Lien In: Challenging Municipalities' Discriminatory Water Practices Under the Fair Housing Act

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Our nation's failing infrastructure and cities' financial woes have led to a dramatic rise in the cost of water across the United States. Many families are unable to pay these higher bills and face disproportionately harsh consequences as a result. While laws vary by jurisdiction, some municipalities place liens on homes for unpaid water debt. Once a lien is placed on a home, the amount of overdue debt can balloon in size as interest, costs, and fees are added, making it difficult for the homeowner to pay off the lien. If the homeowner cannot pay off the lien within a certain timeframe, they may be subject to tax or mortgage foreclosure and eviction from their home. Water shutoffs have also become more prevalent in recent years as cities have become more aggressive in their collection practices following the 2008 recession. A water disconnection, even if temporary, affects the habitability of a home and threatens human health and dignity. These punitive municipal water practices disproportionately impact Black communities nationwide, partly due to racial disparities in wealth and income. This Article argues that civil rights advocates should consider litigation against municipalities under the Fair Housing Act to challenge discriminatory water liens and shutoffs. The statute offers procedural protections for plaintiffs that may be particularly effective in cases involving water liens and shutoffs. This Article also discusses other civil rights laws and state causes of action that could redress discriminatory and unfair municipal water practices.

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INTRODUCTION

Water prices have soared across the United States in recent decades, increasing by more than 100% between 1990 and 2006.[1] Median household income has not kept up with the rising cost of water, putting a critical resource out of reach for scores of communities. Local governments across the nation have imposed harsh consequences on households that cannot afford to pay these higher costs, including placing liens[2] on homes for unpaid water debt. When families cannot afford to pay off these liens, including the high penalties and interest that accompany them, they may face tax foreclosure and eviction. They may also suffer from a temporary or extended loss of water service for failure to pay a bill, which threatens health and human

[1] JOHN E. CROMWELL, III ET AL., STRATUS CONSULTING & JANE MOBLEY ASSOCS., BEST PRACTICES IN CUSTOMER PAYMENT ASSISTANCE PROGRAMS 29, 31 (2010), https://aquadoc.typepad.com/files/water_affordability_4004.pdf, *archived at* https://perma.cc/9ED4-PT29; *see also* DARLENE R. WONG ET AL., NAT'L CONSUMER LAW CTR., REVIEW AND RECOMMENDATIONS FOR IMPLEMENTING WATER AND WASTEWATER AFFORDABILITY PROGRAMS IN THE UNITED STATES 3 (2014), http://www.nclc.org/images/pdf/pr-reports/report-water-affordability.pdf, *archived at* https://perma.cc/W4ZX-ML4P.

[2] A lien is a legal claim on assets, such as real property, which allows the lienholder to obtain access to the property if the debt is not paid. Julia Kagan, *Property Lien*, INVESTOPEDIA (Mar. 2, 2018), https://www.investopedia.com/terms/p/property-lien.asp, *archived at* https://perma.cc/8Z6Q-Y4DU.

dignity. Black communities are disproportionately impacted by these municipal water debt collection practices.[3] Litigation is both viable and necessary to address this conduct and prevent the further loss of Black homeownership due to unaffordable and overdue water bills.

This Article proceeds in three parts. Part I explains the current water affordability crisis impacting Black communities across the country and describes how water liens, a particularly punitive municipal practice to collect unpaid water debt, can lead to unfair outcomes, including the loss of one's home. Part II encourages civil rights litigators to challenge water lien practices that disproportionately impact Black communities under the Fair Housing Act ("FHA").[4] It discusses plaintiffs' allegations in the first FHA lawsuit challenging water liens, *Pickett v. City of Cleveland*,[5] and considers how to address potential defenses that a municipal defendant may raise in a similar suit. Part III briefly explores other federal and state claims to challenge discriminatory water liens. This section also examines how to structure an FHA claim regarding water service shutoffs, another common municipal practice to address unpaid water bills.

While the water affordability crisis in the U.S. has received significant attention in recent years, few have made an explicit link between unpaid water debt and the loss of a home. This Article intends to equip civil rights lawyers and other advocates with ways to challenge—and change—local municipal practices that disproportionately impact Black families and threaten continued homeownership and wealth building.

I. Municipal Water Practices and Their Impact on Black Communities

A. *America's Water Affordability Crisis*

In the last several decades, the cost of water services[6] has increased exponentially. Between 1990 and 2006, water and wastewater bills increased by 105.7% nationally, while median household income increased only 3% per year.[7] Circle of Blue, an organization that conducts an annual study of

[3] This Article is focused on the impact of water debt collection practices on Black communities. However, other communities of color, like the Latinx community, might be similarly affected by the practices described herein. Municipal water collection practices can also impact other vulnerable populations, including older people, families with children, and people with disabilities.

[4] 42 U.S.C. §§ 3601–3631 (2012).

[5] Complaint, Pickett v. City of Cleveland, No. 19-cv-2911 (N.D. Ohio Dec. 18, 2019) [hereinafter *Pickett* Complaint]. The author is lead counsel in *Pickett*, which was filed shortly before this Article was published. All references to the *Pickett* litigation refer solely to allegations made in plaintiffs' operative Complaint at the time this Article was finalized for publication. These allegations have not been ruled on by the court.

[6] "Water," "wastewater," and "sewer" services are generally used interchangeably throughout this Article.

[7] Wong, *supra* note 1, at 3; Cromwell, III et al., *supra* note 1, at 31.

residential water costs in thirty U.S. cities, determined that the price of water rose faster in 2014 than the cost of nearly every other household staple.[8] In 2019, Circle of Blue found that the average monthly cost of water services in the U.S. for a family of four using 150 gallons per person per day was $115.50.[9]

The biggest factor contributing to rising water costs in the United States is aging and failing infrastructure. Pipes installed at various points over the last century[10] all require replacement now, due to varying materials and techniques used during each period.[11] But infrastructure upgrades are expensive: estimates from the U.S. Environmental Protection Agency ("EPA") and other groups of how much money is needed to keep the nation's water systems operating properly range from $271 billion to at least $1 trillion.[12]

Cities lack the funds for needed repairs and upgrades to water infrastructure.[13] Utilities generally issue or sell tax-exempt municipal bonds or obtain other loans to fund large water infrastructure projects.[14] But today

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[8] Brett Walton, *Price of Water 2015: Up 6 Percent in 30 Major U.S. Cities; 41 Percent Rise Since 2010*, Circle of Blue (Apr. 22, 2015), https://www.circleofblue.org/2015/world/price-of-water-2015-up-6-percent-in-30-major-u-s-cities-41-percent-rise-since-2010/, *archived at* https://perma.cc/N2ZK-ZKGZ [hereinafter Walton, *Price of Water 2015*].

[9] Brett Walton, *Price of Water 2019: Even Without Federal Infrastructure Deal, Cities Continue to Invest*, Circle of Blue (June 18, 2019), https://www.circleofblue.org/2019/world/2019-price-of-water/, *archived at* https://perma.cc/EZ2J-PT54.

[10] Specifically, there have been three significant periods of water infrastructure upgrades: in the first decades of the 20th century, in the post-World War II era, and following the passage of the Clean Water Act in 1972. *See, e.g.*, David Sedlak, Water 4.0 173–74 (2015); Am. Soc'y of Civil Eng'rs, 2017 Infrastructure Report Card: Drinking Water 1 (2017), https://www.infrastructurereportcard.org/wp-content/uploads/2017/01/Drinking-Water-Final.pdf, *archived at* https://perma.cc/AB83-NDVN.

[11] Sedlak, supra note 10.

[12] *See* U.S. Envtl. Prot. Agency, EPA-832-R-15005, Clean Watersheds Needs Survey 2012: Report to Congress 3 (2016), https://www.epa.gov/sites/production/files/2015-12/documents/cwns_2012_report_to_congress-508-opt.pdf, *archived at* https://perma.cc/U4WE-WECA; U.S. Envtl. Prot. Agency, Drinking Water Infrastructure Needs Survey and Assessment, Fifth Report to Congress i (2013), https://www.epa.gov/sites/production/files/2015-07/documents/epa816r13006.pdf, *archived at* https://perma.cc/4K3A-PW7E; Am. Water Works Ass'n, Buried No Longer: Confronting America's Water Infrastructure Challenge 10 (2012), http://www.allianceforwaterefficiency.org/uploadedFiles/Resource_Center/Landing_Pages/AWWA-BuriedNoLonger-2012.pdf, *archived at* https://perma.cc/PWH9-3ZK6. These estimates do not include cities' costs to comply with the Clean Water Act and Safe Drinking Water Act (including under court-enforced consent decrees), which also drive up water rates. *See* U.S. Gov't Accountability Office, GAO-08-751, Water Infrastructure 12 (2016), https://www.gao.gov/assets/680/679783.pdf, *archived at* https://perma.cc/HXB2-AVZG; Nat'l Acad. of Pub. Admin., Developing a New Framework for Community Affordability of Clean Water Services 41 (2017), https://www.napawash.org/uploads/Academy_Studies/NAPA_EPA_FINAL_REPORT_110117.pdf, *archived at* https://perma.cc/KC5V-5S2Q; Walton, *Price of Water 2015*, *supra* note 8. Nor do these estimates include the effects of climate change (resulting in more severe storms in the East and Midwest, and drought in the South and West), which will place additional strain on our water systems at a projected cost of more than $36 billion by 2050. *See* Juliet Christian-Smith et al., A Twenty-First Century U.S. Water Policy 178–79 (2016); Sedlak, *supra* note 10, at 180.

[13] *See, e.g.*, Christian-Smith et al., *supra* note 12, at 175–76.

[14] U.S. Gov't Accountability Office, *supra* note 12, at 2, 13.

many cities are in massive debt—totaling an estimated $1.7 trillion nationwide—and are unable to take on additional projects.[15] Federal investment in our water and wastewater systems has waned since the late 1970s, when the U.S. government made significant investments in infrastructure upgrades required by the then-recently enacted Clean Water Act.[16] Since then, accounting for inflation, federal funding for water projects has decreased by 74%.[17] As a result, municipalities are forced to bear these costs.

Local governments facing increased water costs charge higher rates to their customers.[18] And as rates rise, more people are unable to pay their bills. Water is generally considered "affordable" when families spend no more than 2–2.5% of their median household incomes on water services[19] or 4.5% on water and wastewater services combined.[20] This affordability metric has been soundly criticized, particularly given that current income does not account for the toll of individual economic hardships, such as varying family size, credit access, standards of living, and demands on resources.[21] Alternative metrics may more accurately gauge whether bills are affordable for families, including the level of arrearages, the rate at which service is disconnected, whether the customer or household can pay the bill without

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[15] *See* JOSEPH W. KANE, BROOKINGS INST., INVESTING IN WATER 2 (2016), https://www.brookings.edu/research/investing-in-water-comparing-utility-finances-and-economic-concerns-across-u-s-cities/, *archived at* https://perma.cc/K8QN-9VKM.

[16] *See, e.g.*, SEDLAK, *supra* note 10, at 165.

[17] *Supplemental Tables*, *in* U.S. CONG. BUDGET OFFICE, PUBL. NO. 49910, PUBLIC SPENDING ON TRANSPORTATION AND WATER INFRASTRUCTURE, at tbl.W-8 (Sept. 5, 2017) (comparing federal spending on water utilities in 1977 and 2014).

[18] *See* AM. SOC'Y OF CIVIL ENG'RS, *supra* note 10, at 2; WONG ET AL., *supra* note 1, at 10–11; *see also* SEDLAK, *supra* note 10, at 165; JASON AMIRHADJI ET AL., GEORGETOWN LAW HUM. RTS. INST., TAPPED OUT 21 (2013), https://www.law.georgetown.edu/human-rights-institute/wp-content/uploads/sites/7/2017/07/Tapped-Out.pdf, *archived at* https://perma.cc/SS4Y-RDJ4.

[19] *See, e.g.*, U.S. ENVTL. PROT. AGENCY, EPA SCIENCE ADVISORY BOARD, ECON. ENVTL. COMM., EPA-SAB-EEAC-03-004, AFFORDABILITY CRITERIA FOR SMALL DRINKING WATER SYSTEMS 4 (2002); OFFICE OF WATER, U.S. ENVTL. PROT. AGENCY, EPA 815-R-02-003, REPORT TO CONGRESS: SMALL SYSTEMS ARSENIC IMPLEMENTATION ISSUES 4 (2002), https://nepis.epa.gov/Exe/ZyPdf.cgi?Dockey=20001ZJL.txt, *archived at* https://perma.cc/MN5P-QFGP;; JOAN JACOBSON, ABELL FOUND., KEEPING THE WATER ON 4 (2016), https://www.abell.org/sites/default/files/publications/Keeping%20the%20Water%20On.pdf, *archived at* https://perma.cc/JRY3-2T7M [hereinafter JACOBSON, KEEPING THE WATER ON];; *see also* ELIZABETH A. MACK & SARAH WRASE, A BURGEONING CRISIS? A NATIONWIDE ASSESSMENT OF THE GEOGRAPHY OF WATER AFFORDABILITY IN THE UNITED STATES, 12 PLOS ONE 1, 3 (2017), http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0169488, *archived at* https://perma.cc/69GQ-SV5A (citing benchmarks for water affordability as a measure of income, including the United Nations Development Program and United Kingdom's Department of the Environment, Transport, and the Regions (3% of household income), the Organization for Economic Cooperation and Development (3–5%), and the Unitary Universalist Service Committee (2.5%)); WONG ET AL., *supra* note 1, at 10.

[20] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 12, at 27.

[21] *See* PATRICIA A. JONES & AMBER MOULTON, UNITARIAN UNIVERSALIST SERV. COMM., THE INVISIBLE WATER CRISIS 6 (2016), https://www.uusc.org/sites/default/files/water_report_july_2016_update.pdf, *archived at* https://perma.cc/NZ4B-8ZSL; WONG ET AL., *supra* note 1, at 9; CROMWELL, III ET AL., *supra* note 1, at 28.

compromising the ability to pay for other services, and the accessibility and availability of low-income and other assistance programs.[22]

Regardless of the metric used, it is difficult to estimate how many people across the nation are unable to afford their water bills, given the general lack of data.[23] Even so, recent studies indicate that water is increasingly unaffordable for many customers. A 2010 study sponsored by the EPA and Water Research Foundation found that low-income households "will find it increasingly more difficult to pay their water and wastewater bills" and that even households in a slightly higher income bracket (such as median-income families) may not be able to afford their bills in light of competing needs, such as higher energy and food costs.[24] The EPA-sponsored study estimated that up to 15% of residential water customers may be unable to pay their bills and will come into contact with the utility's bill collection practices.[25] A 2016 U.S. Government Accountability Office study also showed that, in four out of ten cities studied, the average water and sewer bill was more than 8% of income for low-income households (far exceeding the accepted affordability standard).[26] And in 2017, a study from Michigan State University concluded that, if water bills continue to rise at current rates, more than a third of U.S. households may be unable to afford their bills by 2022.[27]

While rising water and sewer rates disproportionately impact communities of color,[28] only a few studies have examined the intersection between water affordability and race. In its 2019 report, *Water/Color: A Study of Race and the Water Affordability Crisis in America's Cities*, the NAACP Legal Defense and Educational Fund, Inc. ("LDF") concluded that the water affordability crises in Baltimore and Cleveland will have the most severe impact on the cities' Black residents.[29] Another 2019 study by American

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[22] WONG ET AL., *supra* note 1, at 10–11.

[23] There is no requirement in the United States for municipalities or utilities to collect data on water affordability, rate increases, or infrastructure investments. *See, e.g.*, JONES & MOULTON, *supra* note 21, at 25. As an example, in 2017, the Baltimore Department of Public Works stated that the city had not retained information on the total amount of payments received from residential customers, the average arrears for all residential accounts, the average bill for all residential accounts in arrears, or the number of accounts receiving a notice of disconnection for nonpayment. Letter from Rudolph S. Chow, Dir., Balt. Dep't of Pub. Works, to the Hon. Mary L. Washington, Delegate, Md. House of Delegates (Sept. 25, 2017), in ROGER COLTON, FOOD & WATER WATCH, BALTIMORE'S CONUNDRUM 66–70 (2017), https://www.foodandwaterwatch.org/sites/default/files/baltimore_water_study-final_report-2017.pdf, *archived at* https://perma.cc/RM7D-YQQ2 [hereinafter COLTON, BALTIMORE'S CONUNDRUM].

[24] CROMWELL, III ET AL., *supra* note 1, at 32.

[25] *Id.* at 25.

[26] U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 12, at 27.

[27] MACK & WRASE, *supra* note 19, at 7.

[28] Brett Walton, *Water Affordability is a New Civil Rights Movement in the United States*, CIRCLE OF BLUE (Mar. 22, 2016), http://www.circleofblue.org/2016/water-policy-politics/water-rights-access/water-affordability-new-civil-rights-movement-united-states/, *archived at* https://perma.cc/AN7J-HW2H.

[29] COTY MONTAG, NAACP LEGAL DEF. & EDUC. FUND, INC., WATER/COLOR 35–36, 50–55 (2019), https://tminstituteldf.org/wp-content/uploads/2019/12/Water_Report_FULL_12_20_19.pdf, *archived at* https://perma.cc/4KT7-76F2.

Public Media Reports, Great Lakes Today, and National Public Radio determined that water service shutoffs in the Great Lakes region over the last decade have been concentrated in Black and Latinx neighborhoods.[30] Similarly, in 2016, the organization We the People of Detroit Community Research Collective examined water shutoffs in Detroit and determined there was a widespread impact on Black neighborhoods.[31]

Skyrocketing water prices disproportionately impact communities of color in part because of racial disparities in wealth and income.[32] Indeed, in a 2017 Michigan State University study of water affordability, researchers observed that Black and Latinx households have median incomes substantially lower than white households and thus are more likely to face water affordability challenges.[33] But wealth and income gaps do not fully explain the disproportionate impact of rising water bills on communities of color. A 2011 study of water costs in Michigan counties found that prices were higher in areas with a greater proportion of racial minorities, even after controlling for various factors, including income.[34] In Boston, Massachusetts Global Action studied the relationship between race, income, and water access through its Color of Water project.[35] In examining data from 2007 to 2011 on water shutoff notices throughout the city, the group found a "strong, persistent" relationship between race and water access that was not explained by controlling for estimated average income.[36] LDF's *Water/Color* study analyzed water liens in Cleveland's Cuyahoga County and found that the city's practice of converting delinquent water debt to tax liens had a

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[30] Maria Zamudio & Will Craft, APM Reports, So Close, Yet So Costly 7, 11 (2019), https://www.apmreports.org/story/2019/02/07/great-lakes-water-shutoffs, *archived at* https://perma.cc/49LY-A2CK (including maps showing the concentration of shutoffs in predominantly minority and low-income neighborhoods in Chicago and Detroit).

[31] We the People of Detroit Community Research Collective, http://wethepeopleofdetroit.com/communityresearch/water/, *archived at* https://perma.cc/U6HN-BF5Z.

[32] Wealth and income disparities between people of color and whites have been well-documented. The average wealth for white families is seven times higher than the average wealth for Black families, and more than one in four Black households have zero or negative net worth compared to less than one in ten white families. Janelle Jones, *The Racial Wealth Gap: How African-Americans Have Been Shortchanged Out of the Materials to Build Wealth*, Econ. Policy Inst. (Feb. 13, 2017), http://www.epi.org/blog/the-racial-wealth-gap-how-african-americans-have-been-shortchanged-out-of-the-materials-to-build-wealth/, *archived at* https://perma.cc/N3LG-ANVK. Additionally, in 2013, working families of color were twice as likely to be poor or low-income (47%) compared to whites (23%). Deborah Povich, Brandon Roberts & Mark Mather, Low-Income Working Families: The Racial/Ethnic Divide, Working Poor Families Project Policy Brief 1–2 (Winter 2014–15), https://www.prb.org/wp-content/uploads/2015/03/WPFP-2015-Report-Racial-Ethnic-Divide.pdf, *archived at* https://perma.cc/86AT-HYTK.

[33] Mack & Wrase, *supra* note 19, at 5.

[34] Rachel Butts & Stephen Gasteyer, *More Cost Per Drop: Water Rates, Structural Inequality, and Race in the United States—The Case of Michigan*, 13 Envtl. Prac. 387, 391 (2011).

[35] Kimberly Foltz-Diaz, Patrick Kelleher-Calnan & Suren Moodliar, The Color of Water (2012), http://massglobalaction.org/projects/colorofwater/primary_report_shutoffs_pre-pub.pdf, *archived at* https://perma.cc/52RN-ZRLZ.

[36] *Id.* at 4–5.

significant and disproportionate impact on Black neighborhoods throughout the county.[37] But this impact was not solely attributable to racial differences in income. LDF found that Cleveland was significantly more likely to place water liens in predominantly Black areas than in predominantly white areas, even when examining neighborhood blocks with comparable levels of income.[38]

B. The Connection Between Unpaid Water Debt and Housing

Families that cannot pay their water bills can lose their homes, either practically (when a water service interruption makes a home uninhabitable) or literally (when a water lien results in foreclosure and eventual eviction from a home). This Article focuses primarily on the sale of water liens, a particularly problematic practice that many municipalities engage in to address unpaid water debt.[39] Water liens can directly lead to a loss of homeownership, disproportionately impacting Black communities and likely further widening the racial wealth gap.[40]

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[37] MONTAG, *supra* note 29, at 50–55. These findings later were incorporated into plaintiffs' Complaint in *Pickett*, LDF's lawsuit challenging Cleveland's water practices, as discussed further *infra* Part II.

[38] Letter from Coty Montag, Senior Counsel & Sparky Abraham, Econ. Justice Fellow, NAACP Legal Def. & Educ. Fund, Inc., to Cleveland City Council (May 24, 2019), https://www.naacpldf.org/wp-content/uploads/2019.05.24-Water-Hearing-Request.pdf, *archived at* https://perma.cc/5SZ8-7WVD. *See also Pickett* Complaint, *supra* note 5, at 5, 22.

[39] However, losing one's home is not the only possible consequence of failing to pay your water bill. Water debt can also impact one's health, custody of children, and in severe cases, one's freedom. *See* MONTAG, *supra* note 29, at 28–29. *See also infra* section III.B.1.

[40] Housing equity is a key wealth reservoir for middle and lower-middle class families. *See, e.g.*, THOMAS M. SHAPIRO, TOXIC INEQUALITY 193 (2017). In addition to the municipal water practices addressed in this Article, there are many factors that contribute to the widening of the racial wealth gap with respect to Black homeownership. The financial crisis disproportionately impacted communities of color, and tightened credit standards have made obtaining a mortgage and other forms of credit more difficult in the years following the crisis. *See, e.g.*, SARAH BURD-SHARPS & REBECCA RASCH, SOC. SCI. RESEARCH COUNCIL, IMPACT OF THE U.S. HOUSING CRISIS ON THE RACIAL WEALTH GAP ACROSS GENERATIONS 6, 26 (2015), https://www.aclu.org/files/field_document/discrimlend_final.pdf, *archived at* https://perma.cc/7UGN-9FLC; CHRISTIAN E. WELLER ET AL., CTR. FOR AM. PROGRESS, THE STATE OF COMMUNITIES OF COLOR IN THE U.S. ECONOMY (2011), https://cdn.americanprogress.org/wp-content/uploads/issues/2011/01/pdf/comm_of_color.pdf, *archived at* https://perma.cc/59X7-7BNQ. Further, exclusionary zoning continues to distort the housing market, restricting low-income families and people of color from moving to higher-opportunity neighborhoods with better home equity rates, good schools, parks and green spaces, and quality employment opportunities and services, among other benefits. *See, e.g.*, Richard V. Reeves, *'Exclusionary Zoning' is Opportunity Hoarding by Upper Middle Class*, BROOKINGS INST. (May 24, 2017), https://www.brookings.edu/opinions/exclusionary-zoning-is-opportunity-hoarding-by-upper-middle-class/, *archived at* https://perma.cc/QCW5-RDPT. These factors and others, including the effects of historical discrimination caused by federal, state, and local governmental policies, have contributed to residential racial segregation and overall divestment in Black communities throughout the country. *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW (2017).

1. A Primer on Municipal Liens

Every state has a process authorizing local governments to place liens on properties when homeowners fail to pay property taxes or certain municipal charges, including for water and sewer services. While these laws vary, they typically provide that the jurisdiction can place a lien on a home for the amount of unpaid property taxes or charges.[41] A property might have multiple liens placed on it if both property taxes and various municipal service fees are overdue.[42] In many jurisdictions, the municipal lien takes precedence over a mortgage on the property.[43]

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[41] Virtually every state allows unpaid charges for water and sewer services to be converted to a lien on real property. *See, e.g.*, ARIZ. REV. STAT. ANN. § 9-511.02 (2019); ARK. CODE ANN. § 14-218-114 (2019); CAL. GOV'T CODE § 43008 (West 2019); COLO. REV. STAT. § 31-20-105 (2019); CONN. GEN. STAT. §§ 7-239, 49-72 (2019); DEL. CODE ANN. tit. 25, § 2901 (2019); D.C. CODE ANN. § 34-2407.02 (West 2019); FLA. STAT. § 159.17 (2019); GA. CODE ANN. § 36-60-17 (2019); IDAHO CODE § 42-3212 (2019); 65 ILL. COMP. STAT. 5/11-139-8 (2019); IND. CODE ANN. § 36-9-23-32 (West 2019); IOWA CODE § 384.84 (2019); KAN. STAT. ANN. § 12-808c (2019); KY. REV. STAT. ANN. § 376.265 (LexisNexis 2019); LA. STAT. ANN. § 33:3969 (2018); ME. STAT. tit. 35-A, § 6111-A, tit. 38, § 1208 (2019); MD. CODE ANN., TAX-PROP. § 14-804 (LexisNexis 2019); MASS. GEN. LAWS ch. 40, §§ 42A, 58 (2019); MICH. COMP. LAWS ANN. § 141.121(3) (West 2019); MINN. STAT. § 444.075 (2019); MISS. CODE ANN. § 21-19-2 (2019); MO. REV. STAT. § 250.234 (2019); MONT. CODE ANN. § 7-13-3024 (2019); NEB. REV. STAT. ANN. § 16-682 (LexisNexis 2019); NEV. REV. STAT. § 244.36605 (2019); N.H. REV. STAT. ANN. § 38:22 (2019); N.J. STAT. ANN. §§ 40:14A-21, :14B-42 (2019); N.M. STAT. ANN. § 3-28-16 (2019); N.C. GEN. STAT. §§ 160A-314 to -314.1 (2019); N.D. CENT. CODE § 40-24-01 (2019); OHIO REV. CODE ANN. §§ 743.04, 6103.02 (LexisNexis 2019); OKLA. STAT. ANN. tit. 82, § 642 (West 2019); OR. REV. STAT. § 223.594(2) (2019); 53 PA. STAT. AND CONS. STAT. ANN. § 7106 (West 2019); 44 R.I. GEN. LAWS § 44-9-3 (2019); S.C. CODE. ANN. §§ 5-31-1560, -2040 (2019); S.D. CODIFIED LAWS § 46A-10B-24 (2019); TENN. CODE ANN. § 7-35-202 (2019); TEX. LOC. GOV'T CODE ANN. § 552.0025(d) (West 2019); UTAH CODE ANN. § 10-8-17 (LexisNexis 2019); VT. STAT. ANN. tit. 24, § 3306 (2019); VA. CODE ANN. § 15.2-2118 (2019); WASH. REV. CODE ANN. § 35.21.290 (LexisNexis 2019); W. VA. CODE ANN. § 8-18-23 (LexisNexis 2019); WIS. STAT. ANN. § 66.0809 (West 2019); WYO. STAT. ANN. § 41-10-117 (2019). In some states, the lien process is set forth in local ordinances. *See, e.g.*, ALA. CONST. 1901, LOCAL AMENDMENTS, JEFFERSON CTY., § 4 (2017); NORTH POLE, ALASKA, MUN. CODE § 13.28.010 (2019); BALT., MD., CITY CODE, art. 24, § 1-2(c) (2016), http://ca.baltimorecity.gov/codes/Art%2024%20-%20Water.pdf, *archived* at https://perma.cc/8YWX-AEQA; HAWAII CTY., HAW., ORDINANCE ch. 21, art. 5, § 21-37 (2019), www.hawaiicounty.gov/lb-countycode, *archived at* https://perma.cc/MW5F-MV5A; N.Y.C., N.Y., ADMIN. CODE § 11-301, https://nycadmincode.readthedocs.io/t11/c03/, *archived at* https://perma.cc/K5ZY-GLLK. For an in-depth overview of tax lien sales, see JOHN RAO, NAT'L CONSUMER LAW CTR., THE OTHER FORECLOSURE CRISIS (2012), https://www.nclc.org/issues/the-other-foreclosure-crisis.html, *archived at* https://perma.cc/436Z-Z4VY.

