the effect of leading all families with even one undocumented member to be evicted, Waples' lawyers came up with previously

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[2] Waples has made clear that the Policy "is still in place and being enforced." ECF 239, at 13.

unasserted reasons to attempt to justify the discriminatory effect of enforcing the Policy. During litigation, Waples contended that even if the Policy had a discriminatory impact on Latinos, such discrimination was justified because it allegedly eased performance of credit and criminal background checks, and minimized loss from eviction and other lease underwriting concerns. JA464. Later in the litigation, starting with its reply brief in support of its first motion for summary judgment (JA2545-2547), Waples asserted that the Policy was also necessary to comply with the "anti-harboring statute" (8 U.S.C. § 1324, a provision of the Immigration Reform and Control Act ("IRCA")).[3]

4. The Families Lose Their Homes Because of the Policy

Once Waples began "recertifying" its tenants in 2015 and enforcing its various policies, the Families were notified in writing that they were in breach of the Policy because even though each of the male Plaintiffs—

[3] Although IRCA included provisions beyond the establishment of criminal liability for "harboring," 8 U.S.C. § 1324 is referred to herein as "IRCA" for simplicity's sake.

the sole leaseholders—were in compliance with the Policy from having previously submitted Social Security cards, the female Plaintiffs were not. JA1905-1906.

As a result of the female Plaintiffs' noncompliance with the Policy, Waples refused to renew the Families' annual leases from 2015 to early 2016. Waples permitted the Families to remain at the Park, but used their inability to submit the purportedly required documents as an excuse to convert their leases from annual to month-to-month, increase each Family's rent by $100 per month, and then later threaten to hike the rent another $300 per month, representing more than one-third of each Family's monthly rent. JA1905-1906. Waples also sent multiple "21/30 Notices" informing the Families that, if they did not cure the violation at issue within 21 days, they were required to "vacate the premises" within 30 days. *See, e.g.*, JA332.

The combination of rent increases and 21/30 notices caused the Families to be driven from the Park. JA1906-1907, JA3215.[4] On average, the Families remained at the Park for nearly one additional year after their leases were converted to month-to-month and their rents were hiked. JA1905-1907, JA3215.

B. Procedural History

1. The Families File This Housing Discrimination Lawsuit.

In May 2016, the Families sued Waples to challenge its discriminatory housing Policy. The lawsuit asserted various claims under federal and state law, including that the Policy violated the FHA by creating a disparate impact against Latinos. The Families sought damages, declaratory relief, and an injunction ordering Waples to stop enforcement of the Policy. JA46.

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[4] One of the Families was still living in the Park when summary judgment was first granted. That Family moved out in July 2017, before the second round of summary-judgment briefing. JA3215.

2. The District Court (Judge Ellis) Dismisses the Families' Disparate Impact Claim.

Waples filed a partial motion to dismiss, which the district court (Judge Ellis) denied. In its decision denying Waples' partial motion to dismiss, however, the district court ruled that the Families were foreclosed from relying on a disparate impact theory of liability, and could only proceed with their FHA claim under a disparate treatment theory. JA81-95.

After discovery, the parties cross-moved for summary judgment. In relevant part, the district court partially granted Waples' motion for summary judgment on the Families' FHA claim. JA669-682, JA693.

The Families appealed, challenging the district court's grant of summary judgment on their FHA claim, and the district court's ruling that they could not proceed on a disparate impact theory. JA695.

3. This Court Rules That the Families Established a Prima Facie Disparate Impact Claim, and Rejects Waples' "Anti-Harboring" Defense.

In a published opinion, this Court vacated the district court's judgment. *Reyes*, 903 F.3d 415. The Court held that the district court erred in rejecting the Families' disparate impact claim at Step One of the

Inclusive Communities burden-shifting framework. The Court concluded that the Families in fact had "satisfied step one . . . by demonstrating that Waples' Policy . . . caused a disproportionate number of Latinos to face eviction from the Park compared to the number of non-Latinos who faced eviction based on the Policy." *Reyes*, 903 F.3d at 428-29. That was because the Families had presented evidence that Latinos comprised over 90% of individuals unable to comply with the Policy and consequently facing eviction, despite comprising only 60% of those subject to the Policy. *Id.* at 433 n.11. Because the Families had established a prima facie case of disparate impact, the Court remanded for the district court to consider Steps Two and Three of the *Inclusive Communities* framework in the first instance. *Id.* at 433.

Waples argued in this Court, among other things, that it was entitled to judgment as a matter of law because its Policy was "necessary to avoid the criminal prohibition on harboring illegal aliens." JA825-827. Waples' anti-harboring argument under Step One was that Plaintiffs could not establish that the Policy *caused* a disparate impact because "federal law substantially limit[ed] [its] discretion" by, in Waples' telling,

requiring that it screen residents for lawful immigration status and evict households that include undocumented individuals. JA825-827 (citing *Inclusive Communities*, 576 U.S. at 543). Waples' argument hinged on the federal "anti-harboring" statute (IRCA), which prohibits "conceal[ing], harbor[ing], or shield[ing] from detection" an alien, while knowing or in reckless disregard of the fact that the person entered or remained in the U.S. in violation of law. *See* 8 U.S.C. § 1324(a)(i)(A)(iii).

