IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 24-3395

ALBERT PICKETT, JR.; KEYONNA JOHNSON; JAROME MONTGOMERY; ODESSA PARKS; TINIYA SHEPHERD (f/k/a TINIYA HALL), on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees

v.

CITY OF CLEVELAND, OH

Defendant-Appellant,

On Petition for Permission to Appeal Class Certification Order of the United States District Court for the Northern District of Ohio
Civil Action No. 1:19-cv-02911-SO

BRIEF OF PLAINTIFFS-APPELLEES

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Sixth Circuit Rule 26.1, counsel for Plaintiffs-Appellees certify that no party to this appeal is a subsidiary or affiliate of a publicly owned corporation, and no publicly owned corporation that is not a party to this appeal has a financial interest in the outcome.

/s/ Jennifer A. Holmes
Counsel for Plaintiffs-Appellees

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiffs-Appellees' ("Plaintiffs") respectfully request oral argument. This Court has granted appellate review of the district court's order certifying the Water Lien Class under Rule 23(b)(3) of the Federal Rules of Civil Procedure. Plaintiffs contend that the district court did not abuse its discretion in certifying the Rule 23(b)(3) class, nor the now challenged Rule 23(b)(2) class, and that Cleveland is improperly leveraging this appeal to challenge the district court's summary judgment decision and seek merits review of Plaintiffs' challenge to Cleveland's water lien policy under the Fair Housing Act ("FHA"), 42 U.S.C. § 3064(a). The parties and the Court would benefit from oral argument to address whether the district court abused its discretion in certifying the Water Lien Classes, and whether review of the merits of the underlying claim is necessary as part of that certification decision.

COUNTERSTATEMENT OF ISSUES PRESENTED

1. Whether the district court abused its discretion in certifying the Water Lien Classes under Rules 23(b)(2) and (b)(3) of the Federal Rules of Civil Procedure, where (a) Plaintiffs demonstrated standing for purposes of class certification and (b) the district court properly found that predominance was satisfied under Rule 23(b)(3) of the Federal Rules of Civil Procedure.

2. If this Court decides to expand its review of the district court's class certification order into the merits of Plaintiffs' claim under the FHA, whether the district court properly determined that Cleveland's water lien policy "otherwise make[s housing] unavailable" within the meaning of 42 U.S.C. § 3604(a).[1]

STATEMENT OF THE CASE

I. BACKGROUND

On December 18, 2019, Plaintiffs filed this class action lawsuit challenging Cleveland's water service billing and collection practices under the FHA, the OCRA, and the United States and Ohio Constitutions. Compl., R. 1, PageID #1. Relevant to this appeal, Counts I and II alleged that Cleveland's water lien policy disproportionately harms Black homeowners and constitutes disparate impact discrimination in violation of §§ 3604(a) and 3604(b) of the FHA and § 4112.02(H) of the OCRA. *Id*. at Page ID #32–34.[2]

[1] While Cleveland raises questions under both the FHA and Ohio Civil Rights Act (OCRA), § 4112.02(H)(1), it notes that because OCRA follows the same standard as the FHA it focuses on the Court's interpretation of 3604(a) because it applies "with equal force" under Ohio law. Appellant's Br. at 5–6, n.3.

[2] Plaintiffs did not bring an intentional discrimination claim under the FHA or OCRA. Count III alleged that Cleveland's shutoff practices, including the failure to provide adequate notice, violated due process. *Id.* at PageID #34. Count IV alleged that Cleveland's arbitrary overbilling practices violated due process and equal protection. *Id.* at PageID #36. Plaintiffs' equal protection claim argued that Cleveland's overbilling practices are so arbitrary that they fail rational basis review. Pls.' Mot.to Dismiss Opp'n, R. 9, PageID #147–48. The District Court dismissed Plaintiffs' Equal Protection claim prior to discovery. Mot. to Dismiss Order, R. 11, PageID #187.

a. Through its water lien policy, Cleveland relies upon the threat of home loss to collect unpaid water charges, despite recurring complaints about erroneous overbilling.

Inaccurate billing for water service has been a pervasive problem in Cleveland for over 10 years. For example, between 2013 and 2017, Cleveland water customers submitted over 72,000 billing complaints, including approximately 16,000 overbilling complaints in 2015 alone. Compl., R. 1, PageID #9.