[42] Regardless of whether the property has one lien or multiple liens, for unpaid property taxes or other municipal charges, jurisdictions generally subject the property to the same process for handling delinquent property tax debt. *See, e.g.*, OHIO REV. CODE ANN. § 743.04(A)(1)(a) (LexisNexis 2019) (stating that the director of public service can certify any unpaid water charges, with penalties, to the county auditor, who shall place the certified amount on the real property tax list).

[43] *See, e.g.*, CONN. GEN. STAT. § 7-239 (2019); KY. REV. STAT. ANN. § 376.265(5) (West 2019); MD. CODE ANN., TAX-PROP. § 14-805 (West 2019); N.J. STAT. ANN. § 40:14B-42 (West 2019).

When a municipality places a lien on a home, it triggers the addition of interest, costs, and fees on the amount of taxes or charges owed.[44] These penalties can be steep: the interest on the original debt can exceed 10% in many states, and up to 50% in at least one.[45] Typically, a homeowner has some time[46] to pay off the original lien amount and the added penalties to "redeem" their property, freeing it from the lien and attendant consequences.[47]

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[44] For example, Ohio law specifies the various categories of penalties, fees, and charges that an owner can be required to pay to redeem their property prior to tax sale. OHIO REV. CODE ANN. § 5721.38 (West 2019). Depending on when the owner is able (if at all) to satisfy the lien, they can be required to pay 18% interest on the lien amount, *id.* at (B)(1)(2), as well as an amount equal to the sum of the county prosecuting attorney's fee, *id.* at (B)(1)(3), reasonable attorney's fees, *id.* at (B)(1)(4), and other costs and fees, which are not specified, *id.* at (B)(1)(5). *See also* RAO, *supra* note 41, at 30 (noting that redemption typically requires the payment of interest, penalties, costs of sale, and attorney's fees, and in some states, any intervening post-sale taxes paid by the purchaser).

[45] *See, e.g.*, MASS. GEN. LAWS ch. 60, § 62 (2019) (requiring payment of 16% interest to redeem property prior to the filing of a foreclosure petition); N.H. REV. STAT. ANN. § 80:32 (2019) (requiring payment of 14% interest to redeem property); OHIO REV. CODE ANN. § 5721.38 (West 2019) (requiring the payment of 18% interest to redeem property prior to foreclosure proceedings); TEX. TAX CODE ANN. § 34.21 (West 2019) (specifying that the redemption interest is 25% of the tax lien amount in the first 180 days following the sale and 50% in the first year); WYO. STAT. ANN. § 39-13-109(e)(iv) (2019) (requiring payment of 15% interest to redeem property). Many lenders originating conventional mortgages require that the borrower establish an escrow account to cover the costs of property taxes and insurance. RAO, *supra* note 41, at 10. If the borrower does not have sufficient funds in the escrow account to pay overdue taxes and charges, they are generally subject to mortgage foreclosure by the lender, or subject to tax sale if the lender fails to pay the taxes owed, a not-uncommon occurrence. *Id.* Additionally, many subprime mortgages originated before the 2008 financial crisis do not have escrow accounts, nor do reverse mortgages originated to older homeowners. *Id.* at 9–11.

[46] This time period varies according to state law. In some jurisdictions, the homeowner has a year to pay off the lien. *See, e.g.*, ALASKA STAT. § 29.45.400 (2019); OHIO REV. CODE ANN. § 5721.38 (West 2019). In others, the owner may have less time to satisfy the lien and redeem the property. *See, e.g.*, D.C. CODE § 34-2407.02(a)(5) (2019) (providing that the mayor can sell a property if not redeemed by the owner within 180 days).

[47] *See, e.g.*, MD. CODE ANN., TAX-PROP. §§ 14-817.1, -827, -828 (West 2019). In Maryland, if the owner redeems within four months of the sale and before a foreclosure action is filed, they are required to pay the total lien amount on the property at the time of sale, with interest; any taxes, interest, and penalties paid by the certificate owner; taxes, interest, and penalties accruing after the date of tax sale; attorney's fees for recording the certificate of sale; a title search fee, not to exceed $250; and reasonable attorney's fees, not to exceed $500. *See* MD. CODE ANN., TAX-PROP. § 14-817.1(a)(7) to (8) (West 2019). The costs can increase if the owner waits to redeem the property until after a foreclosure action has been filed. In that situation, the owner must pay the total lien amount at the time of sale, with interest; any taxes, interest, and penalties paid by the holder of the certificate for sale; any taxes, interest, and penalties accruing after the date of the tax sale; and attorney's fees and expenses. *See id.* at (a)(9); *see also* ALASKA STAT. § 29.45.400 (2019) (specifying redemption period of at least one year and providing that, in order to redeem the property, the party must pay the lien amount, plus penalties, interest, and costs); COLO. REV. STAT. § 39-12-103(3) (2019) (redemption may be made before execution of treasurer's deed to purchaser by paying the amount of taxes, delinquent interest, and costs); N.C. GEN. STAT. § 105-374(e) (2019) (requiring person redeeming property prior to foreclosure sale to pay all taxes due, plus penalties, interest, and costs).

If the homeowner fails to redeem their property by paying the overdue charges, including the added penalties, the jurisdiction can sell the lien certificate or the actual deed to the home. This process varies depending on state law. Some states allow the local government to directly foreclose on the home and dispose of the property by selling it at annual tax sale auctions[48] or in rare cases, by taking the property directly.[49] In other states, the government may sell the lien to a private investor,[50] who bids on the right to collect delinquent taxes or charges from the homeowner as well as the additional fees and costs.[51] If the homeowner cannot pay, the investor can move to foreclose and evict the owner from their home.[52] (Throughout this Article, the general term "lien sales" will be used to refer to both processes: those where the local government sells the property itself or where it sells the lien certificate to outside parties.) Regardless of which process is used, it generally results in a transfer of the property to the lien certificate or deed purchaser and extinguishes the homeowner's rights in the property.[53]

2. *Common Issues with Lien Sales*

Lien sales—both for municipal charges like water or sewer services and for property taxes—are problematic for several key reasons, as dis-

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[48] *See, e.g.*, ARIZ. REV. STAT. ANN. § 9-511.02(C) (2019) (a property can be sold by the county if the owner fails to pay utility fees); D.C. CODE § 34-2407.02(a)(4) (2019) (a property may be sold at tax sale if the owner fails to pay water and sewer charges); FLA. STAT. § 159.17 (2019) (a municipality may foreclose on real property when water, sewer, or gas charges are not paid); 65 ILL. COMP. STAT. 5/11-139-8 (2019) (a municipality may foreclose on water liens in the same manner as foreclosures of mortgages on real estate); ME. STAT. tit. 35-A, § 6111-A(3) (2019) (providing for the manner in which the owner is notified of the impending automatic foreclosure of their property due to a water lien); MO. REV. STAT. § 250.234 (2019) (a water lien may be enforced by lawsuit or foreclosure); N.J. STAT. ANN. § 40:14A-21(f) (West 2019) (real property subject to a sewer lien may be foreclosed on or otherwise enforced by the sewerage authority by action or suit in equity); OR. REV. STAT. § 223.594(2) (2019) (authorizing the foreclosure of real property due to a water lien); TENN. CODE ANN. § 7-35-202 (2019) (providing that property may be sold to enforce the payment of fees for water or sewer services); *see also* RAO, *supra* note 41, at 13.

[49] N.H. REV. STAT. ANN. § 80:69 (2019) (if a real estate lien is not paid, the city or town takes the property free and clear of all liens); *see also* RAO, *supra* note 41, at 14.

[50] Ohio law, for example, permits the county treasurer to sell a lien on a home at auction and bundle liens to sell to private investors. OHIO REV. CODE ANN. §§ 5721.31–.33 (West 2019); *see also* RAO, *supra* note 41, at 12. Since at least 2011, Cleveland's Cuyahoga County has sold "lien packages," consisting of thousands of liens bundled together, to private investment companies. Laura Johnston, *New Plan for Selling Tax Liens in Cuyahoga County is Making Supporters of Skeptics*, CLEVELAND.COM (Oct. 25, 2011), https://www.cleveland.com/cuyahoga-county/2011/10/new_plan_for_selling_tax_liens_in_cuyahoga_county_is_making_supporters_of_skeptics.html, *archived at* https://perma.cc/G798-9YXR.

[51] *See, e.g.*, OHIO REV. CODE ANN. §§ 5721.31–.32 (West 2019).

[52] But at least one state grants limited protections to homeowners. In Washington, state law provides that water liens may only be enforced by cutting off service until the delinquent charges are paid. WASH. REV. CODE § 35.21.300 (2019). While water shutoffs also raise significant concerns, discussed further *infra* section III.B.1, the law at least ensures that residents will not lose their homes for unpaid water bills.

[53] RAO, *supra* note 41, at 12.

cussed in this section. The process can be initiated based on very small overdue amounts, bills for property taxes or municipal services are often incorrect or inflated, and municipalities often have discretion in the process, which can lead to inconsistent and discriminatory outcomes. Homeowners can lose significant equity in their homes as properties are often sold only for the amount of overdue debt and other penalties owed. Lien sales can ultimately lead to foreclosure and eviction, increasing the percentage of abandoned and vacant properties throughout a city and heightening its overall deterioration. And, most relevant to this Article, Black communities have historically been and continue to be disproportionately impacted by these municipal practices.

First, a lien sale may be initiated over an unpaid bill of just a few hundred dollars. In Ohio, for example, there is no statutory minimum of arrears for a lien to be sold.[54] And small debts can balloon to thousands of dollars once interest, penalties, and costs are added, making it impossible for many homeowners to redeem their homes.[55]

Baltimore is one example of a jurisdiction where modest overdue water charges multiplied in size during the lien sale process.[56] In recent years, the city sold thousands of water liens, although Maryland has now banned Baltimore from selling liens based solely on water or sewer debt.[57] As one illus-

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[54] OHIO REV. CODE ANN. § 323.01 (West 2019). But other states do specify minimums. In Maryland (excepting the City of Baltimore), the tax collector may withhold properties from auction if less than $250 is owed (including interest and penalties) and may withhold residential properties when total taxes (also including interest and penalties) amount to less than $750. MD. CODE ANN., TAX-PROP. § 14-811(a), (b)(1) (West 2019). In the District of Columbia, the mayor may not sell real properties at tax sale for delinquent amounts less than $2,500. D.C. CODE § 47-1332(c)(2) (2019). In New York City, tax liens for water or sewer debt may not be sold for less than $1,000 in overdue charges over three years. N.Y.C., N.Y., ADMIN. CODE § 11-319 (2019).

[55] RAO, *supra* note 41, at 4. For example, an analysis by the Coalition for Affordable Homes found that, in New York City, the median tax debt of $6,562 ballooned by 65% to $10,847 once fees and interest rates were included. COAL. FOR AFFORDABLE HOMES, COMPOUNDING DEBT 3 (2014), https://cnycn.org/wp-content/uploads/2014/02/CAH-tax-lien-sale-report-final.pdf, *archived at* https://perma.cc/4ZHQ-PGJ6 [hereinafter COMPOUNDING DEBT].

[56] Until December 2017, when Baltimore's first water lien moratorium was imposed, *see supra* note 57, the city was permitted to sell certificates for as little as $350 in unpaid water and wastewater debt for non-owner-occupied properties and $750 for owner-occupied properties that missed at least three quarters of payments. Luke Broadwater, *Mayor Catherine Pugh Orders Halt to Tax Sales for Baltimore Homeowners with Unpaid Bills*, BALT. SUN (Dec. 20, 2017), https://www.baltimoresun.com/maryland/baltimore-city/bs-md-ci-pugh-water-bills-20171220-story.html, *archived at* https://perma.cc/NBC9-3G7P. Before 2015, owner-occupied properties could also be sold for unpaid water bills as small as $350. Yvonne Wenger & Michael Dresser, *City Officials Welcome Passage of Bill to Limit Tax Sales*, BALT. SUN (Apr. 9, 2015), http://www.baltimoresun.com/news/maryland/politics/bs-md-city-tax-sales-20150409-story.html, *archived at* https://perma.cc/A2QT-PLF2.

[57] In 2013, Baltimore sold 523 liens for water bills only. JOAN JACOBSON, ABELL FOUND., THE STEEP PRICE OF PAYING TO STAY 7 (2014), https://www.abell.org/sites/default/files/publications/ec-taxsale1014.pdf, *archived at* https://perma.cc/7PX6-XR8P [hereinafter JACOBSON, STEEP PRICE]. In 2014, 671 homes were sold for water liens only. ADELAIDE ECKARDT ET AL., REPORT OF THE TASK FORCE TO STUDY TAX SALES IN MARYLAND 5 (2018), https://msa.maryland.gov/megafile/msa/speccol/sc5300/sc5339/000113/022600/022602/20180151e

trative example, prior to the new ban, a Baltimore resident was evicted from her home, which her family had owned for three decades, after a $362 unpaid water bill ballooned to $3,600 after interest, penalties, and fees were added to the original bill.[58] Another East Baltimore resident lost her two properties to an investor after a $272.22 unpaid water bill grew to $6,414.69, nearly $5,000 of which was legal fees owed to the lienholder.[59]

Water bills can be wildly inaccurate for reasons outside of the customer's control, such as meter errors. But there is often no meaningful mechanism for the customer to contest the charges prior to a lien being placed on their home and eventually sold.[60] For example, in Cleveland, one resident was charged almost thirty times her normal water use one quarter, resulting in a monthly bill of nearly $1,800.[61] Although the resident hired a plumber at her own expense to confirm there was no leak on her property, the city refused to adjust her bill, offering her only a payment plan to pay off the inflated debt over time.[62] It took her a year to pay the bill on her limited income.[63] This resident's story is not an outlier: between 2013 and 2017,

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.pdf, *archived at* https://perma.cc/7NF4-MB8H. In 2015, that number increased to 902. *Id.* In 2016, the city sold 733 liens based solely on water debt. *Id.* In 2017, about 1,000 customers faced tax sale for unpaid water bills, Yvonne Wenger, *Coalition Calls for End to Tax Sales in Baltimore Over Unpaid Water Bills*, BALT. SUN (June 1, 2017), http://www.baltimoresun.com/maryland/baltimore-city/bs-md-ci-water-tax-sale-20170601-story.html, *archived at* https://perma.cc/48FB-YPL7, and the city recovered approximately $6.4 million by selling water-only liens, Danielle E. Gaines, *Baltimore Lawmakers Push to End Tax Sales Over Water Bills*, WTOP.COM (Jan. 31, 2019), wtop.com/maryland/2019/01/baltimore-lawmakers-push-to-end-tax-sales-over-water-bills/, *archived at* https://perma.cc/H5EA-8Q9A. In December 2017, then-Mayor Catherine Pugh ordered a moratorium on the sale of water liens on owner-occupied residential properties. BALT. CITY DEP'T OF PUB. WORKS, WATER-ONLY LIENS NOT SUBJECT TO TAX SALE (Dec. 20, 2017), https://publicworks.baltimorecity.gov/news/press-releases/2017-12-20-water-only-liens-not-subject-tax-sale, *archived at* https://perma.cc/NBC9-3G7P. In 2018, the Maryland General Assembly extended the moratorium for one year and broadened it to include rental properties. Scott Dance, *Measure to Halt Tax Sales of Baltimore Homes for Unpaid Water Bills Passes as 2018 Session Ends*, BALT. SUN (Apr. 9, 2018), https://www.baltimoresun.com/news/maryland/politics/bs-md-water-tax-liens-20180409-story.html, *archived at* https://perma.cc/V6GT-HGNM. In 2019, the Maryland General Assembly passed a bill, signed into law by Governor Larry Hogan, banning Baltimore from selling liens based solely on unpaid water or sewer debt for residential and religious properties. John Rydell, *Baltimore Water Taxpayer Protection Act Becomes Law*, FOX 5 NEWS (May 8, 2019), https://foxbaltimore.com/news/local/baltimore-water-taxpayer-protection-act-becomes-law, *archived at* https://perma.cc/MBJ3-2SEP; *see also* MD. CODE ANN., TAX-PROP. § 14-849.1 (West 2019). However, lien sales based solely on water and sewer debt are still permissible elsewhere in the state.

[58] Fred Schulte et al., *The Other Foreclosure Menace*, HUFFINGTON POST INVESTIGATIVE FUND (May 18, 2010), https://www.huffingtonpost.com/2010/05/18/the-other-foreclosure-men_n_579936.html, *archived at* https://perma.cc/B258-PNYG.

[59] Fred Schulte & June Arney, *Small Unpaid Bills Put Residents at Risk*, BALT. SUN (Mar. 25, 2007), http://www.baltimoresun.com/business/real-estate/bal-taxsale-small-032507-story.html, *archived at* https://perma.cc/35VS-79HB.

[60] *See* MONTAG, *supra* note 29, at 34, 44–48 (describing the lack of a meaningful opportunity to contest water bills in Baltimore and Cleveland).

[61] *Id.* at 43.

[62] *Id.*

[63] *Id.*

Cleveland's water department received more than 72,000 customer billing complaints.[64]

Some cities even place liens on homes for customers' failure to pay for *contaminated* water. In 2017, Flint sent notices to about 8,000 city homeowners, warning families that they were at risk of tax foreclosure for failing to pay water bills issued between 2014 and 2016.[65] Flint's water contamination problems began in 2014 and have been well-documented: at one point, the city's water had more than 866 times the allowable upper limit of lead.[66] LDF and the American Civil Liberties Union ("ACLU") of Michigan persuaded the city to suspend efforts to place water liens on homes with unpaid water bills.[67] In 2019, when the city's pipes were still being replaced, Flint again mailed nearly 8,000 water lien notices to residents with overdue bills.[68] While city officials quickly clarified that the notices were a mistake, the mayor stated that commercial and rental properties would still be subject to water liens.[69] After additional advocacy by LDF and the ACLU of Michigan,[70] the mayor confirmed that she will not send any residential property water liens to the county (which has the power to foreclose on homes with liens) while the city's service line replacements are ongoing.[71] The Genesee

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[64] Ron Regan, *Cleveland Water Customers Could Face Higher Bills Due to Critical Meter Installation Error*, NEWS 5 CLEV. (Feb. 16, 2017), https://www.news5cleveland.com/news/local-news/investigations/cleveland-water-customers-could-face-higher-bills-due-to-critical-meter-installation-error, *archived at* https://perma.cc/6PDE-TPDR; *see also Pickett* Complaint, *supra* note 5, at 3.

[65] Brianna Sacks, *Flint Residents Win Battle Over Losing Their Homes Because of Unpaid Water Bills*, BUZZFEED NEWS (May 17, 2017), https://www.buzzfeed.com/briannasacks/flint-michigan-tax-liens, *archived at* https://perma.cc/LJL2-G652.

[66] Irwin Redlener, *We Still Haven't Made Things Right in Flint*, WASH. POST (Mar. 7, 2018), https://www.washingtonpost.com/opinions/we-still-havent-made-things-right-in-flint/2018/03/07/5c700692-2211-11e8-badd-7c9f29a55815_story.html, *archived at* https://perma.cc/8EYX-3RBJ.

[67] Sacks, *supra* note 65; NAACP Legal Def. & Educ. Fund, Inc. & ACLU of Michigan, *Moratorium on Placement of Liens on Homes for Unpaid Water Bills* (May 16, 2017), http://www.naacpldf.org/files/about-us/Letter_to_Flint_City_Council_RE_Moratorium_on_Property_Liens.pdf, *archived at* https://perma.cc/3FZK-QKJV. With her colleagues, the author has participated in this advocacy effort on behalf of LDF.

[68] Zahra Ahmad, *Flint Mistakenly Sends Out 7,931 Water Lien Notices*, MLIVE (May 8, 2019), https://www.mlive.com/news/flint/2019/05/flint-mistakenly-sends-out-7931-water-lien-notices.html, *archived at* https://perma.cc/WQ5Y-NTQS.

[69] *Id.*

[70] Letter from Michael Steinberg, Legal Dir., ACLU of Michigan & Sherrilyn Ifill, President and Dir.-Counsel, NAACP Legal Def. & Educ. Fund, Inc., to Karen Weaver, Flint Mayor, Flint City Council & Deb Cherry, Genesee Cty. Treasurer (May 30, 2019), https://www.naacpldf.org/wp-content/uploads/Flint-Letter-2019-05-29-Final.pdf, *archived at* https://perma.cc/2222-67HA.

[71] Letter from Karen Weaver, Flint Mayor, to Michael Steinberg, Legal Dir., ACLU of Michigan & Sherrilyn Ifill, President and Dir.-Counsel, NAACP Legal Def. & Educ. Fund, Inc. (June 10, 2019), https://www.naacpldf.org/wp-content/uploads/2019.06.10-Mayor-Weaver-Letter-to-ACLU-and-NAACP-Legal-Defense-Fund.pdf, *archived at* https://perma.cc/RU5K-NS2X.

County treasurer has also stated that she will not proceed with any foreclosures based on unpaid water bills while Flint is under a water emergency.[72]

Additionally, many state statutes leave municipalities discretion to decide whether to sell liens on homes for unpaid municipal charges like water and sewer.[73] For example, Maryland generally allows local jurisdictions the discretion to determine what kinds of debt to include in tax sales and whether to even sell properties with municipal liens.[74] As a result, jurisdictions throughout the state are wildly inconsistent in how many properties they take to tax sale each year.[75] Discretion in this process could mean that some homeowners in a particular jurisdiction are unfairly penalized for overdue municipal charges and others are not. This could result in discriminatory outcomes based on race, but this issue needs further study.

Homeowners can lose significant equity in their homes through lien sales, as many jurisdictions will auction properties for only the amount of taxes or charges owed, which are likely to be far lower than their market values.[76] There is often no competitive bidding at lien sales, resulting in a potential windfall for investors, who can scoop up properties for far less than they are worth.[77] When liens are sold for more than the owed amounts, state laws generally provide that the difference between the selling price and the lien amount (generally referred to as "excess funds") must be transferred to the homeowner.[78] However, any payment of excess funds to the owner can occur only after the original overdue debt and any additional interest, fees,

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[72] Letter from Deborah L. Cherry, Genesee Cty. Treasurer, to Dave Noble, Exec. Dir., ACLU of Michigan & Sherrilyn Ifill, President and Dir.-Counsel, NAACP Legal Def. & Educ. Fund, Inc. (Sept. 13, 2019), https://www.naacpldf.org/wp-content/uploads/ACLU-Letter.pdf, *archived at* https://perma.cc/DK6D-65KA. *See also* Ahmad, *supra* note 68.

[73] *See, e.g.*, ARIZ. REV. STAT. ANN. § 9-511.02(A) (2019) ("A city or town may file a lien on property for nonpayment of utility user fees . . ."); COLO. REV. STAT. § 31-20-105 (2019) ("Any municipality . . . may cause any or all delinquent charges . . . to be certified to the treasurer . . ."); CONN. GEN. STAT. § 7-239(c) (2019) ("Any municipality . . . may assign . . . any and all liens filed by the superintendent of the waterworks system or tax collector to secure unpaid water charges . . ."); D.C. CODE § 34-2407.02(a)(1) (2019) ("the Mayor may file a certificate of delinquency . . ."); OR. REV. STAT. § 223.594(2) (2019) ("the municipal utility providing such service may place a lien on the real property . . .").

[74] ECKARDT ET AL., *supra* note 57, at 4. However, as noted above, the state no longer permits Baltimore to sell liens based solely on water or sewer debt. *See* Rydell, *supra* note 57 and accompanying text.

[75] ECKARDT ET AL., *supra* note 57, at 4.

[76] RAO, *supra* note 41, at 9. For example, a $200,000 home may be sold at tax lien sale for $1,200. *Id.*

[77] *Id.* at 14.

[78] *See, e.g.*, ALA. CODE § 40-10-28(a)(1) (2019); FLA. STAT. § 197.582(2)(a) (2019); GA. CODE ANN. § 48-4-5(a) (2019); N.M. STAT. ANN. § 7-38-71(A)(4) (2019); N.C. GEN. STAT. § 105-374(q) (2019); OHIO REV. CODE ANN. §§ 5721.20, .39(D)(4) (West 2019); WASH. REV. CODE § 84.64.080(10) (2019). Note that the "excess" that may be conveyed to the homeowner is not the difference between the home's market value and the winning bid on the lien, but instead is the difference between the winning bid and the amount of charges and penalties owed. This typically means that owners can still lose a tremendous amount of equity in their homes even if they are entitled to (and know to request) any surplus funds.

and costs are satisfied.[79] Additionally, homeowners must know to request the excess funds and must claim them within a specified amount of time, ranging from a few months to several years.[80] Otherwise, they forfeit their right to any surplus.[81]

Beyond the loss of equity, lien sales are problematic because they can ultimately lead to foreclosure and the eviction of homeowners and tenants. Wayne County, where Detroit is located, foreclosed on approximately 100,000 homes between 2011 and 2015 during its recent tax foreclosure crisis, discussed in further detail throughout this Article.[82] In Cuyahoga County, thousands of properties face tax foreclosure each year.[83]

Tax foreclosures and evictions increase the number of vacant and abandoned properties in a given area and can contribute to the overall decay and deterioration of a city. As noted above, Baltimore sold thousands of water liens at its tax sales in recent years.[84] This reportedly led to a significant loss of homeownership and a surge of abandoned properties in the city.[85] While Baltimore officials claimed that the tax sale process was needed to find new owners for the city's numerous abandoned or dilapidated properties, most properties sold to investors were occupied.[86] Similarly, in 2017, 74% of tax-delinquent properties in Cuyahoga County were occupied.[87]

Wayne County's recent tax foreclosure crisis had a destabilizing effect on its neighborhoods, particularly throughout Detroit.[88] Between 2013 and

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[79] For example, North Carolina's law specifies the order in which funds may be applied. N.C. GEN. STAT. § 105-374(q) (2019). Only after costs, attorney's fees, taxes, penalties, and interest are paid to owed parties may any balance be paid to entitled persons. *Id.*

[80] *See, e.g.*, FLA. STAT. § 197.582 (2019) (claim for excess funds must be made within 120 days of the tax sale); GA. CODE ANN. § 48-4-5(c) (2019) (excess funds available for five years after sale); N.M. STAT. ANN. § 7-38-71(C) (2019) (owner has two years to claim the balance of sale proceeds); OHIO REV. CODE ANN. § 5721.20 (West 2019) (unclaimed funds revert to county after three years); WASH. REV. CODE § 84.64.080(10) (2019) (owner's right to excess funds is extinguished if not claimed within three years).

[81] *See, e.g.*, N.M. STAT. ANN. § 7-38-71(C) (2019) (unclaimed funds are considered abandoned property).

[82] Bernadette Atuahene, *Don't Let Detroit's Revival Rest on an Injustice*, N.Y. TIMES (July 22, 2017), https://www.nytimes.com/2017/07/22/opinion/sunday/dont-let-detroits-revival-rest-on-an-injustice.html, *archived at* https://perma.cc/XMK9-H88D.

[83] FRANK FORD, W. RESERVE LAND CONSERVANCY, HOUSING MARKET RECOVERY IN CUYAHOGA COUNTY: RACE AND GEOGRAPHY STILL MATTER 20–23 (2018), https://www.wrlandconservancy.org/wp-content/uploads/2018/07/Cuyahoga-Housing-Trend-2018.pdf, *archived at* https://perma.cc/8B32-X5TV; *see also Pickett* Complaint, *supra* note 5, at 4; MONTAG, *supra* note 29, at 44.

[84] *See* ECKARDT ET AL., *supra* note 57, at 5; JACOBSON, STEEP PRICE, *supra* note 57, at 7.

[85] JACOBSON, STEEP PRICE, *supra* note 57, at 8 (noting that Baltimore's tax sale process can lead to evictions, homelessness, and property vacancies and abandonment); *see also* COLTON, BALTIMORE'S CONUNDRUM, *supra* note 23, at 1–2 (stating that Baltimore's water affordability crisis will place more financial strain on the city as it must address homelessness and abandoned properties, among other issues).