This Court rejected Waples' "anti-harboring" argument, vacated the district court's opinion, and remanded for further proceedings. *Reyes*, 903 F.3d at 419, 433. Waples sought further review of this Court's anti-harboring holding, both in this Court and in the U.S. Supreme Court, and was denied. 4th Cir. No. 17-1723, ECF 83, at 7-8, 11-13 (petition for rehearing en banc), *petition denied*, ECF 91; 2019 WL 1294668, at *1 (petition for certiorari), *petition denied*, 139 S. Ct. 2026 (2019).

4. On Remand, Judge Ellis Denies Waples' Motions for Summary Judgment and Reconsideration, Which Were Both Based on Waples' "Anti-Harboring" Defense.

On remand, the Families pursued only a disparate impact theory and Waples filed a renewed motion for summary judgment. In its renewed motion, Waples argued again that it could not be held liable under the FHA because it had a "business necessity" to enact the Policy: avoiding criminal liability under the anti-harboring statute.

The district court (Judge Ellis) rejected this "business necessity" defense at Step Two of the *Inclusive Communities* framework, and denied Waples' motions for summary judgment and reconsideration. JA1276, 1319. In denying Waples' motions, Judge Ellis ruled that there were genuine disputes of fact, including "whether the Policy furthers defendants' interests in avoiding liability under the anti-harboring statute and avoiding loss from eviction." JA1276, JA1318-19. Judge Ellis further ruled that it would be "not appropriate" for the district court to "re-litigate" issues addressed at Step One, because doing so would violate this Court's mandate. JA1318.

5. After Transfer From Judge Ellis, Judge O'Grady Grants Summary Judgment to Waples Based on Its "Anti-Harboring" Defense.

In February 2021, in the midst of pretrial briefing, Judge Ellis *sua sponte* ordered the case reassigned to another district judge. JA1320-1321. After reassignment, Judge O'Grady *sua sponte* ordered the parties to "revisit" the question of "whether avoiding the risk of criminal liability under the [anti-harboring statute] is a valid interest under Step Two of *Inclusive Communities*"—"[n]otwithstanding the [district] [c]ourt's prior Orders." JA1420 (citing JA1275 & JA1316).

Despite the prior rulings by this Court and Judge Ellis, Judge O'Grady granted summary judgment to Waples on "anti-harboring" grounds. JA1511. The district court ruled that "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. It did so despite the evidence—which was undisputed—that fear of "harboring" liability played no part in Waples' adoption of, or enforcement of, the Policy. The court reached that conclusion because it considered "unimportant whether [Waples] can

provide evidence that [it] possessed the valid interest at the time [it] adopted [or enforced] the policy." JA1524. It was sufficient, the district court concluded, that Waples is "presumed to have knowledge of the law at the time the Policy was implemented and enforced." JA1525.

At Step Three, the court ruled that the Families' proposed reasonable alternative—requesting tenants' ITINs but not proof of immigration status—would not "allow Defendants to limit their criminal liability under the anti-harboring statute." JA1526. It so ruled despite the ample evidence in the record, and accompanying disputes of fact, over whether as a factual matter demanding Social Security cards (or other identification unavailable to undocumented individuals) was *necessary* to accomplish any of the *post-hoc* business justifications that Waples proffered.

SUMMARY OF ARGUMENT

Waples' "anti-harboring" defense was rejected repeatedly in this Court and the district court, before the case was transferred from Judge Ellis to Judge O'Grady, and Judge O'Grady came out the other way. This

was reversible error. *First*, IRCA does not shield landlords from disparate impact liability as a matter of law, because screening tenants for their immigration status is not necessary to avoid prosecution for unlawful harboring. *Second*, FHA defendants must provide evidence that they had an actual "business necessity" at the time they implemented and enforced a discriminatory housing policy. They cannot, as Waples did here, rely on *post-hoc* rationalizations created by their lawyers in litigation. *Third*, as Judge Ellis recognized before transferring the case to Judge O'Grady, material disputes over whether Waples' policy in fact furthered its purported "business necessity" should have precluded summary judgment. *Fourth*, as Judge Ellis also acknowledged before transfer, the district court was bound by this Court's prior rejection of Waples' identical anti-harboring defense.

STANDARD OF REVIEW

This Court reviews a summary judgment order *de novo*. *Reyazuddin v. Montgomery Cnty.*, 789 F.3d 407, 413 (4th Cir. 2015). In doing so, the Court must "apply the same legal standards as the district

court, viewing all facts and drawing all reasonable inferences in the light most favorable to" the Families. *J.D. by Doherty v. Colonial Williamsburg Found.*, 925 F.3d 663, 669 (4th Cir. 2019) (internal citation omitted). "Summary judgment is appropriate only where there is no genuine issue of material fact and the movant [Waples] is entitled to judgment as a matter of law." *D.L. ex rel. K.L. v. Baltimore Bd. of Sch. Comm'rs*, 706 F.3d 256, 258 (4th Cir. 2013).

