No. 22-30609

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LOUISIANA FAIR HOUSING ACTION CENTER, INC.,

Plaintiff-Appellee

v.

AZALEA GARDEN PROPERTIES, LLC,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE AND URGING AFFIRMANCE ON THE ISSUES ADDRESSED HEREIN

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INTEREST OF THE UNITED STATES

The United States has a substantial interest in this appeal, which raises important questions regarding the pleading standard for disparate-impact claims under the Fair Housing Act (FHA). The Department of Justice and the Department of Housing and Urban Development (HUD) share enforcement authority under the FHA. See 42 U.S.C. 3610, 3612, 3614. HUD has regulations implementing the FHA's prohibition of disparate-impact discrimination and currently is engaged in a

rulemaking on this topic. See 24 C.F.R. 100.500 (2013); 86 Fed. Reg. 33,590 (June 25, 2021). Furthermore, the Department of Justice has for decades brought disparate-impact claims in its enforcement actions. See, *e.g.*, Order, *United States* v. *Housing Auth. of Ashland*, No. 1:20-CV-01905 (N.D. Ala. May 12, 2021); see also U.S. Amicus Br., *Texas Dep't of Hous. & Cmty. Affs.* v. *Inclusive Cmtys. Project, Inc.*, 576 U.S. 519 (2015) (No. 13-1371).

Additionally, helping formerly incarcerated individuals return to their communities is a priority for the United States. As part of these efforts, HUD released guidance addressing, in part, how the discriminatory-effects standard applies in FHA cases where a housing provider justifies an adverse housing action based on an individual's criminal history. See HUD, *Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing & Real Estate-Related Transactions* (Apr. 4, 2016) (HUD Guidance), available at https://perma.cc/CW7A-GSUC. Consistent with that guidance, the United States filed a Statement of Interest in a similar case addressing the application of the FHA's disparate-impact theory of liability to criminal background policies. See *Fortune Soc'y, Inc.* v. *Sandcastle Towers Hous. Dev. Fund Corp.*, 388 F. Supp. 3d 145 (E.D.N.Y. 2019) (No. 14-6410).

STATEMENT OF THE ISSUE

This Court granted the petition of defendant-appellant Azalea Garden Properties, LLC (Azalea Garden) to file an interlocutory appeal addressing the following question: Whether a plaintiff may plead a disparate-impact claim under the FHA where the plaintiff alleges that a housing provider's criminal background screening practice "predictably will cause" a discriminatory effect following this Court's decision in *Inclusive Communities Project, Inc.* v. *Lincoln Property Co.*, 920 F.3d 890 (5th Cir. 2019), cert. denied, 140 S. Ct. 2506 (2020).

In its opening brief, Azalea Garden asks the Court to reach additional questions involving the application of the discriminatory-effects test to a housing provider's use of criminal background screenings. Specifically, Azalea Garden asks the Court to resolve (1) whether a plaintiff can properly plead disparate impact using data that is not specific to the property at issue; and (2) whether the plaintiff properly pleaded that Azalea Garden employs a blanket ban on individuals with criminal backgrounds.

STATEMENT OF THE CASE

1. Legal Background

The FHA "broadly prohibits discrimination in housing throughout the Nation." *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91, 93 (1979). Among other things, the FHA makes it unlawful "[t]o refuse to sell or rent * * *

or otherwise make unavailable or deny, a dwelling to any person because of race, color, * * * or national origin." 42 U.S.C. 3604(a). A violation of this provision may be established either through a disparate-treatment theory, which requires proof that a defendant acted with a discriminatory intent or motive, or a discriminatory-effects theory (which includes a disparate-impact theory), where a housing decision is shown to have an unjustified discriminatory effect on a protected class. See *Inclusive Cmtys. Project, Inc.* v. *Lincoln Prop. Co.*, 920 F.3d 890, 901 (5th Cir. 2019) (*Lincoln Prop.*), cert. denied, 140 S. Ct. 2506 (2020).[1]

In 2013, HUD issued a regulation establishing the "[b]urdens of proof in discriminatory effects cases." 78 Fed. Reg. 11,482 (Feb. 15, 2013) (2013 Rule); see also 24 C.F.R. 100.500(c) (2013). Under this framework: (1) a plaintiff must prove that the challenged practice "caused or predictably will cause a discriminatory effect" on a protected class; (2) the burden then shifts to the defendant to prove that the "challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests"; and (3) if the defendant satisfies its burden under step two, to prevail, the plaintiff must prove that the

[1] Plaintiffs also may show a discriminatory effect in violation of the FHA by demonstrating that a defendant's policy or practice "creates, increases, reinforces, or perpetuates segregated housing patterns because of" a prohibited trait. See 24 C.F.R. 100.500(a) (2013). The plaintiff has not asserted this theory here.

defendant's interest in "the challenged practice could be served by another practice that has a less discriminatory effect." 24 C.F.R. 100.500(c)(1)-(3) (2013).