[86] Schulte & Arney, *supra* note 59.

[87] FORD, *supra* note 83, at 16.

[88] *See, e.g.*, GARY SANDS & MARK SKIDMORE, LINCOLN INST. OF LAND POLICY, DETROIT AND THE PROPERTY TAX 11 (2015), https://www.lincolninst.edu/sites/default/files/pubfiles/detroit-and-the-property-tax-full_0.pdf, *archived at* https://perma.cc/R288-RJVF; Margaret

2015, more than half of the properties sold at the county's annual tax auctions were occupied.[89] But after the tax sales and subsequent evictions of homeowners, properties remained unoccupied.[90] Errol Jennings, a former president of the neighborhood association in the historically Black Detroit neighborhood of Russell Woods-Sullivan, attested to the devastating effects of these now-empty properties on the quality of the city's neighborhoods.[91] As Mr. Jennings described, these homes were prime targets for home strippers, who would remove the "fixtures, wiring, plumbing, and other valuable elements"; 'stripped' homes subsequently became "magnets" for other illegal activity.[92] Because of both the tax and mortgage foreclosure crises, property values in Mr. Jennings's neighborhood fell by as much as 96%.[93]

Detroit properties purchased by the government fared no better. Homes sold to the Detroit Land Bank, the City of Detroit, or out-of-state investors at the tax foreclosure auctions were often neglected.[94] Homes that remained vacant quickly fell into visible disrepair, leading to depressed property values for the rest of the neighborhood.[95] This made it more difficult for remaining residents to preserve the character of their community.[96]

3. The Impact of Lien Sales on Black Communities

Lien sales and foreclosures can have a disparate impact on Black homeowners and tenants.[97] In *Water/Color*, LDF detailed how Cleveland's water lien practices have a distinct and demonstrable disparate impact on Cuyahoga County's Black neighborhoods.[98] In 2017, the county's population was nearly 60% white and only 30% Black.[99] But that year, 68.9% of water liens were located in predominantly Black census tracts in the county, and

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Dewar, *The Effects on Cities of "Best Practice" in Tax Foreclosure* 17–18 (Ctr. for Local, State, and Urban Policy, Working Paper No. 2, 2009), http://closup.umich.edu/files/closup-wp-2-tax-foreclosure.pdf, *archived at* https://perma.cc/FS8V-EZMP.

[89] Alex Alsup, *A Recent History of Tax Foreclosure*, THE LOVELAND BLOG (Nov. 9, 2015), https://makeloveland.com/blog/a-recent-history-of-tax-foreclosure, *archived at* https://perma.cc/9UX8-EVY4.

[90] Affidavit of Errol Jennings, Exhibit G to Plaintiffs' Motion for Preliminary Injunction and Brief in Support at 2, MorningSide Cmty. Org. v. Sabree, No. 16-008807-CH (Mich. Cir. Ct. Aug. 12, 2016).

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.* at 3.

[97] *See, e.g.*, MONTAG, *supra* note 29, at 4, 28, 50–55; COMPOUNDING DEBT, *supra* note 55, at 5. Other groups can be similarly affected. For example, AARP has found that older homeowners can be adversely affected by tax lien sales, including for water debt. Bill Hogan, *Predators Target Homes of Older Americans*, AARP BULLETIN (Apr. 2014), https://www.aarp.org/money/taxes/info-2014/tax-liens-target-homeowners.html, *archived at* https://perma.cc/C2MT-65NJ.

[98] MONTAG, *supra* note 29, at 50–55.

[99] *Id.* at 50.

only 18% were located in majority-white census tracts.[100] LDF found similar patterns for the entire five-year period between 2014 and 2018.[101] While LDF's study is thus far the only report specifically examining the racial distribution of water liens,[102] similar patterns have emerged both in Cuyahoga County[103] and in other cities when examining tax lien sales more generally, which can include sales for overdue property taxes, water or sewer debt, or other municipal charges, depending on the relevant jurisdiction. In October 2018, the Philadelphia City Council requested a moratorium on tax sales, which were found to be concentrated in Black and minority neighborhoods.[104] A 2014 report by the Coalition for Affordable Homes determined that New York City is six times more likely to sell a tax lien in a majority-Black neighborhood than a majority-white neighborhood.[105] Additionally, data from a nonprofit group providing assistance to Baltimore residents with tax (including water) liens in 2016 revealed that 80% of those being assisted identified as Black.[106]

These findings are not surprising, nor are they a new development. According to historian Andrew Kahrl, who has written extensively about the impact of discriminatory property assessments on Black communities, property taxes and other municipal charges have been used over time as a "potent instrument of white supremacy."[107] For example, property assessments played a significant role in shaping segregated neighborhoods throughout the country in the post-World War II era, as developers and local officials promised artificially low property tax assessments, which translated to smaller annual property tax bills for homeowners, to help lure middle-class white families to suburban areas.[108] Conversely, in order to try to collect revenue and decrease tax delinquency rates, cities over-assessed properties in poor and working class neighborhoods with the largest Black populations, resulting in inflated tax bills in these areas.[109] When Black homeowners could not

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[100] *Id.*

[101] *Id.*

[102] Frank Ford found a similar disparate impact in Cuyahoga County's Black neighborhoods in his report on property tax delinquencies. FORD, *supra* note 83, at 16.

[103] *Id.*

[104] Michael D'Onofrio, *City Council Calls for Moratorium on Sheriff Sales*, PHILA. TRIB. (Oct. 6, 2018), https://www.phillytrib.com/news/city-council-calls-for-moratorium-on-sheriff-sales/article_87ef9708-712b-5dfd-8390-f213114c7842.html, *archived at* https://perma.cc/N9W6-YAGM.

[105] COMPOUNDING DEBT, *supra* note 55, at 3.

[106] PRO BONO RES. CTR. OF MD., TAX SALE PREVENTION PROJECT, BALTIMORE CLINIC STATISTICS 2016 1 (on file with author).

[107] Andrew W. Kahrl, *Unconscionable: Tax Delinquency Sales as a Form of Dignity Taking*, 92 CHI.-KENT L. REV. 905, 910 (2017) [hereinafter Kahrl, *Unconscionable*].

[108] Andrew W. Kahrl, *Capitalizing on the Urban Fiscal Crisis: Predatory Tax Buyers in 1970s Chicago*, 44 J. URB. HIST. 382, 388 (2015).

[109] *Id.* at 389; *see also* Andrew W. Kahrl, *Black People's Land Was Stolen*, N.Y. TIMES (June 20, 2019), https://www.nytimes.com/2019/06/20/opinion/sunday/reparations-hearing.html, *archived at* https://perma.cc/958Q-J747.

pay these faulty bills, they ended up in tax foreclosure.[110] Tax sales contributed to the significant decline in Black land ownership in the second half of the twentieth century, prevented Black communities from partaking in the real estate market, accelerated the deterioration of urban Black neighborhoods, and contributed to the racial wealth gap.[111] As far back as 1940, LDF founder and future Supreme Court Justice Thurgood Marshall wrote that tax foreclosures "depriv[ed] Negroes of their property through subterfuge."[112]

4. Recent Civil Rights Litigation Related to Lien Sales and Foreclosures

Civil rights groups and community organizations are now filing FHA and other civil rights claims to rectify discriminatory tax assessments, tax lien sales, and foreclosures.[113] In 2016, LDF, the ACLU of Michigan, and the law firm of Covington & Burling sued Wayne County, alleging that the county's tax foreclosures had a disparate impact on Black homeowners in violation of the FHA.[114] In *MorningSide Community Organization v. Sabree*, plaintiffs, who were individual Detroit homeowners and several neighborhood associations, alleged that the county foreclosed on properties for unpaid property tax bills, even though municipalities in the county, like

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[110] Kahrl, *Unconscionable*, *supra* note 107, at 911.

[111] *Id.* at 906; *see also* COMPOUNDING DEBT, *supra* note 55, at 5 (finding that eastern Brooklyn and southwest Queens in New York City, which have the highest concentrations of Black and Latinx homeowners in the city and are highly impacted by tax lien sales, have also been affected by a history of redlining, blockbusting, and predatory lending).

[112] Thurgood Marshall, *Cold, Cold Ground*, THE NEW REPUBLIC, Aug. 12, 1940, at 216.

[113] In addition to the cases discussed in this section, other recent lawsuits have challenged tax classification systems under the FHA. In *Robinson v. City of New York*, tenants in New York City apartment buildings alleged that the city's property tax classification system had a disparate impact on Black and Latinx residents. No. 151679/2014, 2015 WL 3367799, at *1 (N.Y. Sup. Ct. Apr. 20, 2015), *aff'd* 40 N.Y.S.3d 381, 383 (N.Y. App. Div. 2016). New York City divides real property into different classes, separating one-, two-, and three-family homes (class one) from all other residential properties (class two). *Id.* at *2. Despite having lower market value, class two properties are taxed at a higher rate than class one properties. *Id.* Plaintiffs alleged that Black and Latinx people were twice as likely to reside in rental buildings in class two and thus disproportionately pay higher taxes, as tenants pay a portion of the landlord's tax burden, taxed at a higher rate. *Id.* The trial court dismissed plaintiffs' claims, finding a lack of standing and cause of action under the FHA. *Id.* at *2–3.

[114] Complaint at 2–3, MorningSide Cmty. Org. v. Sabree, No. 16-008807-CH (Mich. Cir. Ct. July 13, 2016) [hereinafter "*MorningSide* Complaint"]. The author served as lead counsel for LDF in the *MorningSide* case. In addition to the FHA claim, the plaintiffs in *MorningSide* also brought a claim against the City of Detroit, alleging that its misadministration of the poverty exemption application process for property taxes violated their constitutional due process rights. In 2018, plaintiffs settled their due process claim with the city. Press Release, NAACP Legal Def. & Educ. Fund, Inc., LDF and ACLU Settle Tax Foreclosure Case, Enabling Low-Income Detroiters in Foreclosure to Keep Their Homes (July 3, 2018), https://www.naacpldf.org/press-release/ldf-aclu-settle-tax-foreclosure-case-enabling-low-income-detroiters-foreclosure-keep-homes/, *archived at* https://perma.cc/EV5D-PEXA.

Detroit, had failed to comply with their duty to annually assess properties, particularly during and after the 2008 financial crisis.[115]

In fact, Detroit had failed to assess properties for at least two decades prior to the filing of the lawsuit.[116] Because tax bills must be based on the properties' respective assessed values, plaintiffs alleged that Detroit's failure to update assessments after a dramatic reduction in market values saddled homeowners with inflated bills that they should not have had to pay.[117] For example, a homeowner who should have received a tax bill of $72, based on the home's true cash value of $1,700, instead received a tax bill of $1,367.[118] Wayne County officials were aware that the assessments were incorrect and illegal: in a 2015 radio interview, the county treasurer acknowledged that cities in Wayne County "didn't keep up with their assessments," which "didn't reflect the true market value."[119] The Detroit mayor made a similar admission, telling the press in 2015 that "for years homes across the city have been over-assessed."[120]

Despite this specific knowledge that property assessments were invalid, Wayne County foreclosed on homes with overdue property taxes.[121] As mentioned above, between 2011 and 2015, the county foreclosed on an estimated 100,000 homes.[122] In 2014, Wayne County sold 6,000 occupied homes at its annual tax sale auction.[123] The following year, it sold 8,000.[124] In 2016, just after the *MorningSide* case was filed, the county offered more than 14,000

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[115] *MorningSide* Complaint, *supra* note 114, at 2–3. In Michigan, the General Property Tax Act requires cities to perform annual assessments to determine the true cash value of properties and compile an assessment roll listing the assessed value of each property in the city. MICH. COMP. LAWS ANN. § 211.10(1) (West 2019). After the assessments are completed, the county board of commissioners is required to review each city's assessments and make adjustments for any city-wide errors, a process known as "equalization." *Id.* at § 211.34(2). The county then certifies the assessment rolls. *Id.*

[116] *MorningSide* Complaint, *supra* note 114, at 4.

[117] *See, e.g.*, *id.* at 4, 19.

[118] *Id.* at 17.

[119] *Id.* at 11–12, 12 n.5 (citing Cynthia A. Johnson, *Understanding the Foreclosure Difference between Wayne County and the City of Detroit*, YOUTUBE (May 12, 2015), https://www.youtube.com/watch?v=VVADzh4OWqI, *archived at* https://perma.cc/TZZ3-HB4A) (Cynthia A. Johnson interview of Eric Sabree that originally aired on WMKM 1440AM *Stand Up!* Detroit broadcast).

[120] *Id.* at 12 (citing Khalil AlHajal, *Detroit Property Tax Assessments to Decline as 62,000 Properties Face Foreclosure*, MLIVE (Jan. 28, 2015), https://www.mlive.com/news/detroit/2015/01/detroit_property_tax_assessmen.html, *archived at* https://perma.cc/N6BB-FGZ3).

[121] *Id.* at 2–3, 19.

[122] Atuahene, *supra* note 82.

[123] *MorningSide* Complaint, *supra* note 114, at 13 (citing Tom Perkins, *Are Real Estate Investors from Oakland County to Hong Kong Driving Detroit's Blight?*, METRO TIMES (May 4, 2016), https://www.metrotimes.com/detroit/are-real-estate-investors-from-oakland-county-to-hong-kong-driving-detroits-blight/Content?oid=2441828, *archived at* https://perma.cc/GSX2-XHA7).

[124] *Id.* (citing *Detroit Officials to Unveil Property Assessment Changes*, DET. NEWS (Jan. 29, 2016), https://www.detroitnews.com/story/news/local/detroit-city/2016/01/29/detroit-officials-unveil-property-assessment-changes/79545144/, *archived at* https://perma.cc/GFK6-542D).

properties for sale.[125] Plaintiffs alleged that the foreclosures disproportionately impacted Black homeowners in the county in violation of the FHA.[126]

Shortly after the *MorningSide* lawsuit was filed in Wayne County Circuit Court, the judge ruled that plaintiffs had properly stated a claim for race discrimination under the FHA.[127] However, in the same order, the court dismissed plaintiffs' FHA claim, determining that the Michigan Tax Tribunal had exclusive jurisdiction over the matter.[128]

In addition to *MorningSide*, in 2017, the Chicago Lawyers' Committee for Civil Rights and its co-counsel filed a lawsuit under the FHA and other causes of action, challenging the tax assessment practices of Cook County, Illinois.[129] In *Brighton Park Neighborhood Council v. Berrios*, three neighborhood associations allege that the Cook County Assessor's Office fails to assess residential properties in the county properly, chronically under-valuing (or under-assessing) properties in majority-white areas and over-valuing (or over-assessing) properties in predominantly Black and Latinx neighborhoods.[130] As a result, the plaintiffs contend, residential properties in majority-Black and Latinx areas are twice as likely to be over-assessed by 20% or more, as compared to properties in white areas.[131] This means that communities of color in the county must pay more than their fair share of residential property taxes, disproportionately shifting the cost of government services to these communities and impacting housing affordability.[132] In early 2019, the Cook County Circuit Court denied a motion to dismiss the plaintiffs' FHA claim.[133] It determined that "[t]he Fair Housing Act places limits on policies, including tax assessment policies, which make unavailable or deny a dwelling to racial minorities without proper justification."[134] Because plaintiffs allege that the county's tax policy exacerbates existing patterns of residential segregation and has made housing unavailable, the court found that plaintiffs properly stated a claim under the statute.[135]

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[125] Kirk Pinho, *Auction Numbers Swamp County Treasurer's Office*, CRAIN'S DET. (Oct. 16, 2016), http://www.crainsdetroit.com/article/20161016/NEWS/161019897/auction-numbers-swamp-county-treasurers-office, *archived at* https://perma.cc/PD3H-ADZZ.

[126] *MorningSide* Complaint, *supra* note 114, at 21–22.

[127] *MorningSide*, No. 16-008807-CH, slip op. at 17 (Mich. Cir. Ct. Oct. 17, 2016).

[128] *Id.* at 7. The court's reasoning and plaintiffs' appeals are discussed further *infra* section II.C.2.

[129] First Amended Complaint for Injunctive & Other Relief at 28, Brighton Park Neighborhood Council v. Berrios, No. 2017-CH-16453 (Ill. Cir. Ct. Dec. 14, 2017). In addition to the FHA claim, the plaintiffs alleged violations of the state civil rights act and the state and U.S. constitutions. *Id.* at 26–29. They also included a count for the indemnification of the Cook County Assessor by the county. *Id.* at 29.

[130] *Id.* at 2.

[131] *Id.*

[132] *Id.* at 2, 14.

[133] *Brighton Park*, No. 17-CH-16453, 2019 WL 4178606, at *8 (Ill. Cir. Ct. Feb. 7, 2019) (order granting in part and denying in part defendants' motion to dismiss).

[134] *Id.*

[135] *Id.* The court also held that plaintiffs, as neighborhood associations, lacked standing under the uniformity and equal protection clauses of the state and U.S. constitutions and thus dismissed those claims. *Id.* at 4–5.

Both *MorningSide* and *Brighton Park* demonstrate the broad applicability of the federal fair housing law and how it might be used by civil rights lawyers to challenge discriminatory municipal water practices. While not involving water liens, these cases provide a template for how to construct a lawsuit challenging such liens. As discussed further below in Part II, in December 2019, LDF filed *Pickett*, the first-ever lawsuit challenging a city's water lien policy under the FHA.[136] In that lawsuit, LDF represents five individual Black homeowners against the City of Cleveland based on the practices of the local water department.[137]

II. Challenging Discriminatory Water Lien Practices Under the Fair Housing Act

Water lien practices that have a discriminatory impact on Black communities should be challenged through litigation or other advocacy, such as legislative reform.[138] This Article proposes that the FHA is the most suitable and advantageous avenue to address a municipality's discriminatory water lien practices through litigation, although other actions are discussed in Part III. A plaintiff challenging water liens under the FHA could argue, as alleged in *Pickett*, that a city's lien practices are disproportionately centered in predominantly Black neighborhoods and thus lead to an increased risk of foreclosure and eviction in violation of the statute.[139]

The FHA provides civil rights lawyers with a powerful opportunity to challenge municipal water practices, particularly given its generally broad interpretation by courts, its authorization of disparate impact claims, and its other procedural benefits. An FHA claim can also help bolster the connection between discriminatory water practices and their impact on one's housing, an issue that has received little attention to date.

A. The Advantages of an FHA Claim

Enacted just over fifty years ago, the FHA prohibits housing discrimination on the basis of race, color, national origin, sex, religion, familial status, or disability.[140] The statute aims to eliminate residential segregation and

[136] *Pickett* Complaint, *supra* note 5.
[137] *Id.*
[138] For a detailed overview of local, state, and federal policy reforms that would make municipal water lien sales and other practices more fair, see Montag, *supra* note 29, at 71–72.
[139] *See, e.g.*, *Pickett* Complaint, *supra* note 5, at 4–5, 15–22, 32–33.
[140] 42 U.S.C. §§ 3601–3631 (2012).

foster integrated housing patterns for all Americans.[141] The FHA applies to all forms of government, including municipalities.[142]

Courts will likely hold that the FHA applies to discriminatory municipal water practices given its expansive scope. The Supreme Court has recognized that the FHA's terms are "broad and inclusive" and must be subjected to "generous construction."[143] More specifically, 42 U.S.C. § 3604(a) ("Section 3604(a)"), the FHA provision proscribing practices that "otherwise make unavailable or deny" housing on the basis of a protected characteristic,[144] is "as broad a prohibition as Congress could have made, and all practices which have the effect of making dwellings unavailable on the basis of race are therefore unlawful."[145] As described further below, this provision could be used to challenge lien practices that lead to foreclosure and eviction. Additionally, 42 U.S.C. § 3604(b) ("Section 3604(b)") may be used to challenge other municipal practices, such as water service shutoffs, as detailed in Part III. That provision bars discrimination in the "terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith" because of membership in a protected class,[146] and has been applied to a wide range of discriminatory municipal conduct, including water practices.[147]

Importantly, unlike some other civil rights laws, the FHA allows a plaintiff to challenge facially neutral policies that have a discriminatory ef-

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[141] *Id.* at § 3601 ("It is the policy of the United States to provide, with constitutional limitations, for fair housing throughout the United States."); Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2513 (2015) (stating that the purpose of the FHA is "to eradicate discriminatory practices within a sector of our Nation's economy"); Otero v. N.Y. City Hous. Auth., 484 F.2d 1122, 1133–34 (2d Cir. 1973) (commenting that the FHA was designed "to prohibit discrimination . . . so that members of minority races would not be condemned to remain in urban ghettos . . . [and] to fulfill . . . the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups").

[142] *See, e.g.*, United States v. Parma, 661 F.2d 562, 572 (6th Cir. 1981), *cert. denied*, 456 U.S. 926, 926 (1982) (noting that Congress intended for municipalities to be liable under the FHA). Additionally, private parties may be liable under the statute. Accordingly, an FHA lawsuit against a private utility company for the practices described herein may also be warranted. Given that approximately 88% of waterworks in the U.S. are public, see Andrea Kopaskie, *Public vs Private: A National Overview of Water Systems*, UNC ENVTL. FIN. CTR. (Oct. 19, 2016), http://efc.web.unc.edu/2016/10/19/public-vs-private-a-national-overview-of-water-systems/, *archived at* https://perma.cc/5M94-BXCT, this Article only contemplates a suit against a municipality.

[143] Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209, 212 (1972); *see also* Havens Realty Corp. v. Coleman, 455 U.S. 363, 380 (1982) (citing Jones v. Alfred H. Mayer Co., 392 U.S. 409, 417 (1968) (rejecting an interpretation of the FHA that "undermines the broad remedial intent of Congress embodied in the Act")).

[144] 42 U.S.C. § 3604(a) (2012).

[145] United States v. Gilbert, 813 F.2d 1523, 1528 (9th Cir. 1987) (quoting Stackhouse v. DeSitter, 620 F. Supp. 208, 211 n.6 (N.D. Ill. 1985)). *See also* Mich. Prot. & Advocacy Serv., Inc. v. Babin, 18 F.3d 337, 344 (6th Cir. 1994) ("Congress intended § 3604 to reach a broad range of activities that have the effect of denying housing opportunities to a member of a protected class.").

[146] 42 U.S.C. § 3604(b).

[147] *See infra* section III.B.2.

fect on members of a protected class, known as the disparate impact theory of discrimination.[148] For decades, the housing industry contended that disparate impact claims were not cognizable under the FHA, even though eleven federal courts of appeal had authorized such claims.[149] In 2015, the Supreme Court held in *Texas Department of Housing Community Affairs v. Inclusive Communities Project, Inc.* that the FHA permits claims challenging government practices or policies that have an unjustified disparate impact on people of color.[150] In its decision, the Court noted that disparate impact liability is intended to remove "artificial, arbitrary, and unnecessary" barriers to housing.[151] It based its ruling on the FHA's statutory language and purpose, its interpretation of similar language in other civil rights statutes, and the congressional understanding and acceptance that disparate impact claims were permissible when the statute was amended in 1988.[152] The Court also made clear that recognizing disparate impact claims is consistent with the FHA's central purpose in providing a national policy against housing discrimination.[153] Accordingly, a plaintiff challenging water liens under the FHA will not be required to show proof of discriminatory intent if they can show that the municipality's policies have an unjustified discriminatory effect on communities of color.

The FHA also offers other procedural protections for plaintiffs that may be particularly effective in a case involving water liens and tax sales.[154] The FHA explicitly preempts any state or local law that requires or permits a discriminatory housing practice,[155] which may be useful if a defendant municipality claims that state or local law requires it to place and sell liens on homes to collect unpaid water debt.[156] The statute also permits claims by any

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[148] *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2525 (2015).

[149] The D.C. Circuit was the outlier, although that court had assumed without deciding that disparate impact claims were cognizable under the FHA. *See, e.g.*, Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep't of Hous. & Urban Dev., 639 F.3d 1078, 1085 (D.C. Cir. 2011).

[150] 135 S. Ct. at 2525.

[151] *Id.* at 2522, 2524 (citing Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

[152] *Id.* at 2518–21, 2525. For example, the Court noted that Congress included three exceptions to disparate impact liability when the FHA was amended in 1988, which would not have been necessary if the statute did not permit such claims. *Id.* at 2520.

[153] *Id.* at 2521.

[154] *See* Shayak Sarkar & Josh Rosenthal, *Exclusionary Taxation*, 53 HARV. C.R.-C.L. L. REV. 619, 650–55 (2018).

[155] 42 U.S.C. § 3615 (2012); *see also* Sarkar & Rosenthal, *supra* note 154, at 651 (noting the potential usefulness of the FHA's preemption provision in a case challenging exclusionary tax policies).

[156] In *MorningSide*, the first line of Wayne County's motion to dismiss plaintiffs' case stated: "Michigan law requires that county governments foreclose upon property for nonpayment of property taxes." Brief in Support of Motion for Summary Disposition by Defendants Eric Sabree and Wayne County at 1, MorningSide Cmty. Org. v. Sabree, No. 16-008807-CH (Mich. Cir. Ct. Aug. 9, 2016). While Michigan's tax foreclosure law, MICH. COMP. LAWS ANN. § 211.78h (West 2019), is not written in discretionary terms like the laws from other states, *supra* note 73, plaintiffs argued that the FHA preempted Michigan's law. Plaintiffs' Opposition to Wayne County Defendants' Motion for Summary Disposition at 12–13, *MorningSide*, No. 16-008807-CH (Mich. Cir. Ct. Aug. 26, 2016).

persons affected by a housing practice; for example, the statute affords standing to a neighborhood association impacted by home vacancies and neighborhood depreciation following lien sales.[157] The statute also expressly allows affected persons to file a case in either federal or state court, and does not require the exhaustion of administrative remedies prior to filing suit.[158] This distinguishes the FHA from other civil rights statutes that do not specify, for example, that litigants may pursue their claim in state court or that require a party to initially file their claim with an administrative agency.[159]

B. The Framework for an FHA Claim Challenging Water Liens

A case challenging a municipality's water lien practices, like *Pickett*, could be brought under Section 3604(a) of the FHA.[160] In addition to prohibiting refusals to sell or rent housing, or to negotiate for the sale or rental thereof, this provision bars practices that "otherwise make unavailable or deny" a dwelling to any person on the basis of race or other protected characteristic.[161] That statutory language is interpreted broadly and encompasses a wide range of practices that directly affect the availability of housing to people of color.[162] For example, the court in *MorningSide* determined that the provision applies to a municipality's property tax policies that ultimately result in foreclosure and possible eviction of a homeowner.[163] Similarly, in

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[157] *See, e.g.*, Havens Realty Corp. v. Coleman, 455 U.S. 363, 373–74, 379 (1982) (holding that fair housing testers and organizations can have standing under the FHA). In both *MorningSide* and *Brighton Park*, neighborhood associations served as plaintiffs.

[158] 42 U.S.C. § 3613(a)(1)(A).

[159] For example, 42 U.S.C. § 1983 ("Section 1983"), a civil rights law that can remedy deprivations of constitutional rights, does not explicitly specify that plaintiffs can file claims in state court. *See, e.g.*, Haywood v. Drown, 556 U.S. 729, 765 (2009) (Thomas, J., dissenting) (stating that there is no "substantive command" in Section 1983 requiring New York to provide a state judicial forum to a plaintiff). However, states generally do hear claims brought under that statute. *Id.* at 739 (majority) (noting that New York had created courts of general jurisdiction that adjudicate Section 1983 claims).

[160] *Pickett* Complaint, *supra* note 5, at 32.

[161] 42 U.S.C. § 3604(a). Additionally, the federal employment discrimination statute, Title VII of the Civil Rights Act of 1964 ("Title VII"), requires people who believe they have experienced employment discrimination to first file an administrative charge with the Equal Employment Opportunity Commission before they can seek relief in court. 42 U.S.C. § 2000e-5(f)(1).