ARGUMENT

When a landlord's housing practice creates a disparate impact, as it did here, the landlord is liable under the FHA unless it "prove[s] that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests." *Inclusive Communities*, 576 U.S. at 527 (quoting 24 C.F.R. § 100.500(c)(2) (2013)). As this Court already explained in this case, the "necessary to achieve" language in *Inclusive Communities* is "analogous to Title VII's business necessity standard[.]" *Reyes*, 903 F.3d at 424; *see also Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 988 (4th Cir. 1984) (Step Two requires a showing of

"business necessity"); *Reyes,* 903 F.3d at 428 (describing *Betsey* as "still good law").

To meet its burden of proof at trial, therefore, Waples would need to "prove that the challenged practice is necessary" to achieve its purported legitimate interest—avoiding criminal liability under IRCA. *See Inclusive Communities*, 576 U.S. at 527. And to win on summary judgment, Waples needed to prove that there are *no factual disputes* that its purported reasons are in fact "business necessit[ies] sufficiently compelling to justify" the Policy. *Betsey*, 736 F.2d at 988.

Waples never established that proof. While it asserted an "interest" in avoiding criminal liability, its summary judgment briefing did not show that its Policy of requiring documentation of legal status for every adult tenant was "necessary" to achieve that interest. To the contrary, Waples simply cited the existence of IRCA and an unpublished Fourth Circuit decision—*United States v. Aguilar*, 477 F. App'x 1000 (4th Cir. 2012) ("*Aguilar*")—as an *ipso facto* justification for the Policy. *See* JA1016, JA1018, JA1430-1434, JA3182-3184, JA3194-3195. No defense witness claimed to have even been aware of the existence of IRCA, or the

Aguilar decision—or even the notion that "harboring" can be a crime—before this lawsuit was filed. And Waples never provided a scintilla of evidence that its Policy furthered its purported interest in any event, even after the Fourth Circuit had concluded that IRCA did *not* entitle Waples to judgment as a matter of law.

The district court nonetheless granted summary judgment for Waples based solely on the existence of IRCA and *Aguilar*. In so ruling, the district court made four reversible errors.

I. IRCA Does Not Exempt Landlords From Disparate Impact Liability.

At the outset, the district court fundamentally misapprehended the intersection of housing and immigration laws. The district court ruled that the evidentiary record was "unimportant" because IRCA shielded Waples from disparate impact liability as a matter of law. JA1524. But that approach is plainly wrong.

As this Court already made clear in this case, "in the absence of a specific exemption from liability for exclusionary practices aimed at illegal immigrants, we must infer that Congress intended to permit

disparate-impact liability for policies aimed at illegal immigrants when the policy disparately impacts a protected class." *Reyes*, 903 F.3d at 431-32. Waples has not and cannot point to a "specific exemption" from FHA liability in IRCA or in any other statute. Hence, Waples is not entitled to judgment as a matter of law on statutory grounds.

A. Landlords Need Not Demand Tenants' Immigration Documents to Avoid Criminal Harboring Liability.

Demanding tenants' immigration documents is not "necessary" for landlords to avoid criminal "harboring" liability. No judicial authority has ever construed IRCA as requiring landlords to obtain such documents.

The district court's decision was predicated on a legal error: it asserted that IRCA "holds [criminally] liable any person who *houses* an undocumented alien knowingly or in reckless disregard of their immigration status." JA1522 (emphasis added). But the statute says nothing about "hous[ing]" or leasing to anyone. Rather, it prohibits "conceal[ing], harbor[ing], or shield[ing] from detection" a so-called

"alien"—and doing so knowingly or in reckless disregard of their immigration status. 8 U.S.C. § 1324(a)(1)(A)(iii).

Every precedential appellate decision to address whether merely renting to an undocumented individual, without more, violates IRCA has held that it does not. *See United States v. McClellan*, 794 F.3d 743, 751 (7th Cir. 2015) (harboring also requires evidence that the defendant "intended to safeguard that alien from the authorities"); *United States v. Vargas-Cordon*, 733 F.3d 366, 382 (2d Cir. 2013) ("The mere act of providing shelter to an alien, when done without intention to help *prevent the alien's detection* by immigration authorities or police is . . . not an offense under §1324(a)(1)(A)(iii).") (emphasis added); *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."); *see also Lozano v. City of Hazleton*, 724 F.3d 297, 320 (3d Cir. 2013) ("Renting an apartment in the normal course of business is not, without more, conduct that prevents the government from detecting an alien's unlawful presence."); *Villas at Parkside Partners v. City of*

Farmers Branch, Tex., 726 F.3d 524, 530 (5th Cir. 2013) (en banc) (a prohibition on renting to non-citizens "not only fails to facilitate, but obstructs the goal of bringing potentially removable non-citizens to the attention of the federal authorities" because federal law "requires the non-citizen to provide a reliable address to the federal government to guarantee and speed the removal process").