In 2014, this Court adopted HUD's burden-shifting approach for deciding disparate-impact claims under the FHA. *Inclusive Cmtys. Project, Inc.* v. *Texas Dep't of Hous. & Cmty. Affs.*, 747 F.3d 275, 282 (5th Cir. 2014). The Supreme Court affirmed that decision and confirmed that disparate-impact claims are cognizable under the FHA. *Texas Dep't of Hous. & Cmty. Affs.* v. *Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 545 (2015) (*ICP*). In explaining how disparate-impact liability under the FHA is "properly limited," the *ICP* Court observed that "[a] robust causality requirement ensures that racial imbalance does not, without more, establish a prima facie case of disparate impact." *Id.* at 541-542 (alteration, citation, and internal quotation marks omitted). The Court did not explain what it meant by "robust" causation or whether that standard departs from the normal burden of proving, by a preponderance of the evidence, that the challenged policy was the but-for cause of a racial disparity.

Because the question was not before it, the Court also did not explicitly adopt the 2013 Rule; however, the Court cited the regulation's burden-shifting framework for analyzing such claims throughout its analysis. See, *e.g.*, *ICP*, 576 U.S. at 527 (citing 24 C.F.R. 100.500(c) (2013)). Several courts have since read *ICP* as approving or implicitly adopting HUD's approach in the 2013 Rule. See,

e.g., *Reyes* v. *Waples Mobile Home Park L.P.*, 903 F.3d 415, 424 n.4 (4th Cir. 2018); *Mhany Mgmt., Inc.* v. *County of Nassau*, 819 F.3d 581, 618 (2d Cir. 2016).

In *Lincoln Property*, however, this Court read *ICP* "to undoubtedly announce a more demanding test than that set forth in the [2013] HUD regulation." 920 F.3d at 902. There, a plaintiff alleged, among other things, that the defendant housing providers' policy of refusing to accept federal housing vouchers had a disparate impact on Black households in violation of the FHA. *Id.* at 895-898. The district court dismissed the action for failure to state a claim, and the plaintiff appealed. *Id.* at 898. This Court found that the Supreme Court in *ICP* had made "purposeful and significant" modifications to HUD's framework for deciding disparate-impact claims under the FHA, including what this Court characterized as the addition of a new "robust causality requirement" at the prima facie stage. *Id.* at 902 (internal quotation marks and citation omitted). In contrast, this Court explained, the 2013 Rule requires "only a showing that 'a challenged practice caused or predictably will cause a discriminatory effect.'" *Ibid.* (quoting 24 C.F.R. 100.500(c)(1) (2013)).[2]

[2] In 2020, HUD published a rule titled "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard" (2020 Rule), which would have repealed and replaced the 2013 Rule with significantly altered burden-shifting standards for disparate-impact claims. See 85 Fed. Reg. 60,288 (Sept. 24, 2020). Before the 2020 Rule could take effect, however, a district court issued a preliminary injunction staying its implementation and enforcement. See *Massachusetts Fair Hous. Ctr.* v. *HUD*, 496 F. Supp. 3d 600, 603 (D. Mass. 2020).

The *Lincoln Property* Court discussed four other opinions that had considered *ICP*'s robust-causality requirement. See 920 F.3d at 903-905. First, the Court looked to the Eighth Circuit's opinion in *Ellis* v. *City of Minneapolis*, 860 F.3d 1106 (8th Cir. 2017), which "construed *ICP* to require that a plaintiff's allegations point to an artificial, arbitrary, and unnecessary policy causing the problematic disparity, in order to establish a prima facie disparate impact case." *Lincoln Prop.*, 920 F.3d at 904 (internal quotation marks omitted) (quoting *Ellis*, 860 F.3d at 1114). To meet its burden under this test, a complaint "must still allege facts plausibly demonstrating that the [policies] complained of are arbitrary and unnecessary under the FHA." *Ibid.* (quoting *Ellis*, 860 F.3d at 1112).

Second, the Court examined the majority opinion in *Reyes*, in which the Fourth Circuit held that the plaintiffs had stated a prima facie case by citing statistical disparities that were "sufficiently substantial [to] raise [the necessary] inference of causation." *Lincoln Prop.*, 920 F.3d at 904 (second alteration in original) (quoting *Reyes*, 903 F.3d at 425). In contrast, the dissent in *Reyes*—the third construction of *ICP*'s robust causation language the *Lincoln Property* court considered—argued that "robust causation [is] not satisfied by pre-existing

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After reconsidering the 2020 Rule, HUD has proposed re-codifying the 2013 Rule, which remains in effect due to the preliminary injunction. See 86 Fed. Reg. 33,590 (June 25, 2021). HUD currently is considering comments received on that proposal.

conditions * * * *not* brought about by the challenged policy." *Id.* at 905 (citing *Reyes*, 903 F.3d at 434-435) (Keenan, J., dissenting).