Against this pattern of erroneous overbilling, when a customer falls behind on a water bill by as little as $300 for at least 180 days or more, Cleveland takes the most drastic step available to it: converting this unpaid water debt into a lien on the customer's property (herein referred to as a "water lien") that can ultimately result in loss of the home.[3] While authorized by state law, Cleveland's water lien policy is not required under any law, *see* Ohio Rev. Code Ann. § 743.04. Indeed, Cleveland suspended its water lien policy for more than two years during the COVID-19 pandemic without issue. *See* Mustin-Robinson Dep., R. 64-2, PageID #661–63.

Cleveland maintains its water lien policy, which threatens its customers with housing loss, even though it recovers a negligible amount of funds through the policy. Between 2014–2019, the revenue received from water liens comprised less

[3] Twice a year, in September and March, Cleveland places water liens on properties for outstanding debt, which are added to customers' taxes in the county where water service is provided. Ohio Rev. Code Ann. §§ 743.04, 6103.02. *See also* Albrecht Dep., R. 65-11, PageID #1600 (Cleveland attaches water liens to its water customers' properties when their accounts are delinquent for 180 days or greater with a balance of $300 or more).

than one percent of the Cleveland water department's operating budget. *See* Colton Expert Report, R. 64-20, PageID #1306. This minimal water lien revenue has a negligible effect on the water department's total revenue and the water rates billed to customers. *Id*. at PageID #1306–11, 1313–14 (Plaintiffs' expert Roger Colton concluding that if the Cleveland water department lost its entire water lien revenue, it would not harm its financial performance and would, at most, cost residential customers an additional $0.19 per month). Moreover, Cleveland has done no analysis of the efficacy or necessity of its water lien policy and does not know how much unpaid debt it could successfully recover without the use of water liens. *See* Def.'s Ans. to Pl.'s First RFA, R. 65-8, PageID #1461–63.

b. Cleveland places a disproportionate number of water liens in majority Black neighborhoods.

Between 2012 and 2020, Cleveland certified over 17,000 water liens on its customers' properties. Parnell Expert Report, R. 65-15, PageID #1732. Cleveland placed a disproportionate number of these water liens on homes in majority Black neighborhoods. *Id*. at PageID #1756. White residents make up 59% of Cuyahoga County, but only 18.1% of water liens are placed in majority White neighborhoods. *Id*. at PageID #1733, 1738. In contrast, while Black residents make up 29% of Cuyahoga County, 68.3% of water liens are placed in majority Black neighborhoods. *Id*. Even when controlling for median household income, the higher the percentage

of Black residents in any given neighborhood, the higher the number and proportion of all water liens are placed in that neighborhood. *Id*. at PageID #1755–56.

c. Cleveland's conversion of debt into water liens places homeowners at substantially increased risk of housing loss and increases the cost of homeownership.

Cleveland's water lien policy elevates unpaid water charges from a mere debt into an encumbrance on an individual's home. Water liens are a direct cause of municipal foreclosures by virtue of the fact that a homeowner with a water lien is necessarily subject to eviction or foreclosure unless their underlying water debt is resolved. Ohio Rev. Code Ann. § 5721.10; *see also* Steil Rebuttal Report, R. 65-13, PageID #1694–97, 99. In addition, once a water lien is placed, it begins to accumulate penalties, interest, and other fees which can significantly increase the amount of the underlying debt, making it more costly to avoid foreclosure. Pls.' Class Certification Reply, R. 87 Page ID. #4734. Unsurprisingly, the placement of a water lien is associated with a more than fifteen-time increase in a homeowner's risk of foreclosure. *See* Steil Suppl. Report, R. 65-14, PageID #1718 (finding that 16.89% of residential properties with a water lien experienced municipal tax foreclosure compared to only 1.11% of residential properties without a water lien).

These burdens on homeownership are a direct result of Cleveland's implementation of its water lien policy. Unpaid water charges cannot be converted into a water lien absent Cleveland's certification of the debt to the county. *See* Ohio

Rev. Code Ann. § 743.04; Water Lien SOP, R. 64-4, PageID #717. Cleveland also retains control of water liens after placement: if Cleveland and the customer enter into a payment plan after certification, Cleveland recalls the water lien but tracks the customer account for compliance with the payment plan. Cleveland will re-certify the water lien "[i]f the customer breaks the payment plan." Water Lien SOP, R. 64-4, PageID #720.

d. Plaintiffs' expert proposed a methodology to calculate economic damages traceable to water liens but made no representations as to the number of class members whose economic damages would be zero.