Consistent with that clear authority, this Court *in this case* also rejected Waples' argument that IRCA requires landlords to screen lessees for documentation of legal status. *See* Section IV, *infra*.[5]

Moreover, after that decision, Waples itself admitted that there was no such legal requirement. JA1504 ("[W]e're not suggesting that *Aguilar* requires a landlord to ask these questions or ask for proof of legal residency.").

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[5] Waples petitioned for *certiorari*, arguing that the Supreme Court should review "whether plaintiffs can meet [the *Inclusive Communities*] causality standard when the housing policy stems from an attempt to comply with federal law prohibiting the harboring of undocumented aliens." 2019 WL 1294668, at *1. The Supreme Court denied Waples' petition. 139 S. Ct. 2026 (2019).

Despite the clear authority from other circuits, despite this Court's previous rejection of the argument, and despite Waples' own admission that IRCA does not require it to check immigration status, the district court concluded that this Court's unpublished opinion in *Aguilar* shields landlords from liability for implementing discriminatory housing policies. The district court badly misread the decision.

In that unpublished *per curiam* case, the panel held that substantial evidence supported a finding of "reckless disregard" of immigration status for purposes of a harboring conviction. *Aguilar*, 477 F. App'x at 1002-03. The evidence included that the defendant (1) operated an unlicensed flop house in which she rented out nine of the ten rooms in her home to undocumented individuals in order to pay for her mortgage; (2) ignored that immigration agents repeatedly visited her house and warned her that her roomers were undocumented; and (3) admitted that it did not matter to her whether her roomers were undocumented. *Id.* In addition, although not reflected in the *Aguilar* opinion, (4) up to 23 roomers lived in defendant's home over a short period of time; (5) local police and housing authorities reported the home to

immigration officials after numerous housing code violations and a gang-related stabbing on the premises; and (6) defendant herself facilitated one of her undocumented roomers' unlawful entry into the United States by loaning him the money to pay for a "coyote" to smuggle him into the country. *See United States v. Aguilar*, 4th Cir. No. 11-14961, ECF 19 (Brief of U.S. Gov't) (citing district court record). No such evidence exists in this case.

Nowhere does *Aguilar* "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 immigration status of its tenants, as the district court apparently believed. JA1523-1524. That is particularly true of a corporate residential landlord like Waples that was operating a regulated mobile home park in accordance with state and local housing laws.

B. Housing Laws Give Landlords Broad Leeway to Lease to Families with Undocumented Family Members.

Federal housing law affords broad leeway for landlords to vet their tenants without reference to their immigration papers and to lease to

undocumented individuals. Although *employers* must check the legal status of their employees and only employ non-citizens if they are documented, 8 U.S.C. § 1324a, Congress has not made the same policy judgment for residential *landlords*. This makes practical sense: There are millions of undocumented individuals living in the United States. They (and their families) should not be homeless.

Consistent with that policy judgment, federal law *allows* undocumented family members of documented individuals (like the Families) to apply for and live in not only private rental units and mobile homes, but also in federally subsidized housing. 24 C.F.R. §§ 5.504(b), 5.506(b)(2), 5.516, 5.520. In most federally subsidized housing programs, only one family member needs to have eligible status to qualify for prorated financial assistance, and it can be a child. 24 C.F.R. § 5.504(b). Other family members are not required to disclose their immigration status. 24 C.F.R. § 5.508. Other federally funded housing programs do not require *any* household member to establish lawful immigration

status in order to qualify for and live in federally subsidized housing. *See*, *e.g.*, 26 U.S.C. § 42(g) (Low Income Housing Tax Credit).[6]

State laws similarly leave immigration status out of landlords' business. For example, California expressly prohibits landlords from any inquiry regarding a tenant's immigration or citizenship status. Cal. Civ. Code 1940.3(b)(1) ("A landlord . . . shall not . . . [m]ake any inquiry regarding or based on the immigration or citizenship status of a tenant, prospective tenant, occupant, or prospective occupant of residential rental property."). Illinois prohibits landlords from disclosing tenants' immigration status for purposes of harassment, retaliation, or "influencing the tenant to surrender possession" of property. 765 Ill. Comp. Stat. 755/10(f)(1). Relevant here, the Virginia Residential Landlord and Tenant Act *expressly authorizes* landlords to conduct background checks using only an ITIN—even though an ITIN can be

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[6] 42 U.S.C. § 1436a restricts undocumented individuals from directly receiving certain federal housing subsidies. But the statute allows those individuals to live in federally subsidized housing so long as a family member is eligible to receive those subsidies.

obtained by persons without legal status, such as the four female Plaintiffs did here. Code of Va. § 55.1-1203(B).[7]

It thus should come as no surprise that most residential landlords do not promulgate discriminatory policies mandating proof of legal status, and Waples could not identify any other landlord with a similar policy. JA2185-2189.