Finally, the Court looked to the Eleventh Circuit's interpretation of "robust causation" in *Oviedo Town Center, II, L.L.P.* v. *City of Oviedo*, 759 F. App'x 828, 833-835 (2018), which interpreted *ICP* "as promulgating *detailed causation requirements* as a means of *cabining* disparate impact liability." *Lincoln Prop.*, 920 F.3d at 904 (alteration and internal quotation marks omitted). The *Lincoln Property* court explained that to establish a prima facie case under *Oviedo*, a plaintiff must submit data that "establish[es] a disparate impact [with a] causal connection with the policy at issue." *Id.* at 905 (quoting *Oviedo*, 759 F. App'x at 835).

Without deciding which test applies, the *Lincoln Property* court held that under any of the four interpretations, the plaintiff in that case had failed to satisfy the robust-causality requirement because it had not alleged facts that "support[] an inference" that the challenged no-voucher policy caused the statistical disparity that the plaintiff challenged. 920 F.3d at 907.

2. Facts And Prior Proceedings

a. The Louisiana Fair Housing Action Center (LaFHAC) is a nonprofit organization that seeks to eradicate housing discrimination in Louisiana. Doc. 1, at

3.[3] It brought this suit against Azalea Garden, the owner and operator of an apartment complex known as "Azalea Gardens." Doc. 1, at 1.

As relevant here, LaFHAC alleged that Azalea Garden's criminal background policy—both as written and as actually implemented—has a disparate impact because of race in violation of the FHA. Doc. 1, at 20-21. Specifically, despite Azalea Garden's more narrow written policy, LaFHAC alleged that its testing investigation revealed that, in practice, Azalea Garden imposes a "blanket ban" on all applicants with any criminal history, regardless of the age and nature of the conviction, evidence of rehabilitation, or other factors. Doc. 1, at 4. LaFHAC supported these allegations with statements Azalea Garden's employees made to LaFHAC's testers. Doc. 1, at 4. LaFHAC alleged that Azalea Garden communicates its "blanket ban" policy to potential applicants through its employees and its written application, which includes broad questions about an applicant's criminal background. Doc. 1, at 3-4.

In support of its racial discrimination claim, LaFHAC included detailed national, statewide, and local statistics to allege a causal connection between Azalea Garden's criminal background policy (both as written and as applied) and a

[3] "Doc. __, at __" refers to the docket entry number of documents filed on the district court's docket. "ROA.__" refers to the page numbers of documents in the publicly-available record on appeal in this case. "Br. __" indicates the page number of Azalea Garden's opening brief.

disparate impact caused by that policy. Specifically, the complaint alleged statistics demonstrating that Black people are disproportionately more likely to have ever been arrested and incarcerated in the United States, and that these disparities persist in Louisiana and in Jefferson Parish, where Azalea Gardens is located. Doc. 1, at 11-14. The complaint includes, for example, incarceration rates in Jefferson Parish for Black and White individuals from 1990 to 2018, showing that "African Americans in Jefferson Parish were over six times as likely to be incarcerated as [W]hites" during this time period—with some years showing a "disparity in incarceration rates exceed[ing] a 10-to-1 ratio." Doc. 1, at 12-13. The complaint also included statistics demonstrating disparities in the rates of arrest, including that, nationally, "African Americans are 3.64 times more likely to be arrested for marijuana possession than [W]hites," and that this disparity "was significantly higher for Jefferson Parish, where African Americans are 4.9 times more likely to be arrested for marijuana possession," despite both groups using marijuana at similar rates. Doc. 1, at 13-14.

b. Azalea Garden moved to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Doc. 6. As relevant here, Azalea Garden argued that LaFHAC failed to allege sufficient facts to show either that Azalea Garden has a "blanket ban" policy or that its policy caused a racial disparity. Doc. 6-1, at 6-7.

Despite the complaint's allegation of statistics demonstrating disparities between Black and White individuals in incarceration rates within the relevant rental market, Azalea Garden argued that none of the data demonstrated that the policy actually caused a racial imbalance within Azalea Gardens. Doc. 6-1, at 7. LaFHAC countered that it had not only "alleged that Azalea Garden's blanket ban on applicants with criminal history has a disparate impact," but it also had "offered data proving that [Azalea Garden's] blanket ban predictably results in a disparate impact on African Americans." Doc. 10, at 12. Specifically, LaFHAC explained, the data "indicates that Azalea Garden's blanket ban predictably causes * * * fewer African Americans to be accepted by, and thus reside at, Azalea Gardens than the overall population of Jefferson Parish." Doc. 10, at 15-16. Azalea Garden responded that such data was insufficient to allege disparate-impact liability under *ICP* and *Lincoln Property* because the data was not specific to Azalea Gardens and because LaFHAC had not adequately alleged that Azalea Garden's criminal background policy was the cause of any disparity. Doc. 13, at 4-5.