[162] United States v. Gilbert, 813 F.2d 1523, 1526–28 (9th Cir. 1987) (describing the broad application of the FHA). Plaintiffs have used Section 3604(a) to challenge a wide array of discriminatory housing practices. *See, e.g.*, *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish,* 641 F. Supp. 2d 563, 569, 577–78 (E.D. La. 2009) (applying the FHA to invalidate a post-Hurricane Katrina ordinance restricting the rental of housing units to blood relatives in a predominantly white area of the city); First Amended Complaint at 39, Fortune Soc'y, Inc. v. Sandcastle Towers Hous. Dev. Fund Corp., No. 14-cv-6410 (E.D.N.Y. May 1, 2015) (challenging housing provider's criminal background check policy); Fair Hous. Justice Ctr., Inc. v. Edgewater Park Owners Coop., Inc., No. 10-cv-912, 2012 WL 762323, at *1 (S.D.N.Y. Mar. 9, 2012) (challenging a New York City cooperative's rule requiring three references from existing shareholders for potential purchasers).

[163] *See, e.g.*, MorningSide Cmty. Org. v. Sabree, No. 16-008807-CH, slip op. at 16–17 (Mich. Cir. Ct. Oct. 17, 2016) (finding that Wayne County's tax foreclosure policy qualifies as

the *Brighton Park* case challenging tax assessments in Cook County, the court made clear that the FHA applies to tax assessment policies.[164] Outside of the tax context, other courts have found that claims involving the risk of mortgage foreclosure are within the ambit of the FHA.[165] Given that water liens can lead to foreclosure and eviction—thus making housing unavailable—a court should find that Section 3604(a) applies to lien practices.

A claim challenging water liens under the FHA will likely use the disparate impact theory of discrimination, as alleged in *Pickett*.[166] The framework for evaluating disparate impact cases under the FHA is well-established.[167] First, the plaintiff must point to a specific policy of the defen-

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prohibited conduct under the FHA and that plaintiffs adequately stated a claim). *See also* Coleman v. Seldin, 181 Misc. 2d 219, 236 (N.Y. Sup. Ct. 1999) (applying FHA to real property tax assessment practices).

[164] Brighton Park Neighborhood Council v. Berrios, No. 17-CH-16453, 2019 WL 4178606, at *8 (Ill. Cir. Ct. Feb. 7, 2019) (order granting in part and denying in part defendants' motion to dismiss).

[165] For example, in a case challenging a bank's predatory loan practices, the district court found that plaintiffs stated a claim under Section 3604(a) by alleging that the bank caused a greater number of Black and Latinx homeowners to receive mortgage loans that induced default and foreclosure. Saint-Jean v. Emigrant Mortg. Co., 50 F. Supp. 3d 300, 318–20 (E.D.N.Y. 2014). Several years later, when the parties moved for a new trial, some plaintiffs had not yet lost their homes, although the loans were still outstanding. Saint-Jean v. Emigrant Mortg. Co., 337 F. Supp. 3d 186, 208 (E.D.N.Y. 2018). *See also* Pitchford v. Am. Title Co., No. 04-2743, 2007 WL 9706252, at *4 (W.D. Tenn. Mar. 29, 2007) (noting that the "[p]laintiff's effort here to expand the scope of § 3604 to encompass transactions that involve discrimination in home improvement and debt consolidation lending on grounds that the burden of the debt may ultimately lead to foreclosure and the ultimate loss of the borrower's home is arguably consistent with the courts' expansive view of § 3604's reach"); Johnson v. Home Tech Co., No. 03-2567, 2006 WL 8434934, at *10 (W.D. Tenn. Feb. 24, 2006) (endorsing the view that increased risk of foreclosure alone is sufficient to make housing unavailable within the scope of Section 3604(a)); Johnson v. Wachovia Bank of Del., No. 03-2567, 2006 WL 8434813, at *15 (W.D. Tenn. Feb. 16, 2006) (in suit challenging predatory loan scheme, "[t]he plaintiff's injury is actually caused by acceptance of a loan designed to fail" and thereby "designed to make his home unavailable to him").

[166] *Pickett* Complaint, *supra* note 5, at 32. However, certain municipal water practices may give rise to a claim for intentional discrimination under the FHA or other statutes, as discussed further *infra* section III.A.1.

[167] The Supreme Court's decision in *Inclusive Communities* did not abrogate the existing, well-developed framework for evaluating FHA claims, although the housing defense bar would disagree. In 2013, prior to the Court's decision, the U.S. Department of Housing and Urban Development ("HUD") issued a "discriminatory effects" regulation, interpreting disparate impact liability under the FHA. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100). In part, the regulation was intended to provide consistency in how disparate impact claims are evaluated, given that the circuit courts had somewhat varying standards. *See id.* at 11462–11463. In addition to recognizing that disparate impact claims are permitted under the FHA, the HUD regulation outlines the burden-shifting framework that applies to such claims. 24 C.F.R. § 100.500(c). In 2018, HUD sought public comment regarding whether changes to its disparate impact rule were warranted following the Supreme Court's decision in *Inclusive Communities*, as part of a broader effort to curtail established civil rights protections. Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 83 Fed. Reg. 28560 (June 20, 2018), https://www.federalregister.gov/documents/2018/06/20/2018-13340/reconsideration-of-huds-implementation-of-the-fair-housing-acts-disparate-impact-standard, *archived at* https://perma.cc/YF9V-QGVU; *see also* P.R. Lockhart, *The Trump Administration is Considering a Major Rollback of Civil Rights Regulation*, Vox (Jan. 7,

dant that causes a significant disparate effect on a protected group.[168] After identifying the relevant policy or practice, the plaintiff must show a causal nexus between the challenged practice or policy and the disparate impact on the protected class.[169] Once the plaintiff establishes a prima facie disparate impact case, the burden shifts to the defendant to prove that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests.[170] The defendant's justification must be supported by evidence and may not be hypothetical or speculative.[171] Even if the defendant can make this showing, the plaintiff may still prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.[172]

2019), https://www.vox.com/policy-and-politics/2019/1/7/18167275/disparate-impact-civil-rights-trump-administration, *archived at* https://perma.cc/EC5X-LR2S. In August 2019, HUD published a proposed rule to amend the agency's interpretation of its discriminatory effects regulation. HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg 42854 (proposed Aug. 19, 2019) (to be codified at 24 C.F.R. pt. 100), https://www.federalregister.gov/documents/2019/08/19/2019-17542/huds-implementation-of-the-fair-housing-acts-disparate-impact-standard, *archived at* https://perma.cc/QT4V-GEVY. The proposed rule, if implemented, would severely impact the ability of aggrieved persons to seek redress for their injuries under the disparate impact theory of discrimination and goes far beyond the Court's decision in *Inclusive Communities*. *See, e.g.*, U.S. Comm'n on Civil Rights, Comment in Opposition to Notice of Proposed Rulemaking re HUD's Implementation of the Fair Housing Act's Disparate Impact Standard (Oct. 18, 2019), https://www.usccr.gov/press/2019/10-18-HUD-Disparate-Impact-Proposed-Rule.pdf, *archived at* https://perma.cc/4L76-2Y6R. The potential impact of the proposed rule on a case challenging water liens under the FHA is outside the scope of this Article. Regardless, several courts have found that HUD's *existing* rule is consistent with *Inclusive Communities*. For example, the Second Circuit has held that the Supreme Court "implicitly adopted HUD's approach," Mhany Mgmt., Inc. v. County of Nassau, 819 F.3d 581, 618 (2d Cir. 2016), and the Northern District of Illinois concluded that the Court "did not identify any aspect of HUD's burden-shifting approach that requires correction," Prop. Cas. Insurers Ass'n of Am. v. Carson, No. 13-cv-8564, 2017 WL 2653069, at *9 (N.D. Ill. June 20, 2017). *See also* Burbank Apartments Tenant Ass'n v. Kargman, 474 Mass. 107, 126–27 (D. Mass. 2016) (finding that *Inclusive Communities* adopted HUD's burden-shifting framework). The Fourth Circuit also recently rejected an argument that HUD's rule cannot be relied upon, noting that "[t]o the extent the two conflict, *Inclusive Communities* controls, but we also afford the HUD regulation and guidance the deference it deserves." Reyes v. Waples Mobile Home Park Ltd. P'ship, 903 F.3d 415, 432 n.10 (4th Cir. 2018), *cert. denied sub nom.* 139 S. Ct. 2026 (2019). *But see* Inclusive Cmtys. Project, Inc. v. Lincoln Prop. Co., 920 F.3d 890, 902–03 (5th Cir. 2019) (reading the Supreme Court's disparate impact framework in *Inclusive Communities* as a "purposeful and significant" modification of the HUD regulation, imposing a stricter test of causality for a plaintiff to establish a prima facie claim).

[168] *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988) ("[A] plaintiff must begin by identifying the specific . . . practice that is challenged."); *Mhany*, 819 F.3d at 617 ("[A] plaintiff must first establish a prima facie case by showing . . . the occurrence of certain outwardly neutral practices.").

[169] 24 C.F.R. § 100.500(c)(1).

[170] *Id.* at (c)(2). In *Inclusive Communities*, the Court articulated this standard as requiring the defendant to prove that its challenged policy is "necessary to achieve a valid interest." Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2522–23 (2015).

[171] 24 C.F.R. § 100.500(b)(2).

[172] *Id.* at (c)(3); *see also Inclusive Cmtys.*, 135 S. Ct. at 2515 (citing 24 C.F.R. § 100.500(c)(3)).

1. The Plaintiff's Prima Facie Case

A plaintiff challenging water liens can likely establish a prima facie case of disparate impact discrimination under Section 3604(a) of the FHA. As outlined above, the plaintiff must first point to a specific policy of the defendant that causes a significant disparate effect on a protected group. The plaintiff can cite the state statute or local ordinance permitting the municipality to place a lien on a home for unpaid water debt and take action against the homeowner by either foreclosing on the property or selling the lien if the debt remains unpaid.[173] Courts have found that the enforcement of a state or local law can provide the basis for a challenged practice under the FHA.[174] For example, in *Gallagher v. Magner*, the Eighth Circuit held that St. Paul, Minnesota's "aggressive enforcement" of a local housing code that disproportionately impacted people of color established a prima facie case of disparate impact under the FHA.[175] As noted above, many municipalities have discretion under their respective state statutes or local ordinances as to whether to place and sell liens on homes for unpaid municipal charges like water debt.[176] This discretion, if applicable, should be explored and described when articulating the policy.

After identifying the relevant policy or practice, the plaintiff must demonstrate that it has a disproportionate impact on the protected class.[177] The plaintiff can employ a number of different comparative methods to demonstrate impact.[178] One method is to provide statistics showing that the group of persons harmed by the challenged policy includes a greater percentage of protected class members (such as Black people) versus white people.[179] The plaintiff can also show that the proportion of Black residents adversely impacted by the challenged policy is higher than their portion of

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[173] *Pickett* Complaint, *supra* note 5, at 12–13. *See also supra* section I.B.1.

[174] *See, e.g.*, Blake Gardens, LLC v. New Jersey, 309 F. Supp. 3d 240, 249–50 (D.N.J. 2018) (upholding challenge to New Jersey law as facially discriminatory in violation of FHA and Americans with Disabilities Act); City of Austin v. Paxton, 325 F. Supp. 3d 749, 759–60 (W.D. Tex. 2018) (denying motion to dismiss the city's FHA claim, which challenged a state law permitting landlords to decline to rent to tenants with federal housing vouchers); Burbank Apartments Tenant Ass'n v. Kargman, 48 N.E.3d 394, 409 (Mass. 2016) (finding that a determination that disparate impact liability would be precluded when a property owner adheres to the statutory scheme for public housing would run counter to the purposes of the FHA).

[175] 619 F.3d 823, 835 (8th Cir. 2010).

[176] *See* ECKARDT ET AL., *supra* note 57, at 4. *See generally supra* note 73.

[177] *See, e.g.*, Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375, 383 (3d Cir. 2011); Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 938 (2d Cir. 1988).

[178] Robert G. Schwemm & Calvin Bradford, *Proving Disparate Impact in Fair Housing Act Cases After* Inclusive Communities, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 685, 697 (2016) (noting that "courts have eschewed any single test for evaluating statistical evidence in housing cases").

[179] *Id.* at 703 (citing *Mt. Holly Gardens*, 658 F.3d at 382 (holding that a prima facie case of disparate impact was established by data showing that 22.54% of Black households and 32.31% of Latinx households would be affected by the challenged housing demolition, compared to only 2.73% of white households)).

the general population (for example, by demonstrating that 45% of the impacted class is Black, but only 10% of the jurisdiction's population is Black).[180] The plaintiff could also demonstrate that the proportion of disadvantaged protected class members is higher than the proportion of all persons in the general population impacted by the policy.[181]

Neighborhood proxies are often used in FHA cases when the race of the actual protected class members is not available, particularly in areas with stark racial residential segregation.[182] For example, in the *Pickett* Complaint, plaintiffs cited neighborhood-based demographics to allege that Cleveland's policy has a disparate impact, as the actual race of homeowners with water liens was not available.[183] To conduct this analysis, plaintiffs obtained publicly available data on the location of water liens in Cuyahoga County, one of the most racially segregated counties in the nation,[184] and included maps

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[180] *Id.* at 703–04 (citing *Gallagher*, 619 F.3d at 834 (holding that the defendant-city's housing code enforcement policy had disproportionate adverse impact on Black people based on census data showing 61% of population seeking housing was Black, but Black people made up only 11.7% of the city's population)).

[181] *Id.* at 705 (citing *Huntington Branch*, 844 F.2d at 938 (holding that the challenged zoning decision that prevented affordable housing had a substantial adverse impact where 24% of Black families needed subsidized housing compared to only 7% of all Huntington families)).

[182] For example, in *MorningSide*, plaintiffs prepared statistical analyses demonstrating that owner-occupied homes in Wayne County census blocks where a majority of homeowners were Black were more likely to be at risk of tax foreclosure sale than owner-occupied homes in Wayne County census blocks where a majority of homeowners were not Black. *See* Exhibit 2 to Affidavit of Allan Parnell, Plaintiffs' Motion for Preliminary Injunction and Brief in Support, MorningSide Cmty. Org. v. Sabree, No. 16-008807-CH (Mich. Cir. Ct. Aug. 12, 2016). The circuit court determined that plaintiffs stated a claim under the FHA by using statistics demonstrating that tax foreclosures were disproportionately located in predominantly Black areas. *MorningSide*, No. 16-008807-CH, slip op. at 16–17 (Mich. Cir. Ct. Oct. 17, 2016). *See also* City of Memphis v. Wells Fargo Bank, N.A., No. 09-2857-STA, 2011 WL 1706756, at *1 (W.D. Tenn. May 4, 2011) (denying motion to dismiss a foreclosure-based disparate impact claim under the FHA that used neighborhood proxy statistics). Geographic proxies are often used in fair lending cases filed under the FHA or the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. §§ 1691a—1691f (2018), the federal statute prohibiting discrimination in all forms of credit. For example, mortgage redlining cases, typically filed under the FHA and ECOA, challenge a lender's failure to provide credit services to a particular neighborhood because of the demographics of its population, and may use area population statistics as a proxy for race. *See, e.g.*, Complaint at 1, 4–5, 7–10, United States v. KleinBank, No. 17-cv-00136 (D. Minn. Jan. 13, 2017) (using neighborhood proxies to allege that the bank violated the FHA and ECOA by failing to provide credit services to majority-minority areas of the Minneapolis-St. Paul-Bloomington, MN-WI Metropolitan Statistical Area); *see also* Complaint at 2–3, 7–10, United States v. Luther Burbank Savs., No. 12-cv-7809 (C.D. Cal. Sept. 12, 2012) (using neighborhood proxies of several areas of California to allege that the bank's minimum loan amount policy discriminated against Black and Latinx borrowers in violation of the FHA and ECOA). In her previous employment, the author was lead counsel for the United States in the *Luther Burbank* case.

[183] *Pickett* Complaint, *supra* note 5, at 15–21.

[184] *See, e.g.*, *Detroit, Chicago, Memphis: The 25 Most Segregated Cities in America*, USA TODAY (July 20, 2019), https://www.usatoday.com/picture-gallery/money/2019/07/20/detroit-chicago-memphis-most-segregated-cities-housing-policies/1780223001/, *archived at* https://perma.cc/LC8Q-PCH4; William H. Frey, *Black-White Segregation Edges Downward Since 2000, Census Shows*, BROOKINGS INST. (Dec. 17, 2018), https://www.brookings.edu/blog/the-

in their Complaint demonstrating that predominantly Black areas of the county are more likely to have water liens based on unpaid bills than majority-white areas.[185] These maps support plaintiffs' allegations that Black Clevelanders are at a disproportionately high risk of losing their homes through foreclosure and eventual eviction due to the city's water lien policy.[186]

Litigators contemplating a suit challenging water liens should prioritize obtaining data to support a disparate impact analysis prior to filing suit. Generally, this data can be procured by submitting a public records request to the relevant municipality.[187] The records requested should include the addresses of properties or parcel numbers for properties with water liens.[188] If the municipality provides this data, the plaintiff can map the addresses of properties with liens and, using census data on neighborhood demographics, determine whether there are a greater percentage of liens located in predominantly Black areas as compared to white neighborhoods.[189] The lien percentages can also be compared to the general population data in the jurisdiction to demonstrate, for example, that the percentage of liens located in majority-Black neighborhoods far exceed the percentage of the Black population in the jurisdiction overall. Various statistical methods, such as the Z-test, a common statistical test of two proportions, can be used to determine if the differences in percentages are statistically significant and not the result of random variation.[190] Subsequent analyses could also determine whether foreclosures from water liens are disproportionately located in predominantly Black neighborhoods and could examine the effects of neighborhood income distributions on patterns of liens and foreclosures.

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avenue/2018/12/17/black-white-segregation-edges-downward-since-2000-census-shows/, *archived at* https://perma.cc/Q2HS-ZMRX.

[185] *Pickett* Complaint, *supra* note 5, at 15–21.

[186] *Id.* at 4–5, 13–15, 32.

[187] *See, e.g.*, OHIO REV. CODE ANN. §§ 149.43–.45 (West 2019); *see also* Letter from Sparky Abraham, Econ. Justice Fellow & Coty Montag, Senior Counsel, NAACP Legal Def. & Educ. Fund, Inc., to Pub. Records Manager, Cuyahoga Cty. Treasurer (Oct. 29, 2018), https://www.naacpldf.org/wp-content/uploads/20181029-Cuyahoga-Treasurer-Request-2-FINAL.pdf, *archived at* https://perma.cc/FE7J-WBDL (requesting records related to delinquent water debt under Ohio's Open Records Law).

[188] The relevant municipality may be prohibited by law from providing personal identifying information, such as addresses, on properties with liens. In that case, the plaintiff may able to obtain parcel numbers for the properties with liens and match those to addresses. *See* Abraham & Montag, *supra* note 187 (requesting data on parcel numbers).

[189] *Pickett* Complaint, *supra* note 5, at 15–21.

[190] Other common statistical tests include multiple regressions, t-tests, and the chi-square test. *See* Schwemm & Bradford, *supra* note 178, at 708 n.102. The aim of these tests is to measure the level of confidence that the sample data reflects the actual figures. *Id.* at 708. Statistical significance is generally established through a confidence level of 95%. *See* Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308 n.14, 311 n.17 (1977); Schwemm & Bradford, *supra* note 178, at 708–09. A 95% confidence level corresponds to about two standard deviations from the mean. *Id.* at 709 n.104 (citing JOHN E. FREUND & GARY A. SIMON, MODERN ELEMENTARY STATISTICS 312 (8th ed. 1992)).

After demonstrating that a policy has a disproportionate impact on a protected class, the plaintiff must show a causal nexus between the challenged practice or policy and the disparate impact on the protected class.[191] In other words, "the plaintiff must show that the proven statistical disparities are actually caused by the disparity being challenged."[192] In *Inclusive Communities*, the Supreme Court named this element the "robust causality" standard, cautioning that defendants should not be held accountable for racial disparities they did not create.[193] Since the Court's decision, no uniform standard has emerged to determine how an FHA plaintiff must prove this element, and only a few circuit courts have weighed in. In perhaps the most helpful test, although one that is not concretely defined, the Fourth Circuit has held that the element is satisfied by "sufficiently substantial" statistical disparities.[194] The Eighth Circuit interpreted the Court's decision in *Inclusive Communities* to require a plaintiff, at a minimum, to "point to an 'artificial, arbitrary, and unnecessary' policy causing the problematic disparity."[195] In an unpublished decision, the Eleventh Circuit described the Court's decision as "promulgat[ing] detailed causation requirements as a means of cabining disparate impact liability."[196] Additionally, in evaluating the meaning of robust causality, the Fifth Circuit recently cautioned that the element would not be satisfied by evidence showing that protected class members are more

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[191] 24 C.F.R. § 100.500(c)(1) (2019); Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2523–24 (2015). In *Pickett*, plaintiffs allege that Cleveland's water lien policy causes Black residents of Cuyahoga County to suffer an increased risk of foreclosure and eviction relative to white residents. *Pickett* Complaint, *supra* note 5, at 32.

[192] Schwemm & Bradford, *supra* note 178, at 695.

[193] *Inclusive Cmtys.*, 135 S. Ct. at 2523 (citing Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 653 (1989)). Several post-*Inclusive Communities* decisions support the position that the Supreme Court did not impose a heightened standard of causation. *See, e.g.*, Prop. Cas. Insurers Ass'n of Am. v. Carson, No. 13-cv-8564, 2017 WL 2653069, at *8 (N.D. Ill. June 20, 2017) (recognizing that the Supreme Court's decision is consistent with HUD's disparate impact regulation, including on the element of causality). But at least one court has already disagreed, finding that a stricter causality test applies following the Court's 2015 decision. Inclusive Cmtys. Project, Inc. v. Lincoln Prop. Co., 920 F.3d 890, 902–03 (5th Cir. 2019) (stating that the Supreme Court's decision imposed a stricter test of causality).

[194] Reyes v. Waples Mobile Home Park Ltd. P'ship, 903 F.3d 415, 425 (4th Cir. 2018) (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994–95 (1988)), *cert. denied*, 139 S. Ct. 2026 (2019). In *Reyes*, the court found that plaintiffs, Latinx couples who lived at a mobile home park, satisfied the FHA's robust causality requirement by asserting that the park's policy requiring all adult tenants to provide documents proving legal status was likely to cause Latinx tenants to be disproportionately subject to eviction compared to other tenants. *Id.* at 429. Similarly, while not specifically weighing in on how to establish causation, the Second Circuit determined, post-*Inclusive Communities*, that plaintiffs demonstrated a prima facie case of disparate impact by offering disparities showing that the defendant's rezoning decision would decrease the housing available to minorities in the area. Mhany Mgmt., Inc. v. City of Nassau, 819 F.3d 581, 617, 620 (2d Cir. 2016).

[195] Ellis v. City of Minneapolis, 860 F.3d 1106, 1114 (8th Cir. 2017).

[196] Oviedo Town Ctr., II, L.L.L.P. v. City of Oviedo, 759 F. App'x 828, 833 (11th Cir. 2018).

affected than others by a particular policy unless the defendant's action was alleged to be the cause of the impact.[197]

Litigators should continue to follow the development of the case law on this issue. The recent circuit court cases interpreting the robust causality requirement, described above, illustrate the importance of obtaining data on water liens prior to filing and ensuring that any identified disparities in the placement and eventual sale of liens in Black versus white neighborhoods are statistically significant. These cases also underscore the need to carefully craft allegations specifically linking the disparities to the municipality's practices.[198]

2. The Municipality's Legitimate Interest

Once the plaintiff establishes a prima facie case of disparate impact, the burden shifts to the defendant to prove that the challenged practice is necessary to achieve one or more substantial, legitimate, and nondiscriminatory interests.[199] In cases against governmental entities, such as local municipalities, the Supreme Court has described this as the "public interest."[200] The defendant's justification must be supported by evidence and may not be hypothetical or speculative.[201]

In a case challenging water liens, the defendant municipality is likely to argue that the city is in grave financial difficulty (perhaps impacting its ability to make needed infrastructure upgrades) due to the fact that residents are

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[197] *Lincoln Prop. Co.*, 920 F.3d at 906. In *Lincoln Property*, a fair housing organization filed suit under the FHA against the owners and management company of apartment complexes, alleging that the defendants' policy of not accepting housing vouchers at their properties disproportionately excluded Black potential tenants. *Id.* at 895–96. To support its allegations, the plaintiff offered statistical evidence showing that voucher holders in the area were disproportionately Black and disproportionately lived in majority-minority census tracts. *Id.* at 897. According to the Fifth Circuit, this data did not support an inference that the defendants' refusal to accept housing vouchers, or any change to their policy, caused Black persons to be the dominant group of voucher holders in Dallas. *Id.* at 907. In the court's view, the plaintiff made no allegation to support an inference that the defendants bore any responsibility for the geographic distribution of minorities throughout the Dallas area prior to the implementation of the "no vouchers" policy, and pleaded no facts showing Dallas's racial composition before implementation of the policy or how that composition had changed, if at all, since the policy was implemented. *Id.* Thus, the court found that it was entirely speculative as to whether the defendants' policy, as opposed to some other factor, *not* attributable to them, caused there to be less minority habitation in individual census tracts after the policy was implemented. *Id.*

[198] *See, e.g.*, Nat'l Fair Hous. All. v. Fed. Nat'l Mortg. Ass'n, 294 F. Supp. 3d 940, 948 (N.D. Cal. 2018) (finding that plaintiffs adequately pleaded an inference of causation when challenging defendant's policy of basing decisions to maintain foreclosed properties on their age and value and noting that the issue of proof would be resolved at the summary judgment stage).

[199] 24 C.F.R. § 100.500(c)(2) (2019). In *Inclusive Communities*, the Court articulated this standard as requiring the defendant to prove that its challenged policy is "necessary to achieve a valid interest." Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2522–23 (2015).

[200] *Inclusive Cmtys.*, 135 S. Ct. at 2518.

[201] 24 C.F.R. § 100.500(b)(2).

not paying their water bills.[202] It may contend that selling water liens or foreclosing on properties is the only way for the city to recoup those losses. However, in jurisdictions with a history of overbilling customers, which is not uncommon, the plaintiff could argue that the water charges were not lawfully assessed and thus their collection cannot be considered a legitimate interest.[203] Additionally, tax sales often garner very little revenue for a city. For example, as alleged in *Pickett*, Cleveland Water recovered just 0.59% of its operating revenue through water lien sales conducted between 2012 and 2016.[204] In Detroit, more than a third of occupied properties failed to sell in the 2015 tax auction, and those that did sell recovered far less than their purported tax debts—less than $5,000 per property, on average.[205]

Depending on the jurisdiction, the municipality may also argue that lien sales or foreclosures are necessary to dispose of unused properties, an issue in many areas following the recent recession. But, as described above, occupied homes are regularly sold at tax auctions.[206] Additionally, tax sales themselves can increase a city's stock of abandoned and vacant properties. In *MorningSide*, plaintiffs pointed to studies concluding that tax foreclosures in Detroit increased the number of unoccupied properties in the city and contributed to the deterioration of neighborhoods and further disintegration of the property tax base.[207] If similar evidence regarding vacant properties is available in the relevant jurisdiction, a court may not accept this justification as legitimate.

Finally, the defendant jurisdiction may argue that its legitimate interest is in following the mandates of the local or state law permitting lien sales. This argument should fail. The FHA specifically preempts any state or local law that requires or permits a discriminatory housing practice.[208] Further,

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[202] Given that LDF filed *Pickett* shortly before this Article was finalized for publication, this Article does not address any subsequent responsive briefing by the City of Cleveland. The city did not comment on the lawsuit's filing. Mark Naymik, *Cleveland Water Department Discriminates Against Customers in Black Neighborhoods, New Lawsuit Claims*, WKYC STUDIOS (Dec. 19, 2019), https://www.wkyc.com/article/news/investigations/new-lawsuit-claims-city-of-cleveland-water-department-discriminates-against-black-customers/95-f56d7802-cb02-4c5d-9f6c-b0c32d25e77f, *archived at* https://perma.cc/B6TD-MKKK.

[203] *See* Mayers v. Ridley, 465 F.2d 630, 638–39 (D.C. Cir. 1972) (holding that a Recorder's Office practice of neutrally recording illegal property documents did not serve any legitimate governmental interest).

[204] CITY OF CLEVELAND WATER, CONTROLLING COSTS FOR ALL CLEVELAND WATER CUSTOMERS (Jan. 26, 2017), http://www.clevelandwater.com/blog/controlling-costs-all-cleveland-water-customers, *archived at* https://perma.cc/4LMW-E9PT; *see also Pickett* Complaint, *supra* note 5, at 15.

