

No. 22-1660

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**In the United States Court of Appeals  
for the Fourth Circuit**

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JOSE DAGOBERTO REYES; ROSY GIRON DE REYES; FELIX ALEXIS BOLANOS; RUTH RIVAS; YOVANA JALDIN SOLIS; ESTEBAN RUBEN MOYA YRAPURA; ROSA ELENA AMAYA; HERBERT DAVID SARAVIA CRUZ,  
*Plaintiffs-Appellants,*

v.

WAPLES MOBILE HOME PARK LIMITED PARTNERSHIP; WAPLES PROJECT LIMITED PARTNERSHIP; A. J. DWOSKIN & ASSOCIATES, INC.,  
*Defendants-Appellees.*

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On Appeal from the United States District Court  
for the Eastern District of Virginia  
No. 1:16-cv-00563

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**BRIEF FOR *AMICUS CURIAE* NATIONAL FEDERATION OF  
INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER  
IN SUPPORT OF AFFIRMANCE**

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November 17, 2022

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## DISCLOSURE STATEMENT

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: Reyes v. Waples Mobile Home Park Limited Partnership

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Federation of Independent Business Small Business Legal Center

(name of party/amicus)

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

1. Is party/amicus a publicly held corporation or other publicly held entity?  YES  NO
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/ Trevor W. Ezell

Date: November 17, 2022

Counsel for: NFIB Small Business Legal Center

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## STATEMENT OF INTEREST

The National Federation of Independent Business (“NFIB”) is the nation’s leading small business association. Its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB’s mission is to promote and protect the right of its members to own, operate, and grow their businesses. The NFIB Small Business Legal Center (“Legal Center”) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation’s courts through representation on issues of public interest affecting small businesses. To fulfill its role as the voice for small business, the Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

*Amicus* has a strong interest in this case, as the argument appellants (and the federal government) press on appeal poses a grave threat not only to constitutional principles of criminal procedure, but also to the economic vitality of American businesses working in the housing and hospitality industries. *Amicus* is concerned that, on appellants’ view, the Fair Housing Act (“FHA”) will inhibit small businesses’ ability to establish across-the-board policies to ensure compliance with a wide range of criminal statutes. Making matters worse, by increasing compliance costs for housing and hospitality providers, appellants’ newfangled subjective-

necessity standard promises to harm tenants as well, the very people the FHA seeks to protect. For these reasons and others described below, *amicus* respectfully urges this Court to affirm.<sup>1</sup>

## INTRODUCTION

It would be difficult to imagine an argument less faithful to Supreme Court precedent than the one appellants advance here—namely, that a defendant seeking to evade disparate-impact liability under the FHA by pointing to separate obligations under federal criminal statutes must show that (1) its challenged policy is strictly necessary to avoid criminal prosecution *and* (2) fear of criminal liability was the sole motivating factor behind that policy.

Appellants demand a focus on intent (Appellants Br. 33-36) wholly at odds with a *disparate-impact* claim that the Supreme Court has said eschews subjective motivations. *See Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 524-25, 534 (2015). They insist on reading *Inclusive Communities* and its fleeting reference to “necessity” as if it were a statute (Appellants Br. 20-26), an approach the Supreme Court rejected as recently as last year. *See Brown v. Davenport*, 142 S.Ct. 1510, 1528 (2022). And they assert that FHA defendants must

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<sup>1</sup> No party or counsel for any party authored this brief in whole or in part, and no one other than the *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. FRAP 29(a)(4)(E). The parties have consented to the filing of this *amicus* brief. FRAP 29(a)(2).

risk criminal punishment under the Immigration Reform and Control Act (“IRCA”) (Appellants Br. 38-42), notwithstanding high court precedent that disfavors any interpretation of a statute that puts “lawbreaking at the start.” *See CIC Servs., LLC v. IRS*, 141 S.Ct. 1582, 1591-92 & n.3 (2021); *see also Free Enters. Fund v. PCAOB*, 561 U.S. 477, 490 (2010).

Those errors are noteworthy enough and justify affirmance all by themselves. In their brief, appellees ably explain why the statutory text and settled caselaw—not to mention common sense—cannot support appellants’ newfangled subjective necessity rule. *See* Appellees Br. 23-32.