The economic damages flowing from the attachment of a water lien can be determined for each class member using a common methodology. Plaintiffs' expert Dr. Justin Steil proposed that economic damages caused by a water lien could be estimated by calculating (1) the penalties and interest assessed against the water lien, and (2) in the event of foreclosure, the lost equity attributable to the water lien and in excess of the underlying debt amount. Steil Expert Report, R. 71, PageID #3167–71.

Cleveland contends that Plaintiffs' expert Dr. Justin Steil admitted that up to 20% of class members experience no economic harm from its water lien policy, but Dr. Steil made no such admission. Rather, he noted only that 1 in 5 of the Named Plaintiffs experienced no damages from penalties and interest. In his expert reports, Dr. Steil made clear that a precise estimate of classwide damages from penalties and

interest would require tax summary level data for each individual with a water lien. Steil Suppl. Report, R. 65-14, PageID #1713–14. Because Dr. Steil did not have access to this tax summary data for all individuals within the Water Lien Class, Dr. Steil's opening report provided a rough approximation of the total damages from penalties and interest across the entire class by applying his proposed methodology to the Named Plaintiffs and extrapolating the result to the class. *Id.* In deposition testimony, Dr. Steil explained that one of the five Named Plaintiffs had no penalties and interest assessed against their water lien because their mortgage lender had immediately paid off their water lien balance.[4] Steil Dep., R. 65-10, PageID #1505. Thus, he noted that "20 percent of our sample had no penalties and interest." *Id*. He also explained that because some class members may have also paid off their water liens prior to the assessment of fees, the economic damages arising from penalties and interest "for some [class members] would be zero." *Id*. at PageID #1485, 1505.

II. DISTRICT COURT OPINIONS

a. The Parties briefed summary judgment and class certification simultaneously, and the District Court resolved both against Cleveland.

On September 15, 2022, Defendants filed a motion for summary judgment on all remaining counts (Counts I–IV). Def.'s Mot. for Summ. J., R. 64-1, PageID #599.

[4] This Named Plaintiff still suffered economic harm as a result of the water lien because the mortgage lender increased her monthly mortgage payments to account for paying off the water lien. Steil Expert Report, R. 71, PageID #3182.

On the same day, Plaintiffs filed a motion for class certification, requesting that the Court certify four classes, including two classes of Black residents and homeowners in Cuyahoga County who have been obligated to pay a debt against their property pursuant to a water lien placed by Cleveland (the Water Lien Classes)—one under Rule 23(b)(2) for injunctive relief and one under Rule 23(b)(3) for damages. Pls.' Class Certification Mot., R. 65, Page ID #1390–91. On September 29, 2023, the District Court issued an order denying Cleveland's motion for summary judgment. Summ. J. Order, R. 92, PageID #4820. The following day, September 30, 2023, the District Court granted Plaintiffs' motion for class certification, certifying the proposed Water Lien Classes under Rules 23(b)(2) and (b)(3), as well as Plaintiffs' proposed Shutoff and Overbilling Classes under Rule 23(b)(2). Class Certification Order, R. 93, PageID #4851.

b. In its summary judgment order, the District Court held that Cleveland's placement of water liens falls within the scope of § 3604 of the FHA.

The District Court's summary judgment order considered whether § 3604 of Cleveland's water lien policy falls within the ambit of § 3604 and concluded that it does. With respect to § 3604(a), the Court found that Cleveland's water lien policy can make housing unavailable because the attachment of a water lien both significantly increases a homeowner's risk of municipal tax foreclosure and increases the cost of homeownership by triggering the imposition of additional costs

which must be paid to avoid foreclosure. Summ. J. Order, R. 92, PageID #4784. The Court supported its conclusion with case law from this Court and several other circuits, recognizing that § 3604 applies broadly to conduct that "[has] some effect" on housing availability. *Id*. at PageID #4781–84. Its analysis also relied upon Plaintiffs' evidence that the placement of a water lien increases both the risk of municipal foreclosure and the cost of avoiding housing loss. *Id*. Accordingly, the Court held that water liens have the potential to affect housing availability and are therefore properly subject to § 3604(a). *Id*. With respect to § 3604(b), the Court acknowledged Plaintiffs' argument that the water lien policy also falls within the scope of § 3604(b) but declined to address the question given its holding that § 3604(a) applies to the policy. *Id*. at PageID #4785.

c. In its class certification order, the District Court considered whether Plaintiffs' FHA claim could be adjudicated on a classwide basis.