[205] Plaintiffs' Motion for Preliminary Injunction and Brief in Support at 6, MorningSide Cmty. Org. v. Sabree, No. 16-008807-CH (Mich. Cir. Ct. Aug. 12, 2016) (citing Alsup, *supra* note 89 (noting an average auction sale price of $5,200 for occupied homes in certain areas and finding that homes in other areas sold for much less)).

[206] *See, e.g.*, *supra* note 87 and accompanying text.

[207] SANDS & SKIDMORE, *supra* note 88, at 24 (cited in Plaintiffs' Motion for Preliminary Injunction and Brief in Support, *supra* note 205, at 16); DEWAR, *supra* note 88, at 17–18 (same).

[208] 42 U.S.C. § 3615 (2012).

courts have found that precluding a finding of disparate impact liability simply because a defendant is following a mandated statutory scheme contravenes the goal of the FHA in preventing all forms of housing discrimination.[209] Evidence that the municipality is exercising discretion in its water lien practices, adversely impacting Black residents, may be helpful in rebutting this purported legitimate interest. Such a showing would demonstrate that a finding in favor of the plaintiff would not "displace valid governmental . . . priorities" but instead would aid in "'remov[ing] artificial, arbitrary, and unnecessary barriers.'"[210]

3. Less Discriminatory Alternatives

Even if the defendant municipality demonstrates a legitimate interest in its water lien practices, the plaintiff may still prevail by proving that this interest could be achieved through a less discriminatory alternative.[211] The loss of a home based on unpaid water debt is an extreme result, and the proffered alternatives should focus on less draconian bill collection measures that the municipality could utilize, entirely eliminating the risk of foreclosure and eviction.

For example, the municipality could enter into payment plans with delinquent customers, based on their ability to repay debt that is actually owed (i.e., not based on inaccurate billing), before placing liens on homes or selling properties. Payment plans must guarantee key protections for customers, including uniform and consistent terms and a procedure for appeal if plans are denied or originated on onerous terms.[212] They must also be well-publicized so customers know the options available to them.[213] Plans must be a

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[209] *See, e.g.*, Burbank Apartments Tenant Ass'n v. Kargman, 48 N.E.3d 394, 409 (Mass. 2016).

[210] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2524 (2015). In the *Inclusive Communities* decision, Justice Kennedy repeatedly emphasized that certain "safeguards" must be applied in disparate impact cases to ensure, inter alia, that racial considerations are not injected into every housing decision and that racial quotas are not being used by governmental entities in housing decisions. *Id.* at 2523–24.

[211] The Court in *Inclusive Communities* did not weigh in on the application of this element beyond reciting the language of HUD's discriminatory effects regulation. *Id.* at 2515 (citing 24 C.F.R. § 100.500 (2019)). HUD has stated that the plaintiff's less discriminatory alternative must serve the defendant's articulated interest, must be supported by evidence, and may not be hypothetical or speculative. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11473 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100); *see also supra* note 167 (discussing 78 Fed. Reg. 11460).

[212] *See, e.g.*, Montgomery L. Wilson, Cmty. Legal Servs., *Philadelphia's "Statutory Solution": Helping Low Income Homeowners in Philadelphia Save Their Homes from Municipal Property Tax*, 28 MGMT. INFO. EXCH. J. 43, 45 (2014) (identifying the inconsistency of payment plans as the most pervasive issue impacting homeowners seeking to pay off their property tax debt over time).

[213] *Cf. id.* (describing how poorly publicized payment plans are functionally inaccessible to delinquent homeowners).

true alternative to a lien, not an addition to one.[214] Along with payment plans, municipalities should implement affordability programs to reduce water charges for impoverished customers. One study found that cities with affordability programs experience a dramatic improvement in bill coverage payment ratios (the percentage of billed revenue actually paid) of their low-income customers.[215] For example, in Colorado, participants in a low-income affordability pilot program had an average payment ratio of 83% by the end of the pilot in 2011, while other low-income customers in the state had an average payment ratio of 55%.[216] This study found that affordability programs increased the total revenue collected by utilities and can decrease costs associated with collection efforts.[217]

Additionally, the municipality could revise its water lien policy to make it less onerous on customers—and less discriminatory in effect—although the risk of foreclosure or eviction might still remain for some. For example, it could decline to place liens on homes or sell properties based solely on unpaid water debt. It could avoid placing liens on homes or selling properties occupied by an owner or tenant, instead opting to take action only on unoccupied properties for overdue charges. It could also decline to place a lien or sell a property for arrears below a certain amount. Some jurisdictions do not have *any* statutory minimum of overdue charges for a property to be sold at tax sale or have thresholds of just a few hundred dollars,[218] but others require a higher level of debt before a property is eligible for tax sale. For example, in the District of Columbia, the minimum amount of arrears to qualify a homeowner for tax sale is $2,500.[219] The jurisdiction could also enact more protections for homeowners. After an elderly Rhode Island woman lost her home in 2005 for an overdue sewer bill of about $500,[220] the state passed a law requiring significant advance notice of delinquent liens prior to tax sale.[221] The law also permits municipalities to sell delinquent

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[214] For example, the *Pickett* plaintiffs allege that Cuyahoga County may enter into a payment plan with a delinquent customer in Cleveland, but the lien remains on the property while the customer makes payments. *Pickett* Complaint, *supra* note 5, at 27–28.

[215] Colton, Baltimore's Conundrum, *supra* note 23, at 44–45.

[216] *Id.* at 46.

[217] *Id.* at 47–50.

[218] *See supra* note 54 and accompanying text.

[219] D.C. Code § 47-1332(c)(2) (2019); *see also* Gov't of D.C., Office of Tax & Revenue, District of Columbia 2018 Real Property Tax Sale Informational Guide 5, https://otr.cfo.dc.gov/sites/default/files/dc/sites/otr/page_content/attachments/2018%20Tax%20Sale%20FAQ%20%282%29.pdf, *archived at* https://perma.cc/ES22-WNP8.

[220] Press Release, R.I. Gen. Assembly, Senate Passes Crowley Bill to Fix Loophole in Madeline Walker Tax Lien Program (June 6, 2017), http://www.rilin.state.ri.us/pressrelease/_layouts/RIL.PressRelease.ListStructure/Forms/DisplayForm.aspx?List=c8baae31-3c10-431c-8dcd-9dbbe21ce3e9&ID=12924, *archived at* https://perma.cc/4NHA-FF9S.

[221] 44 R.I. Gen. Laws § 44-9-10 (2019) (notice of sale to taxpayer); *see also* Press Release, *supra* note 220.

liens to the state's housing finance agency so that it can work to keep homeowners in their homes.[222]

C. Addressing Potential Defenses

While the municipality may raise a number of defenses in an FHA suit challenging water liens, this Article addresses the following three arguments: (1) Section 3604(a) of the FHA does not apply to conduct that occurs after the acquisition of housing; (2) the plaintiff must pursue administrative remedies in lieu of or prior to filing a lawsuit in court; and (3) the Tax Injunction Act ("TIA") bars a federal (or state) suit. These defenses have regularly been raised in FHA cases of all types and in other lawsuits involving tax lien issues, and all three were raised in the *MorningSide* case challenging tax foreclosures in Wayne County (with mixed success).

1. Post-Acquisition Conduct

A municipal defendant may contend that Section 3604(a) of the FHA does not apply to its water lien practices because they occur after the home was initially sold to the homeowner or rented by the tenant. This defense is extremely common in FHA cases involving "post-acquisition conduct," meaning practices that transpire once the home is acquired or occupied.[223] Some courts have held that Section 3604(a) does not extend to post-acquisition practices, particularly following the Seventh Circuit's 2004 decision in *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*.[224] In *Halprin*, the Seventh Circuit attempted to curtail the broad applicability of the FHA by imposing a narrow interpretation of its purpose, focus, and history—at the expense of victims who suffer from discrimination after moving into their homes.

In *Halprin*, a married couple (the Halprins) sued their homeowners' association and its president, alleging that they suffered harassment and vandalism because the husband was Jewish.[225] The Halprins filed suit under various provisions of the FHA, including Section 3604(b), (but *not* Section 3604(a)), alleging religious discrimination and harassment.[226] The district

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[222] 44 R.I. GEN. LAWS § 44-9-8.3 (2019) (giving the Rhode Island Housing and Mortgage Finance Corporation the right of first refusal to acquire liens at tax sale).

[223] Wayne County raised this defense in *MorningSide*, claiming that the FHA only applies to conduct associated with the sale or rental of a dwelling and thus does not apply to tax foreclosures. Brief in Support of Motion for Summary Disposition by Defendants Eric Sabree and Wayne County, *supra* note 156, at 10. The circuit court rejected this argument. MorningSide Cmty. Org. v. Sabree, No. 16-008807-CH, slip op. at 13–16 (Mich. Cir. Ct. Oct. 17, 2016). For additional scholarship on the post-acquisition defense and how it is commonly asserted in FHA cases, see generally Rigel C. Oliveri, *Is Acquisition Everything? Protecting the Rights of Occupants Under the Fair Housing Act*, 43 HARV. C.R.-C.L. L. REV. 1 (2008).

[224] 388 F.3d 327 (7th Cir. 2004).

[225] 208 F. Supp. 2d 896, 898 (N.D. Ill. 2002).

[226] *Id.* at 899.

court dismissed the claims because the discriminatory and harassing actions did not occur in connection with the initial sale or rental of the Halprins' home.[227] In the court's view, the plaintiffs' allegations "fail[ed] to implicate concerns expressed by Congress in the FHA."[228]

On appeal, Judge Posner, writing for the Seventh Circuit panel, ultimately sided with the Halprins based on a HUD regulation interpreting 42 U.S.C. § 3617, the provision of the FHA prohibiting unlawful conduct that interferes with the "enjoyment of a dwelling."[229] However, he also ruled that Sections 3604(a) and (b) (again, even though the Halprins' suit was not filed under Section (a)) do not prohibit post-acquisition harassment, stating that "[t]he Fair Housing Act contains no hint either in its language or its legislative history of a concern with anything but access to housing."[230] While Judge Posner mused that Section 3604(a) may be construed to cover a constructive eviction ("[i]f you burn down someone's house you make it 'unavailable' to him"), he declined to follow prior Supreme Court and circuit court cases finding FHA violations under this provision for acts that occurred post-sale or rental.[231] In reaching his decision that the Halprins had no claim under Section 3604, Judge Posner concluded that these prior cases did not contain "a *considered* holding on the scope of the [FHA]."[232] Because the Halprins' claim was not related to the acquisition of housing, but to harassment *after* acquisition, the court held that Section 3604 did not apply.[233]

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[227] *Id.* at 899–905.

[228] *Id.* at 904.

[229] *Halprin*, 388 F.3d at 330.

[230] *Id.* at 329 (emphasis in original). *But see* 114 CONG. REC. 2270 (1968) (first section of Senate draft of FHA, stating that it was "the policy of the United States to prevent discrimination on account of race, color, religion, or national origin in the purchase, rental, financing, and occupancy of housing throughout the United States").

[231] *Halprin*, 388 F.3d at 329 (citing Trafficante v. Metro. Life Ins. Co., 409 U.S. 205 (1972); Neudecker v. Boisclair Corp., 351 F.3d 361, 364–65 (8th Cir. 2003); Krueger v. Cuomo, 115 F.3d 487 (7th Cir. 1997); DiCenso v. Cisneros, 96 F.3d 1004, 1008 (7th Cir. 1996); Honce v. Vigil, 1 F.3d 1085, 1090 (10th Cir. 1993)). However, some courts, including the Seventh Circuit, had limited the applicability of Section 3604(a) before *Halprin*. For example, in *Neighborhood Improvement Ass'n v. County of St. Clair*, plaintiffs alleged that the county's failure to maintain tax-delinquent properties discriminated against them and other Black residents by decreasing the value of their homes. 743 F.2d 1207, 1208 (7th Cir. 1984). The Seventh Circuit rejected plaintiffs' claims that Section 3604(a) covers post-acquisition conduct, holding that the provision is "designed to ensure that no one is denied the right to live where they choose for discriminatory reasons, but it does not protect the intangible interests in the already-owned property raised by the plaintiffs' allegations." *Id.* at 1210. *See also* Campbell v. City of Berwyn, 815 F. Supp. 1138, 1143 (N.D. Ill. 1993) (holding that plaintiffs could not bring a claim under Section 3604(a) related to police protection for their home because it was not related to their ability to move and secure housing); Miller v. City of Dallas, No. Civ.A. 3:98-CV-2955-D, 2002 WL 230834, at *13 (N.D. Tex. Feb. 14, 2002) (holding that plaintiffs had no claim under Section 3604(a) for the discriminatory provision of municipal services because they already owned their homes).

[232] *Id.* (emphasis in original).

[233] *Id.* at 330.

While the *Halprin* decision with respect to the applicability of Section 3604 to post-acquisition conduct was wrong for multiple reasons,[234] it sparked a concerning trend. Following the decision, some courts, including the Fifth Circuit and several district courts, began limiting FHA claims to conduct associated only with the initial sale or rental of a dwelling.[235] But within just a few years, the Seventh Circuit rejected *Halprin*'s restrictive interpretation of the FHA. In *Bloch v. Frischholz*, a Jewish family sued their condominium association under Sections 3604(a) and (b), challenging a rule that prevented them from placing objects outside the entrance of their unit doors, including the mezuzah, a religious symbol.[236] The district court granted summary judgment for the association based on *Halprin*, finding that post-acquisition claims were not authorized under Sections 3604(a) or (b) of the FHA.[237] The Seventh Circuit panel agreed.[238] The full en banc appellate court did not. That court found that prohibiting a claim of post-acquisition discrimination under Section 3604(a) would contravene the intent of the FHA:

> Prohibiting discrimination at the sale or rental but not at the moment of eviction would only go halfway toward ensuring the availability of housing. A landlord would be required to rent to an African American but then, the day after he moves in, could change all the locks and put up signs that said 'No blacks allowed.' That clearly could not be what Congress had in mind when it sought to create 'truly integrated and balanced living patterns.'[239]

While the court ultimately determined that the family's Section 3604(a) claim could not proceed because the association's rule did not make housing

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[234] *See* Oliveri, *supra* note 223, at 18–33 (concluding that *Halprin* failed to consider underlying HUD regulations interpreting Section 3604 of the FHA, incorrectly analogized the FHA to Title VII, ineptly relied on legislative history that had not weighed in post-acquisition conduct, and would result in anomalous results in FHA litigation).

[235] *See, e.g.*, Cox v. City of Dallas, 430 F.3d 734, 741–42 (5th Cir. 2005) (relying on *Halprin* and other cases, to rule that Section 3604(a) did not apply to plaintiffs' complaint, which alleged racial discrimination in the city's failure to police the operation of an illegal dump in a predominantly Black neighborhood, because the issue concerned habitability rather than the availability of housing); Lawrence v. Courtyards at Deerwood Ass'n, 318 F. Supp. 2d 1133, 1142–43 (S.D. Fla. 2004) (holding that Sections 3604(a) and (b) apply only to conduct related to the accessibility of housing); Ross v. Midland Mgmt. Co., No. 02-cv-8190, 2003 WL 21801023, at *4 (N.D. Ill. Aug. 1, 2003) (holding that the plaintiff could not bring a claim under Section 3604(a) of the FHA because she only alleged discrimination in the maintenance of her apartment, not in connection with renting her unit).

[236] 587 F.3d 771, 772–73 (7th Cir. 2009) (en banc).

[237] *Id.* at 775.

[238] Bloch v. Frischholz, 533 F.3d 562, 563 (7th Cir. 2008).

[239] *Bloch*, 587 F.3d at 776 (citing Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972)).

"unavailable" to them,[240] the decision effectively overruled *Halprin* in finding that this provision of the FHA may reach post-discriminatory conduct.[241]

Since *Halprin* and *Bloch*, several district courts have agreed that Section 3604(a) applies to post-acquisition conduct.[242] And others never adopted *Halprin*'s narrow reading of the FHA. For example, in 2006, the D.C. Circuit ruled that the "otherwise make unavailable" language of Section 3604(a) covers the loss of housing to those who already occupy it.[243] In *2922 Sherman Ave. Tenants' Ass'n v. District of Columbia*, several tenants' groups filed suit against the District of Columbia, alleging that the city's attempts to close buildings in a gentrifying neighborhood had a disparate impact on Latinx residents.[244] The city argued that, for two of the buildings at issue, no discrimination had occurred because it had merely posted closure notices but never actually closed the buildings (unlike another building at issue in the suit, from which tenants were forcibly removed, leaving them homeless).[245] The D.C. Circuit disagreed, finding that notices informing tenants that their buildings were "unfit for human habitation" and advising them "to seek alternative housing accommodations" qualified as making the buildings "unavailable" under Section 3604(a).[246]

Importantly, Section 3604(a) of the FHA is intended to be construed broadly, and the legislative history of the statute suggests that Congress was concerned with eliminating discrimination both before and after housing is acquired.[247] Limiting this provision to pre-acquisition conduct would signifi-

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[240] *Id.* at 779.

[241] *Id.* at 776. Further, the court found that Section 3604(b) could support the Blochs' claim, distinguishing *Halprin* by finding that the earlier decision involved "isolated acts of discrimination by other private property owners" and not a "contractual connection" between plaintiffs and the association, as in *Bloch*. *Id.* at 780. Post-acquisition conduct under Section 3604(b) is discussed *infra* section III.B.3.

[242] *See, e.g.*, Small v. Anchorage Homeowners Ass'n, No. 18-cv-01605, 2019 WL 1317636, at *4 (S.D. Ind. Mar. 21, 2019) (citing *Bloch* and acknowledging that Section 3604(a) applies to post-acquisition conduct, but finding that plaintiffs failed to properly plead a claim for constructive eviction); Radcliffe v. Avenel Homeowners Ass'n, No. 7:07-CV-48-F, 2013 WL 556380, at *5 (E.D.N.C. Feb. 12, 2013) (finding *Bloch* to be "well reasoned" and holding that the "FHA applies to post-acquisition conduct"); Lewis v. Schmidt, No. 10-cv-1819, 2011 WL 43029, at *9–10 (N.D. Ill. Jan. 4, 2011) (acknowledging that Section 3604(a) applies to post-acquisition conduct, but finding that the plaintiff was not constructively evicted from his home due to lack of water service because he did not allege he was an owner or tenant or that the denial of water service caused him to vacate the premises). Courts have also rejected *Halprin* in Section 3604(b) cases, as described further *infra* section III.B.3.

[243] 2922 Sherman Ave. Tenants' Ass'n v. District of Columbia, 444 F.3d 673, 685 (D.C. Cir. 2006).

[244] *Id.* at 676–77.

[245] *Id.* at 678, 684–85.

[246] *Id.* at 685. *See also* Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep't of Hous. & Urban Dev., 723 F. Supp. 2d 14, 23 (D.D.C. 2010) (holding Section 3604(a) applicable to actions other than sales and rentals that are tied to housing, including the inability of homeowners to inhabit their houses because of a governmental grant program).

[247] 114 CONG. REC. 2270 (1968) (the original purpose of the FHA was to prevent discrimination in the "purchase, rental, financing, and occupancy of housing throughout the United States").

cantly limit its applicability and reach. The expansive nature of Section 3604(a) prohibits post-acquisition policies that make housing unavailable and have a discriminatory effect on Black people.[248] Thus, in a case challenging a municipality's water lien practices that can lead to foreclosure and eviction, it is likely that a court will find that the post-acquisition defense does not apply.

2. *Exhaustion of Administrative Remedies*

In an action challenging water liens, the defendant municipality may argue that the plaintiff is barred from pursuing their claim in court due to the exclusive jurisdiction of the state tax board or tribunal.[249] This defense was raised in *MorningSide* and proved fatal to plaintiffs' FHA claim. While the circuit court agreed with plaintiffs that Wayne County's tax foreclosure policy qualified as prohibited conduct under the FHA, the court dismissed the FHA claim for lack of subject-matter jurisdiction in the same opinion.[250] The court held that the Michigan Tax Tribunal had exclusive jurisdiction over the claim, which it construed as a challenge to the county's statutory duty to equalize tax assessments.[251] The Michigan Court of Appeals affirmed the

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[248] *See, e.g.*, Saint-Jean v. Emigrant Mortg. Co., 50 F. Supp. 3d 300, 318–20 (E.D.N.Y. 2014); Pitchford v. Am. Title Co., No. 04-2743, 2007 WL 9706252, at *4 (W.D. Tenn. Mar. 29, 2007); Johnson v. Home Tech Co., No. 03-2567, 2006 WL 8434934, at *10 (W.D. Tenn. Feb. 24, 2006); Coleman v. Seldin, 181 Misc. 2d 219, 233–34 (N.Y. Sup. Ct. 1999) (finding that the FHA's broad prohibition on discrimination applied to the tax assessment policies of Nassau County, New York); *see also* Brighton Park Neighborhood Council v. Berrios, No. 17-CH-16453, 2019 WL 4178606, at *7 (Ill. Cir. Ct. Feb. 7, 2019) (order granting in part and denying in part defendants' motion to dismiss); MorningSide Cmty. Org. v. Sabree, No. 16-008807-CH, slip op. at 16–17 (Mich. Cir. Ct. Oct. 17, 2016).

[249] Defendants in FHA cases implicating local administrative remedies, such as zoning cases, often contend that a plaintiff must exhaust administrative remedies before filing a claim in court. Courts have generally rejected such arguments. *See* Huntington Branch, NAACP v. Town of Huntington, 689 F.2d 391, 393 n.3 (2d Cir. 1982) (noting that the purpose of allowing "immediate judicial review" of FHA claims would be undercut if plaintiffs were required to first exhaust state administrative remedies); Borum v. Brentwood Vill., LLC, 218 F. Supp. 3d 1, 14 (D.D.C. 2016) (holding that individuals seeking relief from an imminent violation of their federal rights through the FHA are not required to proceed through state-level administrative avenues such as a local zoning commission, as this would defeat the purpose of the remedy that Congress provided through the statute). While a case challenging water liens would not involve zoning, it may implicate a local tax board or tribunal, if applicable in the state, given the connection to property taxes and tax sales.

[250] *MorningSide*, No. 16-008807-CH, slip op. at 16–17.

[251] *Id.* at 7. The Michigan Supreme Court has held that the state tax tribunal has original and exclusive jurisdiction over "(1) a proceeding for direct review of a final decision, finding, ruling, determination, or order; (2) of an agency; (3) relating to an assessment, valuation, rate, special assessment, allocation, or equalization; (4) under the property tax laws." Hillsdale Cty. Senior Servs. v. Hillsdale County, 832 N.W.2d 728, 732 (Mich. 2013); *see also* MICH. COMP. LAWS ANN. § 205.731 (West 2019). This jurisdiction has been extended to include constitutional and civil rights causes of action brought under Section 1983 that raised factual issues within the scope of the Tribunal's tax expertise. *See, e.g.*, Johnston v. City of Livonia, 441 N.W.2d 41, 42 (Mich. Ct. App. 1989) (plaintiff alleged that the city's refusal to partition her property deprived her of its use and enjoyment without due process of law in violation of the Fourteenth Amendment); Johnson v. Michigan, 317 N.W.2d 652, 653, 657 (Mich. Ct. App.

lower court's order.[252] This effectively foreclosed plaintiffs from seeking relief for the discriminatory foreclosures, because Michigan Tax Tribunal procedures require property owners to file an initial claim with the local board of review within a few weeks of receiving their tax bill in order for the Tribunal to later assert jurisdiction over the appeal.[253] Because plaintiffs had not filed a complaint with the board of review after receiving their bills, they could not seek relief from the Tribunal once the lawsuit was dismissed. The plaintiffs in *Brighton Park* have faced a similar challenge, as defendants have argued that they should have filed a tax objection complaint pursuant to state law.[254] But in *Brighton Park*, the court has disagreed with defendants. Because plaintiffs, three nonprofit neighborhood associations, are not taxpayers and are not seeking a refund of taxes paid, the court held that they were not required to file a tax objection complaint prior to seeking relief in court under the FHA.[255]

While litigators should be aware of the ruling in *MorningSide*, it seems less likely that an FHA claim based on water liens would be dismissed on similar grounds. While there is undoubtedly a connection between water liens and taxes, particularly given that water debt can result in tax foreclosure, it does not mean that a local tax board would have any jurisdiction in a case involving water services. In some states, it is clear that the local property tax assessment appeal board does *not* have jurisdiction over water bills.[256] In these states, the board only has jurisdiction over real property values and assessments and other types of tax credits.[257] In other states, rele-

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1982) (plaintiffs alleged their tax assessments violated their rights to constitutional due process and equal protection, claiming that there was a conspiracy to assess their properties at unconstitutionally high rates); Johns Family Ltd. P'ship v. Charter Twp. of Chesterfield, No. 326649, 2016 WL 4129292, at *2 (Mich. Ct. App. Aug. 2, 2016) (plaintiffs alleged that the defendant city deprived them of due process under the Fifth and Fourteenth Amendments to the U.S. Constitution by charging them taxes pursuant to an unconstitutional statute).

[252] *MorningSide*, No. 336430, 2017 WL 4182985, at *4 (Mich. Ct. App. Sept. 21, 2017).

[253] MICH. COMP. LAWS ANN. § 211.30(4) (West 2019); CITY OF DETROIT, PROPERTY ASSESSMENT BOARD OF REVIEW PROCESS, https://detroitmi.gov/government/boards/property-assessment-board-review/property-assessment-board-review-process, *archived at* https://perma.cc/3XCB-B35Y.

[254] Brighton Park Neighborhood Council v. Berrios, No. 17-CH-16453, 2019 WL 4178606, at *5 (Ill. Cir. Ct. Feb. 7, 2019) (order granting in part and denying in part defendants' motion to dismiss).

[255] *Id.* Several of the *MorningSide* plaintiffs were also neighborhood associations, but the circuit court did not distinguish the jurisdiction of the Tax Tribunal on these grounds. Additionally, the plaintiffs in *MorningSide* were not seeking a refund of taxes paid or monetary damages. *MorningSide* Complaint, *supra* note 114, at 48 (requesting declaratory and injunctive relief for Wayne County's violation of the FHA).

[256] *See, e.g.*, MD. CODE ANN., TAX-PROP. § 3-107 (West 2019) (enumerating jurisdiction of the Maryland Property Tax Assessment Appeal Board); MICH. COMP. LAWS ANN. § 205.731 (West 2019) (setting forth the exclusive and original jurisdiction of the Michigan Tax Tribunal); OHIO REV. CODE ANN. § 5703.02 (West 2019) (describing the powers and duties of the Ohio Board of Tax Appeals).

[257] *See supra* note 255.

vant case law has established that water charges are not taxes.[258] For example, the Ohio Supreme Court has held that water rates or charges collected by a municipality cannot be classed as taxes if their use is limited to the waterworks purposes set forth in a particular state statute, and not for general revenue raising purposes.[259] That state statute provides that any funds that remain after payment of the expenses of conducting and managing the waterworks may be applied only to specific water-related projects, such as repairs or extension of the waterworks.[260] Only municipalities without a waterworks or sewage systems may transfer surplus funds to the general fund of the municipal corporation.[261] In Cleveland, for example, the water department is controlled by the city and thus is required to apply all surplus revenues to water-related projects.[262] As a result, water charges collected in Cleveland are not taxes, and the Ohio Board of Tax Appeals should not have jurisdiction over a claim regarding water liens. However, state laws may vary, and litigators should carefully review the law and jurisdiction of the tax board or tribunal, if applicable.[263]

If the relevant state law does not clearly specify that water charges do not fall within the jurisdiction of the tax board or tribunal, the plaintiff could still rebut this defense by pointing to several provisions of the FHA. First, while administrative relief (via a HUD complaint) is available to aggrieved persons, there is no requirement under the FHA that plaintiffs must exhaust administrative remedies before proceeding with a lawsuit in court.[264] Instead, the FHA confers a right to "immediate judicial review" of claims.[265] This aligns with the general presumption that civil rights complainants should have access to the courts. In *Burnett v. Grattan*, the Supreme Court noted that the right to enforce civil rights in court "exist[s] independent of any other legal or administrative relief that may be available as a matter of federal or state law" and these actions are "judicially enforceable *in the first*

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[258] *See, e.g.*, Himebaugh v. City of Canton, 61 N.E.2d 483, 485 (Ohio 1945); *cf.* City of Franklin v. Harrison, 170 N.E.2d 739, 742 (Ohio 1960).