But what is truly remarkable is the amicus brief from the *federal government* urging businesses to court criminal liability under the IRCA to evade civil liability under the FHA. DOJ Amicus Br. 13-17. That flouts the Supreme Court’s declaration that the FHA “does not put housing authorities and private developers in a double bind of liability.” *Inclusive Cmtys.*, 576 U.S. at 542. Carefully limiting the sweep of disparate-impact liability is thus essential to “avoid the serious constitutional questions that might arise” if an effort to comply with the FHA forced a defendant to violate something else. *Id.* at 540. Perhaps recognizing those problems with its reading, the government endeavors to temper it, insisting the anti-harboring statute does not reach as far as appellees fear. DOJ Amicus Br. 18-19. But small businesses do not have the luxury of waiting to see if the government means what it says today.

And it has changed its mind often enough that they are wise not to take the government at its word.

## ARGUMENT

### **I. Besides Undercutting FHA Precedent, A Subjective Necessity Standard Would Flout The Fifth Amendment And Other Safeguards Against Arbitrary Criminal Liability.**

Like appellants, the federal government argues that a defendant may discharge its burden under the FHA's burden-shifting framework only if it subjectively believed its policy was "necessary" to avoid criminal prosecution, which it says requires showing the defendant would have had the requisite *mens rea* under the pertinent criminal law. DOJ Amicus Br. 14, 16 & n.6; *see also id.* at 13 (insisting a court must assess whether "Waples was *in fact* at risk for criminal liability ... based on *what it knew* about its tenants' immigration status" (emphasis added)). In other words, defendants needed to show that they "plausibly satisfied the [scienter] element in Section 1324(a)(1)(A)(iii)"—and thus *plausibly violated a federal criminal statute*—"based on facts in the record." *Id.* at 17.

That reading invites a clear conflict with the Fifth Amendment. The Self-Incrimination Clause provides that: "No person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Supreme Court has long recognized that this guarantee applies to government compulsion that precedes formal initiation of a criminal case. *See United States v. Verdugo-Urquidez*,

494 U.S. 259, 264 (1990). In fact, the Fifth Amendment’s self-incrimination protections apply even where a person runs the risk of *non-criminal* penalties—“any sanction which makes assertion of the Fifth Amendment privilege ‘costly’” is enough. *See, e.g., Spevack v. Klein*, 385 U.S. 511, 514-16 (1967); *Lefkowitz v. Cunningham*, 431 U.S. 801, 805-07 (1977).

Some of these decisions may have represented innovations expanding the guarantee’s historical sweep. *See McKune v. Lile*, 536 U.S. 24, 49-50 (2002) (O’Connor, J., concurring). But the rule the government urges here encroaches on heartland Fifth Amendment territory. The substantial necessity rule would “compel[]” FHA defendants to “be a witness against” themselves by obligating them to disclose what they knew and to show that what they knew amounted to a federal crime, which would invariably open them up to prosecution “in a[] criminal case.” Here, that means testifying to facts that could justify up to *ten years* in prison. 8 U.S.C. §1324(a)(1)(B)(i).

Neither appellants nor the federal government can avoid this collision course with the Fifth Amendment by pointing to the fact that appellants here sued organizations rather than natural persons. *See* D.Ct.Dkt.1 at 4-5. Business entities, to be sure, do not sit in a jail cell. Flesh-and-blood people do. *See George Campbell Painting Corp. v. Reid*, 392 U.S. 286, 288-89 (1968). But entities are made up of people—the same people whose “motives” the subjective necessity rule would

probe, Appellants Br. 34-35, and whose freedom could be imperiled by subsequent criminal prosecution, *see Verdugo-Urquidez*, 494 U.S. at 264. There is simply no basis “to deny [the Fifth Amendment’s forward-looking protections] to some and extend it to others” based on their decision of whether to affiliate with the corporate form. *Spevack*, 385 U.S. at 516; *see also, e.g., Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 707 (2014).

The government attempts to temper the consequences of its position by insisting that the district court over-read the reach of criminal liability under 8 U.S.C. 1324(a)(1)(A)(iii). But parties—including executive “law enforcement” officials—cannot stipulate to the meaning of the law. *Young v. United States*, 315 U.S. 257, 258-59 (1942). And the plain text of the anti-harboring statute—not to mention decisions of this Circuit like *United States v. Aguilar*, 477 F.App’x 1000 (4th Cir. 2012)—“precludes the Government’s effort to erase the criminal penalties from this case.” *CIC Servs.*, 141 S.Ct. at 1592 n.3; *see also Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 69-70 (2007). Accordingly, the federal government’s representation that it currently has no plans to routinely prosecute landlords who “do not, in the normal course of business, verify the immigration status” of their tenants is only as good as its word. DOJ Amicus Br. 18-19.