The district court denied Azalea Garden's motion to dismiss in relevant part. ROA.101. First, the court held that, at the pleading stage, it had to resolve any factual dispute about the contours of Azalea Garden's criminal background policy in favor of LaFHAC. ROA.111-112. The court also accepted as true LaFHAC's allegation that Azalea Garden's criminal background policy—whether a blanket

ban or something short of that—"disproportionately affects and excludes certain applicants based on race." ROA.112.

Second, while the district court agreed with Azalea Garden that the complaint lacked "an allegation regarding an actual racial disparity [at Azalea Gardens] connected to" the criminal background policy, the court found that such property-specific detail was unnecessary because plaintiffs may show a discriminatory effect "not only [in] instances where a practice caused * * * a disparate impact[,] but also * * * where it 'predictably will cause' a disparate impact." ROA.112-113 (citing 24 C.F.R. 100.500(c)(1) (2013)). The court held that LaFHAC sufficiently had pleaded that "the criminal background screening process at Azalea Gardens 'predictably will cause' a disparate impact based on race." ROA.113.

c. Azalea Garden moved the district court to reconsider its order or, alternatively, to certify its order for interlocutory appeal under 28 U.S.C. 1292(b). Doc. 18. The court denied the motion for reconsideration because it "remain[ed] persuaded that the 'predictably will cause' standard has not been foreclosed" by *Lincoln Property*. ROA.175. The court, however, granted the motion to certify because it "recognize[d] the potential for a difference in opinion as to how broadly [*Lincoln Property*] should be applied." ROA.176.

Azalea Garden filed a petition under 28 U.S.C. 1292(b) for permission to appeal the district court's order denying its motion to dismiss, which this Court granted. *Louisiana Fair Hous. Action Ctr.* v. *Azalea Garden Props., LLC*, No. 22-90033 (Sept. 27, 2022). Although the district court certified only a discrete legal question for appeal, in its opening brief, Azalea Garden urges this Court to review additional questions of law raised by the certified order, including "what factual support is necessary to satisfy an FHA plaintiff's prima facie burden to comport with the Supreme Court's 'robust causation' requirement" as well as whether LaFHAC's pleading meets that standard.[4] See Br. iii, 3-5.

SUMMARY OF ARGUMENT

1. The district court correctly found that the "predictably-will-cause" standard articulated in HUD's 2013 Rule survives this Court's *Lincoln Property* decision. The Fair Housing Act by its terms reaches discrimination that is "about to occur," and the 2013 Rule's "predictably-will-cause" standard simply reflects the statute's plain language. Nothing in this Court's opinion in *Lincoln Property* or the Supreme Court's opinion in *ICP* changed that. HUD's burden-shifting analysis as set forth in the 2013 Rule should thus remain the starting point for

[4] Under 28 U.S.C. 1292(b), "it is the order, not the question, that is appealable." *Castellanos-Contreras* v. *Decatur Hotels, LLC*, 622 F.3d 393, 398 (5th Cir. 2010) (en banc). Thus, this Court may choose to reach additional questions that are within the scope of the certified order. See, *e.g.*, *Consumer Fin. Prot. Bureau* v. *All Am. Check Cashing, Inc.*, 33 F.4th 218, 220 n.2 (5th Cir. 2022).

evaluating disparate-impact claims under the FHA. And while *Lincoln Property* read *ICP* to require a new showing of "robust causality," a plaintiff may still meet this burden at the pleading stage by alleging that a criminal background policy or practice actually causes or predictably will cause a discriminatory effect.

2. The district court also did not err in holding that a plaintiff need not allege a racial disparity within a particular property. Rather, a plaintiff may satisfy its pleading burden by pointing to detailed statistical information sufficient to raise a reasonable inference that a criminal background policy actually or predictably results in a disparate impact. Here, LaFHAC offered extensive criminal justice data, including statistics showing that nationally, in Louisiana, and in Jefferson Parish where Azalea Gardens is located, Black individuals are incarcerated at significantly higher rates than White individuals. A reasonable inference from this data is that a policy barring or restricting individuals with criminal backgrounds from renting at Azalea Gardens will result in a greater percentage of Black renters than White being excluded from the property. Those allegations are sufficient to plead a disparate impact.

3. Finally, the district court correctly held that LaFHAC plausibly alleged that Azalea Garden's criminal screening policy amounted to a blanket ban based on statements of Azalea Garden's employees, even though the alleged policy differs from the Azalea Garden's more narrow written policy.

ARGUMENT

A. The Predictably-Will-Cause Standard Is Compatible With Lincoln Property *And* ICP

1. The district court did not err in holding that plaintiffs may plead a claim under the FHA by alleging facts supporting a reasonable inference that a challenged policy or practice predictably will cause a disparate impact based on race. ROA.112-113. The predictably-will-cause standard is premised on the text of the FHA itself, which defines an "[a]ggrieved person" as anyone who, among other things, "believes that such person will be injured by a discriminatory housing practice that is *about to occur*." 42 U.S.C. 3602(i)(2) (emphasis added); see also 42 U.S.C. 3610(g)(2)(A), 3613(c)(1) (authorizing enforcement action and relief for discrimination that "is about to occur").