* * *

As shown above, the district court's conclusion that IRCA carves an exemption out of the FHA rests on two faulty premises: (a) that merely "renting" equals "harboring" and (b) that accepting forms of identification from tenants that do not require legal immigration status (such as an ITIN)—even when doing so aligns with federal and state housing laws and industry standard—constitutes "reckless disregard" subjecting landlords to criminal liability under IRCA. *See Aguilar*, 477 F. App'x at

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[7] Although this specific statute does not apply to mobile home park owners like Waples, it reflects the policy and understanding of the Commonwealth of Virginia that accepting ITINs from tenants does not violate IRCA.

1002 ("A defendant acts with reckless disregard where she *is aware of* but consciously ignores facts and circumstances clearly indicating that an individual is an undocumented alien.") (emphasis added).

Those premises are as illogical as they are unsupported. Under that interpretation, every landlord in the country that accepted an ITIN or did not specifically request documentation of legal status would be subject to prosecution for unlawful harboring. By law, this would include every landlord in California (where inquiry into immigration status is expressly prohibited),[8] and most landlords in Virginia (where reliance on ITINs is expressly allowed in most cases). In addition, this would mean that the federal government enacted stricter requirements on private landlords for checking immigration documents than it did for itself in determining eligibility for living in taxpayer-subsidized housing.

IRCA and *Aguilar* are miles from providing a "specific exemption" that immunizes otherwise discriminatory conduct. Because the district

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[8] Under the district court's interpretation of IRCA, this prohibition on landlords requesting documentation of their tenants' immigration status would need to be struck down as conflict preempted.

court carved an exemption out of the FHA where none exists and granted summary judgment on that basis, the district court's judgment must be reversed.

II. FHA DEFENDANTS MUST PROVE AT STEP TWO THAT A "BUSINESS NECESSITY" WAS AN ACTUAL, CONTEMPORANEOUS REASON THE CHALLENGED POLICY WAS ADOPTED.

The district court further erred by ruling that Waples need not introduce evidence establishing its asserted "business necessity" at the time it enforced the Policy against the Families. JA1524-1525. In fact, no such contemporaneous evidence exists. The FHA does not authorize *post-hoc* justifications for discriminatory policies that are concocted by lawyers after a defendant is sued.

As the Supreme Court and the U.S. Department of Housing and Urban Development have explained, Step Two requires a defendant to "prove that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests." *Inclusive Communities*, 576 U.S. at 527 (quoting HUD Disparate Impact Rule, 24

C.F.R. § 100.500(c)(2) (2013)). [9] The *Inclusive Communities* Court carefully aligned its analysis with the Disparate Impact Rule and the regulatory text accompanying the Rule. 576 U.S. at 527-28, 541, 542. This Court likewise observed in *Reyes* that "[t]he HUD regulation is similar to the framework the Supreme Court ultimately adopted in *Inclusive Communities*[.]" 903 F.3d at 424 n.4.

Under that regulation, which addresses disparate impact claims, a defendant seeking to justify a discriminatory policy at Step Two must prove "[a] legally sufficient justification" that is "supported by evidence"

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[9] In its 2013 Disparate Impact Rule, HUD interpreted the FHA to encompass disparate-impact liability and endorsed a three-part burden shifting framework for adjudicating disparate-impact claims. *See* "Implementation of the FHA's Discriminatory Effects Standard," 78 Fed. Reg. 11460, 11482 (Feb. 15, 2013). Amendments to this regulation were published in 2020, 85 Fed. Reg. 60288 (Sept. 24, 2020), but implementation of that superseding regulation was stayed in its entirety. *Mass. Fair Hous. Ctr. v. HUD*, 496 F. Supp. 3d 600, 612 (D. Mass. 2020), *appeal dismissed,* No. 21-1003 (1st Cir. Feb. 18, 2021). Accordingly, the Disparate Impact Rule, which was in effect at all relevant times during the events complained of in this lawsuit, remains in effect today. *See* 86 Fed. Reg. 33590, 33590 (June 25, 2021) (noting "the 2020 Rule never took effect" and therefore the 2013 Rule "remains in effect due to the preliminary injunction.").

and is not "hypothetical or speculative." 24 C.F.R. § 100.500(b)(2) (2013). A Step Two justification must be "genuine and not false," 78 Fed. Reg. at 11470, "not fabricated or pretextual," *id.* at 11471.

In other words, a defendant cannot concoct a Step Two justification after the fact. *See, e.g.*, *Treece v. Perrier Condominium Owners Ass'n, Inc.*, 2020 WL 759567, at *18 (E.D. La. Feb. 14, 2020) ("A reason is not 'legitimate' or 'valid' if it was not present at the time [of] a rule's adoption, but rather is a post hoc rationalization for a discriminatory policy, or when the justification is otherwise arbitrary."); *Fair Hous. Ctr. of Wash. v. Breier-Scheetz Props., LLC*, 2017 WL 2022462, at *4 (W.D. Wash. May 11, 2017) ("defendants have offered no evidence that would allow the Court to conclude that defendants' concern about fairness is anything more than an arbitrary, *post-hoc* justification for a discriminatory policy"). To be legally sufficient, a "business necessity" justification must be genuine and supported by evidence, and thus must have been an actual, contemporaneous motive for the challenged policy at the time of its enforcement.