Small businesses have plenty of reasons to fear that the government’s word is not worth much. Over the past two decades, the federal government’s position on

what the FHA requires has shifted repeatedly, presumably because its view of what IRCA polices has shifted too. In 2003, the Department of Housing and Urban Development (“HUD”) issued guidance stating that “asking housing applicants to provide documentation of their citizenship or immigration status during the screening process would not violate the Fair Housing Act.” The government now takes the opposite view. Between that day and this one, HUD has changed directions on disparate-impact liability again and again and again, promulgating one rule in 2013, then another in 2020 scrapping the views contained in the 2013 rule, and in 2021 abandoning the 2020 rule by choosing not to defend it in court. *See* Appellees Br. 40 n.12.

The government’s own frenetic confusion suggests the parameters of criminal liability here are potentially unknowable. That problem implicates a host of principles that favor erring in the direction of *ameliorating* criminal punishment. The rule of lenity, for example, “teach[es] that ambiguities about the breadth of a criminal statute should be resolved in the defendant’s favor.” *United States v. Davis*, 139 S.Ct. 2319, 2333 (2019); *see also* *Wooden v. United States*, 142 S.Ct. 1063, 1082-83 (2022) (Gorsuch, J., concurring in judgment). Congress passed the Declaratory Judgment Act to allow individuals “to test the constitutionality of state criminal statutes” by obtaining a declaration of rights before facing down a coercive action. *Steffel v. Thompson*, 415 U.S. 452, 466 (1974); *see also* *Whole Woman’s*

*Health v. Jackson*, 142 S.Ct. 522, 532 (2021) (describing similar origins of *Ex parte Young* doctrine). And anti-vagueness doctrines under the First, Fifth, and Fourteenth Amendments seek to protect parties from being “le[ft] at the mercy of *noblesse oblige*,” *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 255 (2012), and to prevent the need to “steer far wider of the unlawful zone” of activity than necessary, *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

In the context of FHA defendants seeking to avoid criminal liability, these principles likewise favor permitting small businesses to adopt preventative policies to ensure their compliance with criminal laws. The district court rightly rejected an interpretation of the FHA that invites “serious constitutional questions” and is fundamentally at odds with so many principles of federal law that constrain arbitrary criminal liability. *Inclusive Cmtys.*, 576 U.S. at 540. This Court should do the same.

## **II. Imposing A Subjective Necessity Requirement Will Predictably Harm Small Businesses Providing Housing And Hospitality Services—And Those In Need Of Housing.**

In addition to upsetting the various legal principles discussed above, imposing a subjective necessity standard would just as clearly place practical burdens on those small businesses in the housing and hospitality industry that are least able to shoulder them.

It should go without saying that federal law favors an approach to statutory interpretation that encourages private actors to *comply* with criminal statutes—and

not the other way around. *See, e.g., CIC Servs.*, 141 S.Ct. at 1591-92. Unsurprisingly, to ensure their business activities conform to federal law on an ongoing basis, private actors often need to set across-the-board preventative policies. But the subjective necessity standard the government advocates for would make that sensible approach impossible: Because a small business would need to wait until its state of knowledge triggers the requisite criminal *mens rea* to take FHA-compliant action, it could not adopt a policy *ex ante*, but rather would need to wait until a particular tenant forced it to make a one-off determination about likely criminal liability. That is no sound way to run a business in the shadow of criminal laws.

And it is in no way consistent with what the Supreme Court has set forth in its FHA precedent. When it comes to framing policies, businesses need—and the Supreme Court assures them that they have—“discretion” to set their own “priorities” and choose which approach, among various “reasonable approaches,” best serves their goals. *Inclusive Cmty.*, 576 U.S. at 540-41. The subjective necessity rule, though, would force small businesses to adopt and maintain recordkeeping procedures in such detail as would enable them to prove what subjective motivations underlay their adoption of a particular policy, perhaps years in the past. It is surely a bit ironic to treat small businesses like federal agencies tasked with explaining with retroactive exactitude the bases for taking certain actions as if they were subject to APA-like strictures—all while HUD changes its views

willy-nilly and at whiplash speed. *Cf. Dep't of Commerce v. New York*, 139 S.Ct. 2551, 2573-76 (2019).