Consistent with this statutory language, even before HUD promulgated the 2013 Rule courts regularly allowed disparate-impact claims to proceed under the FHA where a challenged policy or practice predictably would lead to a discriminatory result. See, *e.g.*, *Pfaff* v. *HUD*, 88 F.3d 739, 745 (9th Cir. 1996) (defining a "[d]iscriminatory effect" as "conduct that actually or predictably resulted in discrimination") (citation omitted); *United States* v. *City of Black Jack*, 508 F.2d 1179, 1184 (8th Cir. 1974) (holding that "[t]o establish a prima facie case of racial discrimination, the plaintiff need prove no more than that the conduct of the defendant actually or predictably results in racial discrimination"), cert. denied,

422 U.S. 1042 (1975); see also *Texas Dep't of Hous. & Cmty. Affs.* v. *Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 539-540 (2015) (*ICP*) (describing *Black Jack* as "at the heartland of disparate-impact liability" and not identifying any error in *Black Jack*'s legal analysis). The 2013 Rule's clarification that policies and practices that "predictably will cause" an unjustified disparate impact are actionable under the FHA merely reflects the statute's plain text and the long line of cases interpreting it.[5]

2. The district court correctly held that "*Lincoln Property* did not disturb this [Court's] prior adoption of aspects of [the 2013 Rule] except as necessary to comport with" what this Court viewed as "*ICP*'s more demanding robust causation requirement."[6] ROA.113 (citing *Inclusive Cmtys. Project, Inc.* v. *Lincoln Prop. Co.*, 920 F.3d 890 (5th Cir. 2019) (*Lincoln Prop.*), cert. denied, 140 S. Ct. 2506 (2020)). *Lincoln Property* was not a wholesale rejection of the HUD regulation; rather, the *Lincoln Property* Court read *ICP* to "announce[] several 'safeguards' to

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[5] Notably, Azalea Garden does not appear to contest that disparate-impact claims can be brought prospectively. Cf. Br. 24-25.

[6] The United States believes that the 2013 Rule is fully consistent with *ICP*. See, *e.g.*, U.S. Amicus Br., *Reyes* v. *Waples Mobile Home Park L.P.*, No. 22-1660 (4th Cir. Sept. 15, 2022); U.S. SOI, *Fortune Soc'y, Inc.* v. *Sandcastle Towers Hous. Dev. Fund Corp.*, 388 F. Supp. 3d 145 (E.D.N.Y. 2019) (No. 14-6410). But to the extent *Lincoln Property*'s "robust causation" standard requires LaFHAC to plead something more than the 2013 Rule requires, this Court should nonetheless affirm the district court's denial of the motion to dismiss because, as described *infra*, LaFHAC has satisfied any such standard.

incorporate into the burden-shifting framework," including "a 'robust causality requirement' at the prima facie stage." See 920 F.3d at 902 (quoting *Crossroads Residents Organized for Stable & Secure Residencies* v. *MSP Crossroads Apartments LLC*, No. 16-233, 2016 WL 3661146, at *6 (D. Minn. July 5, 2016)).[7]

Azalea Garden claims that this Court "expressly rejected [the 2013 Rule's] 'predictably will cause' standard" in *Lincoln Property*. Br. 1; see also Br. 18-19. It did not. Nothing in *Lincoln Property* is "irreconcilable" with the continued application of the "predictably-will-cause" standard. Cf. Br. 19.

As an initial matter, neither *ICP* nor *Lincoln Property* considered claims based on a "predictably-will-cause" standard. Indeed, the *Lincoln Property* court referenced the "predictably-will-cause" standard only once in its entire opinion. See 920 F.3d at 902 (citation omitted). Specifically, after describing *ICP*'s robust causality requirement, the *Lincoln Property* court stated that "[i]n contrast, the HUD regulation contains no 'robust causation' requirement, rather it requires only a showing that 'a challenged practice caused or predictably will cause a discriminatory effect.'" *Ibid.* (citation omitted). This language makes clear that whatever distinction this Court was drawing between "robust causation" and the

[7] Several courts have held that these "safeguards" either are already reflected in the 2013 Rule or can be applied within its framework. See, *e.g.*, *Reyes*, 903 F.3d at 429 (allowing disparate-impact claim to proceed where the plaintiffs identified a specific policy and alleged that that policy "was likely to cause" a protected group "to be disproportionately subject to eviction").

causation requirement that already appears in the 2013 Rule applies equally to practices that *actually* cause a discriminatory effect and those that *predictably* would cause a discriminatory result. See *ibid.* (citation omitted). In other words, the *Lincoln Property* Court was emphasizing the need for a plaintiff to plead sufficient facts to allow the court to infer a robust causal connection; it was not foreclosing a plaintiff from doing so based on factual allegations that a challenged policy predictably will cause a discriminatory effect.