The District Court's class certification order determined that Plaintiffs had satisfied the requirements of Rule 23 and held that certification of the 23(b)(2) and 23(b)(3) Water Lien Classes was appropriate. R. 93, PageID #4841–50. Relevant to this appeal, the District Court provided two reasons for its holding that Plaintiffs had met the predominance requirement under Rule 23(b)(3). First, it explained that adjudication of Plaintiffs' claims does not require individualized proof of housing unavailability. Because Plaintiffs' claim asserts that the placement of a water lien

itself affects housing availability and gives rise to FHA liability, the Court can resolve the question of whether § 3604(a) applies to Cleveland's lien policy on a classwide basis without individually assessing whether each class member's water lien caused a foreclosure. *See id*. at PageID #4845–48. For a similar reason, the Court also rejected Cleveland's argument that the class could not be certified because as many as 20% of class members could have no economic damages from penalties, interest, and foreclosure under Dr. Steil's model. *Id.* at PageID #4847–48. Without addressing the validity of Cleveland's premise about the percentage of class members who have no penalty, interest, or foreclosure damages, the Court explained that under Plaintiffs' theory, "the assessment of water liens alone, without any paid penalties or subsequent municipal foreclosure, is the harm that makes housing unavailable under [§ 3604(a)] and gives rise to damages." *See id*. at PageID #4848.

Second, the Court determined that Plaintiffs had established predominance because the "common question . . . at the heart" of their FHA claim is whether Cleveland's disproportionate placement of water liens in majority-Black neighborhoods amounts to disparate impact discrimination. *See id.* at PageID #4846. The Court held that the predominance requirement was met because the common issue of whether the elements of an FHA disparate impact claim have been satisfied is more prevalent than any individualized issues identified by Cleveland. *Id*.

SUMMARY OF THE ARGUMENT

The District Court did not abuse its discretion when it certified Plaintiffs' proposed Water Lien Classes. While Cleveland's appeal purports to raise issues with the Rule 23(b)(3) predominance analysis in the District Court's class certification order, it largely seeks to relitigate the District Court's determination on summary judgment that § 3604(a) of the FHA applies to Cleveland's water lien policy. This Court has made clear that Rule 23(f) appeals "should not become a vehicle for early review of a legal theory that underlies the merits of a class action." *In re Delta Air Lines*, 310 F.3d 953, 960 (6th Cir. 2002). Accordingly, Cleveland's arguments should be rejected.

Whether Cleveland's certification of water liens makes housing unavailable within the meaning of § 3604(a) of the FHA has no bearing on whether the Water Lien Classes were properly certified and thus is not an appropriate issue for a Rule 23(f) appeal. The key question at the class certification stage is whether plaintiffs have met the requirements of Rule 23, not whether they will ultimately prevail on the merits. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974).

Cleveland contends that a determination of whether its water lien policy falls within the scope of the FHA is necessary to decide whether Plaintiffs have met the Rule 23(b)(3) predominance requirement, but this is incorrect. The District Court's predominance analysis did not depend on its interpretation of the FHA. Rather, the

District Court's class certification order concluded that the common questions raised by Plaintiffs' claim—including whether § 3604 applies to the lien policy and whether the elements of a disparate impact violation have been established—predominate over any individualized issues raised by Cleveland. Because the District Court properly held that Plaintiffs' FHA claim satisfies the Rule 23(b)(3) predominance requirement without reaching a conclusion on the merits of Plaintiffs' claim, this Court should not review the District Court's § 3604 analysis in a Rule 23(f) appeal. *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 459 (2013) ("Rule 23(b)(3) requires a showing that questions common to the class predominate, not that those questions will be answered, on the merits, in favor of the class.").

If this Court nonetheless finds that it must address the scope of § 3604(a), it should affirm the District Court's determination that it applies to Cleveland's water lien policy. The District Court properly found that the policy could make housing unavailable within the meaning of § 3604(a) because the attachment of a water lien increases both the risk of foreclosure and the cost of maintaining homeownership. Summ. J. Order, R. 92, PageID #4784. The Court provided ample support for this conclusion: It relied on case law from this Court and several other circuits recognizing that § 3604(a) applies broadly to conduct that is distinct from sale or rental but still has the potential to affect housing availability. *See id*. at PageID #4781–82, 4784; Class Certification Order, R. 93, PageID #4845–46. It also relied

on Plaintiffs' factual evidence showing that the placement of a water lien significantly increases a homeowner's risk of municipal tax foreclosure and can increase the cost of homeownership by imposing penalties and other fees which must be paid in order to avoid foreclosure. Summ. J. Order, R. 92, PageID #4784. The District Court's holding therefore "falls within a broad range of permissible conclusions" as to the scope of § 3604(a). *Elfert v. United States*, 149 F. App'x 402, 409 (6th Cir. 2005) (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 400 (1990). Alternatively, if this Court determines that § 3604(a) cannot apply to Cleveland's water lien policy, it should remand for the District Court to consider Plaintiffs' argument that the policy also falls under § 3604(b). Pls.' Summ. J. Opp., R. 85, PageID #3803–04.