[259] *See, e.g.*, *Himebaugh*, 61 N.E.2d at 485; *cf. Harrison*, 170 N.E.2d at 742.

[260] OHIO REV. CODE ANN. § 743.05 (West 2019).

[261] *Id.*

[262] *See* CLEVELAND, OHIO, CODE ch. 19, § 111 (2019) (empowering the city's Director of Public Utilities to manage and supervise the municipal water enterprise, among other responsibilities).

[263] According to a state survey by the American Institute of Certified Public Accountants ("AICPA"), as of 2016, thirty-five states, including the District of Columbia, had some form of a tax tribunal or court. AICPA State and Local Tax Tech. Res. Panel, *Chart of States With and Without State Tax Tribunals* (Feb. 3, 2016), https://www.aicpa.org/Advocacy/State/DownloadableDocuments/Chart-of-States-with-and-without-State-Tax-Tribunals.pdf, *archived at* https://perma.cc/EBQ9-VQ3F. Sixteen states did not have tax tribunals. *Id.*

[264] *See* Bryant Woods Inn v. Howard County., 124 F.3d 597, 601 (4th Cir. 1997).

[265] Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 106 (1979); *id.* at 125–26 (Rehnquist, J., dissenting) (examining the legislative history of the FHA and observing that Congress "carefully chose[ ] language" allowing immediate access to judicial power to individuals "directly victimized by a discriminatory housing practice").

instance."[266] Local tax boards are typically considered quasi-judicial, administrative agencies,[267] and an action before an administrative agency is generally not considered a civil action.[268]

Second, even if water charges could arguably fall within the jurisdiction of a state tax board or tribunal, the plaintiff could argue that such a jurisdictional rule may not displace their express right under the FHA to present their claim to a court, whether state or federal.[269] While a plaintiff may generally seek to litigate a federal civil rights claim in federal court, litigation in state court may be preferable in certain jurisdictions or even required under the TIA, as discussed further below.[270] But issues can arise when state courts decline to exercise jurisdiction over a federal cause of action, due to local jurisdictional rules set forth in state law (as in *MorningSide* when the circuit court refused jurisdiction over plaintiffs' FHA claim) or other reasons.

The Supreme Court has made clear that state courts considering federal claims have a duty to enforce federal laws according to their regular modes of procedure.[271] Accordingly, a state court may not deny a plaintiff's federal rights under the FHA in the absence of a "valid excuse."[272] There are only two narrowly defined circumstances that give rise to a valid excuse: when Congress expressly ousts state courts of jurisdiction or when a state court

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[266] 468 U.S. 42, 50 (1984) (emphasis added); *see also id.* (the "dominant characteristic of civil rights actions" is that "they belong in court").

[267] *See, e.g.*, Penn. R.R. Co. v. Porterfield, 267 N.E.2d 792 (Ohio 1971) (the Ohio Board of Tax Appeals is a quasi-judicial, administrative agency).

[268] *See* Tenbusch v. Dep't of Civil Serv., 431 N.W.2d 485, 492 (Mich. Ct. App. 1988) (holding that a proceeding arising before a state administrative agency like the Tax Tribunal "is not a civil action").

[269] The FHA explicitly provides that claims may be filed in federal or state court. 42 U.S.C. § 3613(a)(1)(A) (2012).

[270] While judges' partisan affiliations are certainly no guarantee of a particular outcome, President Trump's judicial appointees are expected to have a long-lasting effect on the federal judiciary, because they are generally ideologically conservative and young in age. *See* Colby Itkowitz, *1 in Every 4 Circuit Court Judges is Now a Trump Appointee*, WASH. POST (Dec. 21, 2019), https://www.washingtonpost.com/politics/one-in-every-four-circuit-court-judges-is-now-a-trump-appointee/2019/12/21/d6fa1e98-2336-11ea-bed5-880264cc91a9_story.html, *archived at* https://perma.cc/M3PV-AA4Q; Ann E. Marimow, *Two Years In, Trump's Appeals Court Confirmations at a Historic High Point*, WASH. POST (Feb. 4, 2019), https://www.washingtonpost.com/local/legal-issues/two-years-in-trumps-appeals-court-confirmations-at-a-historic-high-point/2019/02/03/574226e6-1a90-11e9-9ebf-c5fed1b7a081_story.html, *archived at* https://perma.cc/X5HG-DQ4F; Li Zhou, *Study: Trump's Judicial Appointees are More Conservative than Those of Past Republican Presidents*, VOX (Jan. 25, 2019), https://www.vox.com/2019/1/25/18188541/trump-judges-mconnell-senate, *archived at* https://perma.cc/J7V9-AR2N. As a result, civil rights litigators may look to file lawsuits in state courts, where judges may be more receptive to their claims. *Cf.* Louis Jacobson, *Liberals Prevail in State Supreme Court Elections*, GOVERNING THE STATES AND LOCALITIES (Nov. 8, 2018), https://www.governing.com/topics/politics/gov-democrats-2018-state-supreme-court-elections.html, *archived at* https://perma.cc/VB8W-KSN7 (noting that moderate-to-liberal judicial candidates prevailed in state supreme court elections in several states).

[271] *See* Howlett v. Rose, 496 U.S. 356, 367 (1990); Claflin v. Houseman, 93 U.S. 130, 136–37 (1876).

[272] *Howlett*, 496 U.S. at 369; Mondou v. N.Y., New Haven & Hartford R.R. Co., 223 U.S. 1, 58 (1912).

refuses jurisdiction due to a neutral state rule regarding the administration of the courts.[273] Neither should apply here. First, there is no relevant congressional authority ousting state courts of jurisdiction over FHA claims. Instead, there is explicit congressional authority under the statute authorizing such claims.[274]

Second, state procedures concerning tax appeals may not be considered "neutral rules" of judicial administration. The Supreme Court has made clear that a rule of judicial administration is not "neutral" if it burdens or undermines federal law.[275] In *Felder v. Casey*, the Court was clear that federal law takes state courts as it finds them only insofar as those courts employ rules that do not "impose unnecessary burdens upon rights of recovery authorized by federal laws."[276] A state rule burdens or undermines federal law—and is thus nullified—if the two conflict.[277] A conflict arises when (1) "compliance with both federal and state regulations is a physical impossibility;"[278] or (2) when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[279]

Felder provides a clear example of how a state jurisdictional rule may burden or undermine federal law, rendering the state law nullified. In that case, a Black man in Wisconsin was allegedly beaten by police officers who arrested him on a disorderly conduct charge that was later dropped.[280] The man later filed suit in state court pursuant to 42 U.S.C. § 1983 ("Section 1983"),[281] alleging that the beating and arrest were racially motivated and violated his constitutional rights under the Fourth and Fourteenth Amendments to the U.S. Constitution.[282] The officers moved to dismiss the case based on the plaintiff's failure to comply with a Wisconsin law imposing certain notice and filing requirements on plaintiffs in state court actions against state or local governmental entities or officers, including in Section 1983 suits.[283] One aspect of the state statute required plaintiffs to provide written notice of their claim within 120 days of the alleged injury or otherwise demonstrate that the relevant government entity had actual notice of the

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[273] Haywood v. Drown, 556 U.S. 729, 735 (2009); *Howlett*, 496 U.S. at 372.

[274] 42 U.S.C. § 3613(a)(1)(A).

[275] *See, e.g.*, *Haywood*, 556 U.S. at 739 ("A jurisdictional rule cannot be used as a device to undermine federal law, no matter how evenhanded it may appear."); *Howlett*, 496 U.S. at 371 (stating that "[a]n excuse that is inconsistent with or violates federal law is not a valid excuse" for a state to decline jurisdiction over a federal claim); Felder v. Casey, 487 U.S. 131, 144 (1988) (The "burdening of a federal right . . . is not the natural or permissible consequence of an otherwise neutral, uniformly applicable state rule.").

[276] 487 U.S. at 150; *see also Howlett*, 496 U.S. at 372 (citing *Felder* for the proposition that states "may apply their own neutral procedural rules to federal claims unless those rules are preempted by federal law").

[277] *See* Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982).

[278] Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963).

[279] Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

[280] *Felder*, 487 U.S. at 134–35.

[281] *Cf. supra* note 159 (discussing litigating Section 1983 claims in state court).

[282] *Felder*, 487 U.S. at 135.

[283] *Id.* at 136.

claim.[284] This functioned as a truncated statute of limitations for a Section 1983 claim, reducing the amount of time that aggrieved persons had to recognize that they had been deprived of a federal constitutional or statutory right from two years (the otherwise applicable limitations period) to four months.[285] While the state appellate court found this notice-of-claim law inapplicable to federal civil rights actions filed in state court, the Wisconsin Supreme Court disagreed, finding that states retain the authority under the Constitution to prescribe the rules and procedures that govern actions in their own tribunals.[286] Accordingly, that court held that the plaintiff was bound by the state notice-of-claim law because he had chosen to vindicate his federal constitutional rights in state court.[287]

The Supreme Court reversed, holding that the state law was preempted when Section 1983 claims were filed in state court.[288] The Court based its ruling on two key determinations. First, it found that the notice-of-claim statute forced civil rights victims who file claims in state courts to comply with a requirement "entirely absent from civil rights litigation in federal courts."[289] In the Court's view, the state law severely reducing the amount of time for civil rights victims to file claims amounted to a substantive burden that was "inconsistent in both design and effect with the compensatory aims of the federal civil rights laws."[290] Specifically, by acting to limit governmental liability, the Wisconsin law inhibited the purpose of Section 1983, which was enacted to provide compensatory relief to those deprived of their federal rights by state actors.[291] The Court also determined that enforcement of the Wisconsin statute would "frequently and predictably produce different outcomes in federal civil rights litigation based solely on whether that litigation takes place in state or federal court."[292] Therefore, the law could not be considered a neutral, uniformly applicable state rule and would not apply when a plaintiff asserts a federal right in state court.[293]

In *MorningSide*, which was litigated in state court, plaintiffs relied heavily on *Felder* and related cases to argue to the appellate court that the lower court's determination that the Michigan Tax Tribunal had exclusive jurisdiction impermissibly burdened their rights under the FHA.[294] For example, plaintiffs pointed to the Michigan Tax Tribunal procedures mentioned above, requiring property owners to file an initial claim with the local board

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[284] *Id.*
[285] *Id.* at 136, 141–42.
[286] *Id.* at 137.
[287] *Id.*
[288] *Felder*, 487 U.S. at 138.
[289] *Id.* at 141.
[290] *Id.*
[291] *Id.*
[292] *Id.*
[293] *Id.* at 144, 151.
[294] Plaintiffs' Application for Interlocutory Leave to Appeal at 21–22, MorningSide Cmty. Org. v. Sabree, No. 336430 (Mich. Ct. App. Jan. 5, 2017).

of review within a few weeks of receiving their tax bill in order for the Michigan Tax Tribunal to later acquire jurisdiction.[295] They argued that this requirement shortened the amount of time that they had to file an FHA claim from two years (as provided by Section 3613 of the statute) to just *weeks* after receipt of their tax bill.[296] This abbreviated statute of limitations stood as an obstacle to the accomplishment and execution of the broad remedial purposes of the FHA, which was enacted to eliminate all forms of housing discrimination throughout the country.[297] The Michigan rules thus operated as a substantive burden on plaintiffs' federal rights.

In addition to contravening the purposes of the FHA, it would have been a "physical impossibility"[298] for plaintiffs to comply with both the requirements of the FHA and the Michigan Tax Tribunal procedures, further demonstrating why the state rules should have been preempted by the federal law. Practically speaking, plaintiffs could not have credibly alleged an FHA violation challenging Wayne County's tax foreclosure practice based on their tax bills alone. Plaintiffs' claim required data on properties that had been foreclosed on and were at risk of foreclosure sale—information that was not available until three *years* after the tax bills were sent to homeowners.[299] It also required an expert analysis of the racial composition of the census blocks in which the foreclosed homes were located and a determination of whether Black homeowners were disparately impacted.[300] This information was not—and could not be—available to plaintiffs within the time allotted under the Tax Tribunal procedures to file a claim with the board of review after receiving their annual bills.[301]

The reasoning in *Felder* should have applied to plaintiffs' claim in *MorningSide*: as in the Supreme Court case, plaintiffs argued that state procedures impermissibly burdened their federal statutory rights. However, plaintiffs' appeal in *MorningSide* was not successful.[302] In its opinion af-

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[295] *Id.* at 20 (citing 42 U.S.C. § 3613(a)(1)(A) (2012)). Plaintiffs cited other reasons that Tax Tribunal procedures limited their rights under the FHA, including that the procedures expressly conflicted with the federal statute's text, narrowed the scope of relief plaintiffs could obtain, and imposed a mandatory administrative exhaustion requirement that is inconsistent with the statute. Plaintiffs' Application for Leave to Appeal at 22–24, 26–30, *MorningSide*, No. 156707 (Mich. Nov. 7, 2017).

[296] *See supra* note 295.

[297] *See* 42 U.S.C. § 3601 ("It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."); Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2511 (2015) (stating that the purpose of the FHA is "to eradicate discriminatory practices within a sector of our Nation's economy").

[298] Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963) ("A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility . . . .").

[299] Plaintiffs' Application for Leave to Appeal, *supra* note 295, at 24–25.

[300] *Id.*

[301] *Id.* at 21, 27.

[302] *MorningSide*, No. 156707 (Mich. Jan. 24, 2018) (order granting motion for immediate consideration and denying application for leave to appeal).

firming the circuit court's dismissal of plaintiffs' case, the Michigan Court of Appeals focused most of its attention on whether the Tribunal had original and exclusive jurisdiction over plaintiffs' claim, as that jurisdiction is defined by Michigan law, and concluded that it did.[303] It touched on plaintiffs' FHA arguments only briefly, stating that the statute's concurrent federal and state jurisdiction does not mean that a state court is required to hear a federal claim when that court is otherwise prohibited from doing so because of a neutral state rule regarding its administration.[304] The decision precluded plaintiffs from challenging their tax foreclosures under the FHA, despite the circuit court's determination that plaintiffs had properly stated a claim under the statute.

While the courts in *MorningSide* were not persuaded that the FHA preempted Michigan's Tax Tribunal procedures, this argument is still worth pursuing in another case challenging lien sales or tax foreclosures, particularly before a court with more familiarity with the FHA. Further, as stated above, a defense that the plaintiff must seek relief from the state tax tribunal may not have much traction in a case involving underlying water debt, which is unlikely to be subject to the jurisdiction of that body.

3. The Tax Injunction Act

In many states, liens based on overdue water or sewer charges may be sold at tax sale.[305] Given this, the defendant jurisdiction may argue that the TIA prohibits the plaintiff from challenging water liens in federal court. Importantly, litigators should be aware of the contours and potential impacts of the TIA, *even if* case law in the relevant jurisdiction holds that water charges are not taxes. As explained below, that determination may not be dispositive. The TIA has been interpreted broadly to cover many types of payments or charges that seemingly have no connection (or a very tenuous one) to state taxation.

The TIA provides that:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.[306]

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[303] *MorningSide*, No. 336430, 2017 WL 4182985, at *2–4 (Mich. Ct. App. Sept. 21, 2017).

[304] *Id.* at 8 (citing Howlett v. Rose, 496 U.S. 357, 372 (1990)). The appellate court did not explicitly hold that the Michigan Tax Tribunal procedures are "neutral" but impliedly did so, calling plaintiffs' arguments "unavailing." *Id.* The court did not address the argument that the Michigan rules burdened or undermined plaintiffs' rights under the FHA.

[305] *See, e.g.*, IOWA CODE § 384.84 (2019); ME. STAT. tit. 35-A, § 6111-A (2019); MICH. COMP. LAWS ANN. § 141.121(3) (West 2019); OR. REV. STAT. § 223.594(2) (2019); *see generally supra* note 41 (listing state and local laws that permit municipalities to place liens on homes for unpaid water or sewer debt).

[306] 28 U.S.C. § 1341 (2012).

Due to concerns about comity and federalism (in plain language, federal court interference with state business), the TIA cabins the adjudication of issues related to state taxation to state forums. It prohibits federal courts from issuing declaratory judgments holding state tax laws unconstitutional[307] or entertaining damages actions in suits concerning the validity of state tax systems.[308] In addition to state taxes, the TIA has been applied to municipal and county taxes.[309]

The TIA is limited in one key respect: it only applies to taxes.[310] But the analysis of whether a particular assessment is a "tax" for TIA purposes is not necessarily straightforward. Courts apply federal law to the determination, and so a particular assessment that is *not* a tax under the relevant state law may still be categorized as one under the TIA.[311] Other charges that are not obviously taxes have been held to fall within the ambit of the statute. For example, courts have held that milk handling surcharges, monthly payments by parolees into a victim's compensation fund, and licensing fees for video poker machines are taxes for TIA purposes.[312]

A plaintiff may be able to circumvent the TIA by arguing that water charges are properly considered "fees" rather than "taxes." The fee test has most often been used to determine whether a regulatory assessment or charge is a tax for TIA purposes.[313] Because the TIA applies only to taxes, municipal charges that are properly considered "fees" are outside the scope of the statute.[314] To determine if an assessment is a fee or a tax, courts generally distinguish between "broader-based taxes that sustain the essential flow of revenue to state (or local) government and fees that are connected to some regulatory scheme."[315] While this distinction can be "blurry,"[316] three factors guide this analysis: (1) what entity imposes the assessment; (2) who pays the

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[307] California v. Grace Brethren Church, 457 U.S. 393, 408 (1982).

[308] Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 116 (1981).

[309] *See, e.g.*, Rosewell v. LaSalle Nat'l Bank, 450 U.S. 503 (1981) (applying TIA to county property tax); Hager v. City of West Peoria, 84 F.3d 865, 868 n.1 (7th Cir. 1996).

[310] *See, e.g.*, Miami Herald Pub. Co. v. City of Hallandale, 734 F.2d 666, 666–67, 670 (11th Cir. 1984); Rendon v. Florida, 930 F. Supp. 601, 604 (S.D. Fla. 1996).

[311] *See* Hedgepeth v. Tennessee, 215 F.3d 608, 612 (6th Cir. 2000) (citing Wright v. McClain, 835 F.2d 143, 144 (6th Cir. 1987)). In fact, whether the body imposing the assessment labels it as a tax or fee is not dispositive for TIA purposes. *See* Collins Holding Corp. v. Jasper County, 123 F.3d 797, 800 (4th Cir. 1997) (citing Cumberland Farms, Inc. v. Tax Assessor, 116 F.3d 943, 946 (1st Cir. 1997)).

[312] *Cumberland Farms*, 116 F.3d at 947 (finding that milk handling surcharge was closer to a tax than a fee for TIA purposes); *Wright*, 835 F.2d at 145 (holding that parolee payments were taxes under the TIA); Collins Holding Corp. v. Jasper County, 181 F.3d 87 (Table), 1999 WL 365557, at *1–2 (4th Cir. 1999) (finding that licensing fees for video poker machines were taxes for purposes of the TIA).

[313] Am. Civ. Liberties Union of Tenn. v. Bredesen, 441 F.3d 370, 374 (6th Cir. 2006) (citing San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n, 967 F.2d 683 (1st Cir. 1992)).

[314] *See, e.g.*, Bidart Bros. v. Cal. Apple Comm'n, 73 F.3d 925, 930 (9th Cir. 1996).

[315] *Collins*, 123 F.3d at 800; *see also* Hager v. City of West Peoria, 84 F.3d 865, 871 (7th Cir. 1996); *San Juan Cellular*, 967 F.2d at 685.

[316] *Collins*, 123 F.3d at 800.

assessment; and (3) the revenue's ultimate use.[317] In evaluating these three factors, the statutory or regulatory scheme pertaining to water billing and use of revenues will be essential to the determination.

With respect to the first factor, courts are more likely to consider an assessment to be a tax if it is imposed directly by the legislature as opposed to another body, such as an administrative agency.[318] The plaintiff should determine how water rates are set and assessed in the relevant jurisdiction. If rates are set by an administrative body, like the city's water department, the charges are more likely to be considered "fees" and thus not covered by the TIA.[319]

To evaluate the second factor, courts examine the class of people who pay the assessment. An assessment paid by a "broad class of parties is more likely to be a tax than an assessment imposed upon a narrow class."[320] Although water charges are generally paid by a large group of persons, depending on the size of the jurisdiction, the fact that water charges are paid *only* by those who voluntarily receive the service will be highly relevant, supporting an argument to characterize them as fees.[321]

Third, courts look to the assessment's ultimate use, distinguishing between an assessment treated as general revenue and paid into the state's fund and an assessment placed in a special fund and only used for particular purposes.[322] The former is more likely to be categorized as a tax; the latter as a fee.[323] However, an assessment placed in a special fund may still be consid-

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[317] *Bidart Bros.*, 73 F.3d at 931 (citing *San Juan Cellular*, 967 F.2d at 685).

[318] *Id.*

[319] Many jurisdictions grant the municipality or the state public service commission the power to set water rates. *See, e.g.*, BALT., MD., CITY CODE, art. 24, § 3-1 (2016), http://ca.baltimorecity.gov/codes/Art%2024%20-%20Water.pdf, *archived* at https://perma.cc/MS8S-9J55 (stating that the Board of Estimates may establish, assess, and change water and wastewater rates, on the recommendation of the Director of Finance and Director of Public Works); CLEVELAND, OHIO, CODE ch. 19, § 112 (2019), http://www.clevelandcitycouncil.org/legislation-laws/charter-codified-ordinances, *archived* at https://perma.cc/DS6P-ZBQV (water rates are managed and supervised by the Director of Public Utilities and fixed by Board of Control, subject to approval by city council); D.C. CODE § 34-2202.16 (2019) (providing that the Water and Sewer Authority establishes and adjusts retail water and sewer rates); FLA. STAT. § 367.081 (2019) (water rates set by Florida Public Service Commission); OHIO REV. CODE ANN. § 743.04 (West 2019) (authorizing the director of public service to assess and collect water rents).

[320] *Bidart Bros.*, 73 F.3d at 931.

[321] Page v. City of Wyandotte, 666 F. App'x 390, 393 (6th Cir. 2016).

[322] *Bidart Bros.*, 73 F.3d at 932. *See also* BellSouth Telecomms. Inc. v. Farris, 542 F.3d 499, 502 (6th Cir. 2008) (The TIA operates only to shield taxes defined as assessments for general revenue raising purposes and does not apply when a lawsuit does not directly threaten the ultimate purpose of raising tax revenue).

[323] Trailer Marine Transp. Corp. v. Rivera Vasquez, 977 F.2d 1, 6 (1st Cir. 1992) (fees held separately from general funds and used only to compensate automobile accident victims were not taxes under TIA); Gov't Supplies Consolidating Servs., Inc. v. Bayh, 975 F.2d 1267, 1271 n.2 (7th Cir. 1992) (fees imposed on waste transportation vehicles used to implement waste disposal regulatory system were not taxes).

ered a tax if expended to provide a general benefit to the public.[324] As stated above, Ohio law, for example, mandates that municipal waterworks apply any surplus revenue to a special fund,[325] and the Ohio Supreme Court has held that a municipality's water rates or charges are not taxes when their use is limited to this statutory provision and not for general revenue.[326] Further, Cleveland has specified that its revenue from water charges is allocated entirely to water-related infrastructure, water treatment and delivery, and water customer service and administration.[327] While these factors provide strong support in favor of categorizing water charges as fees for TIA purposes in this example, a court may still reject this argument given that water services generally benefit the public.

There are a few other ways a plaintiff could argue that the TIA should not apply. In addition to the fee test, courts have applied a different test to evaluate whether "contractual debts" are taxes under the TIA.[328] In *American Civil Liberties Union of Tennessee v. Bredesen*, the Sixth Circuit held that a premium charge to purchase a specialty "Choose Life" license plate was not a TIA-tax, but instead an "ordinary debt."[329] While taxes rely on the state's "sovereign power to coerce sales," regular contractual payments arise from "willing purchases" like those made by "any ordinary market participant."[330]

Courts have used the *Bredesen* test to evaluate unpaid electrical charges, perhaps the closest comparison to water debt. In *Brown Bark I, L.P. v. Traverse City Light & Power Department*, the Western District of Michigan determined that unpaid lighting charges were not taxes for TIA purposes where the charges were owed to the city's light and power department pursuant to a private contract with a condominium developer and converted to a tax lien.[331] There, the court made a distinction between a debt owed to a local government because of services provided to certain individuals pursuant to a voluntary contract (not a tax under the TIA) and a debt owed to the government in its sovereign capacity (a tax under the TIA).[332] In a case challenging water liens, the plaintiff could argue that water charges, like the lighting

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[324] *See, e.g.*, Indiana Waste Sys., Inc. v. County of Porter, 787 F. Supp. 859, 865 (N.D. Ind. 1992) (finding that a fee imposed on landfill owners was a "tax" for TIA purposes even where placed in a special fund and used only for the administration of landfills and recycling).

[325] OHIO REV. CODE ANN. § 743.05 (West 2019).

[326] Himebaugh v. City of Canton, 61 N.E.2d 483, 485 (Ohio 1945); *cf.* City of Franklin v. Harrison, 170 N.E.2d 739, 741 (Ohio 1960).

[327] CITY OF CLEVELAND, WHERE YOUR DOLLAR GOES (2019), http://www.clevelandwater.com/where-your-dollar-goes, *archived at* https://perma.cc/JU2E-RJEX.

[328] It is unclear which test would apply in a case involving water debt.

[329] 441 F.3d 370, 373 (6th Cir. 2006).

[330] *Id.* at 374; *see also* Ariz. Life Coal. Inc. v. Stanton, 515 F.3d 956, 962–63 (9th Cir. 2008) (finding that "the transaction between a state's vehicle owner and the issuing authority is more akin to a contractual debt than a state imposed tax," so the TIA does not apply); Women's Res. Network v. Gourley, 305 F. Supp. 2d 1145, 1154 (E.D. Cal. 2004) (finding same).

[331] 736 F. Supp. 2d 1099, 1112 (W.D. Mich. 2010).

[332] *Id.*

charges in *Brown Bark*, arise from a voluntary contractual relationship between the utility company and its customers.[333] These charges are a contractual debt due to the utility in its proprietary capacity, not its sovereign capacity.

Finally, outside of these two tests, the plaintiff could argue that a federal suit should be allowed because there is no "plain, speedy and efficient remedy" in state court, as the language of the TIA expressly requires.[334] However, this exception has generally been "construe[d] narrowly."[335] For the TIA to apply, the state remedies available to the taxpayer need only provide minimal procedural protections, such as "a full hearing and judicial determination at which she may raise any and all constitutional objections to the tax."[336] "The state remedy need not be the best of all possible remedies," and the likelihood of the plaintiff's success in state court "is not a factor to be considered."[337] Still, there are ways the plaintiff could seek to apply this exception. If water charges cannot be contested in the state tax tribunal, that forum is unavailable to the plaintiff. Additionally, many states have a faulty process for residents to dispute their water bills and do not offer a hearing or meaningful opportunity to request an adjustment.[338] Regardless, the FHA does explicitly permit a plaintiff to file a claim in state court.[339] As a result, it is unlikely that the plaintiff could persuade a federal court that no remedy was available at the state level. Thus, the plaintiff should be prepared to litigate a case challenging water liens in state court, if the TIA is found to apply.

The TIA prompted the plaintiffs in *MorningSide* to file their complaint in state court, given that the case involved a local taxation system (even though plaintiffs challenged the county's tax foreclosures, rather than the

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[333] But note that the issue of whether a voluntary contract for water services exists may require further analysis. In *Guertin v. Michigan*, one of the cases brought by Flint residents challenging the city's contaminated water, the Eastern District of Michigan held that the city's provision of water services did not create a contract under state law because of the lack of mutual assent. No. 16-CV-12412, 2017 WL 2418007, at *19 (E.D. Mich. Oct. 30, 2017), *aff'd in part, rev'd in part*, Guertin v. Michigan, 912 F.3d 907 (6th Cir. 2019). There, the court found that Flint was not legally capable of declining to provide water services to residents, and, in turn, residents could not choose to decline to pay the required fee. *Id.* Thus, there was no mutual assent to form a contract. *Id.* (citing Lufthansa Cargo A.G. v. County of Wayne, 142 Fed. App'x 265, 266 (6th Cir. 2005) (no implied contract under state law because defendant airline was statutorily required to pay fee when landing at airport)). On appeal, the Sixth Circuit acknowledged the involuntary relationship between the city and the residents for the provision of water. *Guertin*, 912 F.3d at 925–26. However, the TIA was not at issue in that suit.