3. Finally, Azalea Garden argues (Br. 19) that to state a prima facie case, LaFHAC "must establish robust causation, not just state an abstract 'plausible' connection between the alleged policy and a racial imbalance." This also is wrong. Even if *ICP* requires a causality showing over and above what the 2013 Rule requires, that would not somehow impose a heightened *pleading* standard. Rather, it would require that plaintiffs plausibly plead a causal connection that is "robust" or "strong."[8]

Contrary to Azalea Garden's assertion, neither *Lincoln Property* nor *ICP* altered the plausibility standard for pleading, which requires only that the plaintiff plead "factual content that allows the court to draw the reasonable inference" that a challenged policy causes a disparate impact. See *Lincoln Prop.*, 920 F.3d at 899

[8] See *Robust*, Merriam-Webster, https://perma.cc/GT3Y-FZEG (last visited Dec. 20, 2022) (defining "robust" as "having or exhibiting strength"); see also Br. 20 (defining "robust" as "strongly formed or constructed").

(quoting *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009)). In *Lincoln Property*, this Court reaffirmed that to survive a motion to dismiss, a complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" 920 F.3d at 899 (quoting *Ashcroft*, 556 U.S. at 678). And in discussing the four different interpretations of "robust causality" from other courts, the *Lincoln Property* Court recognized that, under any test, a plaintiff must only "plausibly" plead a prima facie case. See *Inclusive Cmtys. Project, Inc.* v. *Heartland Cmty. Ass'n, Inc.*, 824 F. App'x 210, 215 (5th Cir. 2020) (summarizing *Lincoln Property*'s examination of the different interpretations of "robust causality").

Lincoln Property supports the district court's decision because at the pleading stage, LaFHAC was required only to allege sufficient "factual content" regarding racial disparities in arrests and incarceration "that allows the court to draw the reasonable inference" that Azalea Garden's alleged blanket ban on renters with criminal backgrounds will have a disparate impact on Black renters. See *Lincoln Prop.*, 920 F.3d at 899 (citation omitted). While under *Lincoln Property* the alleged causal connection must be strong—or "robust"—such "robust connection" need only be *plausible* at the pleading stage.

B. The District Court Correctly Held That LaFHAC Properly Pleaded That Azalea Garden's Criminal Background Screening Policy Had A Disparate Impact Based On Race

The district court correctly held that LaFHAC adequately pleaded that Azalea Garden's criminal background screening policy predictably would cause a disparate impact on prospective Black renters. Although the FHA does not forbid housing providers from considering applicants' criminal records, it does require that providers do so in a way that does not disproportionately disqualify people based on a characteristic protected by the statute, such as race. To that end, HUD has issued guidance on the application of the FHA to housing providers' use of criminal records. See generally HUD Guidance. This Guidance, which explains how the 2013 Rule's burden-shifting regime applies to criminal records policies, specifically recognizes that a plaintiff may establish a prima facie case through statistical analysis showing that excluding tenants with criminal records causes or predictably will cause a disparate impact on members of a protected group. HUD Guidance 3-4. The HUD Guidance further provides that a plaintiff need not allege a racial disparity at the defendant property itself. See HUD Guidance 4 (discussing the types of evidence which may support a disparate-impact claim). As such, the district court correctly held that LaFHAC sufficiently pleaded a disparate impact.

1. The HUD Guidance explains that at step one of the burden-shifting framework, a plaintiff can establish a prima facie case by introducing reliable

statistical analyses proving that a housing provider's criminal background practices or policies have resulted or predictably will result in a disparate impact based on race. HUD Guidance 3. The burden then shifts to the housing provider to prove with evidence—and not just by invoking generalized concerns about safety—that the policy is necessary to accomplish the provider's substantial, legitimate, nondiscriminatory interest. HUD Guidance 4-7. Even if this showing is made, the policy will nevertheless be unlawful if a plaintiff proves a less discriminatory alternative could serve the defendant's stated interests. HUD Guidance 7. For example, even if the housing provider advances an interest in ensuring resident safety and protecting property, the Guidance explains that an individualized review of applicants' criminal records—and of relevant mitigating information beyond what is contained in the tenant's criminal background—is likely to have a less discriminatory effect than categorical exclusions that do not take such additional information into account. HUD Guidance 7.

HUD's Guidance is consistent with the Supreme Court's decision in *ICP* and supports the decision of the district court here. See generally HUD Guidance; *Reyes* v. *Waples Mobile Home Park L.P.*, 903 F.3d 415, 432 & n.10 (4th Cir. 2018) (recognizing that where there is conflict, *ICP* controls, but "afford[ing] the HUD regulation and guidance the deference it deserves"). Indeed, numerous courts have applied *ICP*, along with the HUD Guidance, to hold that a plaintiff can establish a

prima facie case by pointing to reliable statistical analyses showing that a ban on tenants with criminal records predictably will have a disproportionate adverse effect on members of a protected group compared to other individuals. See, *e.g.*, *Jackson* v. *Tryon Park Apartments, Inc.*, No. 6:18-CV-06238, 2019 WL 331635, at *3 (W.D.N.Y. Jan. 25, 2019) (denying motion to dismiss disparate-impact claim based on criminal screening policy); *Sams* v. *Ga W. Gate, LLC*, No. 415-282, 2017 WL 436281, at *5 (S.D. Ga. Jan. 30, 2017) (same); *Alexander* v. *Edgewood Mgmt. Corp.*, No. 15-01140, 2016 WL 5957673, at *3-4 (D.D.C. July 25, 2016) (same).