Cleveland also attempts to manufacture a class certification issue by conflating the separate inquiries of standing and damages, and by mischaracterizing the record in this case. Cleveland argues that certification of Rule 23(b)(3) Water Lien Class was improper because up to 20% of the unnamed class members it includes have incurred no economic damages traceable to a water lien, and thus they have no standing to pursue an FHA claim. *See, e.g.,* Appellant's Br. at 9. As an initial matter, Cleveland's assertion that 20% of the Water Lien Class lacks economic damages misconstrues the record. Contrary to Cleveland's claims, Plaintiffs' expert noted only that *some* members of the Water Lien Class would likely lack economic

damages from penalties and interest specifically, and made no representation as to what portion of the class would ultimately lack economic harm of any kind. More fundamentally, the relevant question at the class certification stage is whether at least one named plaintiff has standing to pursue a claim, not whether every class member has standing to recover damages. *See, e.g.*, *Barrows v. Becerra*, 24 F.4th 116, 127 (2d Cir. 2022); *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 676 (7th Cir. 2009)... Because each of the four Named Plaintiffs in this litigation incurred an injury that was caused by Cleveland's water lien policy and would be redressed by the relief sought, Plaintiffs have established sufficient standing at the class certification stage.

ARGUMENT

I. STANDARD OF REVIEW

District courts have broad discretion to certify a class. *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 850 (6th Cir. 2013). An appellate court's review of a class certification order is "narrow" and "very limited," and will be reversed "only if [the defendant] makes a strong showing that the district court's decision amounted to a clear abuse of discretion." *Id.* (quoting *Olden v. LaFarge Corp.*, 383 F.3d 495, 507 (6th Cir. 2004)) (additional citations omitted). This Court does not find an abuse of discretion absent a "definite and firm conviction that the district court committed a clear error of judgment." *In re Whirlpool*, 722 F.3d at 850 (cleaned up). An abuse of discretion occurs only where the district court

relies on "clearly erroneous findings of fact, applies the wrong legal standard, misapplies the correct legal standard when reaching a conclusion, or makes a clear error of judgment." *Id.* Even if this Court "might decide differently" if it considered "the issue *de novo*," that is not sufficient for abuse of discretion. *United States v. Johnson*, 697 F.2d 735, 739 (6th Cir. 1983).

Cleveland's contention that the district court's interpretation of 42 U.S.C. § 3604(a) should be subject to *de novo* review based on *United States v. Brown*, Appellant's. Br. at 13, should be rejected. *Brown* did not involve review of a class certification order; instead, it involved an appeal of the district court's sentencing decision which required review of the interpretation of a particular federal sentencing statute. 639 F.3d 735, 737–38 (6th Cir. 2011). Moreover, to the extent the Court engages in a review of the district court's analysis of the FHA—which it should not—the Court already recognized that the abuse of discretion standard would apply to such a review. *See* Order Granting Petition to App. Class Certification, R. 102, PageID #4924 (noting "Cleveland may be able to show that the district court's application of the FHA was an abuse of discretion").

II. THE RELEVANT INQUIRY IN THIS RULE 23(F) APPEAL IS WHETHER COMMON ISSUES PREDOMINATE, NOT A REVIEW OF THE DISTRICT COURT'S MERITS ANALYSIS.

Cleveland's arguments about the FHA are an attempt to circumvent the limits of a Rule 23(f) appeal and seek interlocutory review of the District Court's merits decision in its Summary Judgment Order holding that Plaintiffs presented a viable theory of relief under § 3604(a). But Rule 23(f) permits only review of a district court's class certification, and in this case, a merits determination about the scope of the FHA is irrelevant to the predominance finding Cleveland challenges here. Nevertheless, should the Court address the FHA, it should hold that the District Court did not abuse its discretion in concluding that Cleveland's water lien policy is encompassed by the broad scope of the statute because it "otherwise makes [housing] unavailable" by making it more difficult for residents to maintain housing.

A. This Court Should Not Review the District Court's FHA Analysis Because it is Not Relevant to Whether the Water Lien Class Was Properly Certified.