[334] 28 U.S.C. § 1341 (2012).

[335] California v. Grace Brethren Church, 457 U.S. 393, 413 (1982).

[336] Rosewell v. LaSalle Nat'l Bank, 450 U.S. 503, 514 (1981); *see also* King v. Sloane, 545 F.2d 7, 8 (6th Cir. 1976) (holding that federal courts must not entertain "actions for relief from State or local taxes unless federal rights are protected in no other way").

[337] Colonial Pipeline Co. v. Morgan, 474 F.3d 211, 218 (6th Cir. 2007).

[338] *See* MONTAG, *supra* note 29, at 34, 44–48 (describing the lack of a meaningful opportunity to contest water bills in Baltimore and Cleveland, respectively).

[339] 42 U.S.C. § 3613(a)(1)(A) (2012).

city's underlying assessments). Even so, Wayne County still raised the TIA as a defense, arguing that it even precluded plaintiffs' suit in *state* court.[340] To support its argument, the county cited the Supreme Court's decision in *National Private Truck Council, Inc. v. Oklahoma Tax Commission*.[341] In that case, which involved a constitutional challenge to an Oklahoma tax on nonresident motor carriers, the Supreme Court held that Section 1983 does not provide for injunctive or declaratory relief against a state tax, either in federal *or* state court, when the state provides for an adequate legal remedy through other means (such as state refund).[342] While the Court did concede that "the [TIA] does not apply in state courts" and "does not prohibit state courts from entertaining . . . suits that seek to enjoin the collection of state taxes,"[343] the Court found no congressional intent in Section 1983 to overcome the presumption that federal law generally will not interfere with administration of state taxes.[344]

Still, in examining Section 1983 exclusively, the Court in *National Private Truck Council* did not contemplate a rule of general applicability regarding state-court application of all federal statutes.[345] And importantly, the FHA contains a clear and explicit intent for aggrieved persons to be able to enjoin all governmental policies that constitute housing discrimination, including tax policies, in federal or state court.[346] For this reason, a plaintiff may still challenge a municipality's water lien practices in state court, even if barred by the TIA from pursuing a federal court action.[347]

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[340] *See* Response to Plaintiffs-Appellants' Application for Interlocutory Appeal by Defendants-Appellees Eric Sabree and Wayne County at 14–17, MorningSide Cmty. Org. v. Sabree, No. 336430 (Mich. Ct. App. Jan. 26, 2017); Response to Motion for a Preliminary Injunction by Defendants Eric Sabree and Wayne County at 6–9, *MorningSide*, No. 16-008807-CH (Mich. Cir. Ct. Aug. 26, 2016).

[341] *See, e.g.*, Response to Plaintiffs-Appellants' Application for Interlocutory Appeal by Defendants-Appellees Eric Sabree and Wayne County, *supra* note 340, at 14 (citing *Nat'l Private Truck Council*, 515 U.S. 582 (1995)).

[342] *Nat'l Private Truck Council*, 515 U.S. at 585, 591.

[343] *Id.* at 585, 588.

[344] *Id.* at 590; *see also* Sarkar & Rosenthal, *supra* note 154, at 639 (writing that the Court "located the comity principle in § 1983 itself").

[345] *Nat'l Private Truck Council*, 515 U.S. at 590 (interpreting Section 1983 only).

[346] 42 U.S.C. §§ 3613(a)(1)(A), 3615 (2012).

[347] *See* United States v. County of Nassau, 79 F. Supp. 2d 190, 196–97 (E.D.N.Y. 2000) (recognizing that FHA claims can be brought in state court when barred by the TIA in federal court); Cmty. Dev., Inc. v. Sarpy County, No. 8:16-cv-135, 2016 WL 3748710, at *4, *7–8 (D. Neb. May 26, 2016) (remanding FHA claim to state court pursuant to the TIA). In this sense, it is unlikely that application of the TIA would completely bar a plaintiff's claim in a lawsuit challenging water liens, although, as noted in this section, Wayne County attempted to dismiss plaintiffs' claims in *MorningSide* based on the TIA.

III. Other Actions To Challenge Municipal Water Practices

A. Additional Federal and State Claims to Challenge Water Liens

In addition to the FHA, civil rights litigators should also consider bringing other federal or state causes of action to challenge a municipality's discriminatory or unfair water lien practices. Below, this Article briefly summarizes causes of action for intentional discrimination, including under 42 U.S.C. § 1981 ("Section 1981"), 42 U.S.C. § 1982 ("Section 1982"), the Equal Protection Clause of the Fourteenth Amendment, the FHA, and Title VI of the Civil Rights Act of 1964 ("Title VI"). It also explores state law claims.

1. Intentional Discrimination Claims

Some municipal actions, such as employing differing policies for how water liens are placed or sold in predominantly Black versus white areas, could support a claim under Section 1981, Section 1982, or the Equal Protection Clause of the Fourteenth Amendment. Section 1981 prohibits race-based discrimination in the making and enforcement of contracts,[348] and Section 1982 prohibits race-based discrimination related to all real and personal property.[349] The Equal Protection Clause prohibits a state from denying any person within its territory the equal protection of the laws, and is also available to a plaintiff seeking to challenge governmental discrimination in the housing market.[350] All three causes of action have been held to apply to

[348] Section 1981(a) reads: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." 42 U.S.C. § 1981(a). Part (b) defines "mak[ing] and enforc[ing] contracts" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *Id.* at (b).

[349] Section 1982 reads: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982.

[350] U.S. Const. amend. XIV, § 1, cl. 4. Municipal water practices, including the placement of liens, have been challenged under the Fourteenth Amendment to the U.S. Constitution. *See, e.g.*, Dunbar v. City of New York, 251 U.S. 516, 519 (1920) (finding that enforcing a lien against a landlord for their tenant's delinquent water bills did not violate the landlord's substantive due process rights); *see also Pickett* Complaint, *supra* note 5, at 34–37 (alleging that Cleveland's water practices violate the due process and equal protection guarantees of the Fourteenth Amendment).

discriminatory municipal conduct[351] and require a showing of intentional discrimination.[352]

While Section 1982 includes a private right of action,[353] claims under Section 1981 and the Fourteenth Amendment would need to be brought under Section 1983.[354] Courts apply similar standards for evaluating Section 1981 and 1982 claims, as well as violations of the Equal Protection Clause.[355] The plaintiff must establish municipal liability, demonstrating that the allegedly discriminatory actions were conducted pursuant to an official policy or could be considered a custom or practice by a final policymaker.[356] Once municipal liability is established, the plaintiff must show that (1) they were treated differently from others who were similarly situated; and (2) the treatment was intentionally based on impermissible considerations such as

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[351] Courts have allowed claims challenging the discriminatory denial of municipal services to proceed under Section 1981. *See* Kennedy v. City of Zanesville, 505 F. Supp. 2d 456, 494 (S.D. Ohio 2007) (involving the discriminatory denial of water services). Additionally, the Supreme Court has noted that Section 1982 supports a claim against a municipality for discrimination. *See* City of Memphis v. Greene, 451 U.S. 100, 120 (1981) (Section 1982 concerns the right of Black citizens to acquire and use property on an equal basis with whites and the enforceability of property interests acquired by Black persons). Section 1982 is assumed to prohibit racial discrimination in the terms, conditions, and services related to housing as fully as Section 3604(b). *See* ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 27:6 (2017 ed.) (citing Arval A. Morris & L.A. Powe, Jr., *Constitutional and Statutory Rights to Open Housing*, 44 WASH. L. REV. 1, 83 (1968) ("Although [S]ection 1982 does not explicitly cover discriminatory terms and conditions . . . , the section would be practically nullified if it were not construed to prohibit th[is] practice[ ]."")). Further, the Equal Protection Clause has been held to apply to a municipality's discriminatory provision of services, including water and sewer. *See, e.g.*, Hawkins v. Town of Shaw, 437 F.2d 1286, 1290 (5th Cir. 1971), *on reh'g*, 461 F.2d 1171 (5th Cir. 1972). As described in *Water/Color*, LDF litigated the *Shaw* case, the first-ever lawsuit challenging unequal municipal services as a violation of the Fourteenth Amendment's Equal Protection Clause. MONTAG, *supra* note 29, at 14–16. Note that at the time the case was litigated, a plaintiff could prevail in an equal protection case by offering proof of discriminatory impact. *Shaw*, 437 F.2d at 1291–92 (noting that there was no evidence of intent to discriminate by the town or its officials but holding that the law was "clear" that no evidence of intent was required in a civil rights lawsuit alleging racial discrimination). The Supreme Court effectively limited the reach of *Shaw* by declaring in *Washington v. Davis* that equal protection claims require a showing of discriminatory intent. 426 U.S. 229, 239 (1976).

[352] *See* Patterson v. McLean Credit Union, 491 U.S. 164, 186 (1989) (Section 1981 requires a showing of discriminatory intent); *Davis*, 426 U.S. at 242; Hamilton v. Svatik, 779 F.2d 383, 387 (7th Cir. 1985) (Section 1982 requires proof of discriminatory intent); Save Our Cemeteries, Inc. v. Archdiocese of New Orleans, Inc., 568 F.2d 1074, 1078 (5th Cir. 1978) (same); Byrd v. Local 24, I.B.E.W, No. 72-848-M, 1977 WL 15446, at *14 (D. Md. June 13, 1977) (interpreting the Supreme Court's decision in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), as requiring a showing of discriminatory intent to make out a claim under Section 1982).

[353] *Jones*, 392 U.S. at 413.

[354] Dennis v. County of Fairfax, 55 F.3d 151, 156 (4th Cir. 1995) (refusing to find a private right of action against state actors under Section 1981).

[355] Painter's Mill Grille v. Brown, 716 F.3d 342, 348 (4th Cir. 2013) (quoting CBOCS West, Inc. v. Humphries, 553 U.S. 442, 447 (2008) ("[The United States Supreme Court's] precedents have long construed §§ 1981 and 1982 similarly[.]")).

[356] *See* Spell v. McDaniel, 824 F.2d 1380, 1385 (4th Cir. 1987) (citing Monell v. Dep't of Soc. Servs. of the City of N.Y., 436 U.S. 658, 694 (1978)).

race.[357] In addition to requiring a higher standard of proof by requiring plaintiffs to establish intentional discrimination (and disallowing disparate impact claims), these causes of action do not offer the same procedural benefits as the FHA. For example, Section 1982 restricts its applicability to "citizens,"[358] and generally does not permit claims by third parties as the FHA does.[359] Additionally, in claims brought under Sections 1981 and 1982, a plaintiff may be unable to recover damages due to governmental immunity.[360]

The FHA also permits actions for intentional discrimination, generally known as disparate treatment claims. The statute bars housing practices that are motivated by intentional consideration of any of its protected classes, even absent any personal prejudice or malicious behavior by the defendant.[361] A disparate treatment claim under Section 3604(a) of the FHA would likely be similar to a claim under Sections 1981 or 1982 or the Equal Protection Clause. For example, if the plaintiff could establish that the relevant utility is exercising discretion in its water lien policies that affects Black, but not white, residents, they could likely establish a prima facie case of disparate treatment.[362] For example, it may be the case that the local government is only moving to place or sell liens for properties based on unpaid water debt in majority-Black neighborhoods, but not majority-white neighborhoods.

A plaintiff could also challenge water liens under Title VI, which requires recipients of federal funds to administer their programs in a manner that is not discriminatory.[363] Most municipalities receive federal funding to

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[357] *See* Denny v. Elizabeth Arden Salons, Inc., 456 F.3d 427, 434 (4th Cir. 2006); LeClair v. Saunders, 627 F.2d 606, 609–10 (2d Cir. 1980).

[358] *See, e.g.*, Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1036 n.9 (2d Cir. 1979) (declining to address plaintiff's claim under Section 1982, because the record did not reflect whether he was a citizen, and addressing his FHA claim only). Section 1981 does apply to "all persons," however. *See, e.g.*, Anderson v. Conboy, 156 F.3d 167, 171 (2d Cir. 1998) (distinguishing Section 1981's reference to "all persons" from Section 1982's reference to "citizens" and finding it suggests that the former proscribes alienage discrimination).

[359] *Compare* Havens Realty Corp. v. Coleman, 455 U.S. 363, 373–74, 378–79 (1982) (holding that fair housing testers and organizations can have standing under the FHA), *with* Warth v. Seldin, 422 U.S. 490, 514 n.22 (1975) (denying third party standing to plaintiffs under Sections 1981 and 1982 based on a claim of indirect harm); Smith v. City of Cleveland Heights, 760 F.2d 720, 722–24 (6th Cir. 1985) (finding that the plaintiff had standing to bring claims for his noneconomic "stigmatic" injury under Sections 1981 and 1982 because he was asserting his own right and not the rights of third parties).

[360] *See, e.g.*, City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981) (holding that punitive damages are not recoverable against a municipality in a suit under Section 1983).

[361] SCHWEMM, *supra* note 351, at § 10:2. Among other cases, Professor Schwemm cites *Community Services, Inc. v. Wind Gap Municipal Authority*, 421 F.3d 170, 177 (3d Cir. 2005), for the proposition that an FHA plaintiff need not show that a defendant's discriminatory purpose was malicious or invidious. SCHWEMM, *supra* note 351, at § 10:2.

[362] *See supra* notes 73 through 75 and accompanying text.

[363] 42 U.S.C. § 2000d (2012). *See also* Martha F. Davis, *Let Justice Roll Down: A Case Study of the Legal Infrastructure for Water Equality and Affordability*, 23 GEO J. ON POVERTY L. & POL'Y 355, 376–77 (2016).

support their water programs and thus are covered by the statute.[364] Private judicial enforcement under Title VI is limited to claims of intentional discrimination.[365]

2. *State Law Claims*

A plaintiff challenging water liens under the FHA may want to add a cause of action under the relevant state housing law.[366] Nearly all states have laws that provide for fair housing, often encompassed within a more comprehensive statute pertaining to civil rights.[367] For example, the state law

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[364] *See, e.g.*, Jay Apperson, *Board of Public Works Approves Funding for Clean Water and the Chesapeake Bay*, MD. DEP'T OF THE ENV'T (Aug. 22, 2018), http://news.maryland.gov/mde/2018/08/22/board-of-public-works-approves-funding-for-clean-water-and-the-chesapeake-bay-46/, *archived at* https://perma.cc/FJM3-PFVN; DIV. OF ENVTL. & FIN. ASSISTANCE, OHIO EPA, OFFICE OF FIN. ASSISTANCE, http://epa.ohio.gov/defa/ofa#16954615-about-us, *archived at* https://perma.cc/U9LM-BV27#169544614-contacts.

[365] Alexander v. Sandoval, 532 U.S. 275, 279–80 (2001). An individual could also file an administrative complaint under Title VI with the EPA pursuant to a disparate impact or disparate treatment theory of discrimination. *See, e.g.*, 40 C.F.R. § 7.120 (2019) (EPA regulation authorizing a party who believes they have been discriminated against to file an administrative complaint with the agency); *id.* at § 7.35 (EPA regulation permitting disparate impact claims in administrative complaints). However, the EPA has an abysmal record of handling civil rights complaints and this course of action may not be fruitful. In 2015, the Center for Public Integrity determined that the EPA's civil rights office had not made one formal finding of discrimination under Title VI in twenty-two years, although hundreds of complaints had been filed. Kristen Lombardi et al., *Environmental Racism Persists, and the EPA is One Reason Why*, CTR. FOR PUB. INTEGRITY (Aug. 3, 2015), https://www.publicintegrity.org/2015/08/03/17668/environmental-racism-persists-and-epa-one-reason-why, *archived at* https://perma.cc/7JUE-3QK3. That same year, Earthjustice, an environmental justice nonprofit, filed a lawsuit against the EPA on behalf of five local community groups for failing to complete investigations of complaints that had been filed at least a decade prior, contravening Title VI's regulations, which set forth mandatory procedures and timelines for investigations of complaints. Complaint, Californians for Renewable Energy v. U.S. Envtl. Prot. Agency, No. 15-cv-3292 (N.D. Cal. July 15, 2015); *see generally* 40 C.F.R. §§ 7.10 *et seq*. Since 2016, LDF, along with Earthjustice, has represented one of the groups in their underlying EPA complaint, which was originally filed in 2003, regarding the siting of a landfill in a majority-Black community in Alabama. NAACP Legal Def. & Educ. Fund, Inc., *LDF, Earthjustice, and the Environmental Law Clinic at Yale Fight Landfill in Historic Black Alabama Community* (Mar. 4, 2018), https://www.naacpldf.org/case-issue/ldf-earthjustice-environmental-justice-law-clinic-yale-fight-landfill-historic-black-alabama-community/, *archived at* https://perma.cc/9XB6-ELSD. The author has been involved in that advocacy effort.

[366] The plaintiffs in *Pickett* allege that Cleveland violated the Ohio Civil Rights Act. *Pickett* Complaint, *supra* note 5, at 33–34. Many cities also have fair housing ordinances that may apply in a similar case. *See, e.g.*, CHI., IL., FAIR HOUS. ORDINANCE § 5-8-010 *et seq.* (2019), https://www.chicago.gov/content/dam/city/depts/cchr/AdjSupportingInfo/AdjFORMS/2018AdjForms/2018OrdinanceBooklet.pdf, *archived at* https://perma.cc/6VH9-7LBH; PORTLAND, OR., CITY CODE § 23.01.060 (2019), https://www.portlandoregon.gov/citycode/article/725421, *archived at* https://perma.cc/S4X7-8JJX; SEATTLE, WA., MUN. CODE, tit. 14, ch. 14.08 (2019), https://library.municode.com/wa/seattle/codes/municipal_code?nodeId=TIT14HURI_CH14.08UNHOPR, *archived at* https://perma.cc/RFQ6-QSWZ.

[367] *See, e.g.*, MD. CODE ANN., STATE GOV'T § 20-702 (West 2019); OHIO REV. CODE ANN. § 4112.02(H) (West 2019). Mississippi is reportedly the only state that does not prohibit discrimination in housing transactions. *See* Giacomo Bologna, *Black Mississippians Twice as Likely to Be Denied a Home Loan as Whites, Data Show*, CLARION LEDGER (Apr. 22, 2019), https://www.clarionledger.com/story/news/politics/2019/04/22/homes-sale-black-mississippi-

may be more expansive than the FHA in defining protected classes.[368] Further, a plaintiff may want to explore other state law or common law claims that could apply to municipal water practices. States generally prohibit unfair or deceptive acts and practices ("UDAP"), which could arise in the context of a utility's billing practices or water lien policies.[369] While some UDAP statutes do not apply to utilities regulated by the state's public utility commission, public water utilities in the relevant jurisdiction may not be commission-regulated entities.[370] Additionally, water lien practices by municipalities may give rise to a contract or tort claim.[371]

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ans-denied-loans-more-often/3496801002/, *archived at* https://perma.cc/MT4U-59FW (citing The Policy Surveillance Program, *State Fair Housing Protections*, LAW ATLAS (last updated Aug. 1, 2017), http://lawatlas.org/datasets/state-fair-housing-protections-1498143743, *archived at* https://perma.cc/4VGN-M9DC). Only thirty-five states and the District of Columbia are currently certified by HUD as having agencies that administer fair housing laws substantially equivalent to the FHA. U.S. DEP'T OF HOUS. & URBAN DEV., FAIR HOUSING ASSISTANCE PROGRAM (FHAP) AGENCIES, https://www.hud.gov/program_offices/fair_housing_equal_opp/partners/FHAP/agencies, *archived at* https://perma.cc/5TTN-7R9A.

[368] *See, e.g.*, D.C. CODE § 2-1402.21 (2019) (prohibiting housing discrimination on the basis of "race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, disability, matriculation, political affiliation, source of income, status as a victim of an intrafamily offense, or place of residence or business of any individual").

[369] *See, e.g.*, MD. CODE ANN., COM. LAW § 13-303 (West 2019); OHIO REV. CODE ANN. § 1345.02 (West 2019). *See generally* CHARLES HARAK ET AL., NAT'L CONSUMER LAW CTR., ACCESS TO UTILITY SERVICE § 15.4.2 (6th ed. 2018).

[370] For example, Maryland's UDAP statute does not apply to a "public service company, to the extent that the company's services and operations are regulated by the Public Service Commission." MD. CODE ANN., COM. LAW § 13-104 (West 2019). However, public water utilities are not subject to regulation by the commission in Maryland. *See id.*, PUB. UTIL. § 1-101(ss). Thus, public water utilities are subject to liability under the state's UDAP law. In Ohio, public utilities are not subject to the state's UDAP law. OHIO REV. CODE ANN. § 1345.01(A) (West 2019). While waterworks are generally considered public utilities under state law, *id.* at § 4905.03, municipally owned waterworks (like Cleveland Water) are not regulated by the commission, *id.* at § 4905.02(A)(3). Accordingly, municipal waterworks are subject to UDAP liability in Ohio.

[371] *See generally* HARAK ET AL., *supra* note 369. For example, utilities have a duty to serve their customers. *Id.* at § 2.1.2 (citing United Fuel Gas Co. v. Railroad Comm'n, 278 U.S. 300 (1929); N.Y. ex. rel. Woodhaven Gaslight Co. v. Public Serv. Comm'n, 269 U.S. 244 (1925); Allen's Creek Props. v. City of Clearwater, 679 So. 2d 1172 (Fla. 1996)). Utilities must provide service to residents living within their service area who have applied for service and are willing to pay for service and comply with the utility's rules and regulations. *Id.*; Nolte v. City of Olympia, 982 P.2d 659, 667 (Wash. Ct. App. 1999) (as exclusive provider of water and sewer service, city owes public duty to serve all within service area subject to reasonable conditions as allowed by law). Pursuant to this duty, utilities must provide adequate and reasonably efficient service, on reasonable terms, without unjust discrimination, and at reasonable rates. HARAK ET AL., *supra* note 369, at § 2.1.2. For utilities that fail to abide by this duty, courts can award damages or grant equitable relief. *Id.* at § 2.4.2. *But see* Guertin v. Michigan, No. 16-CV-12412, 2017 WL 2418007, at *19 (E.D. Mich. June 5, 2017), *aff'd in part, rev'd in part*, Guertin v. Michigan, 912 F.3d 907 (6th Cir. 2019) (no mutual assent to form contract in provision of water services by city to residents).

B. Challenging Water Service Shutoffs

1. The Connection Between Water Shutoffs and Housing

While this Article is mainly focused on water liens, litigators could also consider civil rights litigation to challenge water shutoffs. Local utilities may generally disconnect, or shut off, water service to a home when the owner or tenant fails to pay their bill.[372] In recent years, water service shutoffs have significantly increased as utilities have become more aggressive in their collection practices, particularly after the recent recession, when many cities struggled financially.[373] A service shutoff amounts to a practical eviction by making the home uninhabitable.[374] Without access to running water, families cannot cook, shower or bathe, clean, or flush their toilets. This poses a threat to public health and human dignity.[375] States or municipalities may also take legal action against residents who do not have running water in their

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[372] *See, e.g.*, IND. CODE § 8-1.5-3-4(d) (2019); IOWA CODE § 384.84 (2019); LA. STAT. ANN. § 33:3969 (2018); N.J. STAT. ANN. § 40:14A-21 (West 2019); OHIO REV. CODE ANN. § 6103.02 (West 2019); OHIO ADMIN. CODE 4901:1-15-26 to -27 (2019); WASH. REV. CODE § 35.21.300 (2019); W. VA. CODE § 8-18-23 (2019); BALT., MD., CITY CODE, art. 24, §§ 2-1, 2-3, 4-3 (2016), http://ca.baltimorecity.gov/codes/Art%2024%20-%20Water.pdf, *archived at* https://perma.cc/BV7R-Y335; HAW. CTY., HAW. ORDINANCE ch. 21, art. 5, § 21-32 (2019), http://www.hawaiicounty.gov/lb-countycode, *archived at* https://perma.cc/5AZ3-FUJH.

[373] CHRISTIAN-SMITH ET AL., *supra* note 12, at 62.

[374] CROMWELL, III ET AL., *supra* note 1, at 27. While there is not a single definition of habitability, generally it is interpreted to mean a living space with a water supply free from contamination and access to sanitary facilities that are adequate for personal cleanliness and waste disposal. U.S. DEP'T OF HOUS. & URBAN DEV., HPRP HOUSING HABITABILITY STANDARDS INSPECTION CHECKLIST (Oct. 2009), https://www.hudexchange.info/resource/1153/hprp-housing-habitability-standards-inspection-checklist/, *archived at* https://perma.cc/EUZ7-8CBZ. Recognizing that running water is a key part of habitability, many states and localities have statutes requiring landlords to provide water to tenants. *See, e.g.*, OHIO REV. CODE ANN. § 5321.04 (West 2019) (landlords must supply running water and reasonable amounts of hot water); BALT. CTY., MD., HOUS. CODE OF ORDINANCE § 35-3-101 (2019), https://library.municode.com/md/baltimore_county/codes/code_of_ordinances?nodeId=ART35BUHO_TIT3HOGE, *archived at* https://perma.cc/J5LH-EPN3 (landlord prohibited from denying essential services such as running water).

[375] AMIRHADJI ET AL., *supra* note 18, at 31, 35. There are a number of health consequences that can arise from a lack of running water in one's home. In 2017, researchers at the Henry Ford Global Health Initiative issued findings that Detroit city blocks that experienced water shutoffs were 1.55 times as likely to experience water-related illnesses as blocks with no shutoffs. Allie Gross, *Experts See Public Health Crisis in Detroit Water Shutoffs*, DET. FREE PRESS (July 26, 2017), https://www.freep.com/story/news/local/michigan/detroit/2017/07/26/detroit-water-shutoffs/512243001/, *archived at* https://perma.cc/FGK2-BWAB. While the Henry Ford Global Health Initiative later backpedaled from the findings, confirming their accuracy but stating that the data was "preliminary," other health officials were more candid about the public health crisis resulting from the city's shutoffs. *Id.* Among other impacts, officials declared that shutoffs could result in dehydration, which can cause problems for both older and younger people and those with chronic diseases. *Id.* They also stated that water service interruptions can contribute to poor hygiene, leading to skin and gastrointestinal diseases, and may exacerbate mental health issues. *Id.* Additionally, the threat of a shutoff may lead a family to forego medical expenses or food in order to avert a service interruption, which can also lead to serious health impacts. CROMWELL, III ET AL., *supra* note 1, at 27.

homes.[376] In one extreme example, the city of Easton, Pennsylvania once had a policy of evicting residents when their water service was disconnected for nonpayment.[377] The city required a code inspection and repair of any code violations before water service could be reconnected.[378] Easton has since changed its law.[379]

Water shutoffs have been a crisis in cities like Detroit. In 2014, the city disconnected water service to approximately 44,000 households for nonpayment of bills.[380] Despite international outcry,[381] Detroit continues to disconnect service to city residents for nonpayment. In May 2018, nearly 18,000 households in the city were at risk of losing their water service.[382] In 2019, the number of households at risk had dropped substantially: only 5,600 were at risk of disconnection, but the average amount of debt was high, averaging around $750.[383]

But Detroit is not alone. In 2015, Baltimore sent shutoff notices to 25,000 residential and commercial customers (an estimated 60,000 individu-

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[376] For example, the lack of running water can impact custody of children. In twenty-one states, parents may have their children removed from their homes due to lack of running water. AMIRHADJI ET AL., *supra* note 18, at 34. In Michigan, the lack of running water can be a factor in determining whether parents are providing a suitable home for their children. *Id.* And in some states, the inability to pay for water and sanitation services can lead to criminal charges or other legal action. JONES & MOULTON, *supra* note 21, at 12. In Detroit, residents can face felony criminal charges for reconnecting their water without permission from the utility. MICH. COMP. LAWS ANN. § 750.383(a) (West 2019); *see also* Khalil AlHajal, *Detroit to Crack Down on Unauthorized Water Re-connections During 15-Day Pause in Cutoffs*, DET. NEWS (July 21, 2014), https://www.mlive.com/news/detroit/index.ssf/2014/07/detroit_to_crack_down_on_unaut.html, *archived at* https://perma.cc/2S7Q-GN3T. In Baltimore, it is a misdemeanor to reconnect a water supply after termination of service. BALT., MD., CITY CODE art. 24, §§ 21-4, -6, -12 (2016), http://ca.baltimorecity.gov/codes/Art%2024%20-%20Water.pdf, *archived at* https://perma.cc/X6M3-U4JB. And in Alabama, it is a misdemeanor to build, maintain, or use a sewage system that is not sanitary, ALA. CODE § 22-26-1 (2019), which can be prohibitively expensive for families. *See* Inga T. Winkler & Catherine Coleman Flowers, *"America's Dirty Secret": The Human Right to Sanitation in Alabama's Black Belt*, 49 COLUM. HUM. RTS. L. REV. 181, 185, 189 (2017) (noting that private septic systems can cost up to $30,000 in Lowndes County, Alabama, where the median household income was below $26,000 in 2015).