Likewise here, LaFHAC plausibly alleged the existence of a policy—Azalea Garden's blanket ban on tenants with criminal records—and it plausibly alleged that Azalea Garden's policy results (and predictably will result) in a disproportionate percentage of prospective Black renters being denied housing opportunities. The complaint alleged statistical evidence that "[n]ationally, African Americans are incarcerated at between four-and-a-half to over seven times the rate of [W]hites." Doc. 1, at 11. And the complaint included additional allegations suggesting that these disparities persist at the state and local level. Doc. 1, at 11-12. For instance, LaFHAC alleged that in Jefferson Parish, "in some years the disparity in incarceration rates exceeded a 10-to-1 ratio, and the disparity in recent years has persisted above the national average." Doc. 1, at 12. This data was sufficient to plausibly plead a "robust" causal connection between Azalea

Garden's policy of categorically excluding all applicants with a criminal background and a disparate impact on Black renters. Doc. 1, at 11-15.

2. Contrary to Azalea Garden's argument (Br. 32), LaFHAC did not need to plead a racial disparity within Azalea Gardens itself. As the district court correctly found, LaFHAC adequately pleaded that Azalea Garden's policy predictably will cause a disparate impact, based on detailed statistical evidence, and was not required to plead specifics about Azalea Garden's racial composition. See ROA.112-114.

Following *ICP*, courts have continued to find, and the HUD Guidance reaffirms, that a plaintiff may satisfy step one of the burden-shifting test by alleging facts—including "national statistics on racial and ethnic disparities in the criminal justice system"—that a criminal history policy "actually or predictably results in a disparate impact." See HUD Guidance 3; *Connecticut Fair Hous. Ctr.* v. *CoreLogic Rental Prop. Sols., LLC*, 478 F. Supp. 3d 259, 291 (D. Conn. 2020); see also *Carson* v. *Lacy*, 856 F. App'x 53, 54 (8th Cir. 2021) (per curiam) (reversing the dismissal of a Title VII claim and holding that the plaintiff's citation to statistical data showing the rates of incarceration by race in Arkansas was sufficient to plausibly allege that a policy of limiting the hiring of applicants with certain felony convictions had an impermissible disparate impact); *Smith* v. *Home Health Sols., Inc.*, No. 17-30178, 2018 WL 5281743, at *3-4 (D. Mass. Oct. 24,

2018) (collecting cases holding, in the Title VII context, that citation to national data showing that criminal record exclusions have a disparate impact based on race is sufficient to survive a motion to dismiss).

A plaintiff may also, but need not, present "applicant data, tenant files, census demographic data[,] and localized criminal justice data," to support their claim. See HUD Guidance 3-4. But, this data is sometimes unavailable and "[t]here is no requirement * * * that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants." *Dothard* v. *Rawlinson*, 433 U.S. 321, 330 (1977); see also *Alexander*, 2016 WL 5957673, at *4 (recognizing that while "there may be better or more precise statistics, * * * it is also true that there is a limit on what plaintiff can reasonably be expected to provide before discovery").

While a disparity between Azalea Garden's demographics and the demographics of those who applied to rent at the complex might be *relevant* to whether a disparate impact exists, it would not be dispositive. For example, even if the Black population at Azalea Gardens approximates the percentage of Black prospective renters who applied to rent there, that would not defeat a disparate impact claim. Rather, the question is whether the policy has a discriminatory effect *compared to what the racial makeup of the property would be without the policy*. See, *e.g.*, *Stockwell* v. *City & Cnty. of San Francisco*, 749 F.3d 1107, 1115

(9th Cir. 2014) (explaining, in an ADEA case, that once a plaintiff identifies a specific practice, the next question is "whether that practice had a disproportionate adverse impact on otherwise eligible [prospective applicants]"). Many individuals who otherwise would have applied to rent dwellings may be deterred from doing so based on an expectation that their applications would be rejected. As one court recently explained in examining a similar criminal screening practice, "statistics considering the potential applicant pool, rather than the actual applicant pool" may be used where "the actual applicant pool might not reflect the potential applicant pool, due to a self-recognized inability on the part of potential applicants to meet the very standards challenged as being discriminatory." *Fortune Soc'y, Inc.* v. *Sandcastle Towers Hous. Dev. Fund Corp.*, 388 F. Supp. 3d 145, 170 (E.D.N.Y. 2019) (quoting *E.E.O.C.* v. *Joint Apprenticeship Comm. of Joint Indus. Bd. of Elec. Indus.*, 164 F.3d 89, 97 (2d Cir. 1998)); see also *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 365 (1977) ("If an employer should announce his policy of discrimination * * * his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs.").