Appeals under Rule 23(f) are not meant to be vehicles for interlocutory merits reviews, but are instead limited to evaluating only the "district court's decision *certifying* the class." *Olden v. LaFarge Corp.*, 383 F.3d 495, 507 (6th Cir. 2004) (quoting *Armstrong v. Davis*, 275 F.3d 849, 867 (9th Cir. 2001)). As the Supreme Court has explained, "[i]n determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail

on the merits, but rather whether the requirements of Rule 23 are met." *Eisen*, 417 U.S. at 178 (citation omitted). The Supreme Court has further clarified that "[m]erits questions may be considered to the extent—but only to the extent—that they are *relevant to determining whether the Rule 23 prerequisites for class certification are satisfied*." *Amgen*, 568 U.S. at 466 (emphasis added) (citing, *inter alia*, Advisory Comm.'s 2003 Note, Fed. Rule Civ. Proc. 23(c)(1) ("[A]n evaluation of the probable outcome on the merits is not properly part of the certification decision.").

While in some cases analysis of a class certification decision may involve some overlap with the merits of a claim, *see e.g., Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011), *Rikos v. Proctor & Gamble Co.*, 799 F.3d 497, 519–20 (6th Cir. 2015), in this case an analysis of the merits is not relevant to determining whether the 23(b)(3) Water Lien Class meets the requirements of Rule 23.[5] Cleveland contends that the District Court's § 3604(a) interpretation constitutes an error with its Rule 23(b)(3) predominance analysis, but the Court's § 3604(a) analysis was not pertinent to its conclusion that predominance was demonstrated.

[5] For the first time, Cleveland now also seeks to oppose certification of the Water Lien Class pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. Cleveland "d[id] not contest Plaintiffs argument that certification for the Water Lien Class is proper under Rule 23(b)(2)" before the District Court. Class Certification Order, R. 93, PageID #4838. Nor did Cleveland challenge certification of the Rule 23(b)(2) class in its petition for review. *Compare* Def.'s Pet. (No, 23-0309, Oct. 13, 2023) at 1 (challenging the District Court's certification of the (b)(3) class), *with* Appellant's Br. at 1 (challenging the District Court's certification of both the (b)(2) and (b)(3) classes). Thus, Cleveland has waived this argument, and the Court should decline to consider it. *Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 552 (6th Cir. 2008) (explaining that "an argument not raised before the district court is waived on appeal" in part to "ensure[] fairness to litigants by preventing surprise issues from appearing on appeal").

Rather, the Court concluded that Plaintiffs had satisfied the predominance requirement because common issues predominated over individualized issues. Specifically, the District Court properly found that the elements of the disparate impact analysis are common to all members of the class, Class Certification Order, R. 93, PageID #4846, and that whether Cleveland's "disproportionate placement of water liens on Black homeowners and residents of Cuyahoga County violates the FHA" is the "common question that lies at the heart of this litigation." *Id*. at PageID #4842. Cleveland does not dispute that Plaintiffs have asserted a common question; instead, it argues that the answer to that common question should be no. That merits determination is inappropriate for Rule 23(f) review. *See Daffin v. Ford*, 458 F.3d, 553 (6th Cir. 2006) (explaining that the question of whether a particular provision permits a plaintiff's claim "is a merits issue" that is not appropriate for Rule 23(f) review).

Cleveland nonetheless argues that the District Court erred in certifying the 23(b)(3) Water Lien Class because, in Cleveland's view, its water lien policy does not constitute a violation of the FHA. Appellant's Br. at 18. In particular, Cleveland contends that the District Court erred in applying § 3604(a) to water liens because, Cleveland argues, its water lien policy does not "otherwise make unavailable or deny" housing based on race. *Id.* at 14. But as explained above, this argument is irrelevant to determining whether the Water Lien Class satisfies Rule 23(b)'s

predominance requirement and therefore does not demonstrate that the District Court abused its discretion in certifying the class. "Rule 23(b)(3) requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Amgen*, 568 U.S. at 459 (emphasis in original). The water lien class's "inability to prove [a violation of the FHA] would not result in individual questions predominating." *Id.* at 459–60. Rather, on the question of whether Cleveland's water lien policy falls within the ambit of the FHA, "the class is entirely cohesive: It will prevail or fail in unison. In no event will the individual circumstances of particular class members bear on the inquiry." *Id.* at 460; *see also In re Whirlpool Corp.*, 722 F.3d at 859 (Sixth Circuit "[f]ollowing *Amgen*'s lead" rejecting need to resolve question on the merits to satisfy predominance requirement where class "will prevail or fail in unison"). This case is unlike *Wal-Mart Stores v. Dukes*, where the Supreme Court found the question of commonality overlapped with the merits of the plaintiffs' Title VII claim. 564 U.S. at 352. In *Wal-Mart*, the key question of whether Wal-Mart had engaged in a pattern or practice of discrimination was not susceptible to a common answer but would require examining the reasons for millions of employment decisions. *Id.* By contrast, here, the scope of § 3604(a) is a pure merits question that will apply equally to the entire class and does not require individual analysis of each class member's circumstances. Thus, its determination is not relevant to the predominance analysis, and Cleveland