[377] *See* ROGER COLTON, COLLECTING WATER BILLS IN EASTON, PENNSYLVANIA 13, 17, 22 (2002), http://www.fsconline.com/downloads/Papers/2002%2009%20easton-water-bills.pdf, *archived at* https://perma.cc/FYZ4-DBV4.

[378] *Id.*

[379] EASTON, PA., MUN. CODE art. 1, § 572-2(B)(4)(c) (2019), https://ecode360.com/9641786, *archived at* https://perma.cc/HV75-SHZE.

[380] Kat Stafford, *Controversial Water Shutoffs Could Hit 17,461 Detroit Households*, DET. FREE PRESS (Mar. 26, 2018), https://www.freep.com/story/news/local/michigan/detroit/2018/03/26/more-than-17-000-detroit-households-risk-water-shutoffs/452801002/, *archived at* https://perma.cc/DJW3-V22S.

[381] *See, e.g.*, Press Release, U.N. Office of the High Comm'r on Human Rights, Detroit: Disconnecting Water From People Who Cannot Pay—An Affront to Human Rights, Say UN Experts (June 25, 2014), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14777, *archived at* https://perma.cc/B77Q-5NRE.

[382] Stafford, *supra* note 380.

[383] Christine Ferretti, *Fewer Detroit Water Customers at Risk of Shutoffs*, DET. NEWS (Apr. 11, 2019), https://www.detroitnews.com/story/news/local/detroit-city/2019/04/11/fewer-detroit-water-customers-risk-shutoffs/3415996002/, *archived at* https://perma.cc/HCR9-RE6M.

als[384]) in both the city and county who collectively owed more than $40 million in unpaid charges.[385] Ultimately, it disconnected water service to 8,100 residential properties, with only half getting water restored after settling their accounts (including paying an additional service-restoration fee).[386] That same year, 44,000 shutoff notices were sent out to Cleveland Water customers for failure to pay their bills.[387] Additionally, about one in five customers in New Orleans, Louisiana and Gary, Indiana had their water service disconnected in 2015, and about one in eight customers lost their water service in Birmingham, Alabama and Youngstown, Ohio.[388] More recently, a 2019 report found that utilities in the Great Lakes region issued nearly 370,000 shutoff notices over the last decade, and these notices were disproportionately concentrated in majority Black, Latinx, and low-income neighborhoods.[389]

The intentional discrimination claims outlined above could also apply to a shutoffs-centered claim. For example, a municipality could be liable under Section 1983 if it disconnects water service to delinquent customers who live in majority-Black neighborhoods, but not to delinquent customers in white neighborhoods. Water shutoffs have also been challenged under the Fourteenth Amendment to the U.S. Constitution or state constitutional provisions.[390] For example, in *Pickett*, plaintiffs allege that the water department's

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[384] Food & Water Watch, Baltimore Must Stop Household Water Shutoffs: An Analysis of Key Facts, Figures, and Trends 1 (2015), https://www.foodandwaterwatch.org/sites/default/files/baltimore_water_shutoff_analysis.pdf, *archived at* https://perma.cc/TG4S-VL2N.

[385] Luke Broadwater, *Baltimore to Send Water Turn-off Notices to 25,000 Delinquent Customers*, Balt. Sun (Mar. 26, 2015), http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-water-bills-20150326-story.html, *archived at* https://perma.cc/EK9K-SFFU.

[386] Jacobson, Keeping the Water On, *supra* note 19, at 9–10; Balt., Md., City Code, art. 24, § 2-3(c) (2016), http://ca.baltimorecity.gov/codes/Art%2024%20-%20Water.pdf, *archived* at https://perma.cc/8YWX-AEQA (requiring payment of service-restoration fee to resume water service after it is cut off for nonpayment). As of July 1, 2019, Baltimore's "delinquent turn-off" fee is $104. Balt. City Dep't of Pub. Works, Water Billing Rates and Fees, https://publicworks.baltimorecity.gov/Water-Bill-Rates-and-Fees.

[387] Ron Regan et al., *Drowning in Dysfunction: How the Cleveland Water Department is Failing its Community, Violating Rights*, News 5 Clev. (June 29, 2017), https://www.news5cleveland.com/longform/drowning-in-dysfunction-how-the-cleveland-water-dept-is-failing-its-community-violating-rights, *archived at* https://perma.cc/2LCT-8XM3.

[388] U.S. Gov't Accountability Office, *supra* note 12, at 72–73.

[389] Zamudio & Craft, *supra* note 30, at 7.

[390] *See, e.g.*, In re City of Detroit, 841 F.3d 684, 699 (6th Cir. 2016) (finding no substantive due process right to affordable water in case challenging Detroit shutoffs); Ransom v. Marrazzo, 848 F.2d 398, 411–12 (3d Cir. 1988) (the provision of water services is not protected by substantive due process); Chatham v. Jackson, 613 F.2d 73, 78–79 (5th Cir. 1980) (city's practice of terminating water service to the landlord when the tenant's bills were delinquent did not violate substantive due process). For an in-depth discussion of how procedural and substantive due process challenges to water shutoffs could be structured, see Montag, *supra* note 29, at 63–68; Sharmila L. Murthy, *A New Constitutive Commitment to Water*, 36 B.C. J.L. & Soc. Just. 159, 189–207 (2016).

failure to notify customers of impending service disconnections and their right to a hearing to dispute their water charges is unconstitutional.[391]

Below, this Article briefly discusses the structure of an FHA claim challenging water shutoffs and the likely defense that the statute does not apply to post-acquisition conduct.

2. The Framework for an FHA Claim Challenging Shutoffs

A plaintiff challenging a water service disconnection could file suit under Section 3604(a) of the FHA.[392] In order for a home to be habitable, it must have a supply of potable water.[393] With respect to rental housing in particular, the plaintiff could argue that disconnecting water service makes their housing unavailable, violating this provision of the FHA. However, some jurisdictions have laws explicitly prohibiting this argument in certain landlord-tenant actions when the tenant is responsible for, but has failed to pay, their water bill. Baltimore is one example of a jurisdiction with this type of ordinance, which specifies when the lack of running water may be used as a defense in an action by a landlord seeking the recovery of rent from a tenant.[394] While Baltimore's law does not specifically pertain to an FHA action, a municipality may raise it as a defense to support its argument that the customer must pay their bill.

A plaintiff could also challenge water shutoffs under Section 3604(b) of the FHA without needing to show that they have lost or are at risk of losing their home.[395] Section 3604(b) prohibits discrimination in the "terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith" because of membership in a

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[391] *Pickett* Complaint, *supra* note 5, at 34–37. Plaintiffs also allege that Cleveland violated their constitutional rights to due process and equal protection through its unjust and arbitrary policy of overbilling customers and failing to provide a hearing process to contest erroneously high bills. *Id.* at 36–37.

[392] At least one case has raised such a claim. In *Lewis v. Schmidt*, a pro se plaintiff challenged a city's disconnection of water service to his residence under the FHA, among other causes of action. No. 10-cv-1819, 2011 WL 43029, at *1 (N.D. Ill. Jan. 4, 2011). The court dismissed the FHA claim, finding that the plaintiff did not sufficiently allege that he was constructively evicted from his home due to the water service shutoff. *Id.* at *10. Additionally, in a 2016 law review article, Professor Martha F. Davis proposed that water shutoffs could be challenged through an FHA suit, among other civil rights statutes. *See* Davis, *supra* note 363, at 379–82.

[393] *See* U.S. Dep't of Hous. & Urban Dev., *supra* note 374, at 1.

[394] Balt. Cty., MD., Hous. Code of Ordinance § 35-4-201(b)(2)(i) (2019), https://library.municode.com/md/baltimore_county/codes/code_of_ordinances?nodeId=ART35BUHO_TIT3HOGE, *archived at* https://perma.cc/3DV7-MKRU (a tenant can assert that the lack of hot or cold running water is a serious threat to the life, health, and safety of the occupants of a leased premise, unless the property is a single-family dwelling or multiple dwelling where the tenant is responsible for payment of the water charge and the lack of water is due to the tenant's failure to pay).

[395] *See* Davis, *supra* note 363, at 379–82.

protected class.[396] Many courts have applied this provision to cases involving the discriminatory provision of municipal services, including water and sewer.[397] As far back as 1974, the Fifth Circuit held that a city's refusal to allow a proposed low-income housing development to connect to municipal water and sewer lines established a prima facie case of discrimination under the FHA and other civil rights laws.[398] In 2007, the Southern District of Ohio determined in *Kennedy v. City of Zanesville* that the FHA and other civil rights statutes "clearly" cover discrimination in the "procurement of water, a vital resource."[399] And in 2019, the Eleventh Circuit determined that Section 3604(b) covers water services, which are closely tied to the sale or rental of a dwelling and are essential to habitability.[400] Accordingly, a plain-

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[396] 42 U.S.C. § 3604(b) (2012). This provision has been applied to various types of services, including "garbage collection and other services of the kind usually provided by municipalities." Mackey v. Nationwide Ins. Cos., 724 F.2d 419, 424 (4th Cir. 1984). *See also* Jersey Heights Neighborhood Ass'n v. Glendening, 174 F.3d 180, 193 (4th Cir. 1999) ("The [FHA's] services provision simply requires that 'such things as garbage collection and other services of the kind usually provided by municipalities not be denied on a discriminatory basis.'") (quoting *Mackey*, 724 F.2d at 424); Miller v. City of Dallas, No. Civ.A. 3:98-CV-2955-D, 2002 WL 230834, at *14 (N.D. Tex. 2002) (holding that plaintiffs could bring claim under Section 3604(b) to challenge municipality's services, including flood protection and landfill practices, as racially discriminatory).

[397] Comm. Concerning Cmty. Improvement v. City of Modesto, 583 F.3d 690, 711–15 (9th Cir. 2009) (evaluating cases alleging post-acquisition housing discrimination and holding that Section 3604(b) reaches discriminatory conduct after housing is acquired, including municipal services); Shaikh v. City of Chicago, 341 F.3d 627, 631–32 (7th Cir. 2003) (dicta suggesting that municipal services are covered by Section 3604(b)); Good Shepherd Manor Found., Inc. v. City of Momence, 323 F.3d 557, 565 (7th Cir. 2003) (a city's termination of water supply to group home for people who are disabled could violate FHA); Edwards v. Johnston Cty. Health Dep't, 885 F.2d 1215, 1224 (4th Cir. 1989) (Section 3604(b) applies to some municipal services); Cooke v. Town of Colorado City, 934 F. Supp. 2d 1097, 1114–15 (D. Ariz. 2013) (denying motion to dismiss Section 3604(b) claim related to the municipality's provision of water, electricity, and sewer services); Middlebrook v. City of Bartlett, 341 F. Supp. 2d 950, 959–60 (W.D. Tenn. 2003) (finding that plaintiff established a prima facie case of discrimination related to the provision of building permit and water services after purchase of land). Some courts have limited Section 3604(b) claims to particular types of municipal services, but generally only when the services at issue are too far removed from those typically provided by a local government to come within the scope of the FHA. *See* Oliveri, *supra* note 223, at 9 n.48 (citing *Jersey Heights*, 174 F.3d at 193) ("[T]he siting of a highway was not a 'service' under Section 3604(b)."); Southend Neighborhood Improvement Ass'n v. County of St. Clair, 743 F.2d 1207, 1210 (7th Cir. 1984) ("Section 3604(b) only applies to 'services generally provided by governmental units such as police and fire protection or garbage collection' and not to decisions related to maintenance of county-owned property."); S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 254 F. Supp. 2d 486, 502–03 (D.N.J. 2003) (finding that plaintiffs failed to state a cognizable claim under Section 3604(b) because the grant of industrial air pollution permits was too far removed from "services" covered by the FHA). *See also* Clifton Terrace Assocs., Ltd. v. United Techs. Corp., 929 F.2d 714, 720 (D.C. Cir. 1991) (discriminatory municipal services violate the Fourteenth Amendment but may not be redressable under Section 3604(b) of the FHA).

[398] United Farmworkers of Fla. Hous. Proj., Inc. v. City of Delray Beach, 493 F.2d 799, 808 (5th Cir. 1974).

[399] 505 F. Supp. 2d 456, 499 (S.D. Ohio 2007).

[400] Georgia State Conf. of the NAACP v. City of LaGrange, 940 F.3d 627, 634 (11th Cir. 2019).

tiff has a strong basis to argue that this provision of the FHA applies to discriminatory municipal water shutoffs.

While the Court's decision in *Inclusive Communities* did not address disparate impact claims under Section 3604(b), it is very likely that such claims are cognizable under that provision.[401] The structure of the claim would be similar to a disparate impact case challenging water liens. To establish a prima facie case of discrimination, the plaintiff could show, through publicly available data reflecting the location of service shutoffs, that predominantly Black neighborhoods are more likely to have water service disconnected based on unpaid bills. As a result, residents of these neighborhoods are at a disproportionately high risk of living in an uninhabitable home due to the lack of running water.

It may be more difficult for a plaintiff to rebut the municipality's business necessity defense. The municipality will likely argue that it is due payment for services provided, and that the disconnection of service is a permissible course of action for customers who do not pay their bills (and less onerous for customers than the sale of water liens).[402] The strongest argument, if applicable, may be that bills are faulty and thus customers should not be required to pay. This argument may be most effective in jurisdictions plagued by billing issues, but would require further research and investigation. Additionally, if the plaintiff can show that the city is exercising discretion in disconnecting water service in predominantly Black neighborhoods with overdue bills, but not white neighborhoods, they would likely be able to succeed on such a claim (and establish discriminatory intent for a disparate treatment claim under the FHA or other civil rights action).[403]

Even if the municipality can show a legitimate interest in water shutoffs, the plaintiff may still succeed by showing a less discriminatory means to achieve that purpose. For example, similar to the alternatives that could be

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[401] *See* SCHWEMM, *supra* note 351, at § 10:4; *see also* Betsey v. Turtle Creek Assoc., 736 F.2d 983, 988 (4th Cir. 1984) (endorsing disparate impact claims under 3604(b)). As Professor Schwemm notes, Section 3604(b) uses the term "discriminate," which the Supreme Court relied on in *Inclusive Communities* to hold that another provision of the FHA, 42 U.S.C. § 3605, authorizes disparate impact claims. SCHWEMM, *supra* note 351, at § 10:4.

[402] Indeed, when Baltimore had its shutoff crisis in 2015, then-City Council President Bernard C. "Jack" Young expressed support for the impending disconnections, noting that "I like it better than taking people's houses and putting them into foreclosure." JACOBSON, KEEPING THE WATER ON, *supra* note 19, at 9. But not every utility disconnects service to customers for nonpayment. In Arizona, for instance, "[u]tilities are advised not to terminate residential service when the customer has an inability to pay." *See State Disconnection Policies*, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, https://liheapch.acf.hhs.gov/Disconnect/disconnect.htm, *archived at* https://perma.cc/KBS6-6T9Q.

[403] *See* Davis, *supra* note 363, at 382 (suggesting that a municipality could have a policy of targeting shutoffs in city wards with a concentration of unpaid water debt for reasons of efficiency). In *Water/Color*, LDF confirmed that Professor Davis's hypothesis is correct, at least in Cleveland, which has stated to local advocates that it determines where to terminate service based on geographic zone and account balance amounts. According to the city's water department, it rotates through zones, shutting off accounts with both higher overdue balances and lower balances if in the same area. MONTAG, *supra* note 29, at 44; *see also Pickett* Complaint, *supra* note 5, at 11.

raised in a case challenging water liens, the plaintiff could argue that the municipality should enter into payment plans with customers or raise the minimum level of arrears before service is disconnected.[404]

3. Addressing the Post-Acquisition Defense

As with a Section 3604(a) suit, a plaintiff challenging water shutoffs under Section 3604(b) should be prepared to rebut a defense that this provision of the FHA does not cover post-acquisition conduct. As detailed above, this issue under Section 3604(a) concerns whether the phrase "otherwise make unavailable" applies to conduct that occurs after the initial sale or rental of a dwelling.[405] The language of Section 3604(b) is different, prohibiting discrimination in the "terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith."[406] In a claim under this provision of the FHA, the key post-acquisition issue is whether the phrase "services or facilities in connection therewith" applies only to the "sale or rental" of the dwelling (limiting the provision to pre-acquisition conduct) or whether it applies to the dwelling itself (extending it to post-acquisition conduct).[407]

Numerous courts have agreed that Section 3604(b) covers post-acquisition conduct.[408] In 2019, the Eleventh Circuit held in *Georgia State Conference of the NAACP v. City of LaGrange* that a current owner or renter can bring a claim for discriminatory conduct related to the provision of services (including water) for a dwelling.[409] In that case, plaintiffs alleged that the

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[404] *See supra* section II.B.3.

[405] *See supra* section II.C.1.

[406] 42 U.S.C. § 3604(b).

[407] *See* Oliveri, *supra* note 223, at 19–20. While acknowledging that the text of Section 3604(b) is unclear, Professor Oliveri explains that application of the grammatical rule of "the last antecedent" would mean that the phrase "services or facilities in connection therewith" modifies "dwelling" only, extending this provision of the FHA to post-acquisition conduct. *Id.* at 20.

[408] *See, e.g.*, Davis v. City of New York, 902 F. Supp. 2d 405, 436 (S.D.N.Y. 2012) (finding that Section 3604(b) prohibits post- and pre-acquisition discrimination in the provision of housing-related services); Concerned Tenants Ass'n of Indian Trails Apts. v. Indian Trails Apts., 496 F. Supp. 522, 525 (N.D. Ill. 1980) (holding that "there need be no argument when the statutory language is so clear" that Section 3604(b) prohibits post-acquisition services that are racially discriminatory); United States v. Morgan, No. CV 407-125, 2010 WL 11537561, at *4 (S.D. Ga. Mar. 30, 2010) (recognizing post-acquisition claim under Section 3604(b)); Jackson v. Comberg, No. 8:05-cv-1713-T-24TMAP, 2007 WL 2774178, at *4 (M.D. Fla. Aug. 22, 2007) (Section 3604(b) applies to "discriminatory conduct during the rental of the property"); Richards v. Bono, No. 5:04CV484-OC-10GRJ, 2005 WL 1065141, at *4 (M.D. Fla. May 2, 2005) (Section 3604(b) "prohibit[s] unlawful discriminatory conduct after a tenant has taken possession of the dwelling").

[409] Georgia State Conf. of the NAACP v. City of LaGrange, 940 F.3d 627, 632 (11th Cir. 2019). In *LaGrange*, LDF filed an amicus brief in support of plaintiffs. Press Release, NAACP Legal Def. & Educ. Fund, Inc., LDF Files Amicus Brief in the Eleventh Circuit Court of Appeals in Georgia Fair Housing Case (Mar. 7, 2018), https://www.naacpldf.org/press-release/ldf-files-amicus-brief-in-the-eleventh-circuit-court-of-appeals-in-georgia-fair-housing-case/, *archived at* https://perma.cc/MX29-ZEXZ.

city's policy requiring an individual to pay all debts they owe to the city in order to receive utilities had a disparate impact on Latinx residents.[410] The district court dismissed plaintiffs' Section 3604(b) claim, holding that a "proper reading" of that provision extends it only to conduct occurring at the time of acquisition.[411] In reversing the district court's opinion, the Eleventh Circuit cited the broad language of the FHA and its lack of a temporal limitation.[412]

Other cases have reached similar conclusions. In *Concerned Tenants Ass'n of Indian Trails Apartments v. Indian Trails Apartments*, a case about the quality of apartment services provided to Black versus white tenants, the district court rejected the defendant apartment complex's "tortured interpretation" that Section 3604(b) applies only to activities related to the availability of housing, finding it "ludicrous" and "counter to the plain and unequivocal language of the statute."[413] With respect to cases involving discriminatory municipal services, courts have also recognized that such claims would generally not arise until the tenant or owner was residing in the home.[414] In *Committee Concerning Community Improvement v. City of Modesto*, the Ninth Circuit highlighted this particular point, noting that "[t]here are few 'services or facilities' provided at the moment of [acquisition], but there are many 'services or facilities' provided to the dwelling associated with the occupancy of the dwelling."[415]

HUD regulations provide further support for applying Section 3604(b) to post-acquisition conduct. One such regulation, entitled "[d]iscrimination in terms, conditions, and privileges and in services and facilities," prohibits the denial or limitation of services or facilities in connection with the sale or rental of a dwelling.[416] While this language appears to limit coverage to pre-acquisition issues, HUD provides examples of prohibited conduct that clearly contemplate post-acquisition activity. One example includes "[l]imiting the use of privileges, services or facilities associated with a dwelling because of race, color, religion, sex, handicap, familial status, or national origin of an owner, tenant or a person associated with him or her."[417] The reference to "owner" or "tenant" implies that the section applies to activity that occurs after the sale or rental of the property.[418] Additionally, another regulation entitled "[o]ther prohibited sale and rental conduct" bans "[the refusal] to provide municipal services or property . . . for dwellings or providing such services . . . differently because of" mem-

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[410] Georgia State Conf. of the NAACP v. City of LaGrange, No. 3:17-cv-067, 2017 WL 8777467, at *1 (N.D. Ga. Dec. 7, 2017).
[411] *Id.* at *2–3.
[412] *LaGrange*, 940 F.3d at 631–32.
[413] 496 F. Supp. 522, 525 (N.D. Ill. 1980) (emphasis omitted).
[414] Oliveri, *supra* note 223, at 10.
[415] 583 F.3d 690, 713 (9th Cir. 2009).
[416] 24 C.F.R. § 100.65 (2019).
[417] *Id.* at (b)(4).
[418] Oliveri, *supra* note 223, at 22.

bership in a protected class.[419] This proscribes discriminatory conduct associated with the use or occupancy of a property, not simply the initial acquisition of the dwelling. Further, in its enforcement actions HUD has consistently taken the position that Section 3604(b) applies to post-acquisition conduct.[420] Given that HUD is the agency charged with the implementation and administration of the FHA, and these regulations are consistent with the primary purpose of the statute, HUD's regulations are entitled to deference.[421] Accordingly, courts have repeatedly deferred to HUD's interpretation of Section 3604(b) to cover post-acquisition conduct.[422]

However, some courts considering water and sewer claims under the FHA have limited the reach of Section 3604(b). In *Steele v. City of Port Wentworth*, plaintiffs alleged that the city violated Section 3604(b) of the FHA by denying water and sewer services to predominantly Black neighborhoods, among other inferior municipal services.[423] The district court dismissed the FHA claim, holding that it only applies to conduct associated with the sale or rental of a dwelling.[424] In *Lewis v. Schmidt*, a district court in Illinois refused to consider a Section 3604(b) claim involving a water shutoff, similarly concluding that this provision of the FHA did not apply because the claim did not involve the sale or rental of a dwelling.[425]

In another recent case, *Drayton v. McIntosh County*, plaintiffs challenged a municipality's failure to provide essential services, including sufficient water and sewer supplies, to the Gullah Geechee people on Sapelo

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[419] 24 C.F.R. § 100.70(d)(4). Although this regulation falls under the heading of conduct that "otherwise makes [housing] unavailable," parroting the language of Section 3604(a), HUD has made clear that its regulations may describe conduct that violates more than one of the subsections of Section 3604. *See* 24 C.F.R. § 100.50(a).

[420] *See, e.g.*, U.S. Dep't of Hous. & Urban Dev. v. Paradise Gardens, Section II, Homeowners' Ass'n, No. 04-90-0321-1, 1992 WL 406531, at *10 (HUDALJ Oct. 15, 1992), *aff'd*, 8 F.3d 36 (11th Cir. 1993); U.S. Dep't of Hous. & Urban Dev. v. Murphy, No. 02-89-0202-1, 1990 WL 456962, at *43 (HUDALJ July 13, 1990).

[421] Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997); Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 866 (1984).

[422] *See, e.g.*, Bloch v. Frischholz, 587 F.3d 771, 780 (7th Cir. 2009) (en banc) ("Allowing certain claims for post-acquisition discrimination to proceed under § 3604(b) is also consistent . . . with regulations adopted by HUD, the agency responsible for implementing the FHA."); Comm. Concerning Cmty. Improvement v. City of Modesto, 583 F.3d 690, 713–14 (9th Cir. 2009) (noting that HUD's regulations implementing the FHA support post-acquisition claims under Section 3604(b)); Davis v. City of New York, 902 F. Supp. 2d 405, 437 (S.D.N.Y. 2012) (acknowledging that its reading of the FHA, allowing post-acquisition claims, comports with HUD's interpretation).

[423] Steele v. City of Port Wentworth, No. CV4:05-cv-135, 2008 WL 717813, at *1 (S.D. Ga. Mar. 17, 2008).

[424] *Id.* at *12. Although plaintiffs' claim was not brought under Section 3604(a), the court also determined that the alleged deprivation did not render the home unavailable because plaintiffs continued to have access to water and sanitation through wells and septic systems. *Id.*

[425] Lewis v. Schmidt, No. 10-cv-1819, 2011 WL 43029, at *9 (N.D. Ill. Jan. 4, 2011). But as stated *supra* at note 242, the court did find that Section 3604(a) covers post-acquisition conduct.

Island in Georgia.[426] The district court dismissed plaintiffs' FHA claims, determining that Section 3604(b) "is limited to claims of discrimination that impact accessibility and availability of housing, and not claims that relate to the use and enjoyment of already-acquired housing."[427] In *Drayton*, the Civil Rights Division of the U.S. Department of Justice filed a statement of interest making clear that a holding that Section 3604(b) applies only to pre-acquisition conduct would be contrary to Congress's goal of creating "truly integrated and balanced living patterns" and would frustrate the purposes of the FHA, but to no avail.[428] However, the Eleventh Circuit's 2019 decision in *LaGrange*, finding that Section 3604(b) covers post-acquisition water services,[429] may portend more favorable decisions for plaintiffs on this issue.

Still, given this split of authority, a plaintiff challenging water shutoffs under the FHA should be prepared to vigorously assert that Section 3604(b) applies to post-acquisition conduct, and in particular, to municipal actions that have a discriminatory effect on a city's Black residents.

Conclusion

If current projections are accurate, the problem of water affordability in the United States will only worsen with time. Many cities are using aggressive tactics to collect unpaid water debt, punishing customers for their inability to pay by placing liens on their homes, resulting in foreclosure and eventual eviction when the liens or properties are sold. Cities may also disconnect water services to residents in arrears, making homes uninhabitable. These practices disproportionately impact Black communities. When appropriate, civil rights lawyers should aggressively pursue litigation to tackle water injustices by local governments. While this Article focuses primarily on utilizing the FHA to challenge water liens, litigators should consider the full arsenal of civil rights laws to address discriminatory and other unfair municipal conduct related to water services. Regardless of the form of advocacy, civil rights lawyers and advocates must continue to fight against discrimination in municipal water services and promote access to affordable water as a right that should be shared by all.

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[426] Drayton v. McIntosh County, No. 16-cv-053, slip op. at 5 n.6 (S.D. Ga. Oct. 30, 2017) (order granting in part and denying in part motion to dismiss).

[427] *Id.* at 15. The court also determined that the meaning of "availability of housing" under Section 3604(a) applies only to "pre-acquisition conduct related to the sale or rental of a dwelling." *Id.* at 13 (citing Cox v. City of Dallas, 430 F.3d 734, 740–43 (5th Cir. 2005)).

[428] Statement of Interest of the United States at 10, *Drayton*, No. 16-cv-053 (S.D. Ga. June 17, 2016).

[429] Georgia State Conf. of the NAACP v. City of LaGrange, 940 F.3d 627, 632 (11th Cir. 2019).