Indeed, the whole purpose of Step Two is to inquire into the actual motives behind a challenged policy: "The FHA is a broadly remedial statute designed to prevent and remedy invidious discrimination on the basis of race, . . . that facilitates its antidiscrimination agenda by encouraging a searching inquiry into *the motives behind a contested policy* to ensure that it is not improper." *Mt. Holly Gardens Citizens in Action v. Twp. of Mt. Holly*, 658 F.3d 375, 385 (3d Cir. 2011) (citations omitted; emphasis supplied). "[Step Two] simply results in a more searching inquiry into the defendant's *motivations*—precisely the sort of inquiry required to ensure that the government does not deprive people of housing 'because of race.'" *Id.* (emphasis supplied); *Avenue 6E Investments, LLC v. City of Yuma*, 818 F.3d 493, 513 (9th Cir. 2016) (quoting *Mt. Holly*). To accomplish that goal, Step Two cannot be a contest in which lawyers create theoretical *post-hoc* justifications.

Waples never produced any evidence demonstrating that the Policy was actually motivated by a desire to avoid criminal "harboring" liability: not a single internal document dating to before the filing of this lawsuit, and no deposition testimony. Instead, Waples' employees testified that

they *did not know* why the Policy was written the way it was. JA3400-3401, JA3408-3409. In fact, they testified that they did *not* believe that Waples would be subjected to civil or criminal liability for renting to undocumented individuals. JA513-514. To the extent any contemporaneous evidence existed, it shows that the reason Waples started enforcing the Policy through the "recertification" process was because two tenants (not immigrants) at other locations turned eighteen and Waples then found out they had criminal records. It had nothing to do with harboring. JA1504-1505, JA2106-2108, JA2234-2235. Waples did not even include "anti-harboring" in its self-serving, counseled response to an interrogatory asking it to list "the reasons for creating, developing, modifying, and enforcing" the Policy. JA463-464.

Waples' IRCA justification was thus created *post hoc*, and for that reason Waples cannot satisfy the "business necessity" test. *See Phillips v. Cohen*, 400 F.3d 388, 400 (6th Cir. 2005) (finding that "[t]he trial judge was correctly dubious of the seductive logic of post-hoc explanation" used to justify defendant's otherwise discriminatory employment policy); *Mozee v. Am. Commercial Marine Serv. Co.*, 940 F.2d 1036, 1045 (7th Cir.

1991), *opinion supplemented on denial of reh'g*, 963 F.2d 929 (7th Cir. 1992).

The district court reached the opposite—and legally incorrect—conclusion, that it was "unimportant" whether Waples "possessed the valid interest at the time" it adopted or enforced the policy. JA1524. The district court's decision was based on the following line of reasoning: (1) "[t]he anti-harboring statute was in effect at the time the challenged policy was implemented"; (2) "*Aguilar* had been decided" at that time and "would inform the Defendants that they could face liability"; and (3) "[t]he Defendants are presumed to have knowledge of the law at the time the Policy was implemented and enforced." JA1524-1525.

That line of reasoning contains several errors. One is a basic factual error: the record evidence was clear that Waples did *not* know about the anti-harboring statute or *Aguilar* at the time. But the other is a pure legal error as to the elements of disparate impact liability: it *was* important (not "unimportant")—indeed, it was compulsory—for Waples at Step Two to prove that it *in fact* adopted the Policy to avoid criminal anti-harboring liability, as discussed above. The district court's analysis,

focusing on whether Waples "*could*" be held liable under IRCA but ignoring the lack of evidence supporting its alleged justification, contravenes *Inclusive Communities* and the Disparate Impact Rule's requirements that the justification "be supported by evidence and . . . not be hypothetical or speculative." 24 C.F.R. § 100.500(b)(2) (2013).

III. GIVEN THE PARTIES' FACTUAL DISPUTE OVER WAPLES' ALLEGED "BUSINESS NECESSITY," SUMMARY JUDGMENT IS UNWARRANTED.

Even if reducing the risk of harboring liability *could* constitute a business necessity, and FHA defendants *could* devise a "business necessity" after they are sued, the district court erred in granting summary judgment because—as Judge Ellis made clear before transferring the case to Judge O'Grady—"there is a genuine dispute of fact as to whether the Policy *furthers* defendants' interests in avoiding liability under the anti-harboring statute." JA1318 (emphasis added). In other words, Waples never proved that its Policy was necessary *in this case*. Judge O'Grady improperly resolved that factual dispute in Waples' favor, even though Waples never introduced any evidence addressing it.

At minimum, Judge O'Grady should have left for a jury to decide whether the Policy was *actually* necessary to avoid anti-harboring liability in this case. Here, a reasonable jury could find that the Policy did not further the alleged interest.

First, the Families lived at the Park for at least three years before Waples enforced its long-existent Policy against them. *See, e.g.*, JA337, JA343, JA366-367, JA386, JA391-392, JA2027-2030, JA2038, JA2086, JA2095-2096. Having a Policy requiring proof of legal status, but consciously disregarding its enforcement for years, is evidence that Waples was not concerned about harboring liability.