wrongly implores this Court to conduct its own statutory interpretation of the FHA and reweigh evidence the District Court relied on below. *See generally* Appellant's Br. at 14–21.

B. If This Court Must Address Whether the Water Lien Policy Is Subject to § 3604(a) of the FHA, It Should Affirm the District Court's Determination.

If this Court determines that it should reach the scope of § 3604(a) under the FHA, it should hold that the District Court did not abuse its discretion in determining that Plaintiffs may pursue an action under the FHA because Cleveland's attachment of a water lien "has the effect of making housing unavailable . . . within the scope of 42 U.S.C. § 3604." Class Certification Order, R. 93, PageID #4846. This Court has instructed that the abuse of discretion standard "requires the appellate court to uphold any district court determination that falls within a broad range of permissible conclusions." *Elfert*, 149 F. App'x at 409 (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 400 (1990).

The District Court did not abuse its discretion in applying § 3604(a) to Cleveland's water lien policy in determining that water liens can make housing unavailable within the meaning of the FHA. The district court's application of § 3604(a) is well within the range of permissible conclusions, as the FHA has a broad reach, many other courts have applied § 3604(a) to post-acquisition conduct, and

Plaintiffs have evidence showing that Cleveland's placement of housing liens affects the ability to maintain housing.

The FHA bans housing discrimination on the basis of race and other protected characteristics. 42 U.S.C. §§ 3601–3631. The U.S. Supreme Court has recognized that the FHA's terms are "broad and inclusive" and must be subject to "generous construction." *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) (narrow interpretations of FHA "undermine[] the broad remedial intent of Congress embodied in the Act"). Likewise, this Court has also found that "an examination of the [FHA], 42 U.S.C. §§ 3601–3612, reveals a broad legislative plan to eliminate all traces of discrimination within the housing field." *Marr v. Rife*, 503 F.2d 735, 740 (6th Cir. 1974).

Section 3604(a), in relevant part, makes it unlawful to "refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or *otherwise make unavailable* or deny" housing based on protected characteristics, including race. 42 U.S.C. § 3604(a) (emphasis added). As this Court has explained, "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." *Mich. Prot. & Advoc. Serv., Inc. v. Babin*, 18 F.3d 337, 344 (6th Cir. 1994) (emphasis added). Indeed, § 3604(a)'s scope is intended to be "expansive." *Pitchford v. Am.*

Title Co., No. 04-2743, 2007 WL 9706252, at *4 (W.D. Tenn. Mar. 29, 2007). This Court has explained that conduct falls within the scope of § 3604's "otherwise make unavailable" prohibition when it "directly affect[s] the availability of housing" for a protected group. *Babin*, 18 F.3d at 344–45. Conduct makes housing unavailable within the meaning of § 3604(a) when it "ha[s] the *potential* to affect housing for minorities." *Bowen v. Am. Title Co.*, No. 04–2575 D/P, 2007 WL 9706328, at *4 (W.D. Tenn. Mar. 28, 2007).

The District Court did not abuse its discretion in determining that Cleveland's placement of a water lien makes housing unavailable within the meaning of the FHA. Cleveland has not shown that the District Court made a clear error of judgment in applying *Babin* to its water liens, which "have the *effect* of denying housing opportunities to a member of a protected class." *Babin*, 18 F.3d at 344 (emphasis added). This standard is not, as Cleveland suggests, a narrow requirement that § 3604(a) is limited only to practices that affect a person's "opportunity to obtain a dwelling or housing," Appellant's Br. at 16; on the contrary, the statute also encompasses practices that interfere with a person's ability to keep their home. *See Johnson v. Wachovia Bank of Del., N.A.*, No. 03-2567, 2006 WL 8434813, at *15 (W.D. Tenn. Feb. 16, 2006) (holding that a predatory lending scheme that could "rob borrowers of home ownership" had a "direct enough" effect on the availability of housing under *Babin* "to fall within the provisions of § 3604").