But irony aside, forcing small businesses to make one-off legal determinations about possible criminal liability threatens untold practical burdens. It goes without saying that the federal anti-harboring statute is not the only law that small business may need to steer clear of. Federal and state laws, for example, impose criminal liability for housing providers that harbor sex trafficking. *See, e.g., Ricchio v. McLean*, 853 F.3d 553, 556-57 (1st Cir. 2017) (Souter, J.) (permitting claims against motel owner under Trafficking Victims Protection Act, 18 U.S.C. §§1589(b), 1590(a), 1591(a)); Nat'l Conf. of State Legislatures, *Human Trafficking State Laws*, <https://bit.ly/3O8MibP> (last visited Nov. 17, 2022) (collecting state laws). Courts should make it as easy as possible for businesses to comply with laws like these.

According to DOJ, however, a small housing provider with less than 10 employees cannot adopt a preventative policy; instead it must constantly monitor legal compliance, as every new guest arrival or tenant application prompts a new round of questions: Is this new state of facts “materially distinguishable” from the facts in, say, *Aguilar*? Is *Aguilar* even an accurate statement of our potential liability under 8 U.S.C. §1324(a)(1)(A)(iii)? Does this situation implicate a different criminal statute entirely? Has the government said it will not prosecute people like us? Has it changed its mind? “Who can even attempt all that, at least without an

army of perfumed lawyers ...?” *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring).

Adopting a subjective necessity rule would do more than harm small businesses providing housing and hospitality services. It would almost certainly harm the very people the FHA is designed to protect—individuals seeking housing. The Supreme Court, after all, recognized that a heavy-handed approach to disparate impact liability would invariably hamper housing providers’ ability to pursue goals that “contribute to a community’s quality of life” by “impos[ing] onerous costs.” *Inclusive Cmty.*, 576 U.S. at 541-42.

Those costs could come in many shapes and sizes. Some small businesses, for example, may simply lack manpower and struggle to hire additional employees in a persistently tight labor market. *See* NFIB, *Small Businesses Struggle with Inflation, Labor Shortages* (Nov. 8, 2022), <https://bit.ly/3THCKFI>. Understaffed and overloaded with new FHA compliance obligations, a housing provider’s routine maintenance tasks and provision of other services for tenants may fall by the wayside. Or businesses may incur regular monetary costs in seeking ongoing legal advice to help chart a safe course between the FHA and countless other criminal laws like IRCA, only to pass these new expenses on to tenants in the form of higher rents. (Good luck to a business that finds itself trapped inside of a vicious circle if those increased rents, in turn, have a disparate impact on a subset of tenants.) This is the

exact opposite of what the FHA envisions: “disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system.” *Inclusive Cmtys.*, 576 U.S. at 533.

Worst of all, the government’s rule may even incentivize businesses to engage in the sort of profiling the FHA sought to eradicate. “Recognition of disparate-impact liability under the FHA ... permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment. In this way disparate-impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping.” *Inclusive Cmtys.*, 576 U.S. at 540. But by preventing small businesses from adopting across-the-board policies that apply to all tenants alike (like the one at issue in this case), the subjective necessity standard could pressure some businesses to make individualized assessments of immigration status based on protected traits. *Cf. id.* at 542 (“Without adequate safeguards at the prima facie stage, disparate-impact liability might cause race to be used and considered in a pervasive way and ‘would almost inexorably lead’ governmental or private entities to use ‘numerical quotas,’ and serious constitutional questions then could arise.”).

The FHA neither demands nor tolerates these perverse results. Neither should this Court.

## CONCLUSION

This Court should affirm the district court's judgment granting defendants' motion for summary judgment and dismissing this action.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on November 17, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. All participants in this case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

/s/ Trevor W. Ezell  
Trevor W. Ezell

## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 2,857 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). *See* Fed. R. App. P. 29(a)(4)(G). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 with 14-point Times New Roman font.

November 17, 2022

/s/ Trevor W. Ezell  
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