Second, Waples failed to introduce evidence that it was at risk of prosecution for harboring undocumented individuals before it adopted and enforced the Policy (for example, because Waples helped to conceal its tenants or was aware of facts or circumstances clearly indicating that its tenants were undocumented). Instead, Waples made two meritless arguments:

(i) Waples contended that it may be at risk for harboring liability *now*, because it gained some knowledge about the female Plaintiffs'

immigration status as a result of its own discriminatory Policy and this lawsuit. *See* JA511 ("Well, we do believe that we have some exposure to the harboring of illegal immigrants *because we have knowledge they're undocumented by taking the application*.") (emphasis added); *see also* JA1488 ("We now have actual knowledge that the female plaintiffs were not in the United States legally."). But at that point, the question of whether a policy violates the Fair Housing Act is circular. To begin, the landlord establishes the discriminatory policy, which entangles the landlord in its tenants' immigration documents. Next, the landlord necessarily learns about whether its tenants have the requested documents. Because the landlord has gained knowledge about its tenants' immigration documents as a result of the policy, Waples argues that it *puts itself at greater risk* of harboring liability. *See Aguilar*, 477 F. App'x at 1002 ("A defendant acts with reckless disregard where *she is aware of* but consciously ignores facts and circumstances clearly indicating that an individual is an undocumented alien."). That foreseeable consequence of the policy cannot be a valid justification for imposing the discriminatory policy in the first place. *See Betsey*, 736 F.2d

at 988 (a business necessity must be "sufficiently compelling to justify" the discriminatory policy).

(ii) Waples also argued that it "knew" it was at risk of harboring prosecution because many Latinos lived in and around the Park. *See* JA1487, JA1501-1502, JA1504-1506. Waples' argument is that *because* many Latinos live in and around the Park, and because statistically Latinos in Virginia are more likely than non-Latinos to be undocumented, *that alone* entitles Waples to discriminate against Latinos by adopting a policy that disparately results in Latino families being evicted from the Park. But that argument relies on a discriminatory premise—if our tenants are Latino, we can discriminate against Latinos—and thus violates the *Inclusive Communities* rule that a Step Two "business necessity" cannot be valid if it is itself discriminatory. 576 U.S. at 527. Waples' argument also contorts anti-harboring law. Knowledge of aggregate demographic statistics comes nowhere close to the requisite *mens rea*, even as articulated in *Aguilar*: "consciously ignor[ing] facts and circumstances *clearly indicating* that *an individual* is an undocumented alien." 477 F. App'x at 1002. In any event,

for current purposes the question is whether a reasonable juror could find that Waples was *not* justified in discriminating against its Latino tenants. Because there was evidence from which such a juror could so find, this argument cannot have been a basis on which to grant summary judgment to the movant, Waples.

Third, Waples "enforced" the Policy not by evicting the Families after it learned about the female Plaintiffs' lack of requested documents, but by raising the Families' rent—further proving that the Policy had nothing to do with harboring. *See* JA1479 (district court observes: "there was clear evidence that at certain times, [Waples] didn't intend to evict any of the tenants; instead w[as] using this as a means to get added monthly rents").

Whether Waples' Policy actually *furthered* its purported "business necessity" of avoiding IRCA liability remains a disputed factual question that only a jury is permitted to resolve.

IV. THIS COURT'S PRIOR DECISION AND REMAND ORDER FORECLOSED SUMMARY JUDGMENT ON "ANTI-HARBORING" GROUNDS.

In addition to and irrespective of the above grounds, summary judgment based on IRCA was foreclosed by this Court's 2017 decision and remand order. *See Reyes*, 903 F.3d at 433 & n.12. In this Court, and in its petition for *certiorari* to the Supreme Court after its defeat in this Court, Waples made the identical legal argument that ultimately prevailed before Judge O'Grady: that IRCA and *Aguilar* compel judgment in its favor as a matter of law. Waples lost. *Supra*, at 14-15.

Yet on remand, Waples argued before Judge Ellis that it was entitled to summary judgment based on IRCA and *Aguilar*. Judge Ellis denied Waples' summary judgment motions on this point, and then denied Waples' motion for clarification or reconsideration on the same point. *Supra*, at 16.

Yet Judge O'Grady ruled the opposite. That ruling was barred by this Court's 2017 decision.

A. The District Court Was Bound By This Court's Mandate.

As Judge Ellis recognized before transferring this case to Judge O'Grady, the district court was bound by this Court's mandate: "[D]istrict courts are bound to carry out the mandate of the higher court [and] may not reconsider issues that the mandate has laid to rest." JA1318 (citing *United States v. Susi*, 674 F.3d 278, 283 (4th Cir. 2012); *Doe v. Chao,* 511 F.3d 461, 464-65 (4th Cir. 2007); *South Atl. Ltd. P'ship of Tn., LP v. Riese*, 356 F.3d 576, 583-84 (4th Cir. 2004)). *See also United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993) (quoting *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939)) ("Few legal precepts are as firmly established as the doctrine that the mandate of a higher court is 'controlling as to matters within its compass.'").