Permitting plaintiffs to rely on national, state, and local statistics also takes into account the fact that some housing providers do not keep detailed records of applications or tenant files, and that such failure should not be rewarded through a requirement that plaintiffs rely on such information to demonstrate a disparate

impact. See, *e.g.*, *Gilligan* v. *Jamco Dev. Corp.*, 108 F.3d 246, 250 (9th Cir. 1997) (recognizing "the danger of dismissing a discrimination case on a minimal record" and rejecting a standard that "would require plaintiffs to plead facts they may have no way of knowing").

Moreover, contrary to Azalea Garden's argument (Br. 32-33), allowing LaFHAC's case to proceed based in part on statistics demonstrating "racial disparities in the criminal justice system" at the national, state, and local levels is consistent with this Court's concept of a "robust causation [requirement]." Here, LaFHAC provided detailed statistical evidence of the racial disparities in arrest and incarceration rates in the relevant rental market. See Doc. 1, at 11-14. It stands to reason that a policy of categorically excluding potential renters with *any* criminal conviction—as LaFHAC alleges Azalea Property employs—will therefore affect a greater percentage of Black prospective renters than White. See *Lincoln Prop.*, 920 F.3d at 899 (The plausibility standard requires that a plaintiff allege "factual content that allows the court to draw the reasonable inference" that a challenged policy causes a disparate impact.).

LaFHAC does not seek to hold Azalea Garden liable for racial disparities in the criminal justice system; rather, it plausibly alleges that Azalea Garden itself imposed a policy of considering criminal records in a non-individualized manner and that the policy has an unjustified discriminatory impact based on race because

it predictably will cause more people of a particular race to be denied housing at Azalea Gardens. See Doc. 1, at 20-21. See also HUD Guidance 7 (explaining that "individualized assessment of relevant mitigating information" is likely a less discriminatory alternative to categorical exclusions). To be sure, Azalea Garden will have the ability, at summary judgment or trial, to show that its criminal background policy is "necessary to achieve" its "legitimate, nondiscriminatory interests." 24 C.F.R. 100.500(c)(2) (2013). But at the pleading stage, LaFHAC has met its burden to allege that the policy has an unjustified disparate impact on prospective Black renters.

C. LaFHAC Has Adequately Pleaded That Azalea Garden Maintains A Blanket Ban On Tenants With Criminal Backgrounds

Finally, Azalea Garden incorrectly suggests (Br. 8, 14, 34 n.14) that LaFHAC cannot ground a disparate-impact claim on Azalea Garden's employees' statements that it imposes a blanket ban on individuals with criminal backgrounds, which, it claims, do not reflect its written policy.[9] The district court declined to resolve this factual dispute regarding the contours of Azalea Garden's criminal

[9] Azalea Garden's written policy categorically excludes all applicants with "any misdemeanor conviction in the preceding five (5) years," "any felony convictions (with no time limit)," and "any drug related convictions." See Doc. 1, at 3-4 (alterations omitted). Although this written policy is slightly more tailored than a full "blanket ban," it too may violate the FHA as it does not adequately account for the severity or recency of criminal conduct or any mitigating information, and thus may fail at step three of the burden-shifting analysis. See HUD Guidance 6-7.

background policy based on its finding that, in any event, "something short of a complete ban [*i.e.* defendant's written policy] could potentially run afoul of the FHA." ROA.111-112.

Though the district court's holding in this regard was correct, it also is true that LaFHAC here has alleged facts suggesting that Azalea Garden employs a policy in practice that differs from its written policy. See Doc. 1, at 4-9. Even an unofficial policy or practice may be actionable where it has a disparate impact on a protected class. See *Fortune Soc'y*, 388 F. Supp. 3d at 173-174 (denying summary judgment due to a genuine issue of material fact about whether, despite its stated policy, the defendant employed a blanket ban on individuals with a criminal record). Otherwise, landlords with discriminatory informal or unwritten practices could insulate themselves from disparate-impact liability by maintaining compliant written policies that they do not actually follow.

Here, LaFHAC plausibly identified and alleged a policy—Azalea Garden's blanket ban on tenants with criminal records—and it provided statistical evidence at the local, state, and national levels to plausibly show that this policy results (and predictably will result) in a disparate impact on prospective Black renters. If this Court reaches the additional issues that Azalea Garden asks it to address, it should hold that LaFHAC sufficiently pleaded a disparate-impact claim under the FHA.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's order denying Azalea Garden's motion to dismiss on the issues addressed herein.

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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2022, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE AND URGING AFFIRMANCE ON THE ISSUES ADDRESSED HEREIN with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Yael Bortnick
YAEL BORTNICK
Attorney

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(g):

(1) This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), it contains 6477 words according to the word processing program used to prepare the brief.

(2) This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2019, in 14-point Times New Roman font.

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Date: December 23, 2022