Moreover, and as Judge Ellis also recognized, the scope of an appellate court's mandate is not limited to those matters that the higher court *expressly* decided; "the mandate rule 'forecloses relitigation of issues expressly *or impliedly* decided by the appellate court.'" *Riese*, 356 F.3d at 584 (quoting *Bell,* 5 F.3d at 66) (emphasis supplied). *See also id.*

("the court may not alter rulings impliedly made by the appellate court.") (citing *Bell*, 5 F.3d at 66); JA1318 (Judge Ellis's opinion, quoting these principles from *Riese*).

Before ruling on Waples' motion for reconsideration, Judge Ellis had the following revealing exchanges with Waples' counsel:

> THE COURT: Let me ask you specifically: Did you argue that step one could not be satisfied because the anti-harboring statute provided a justification for [Waples] asking for that proof [of legal status]?
> MR. DINGMAN: That was one of the arguments presented, yes.
> THE COURT: And that's in your brief in the Fourth Circuit?
> MR. DINGMAN: We raised the anti-harboring statute in our briefs to the Fourth Circuit.

JA1289-1290.

> THE COURT: [T]he Fourth Circuit made unmistakably clear that summary judgment on step one, which I had granted, should be vacated. And you're telling me, well, they didn't consider this, they didn't consider that, but you ignore, Mr. Dingman, that I don't sit to discipline the Fourth Circuit, I don't sit to correct the Fourth Circuit; I sit to obey the clear mandate. I don't have authority beyond the mandate. Do I?
> MR. DINGMAN: No sir.

JA1298.

As the exchanges underscore, Waples' IRCA argument was fully briefed to this Court in 2017. In a section of its appellate brief titled

"Waples' Policy is necessary to avoid the criminal prohibition on harboring illegal aliens," Waples summarized its argument as follows: "Given the conviction in *Aguilar* in the same federal district in which the Park is located, this Court's affirmance of it, and the record in this case, Waples has no discretion to ignore the potential criminal implications of renting to an illegal alien." JA825-827. That argument is identical to the argument presented in its supplemental brief in support of summary judgment: "Given *Aguilar* and the broad text of the anti-harboring provision, Defendants had no discretion to ignore the potential criminal implication of renting to undocumented immigrants." JA1433.

This Court gave no credit to Waples' argument, vacated Judge Ellis's opinion, and remanded the case. *Reyes*, 903 F.3d at 419, 433. This Court's rejection was implicit rather than explicit, but there is no question that the argument was rejected: if this Court had accepted the argument that Waples had "no discretion to ignore the potential criminal implications of renting to an illegal alien," then it could not have concluded that Waples' policy excluding undocumented immigrants constituted a prima facie violation of the FHA, *id.* at 428-29, 433 n.12.

IRCA either *compels* Waples to check immigration status or it does not, and this Court already decided that it does not. If that is true at Step One, as this Court held that it is, then it must also be true at Steps Two and Three. *Riese*, 356 F.3d at 584. As Judge Ellis recognized, the district court lacked authority under the remand order to deviate from this Court's mandate.

B. The Law-Of-The-Case Doctrine Applies to This Court.

This Court is also bound by its prior decision pursuant to the law-of-the-case doctrine, which holds that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983). Since the Court has established the law of the case, that law must be followed "in all subsequent proceedings in the same case in the trial court or *on a later appeal*" unless an exception applies: "(1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to the issue, or (3) the prior decision was clearly erroneous and would work

manifest injustice." *Everett v. Pitt Cnty. Bd. of Educ.*, 788 F.3d 132, 142 (4th Cir. 2015).

None of the exceptions applies. Waples' argument is the same today as it was the first time the Fourth Circuit decided the issue, and Waples put forward no additional evidence in the district court (it merely continued to point to IRCA and *Aguilar*). No new controlling authority has intervened. And this Court correctly concluded the first time that IRCA does not bar disparate-impact liability.

CONCLUSION

For the foregoing reasons, this Court should reverse the grant of summary judgment and remand for trial. If the Court agrees with the Families as to Argument Sections I, II, or IV, the remand order should preclude Waples from relying on IRCA as a "business necessity" at Step Two of the *Inclusive Communities* framework. If the Court agrees with the Families only as to Section III, whether Waples' Policy in fact furthers its purported interest in avoiding IRCA liability would remain one of the triable issues.

Dated: September 8, 2022

Respectfully Submitted,

/s/ Nicholas M. DiCarlo

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REQUEST FOR ORAL ARGUMENT

In accordance with Local Rule 34(a), the Families respectfully request oral argument. This case presents important legal questions concerning housing discrimination and immigration, and the Families believe that oral argument would benefit this Court's consideration and resolution of this appeal.

Dated: September 8, 2022 */s/ Nicholas M. DiCarlo*

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 22-1660 **Caption:** Rosy Giron de Reyes, et al. v. Waples Mobile Home Park LP, et al.

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