Other courts have similarly applied § 3604(a)'s "make unavailable" language to conduct that increases the risk of loss of housing for those who have already acquired housing. For example, the D.C. Circuit has "made clear that 'make unavailable' means not just preventing access to new housing by prospective buyers and renters but also the loss of housing to those who already occupy it." *Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep't of Hous. & Urb. Dev.*, 723 F. Supp. 2d 14, 22–23 (D.D.C. 2010) (citing *2922 Sherman Ave. Tenants' Ass'n v. Dist. of Columbia*, 444 F.3d 673, 685 (D.C. Cir. 2006)); *see also Hargraves v. Cap. City Mortg. Corp.*, 140 F. Supp. 2d 7, 20 (D.D.C. 2000) (holding that § 3604(a) applies to "predatory practices" in lending because those practices "can make housing unavailable by putting borrowers at risk of losing the property which secures their loans").

Cleveland's placement of water liens makes housing "unavailable" by increasing the risk of people losing their homes. *See Greater New Orleans Fair Hous. Action Ctr.*, 723 F. Supp. 2d at 22–23 (citing *2922 Sherman Ave. Tenants' Ass'n*, 444 F.3d at 685). Cleveland converts unpaid water charges into water liens, which makes it more difficult for residents to retain their housing. *See* Ohio Rev. Code Ann. § 743.04; Water Lien SOP, R. 64-4, PageID #717. Under Ohio law, a homeowner with a water lien is subject to eviction or foreclosure unless their underlying water debt is resolved. Ohio Rev. Code Ann. § 5721.10. As Plaintiffs'

expert explained in his report, "residential properties with attached water liens experienced municipal tax foreclosures at more than 15 times the rate of residential properties without water liens." *See* Steil Suppl. Report, R. 65-14, PageID #1718. This heightened risk of foreclosure triggered by a water lien supports a determination that Cleveland's water lien policy may lead to housing unavailability and therefore falls within the scope of § 3604(a). *See, e.g., Pitchford*, 2007 WL 9706252, at *4 (concluding that "transactions that involve discrimination in home improvement and debt consolidation lending" reasonably fall within scope of § 3604 "on grounds that the burden of the debt *may* ultimately lead to foreclosure and the ultimate loss of the borrower's home") (emphasis added); *Johnson v. Wachovia Bank of Delaware, N.A.*, 2006 WL 8434813, at *15 ("[Home mortgage] transactions directly affect the borrowers availability of housing because the burden of the debt *can* lead to foreclosure on their home.") (emphasis added).

Further, Cleveland's placement of water liens also makes housing unavailable within the meaning of § 3604(a) by increasing the cost of maintaining homeownership. *See United Farm Bureau Mut. Ins. Co. v. Metro. Hum. Rels. Comm'n*, 24 F.3d 1008, 1014 n.8 (7th Cir. 1994) (denial of homeowner's insurance makes housing unavailable because it may increase the cost of homeownership).[6] In

[6] Although this portion of the opinion interprets state and local law, the ordinance at issue contained language that is "virtually identical" to § 3604 of the FHA, and the court interpreted the state and local provisions consistently with the Ninth Circuit's readings of the FHA. *See id.* at 1011–14.

addition to creating a property interest in a home, the attachment of a lien triggers the imposition of penalties, fees, and interest, which are added to the lien amount and must be paid to prevent foreclosure. Steil Dep., R. 65-10, PageID #1482, 1488. Thus, attachment of a lien can force a homeowner to pay a sum that exceeds their water debt to avoid foreclosure and retain ownership of their home. *Id.* at PageID #1489. Indeed, Plaintiffs' expert Dr. Steil found that penalties and interest increased the Named Plaintiffs' original water lien liability by an average of approximately 37%. Steil Expert Report, R. 71, #3172.

Applying § 3604(a) to Cleveland's placement of water liens is in line with other courts. As the District Court cited in its order denying summary judgment to Cleveland, there is ample precedent from other courts that, contrary to Cleveland's narrow reading, the FHA "covers other activities other than the purchase or rental of homes that have the potential to adversely affect housing for minorities." Summ. J. Order, R. 92, PageID #4781–82 (citing *United States v. Mitchell*, 580 F.2d 789 (5th Cir. 1978) (finding that racial steering is prohibited under § 3604); *Hanson v. Veterans Admin.*, 800 F.3d 1381, 1386 (5th Cir. 1986) (concluding that discriminatory appraisals constitute violations of § 3604); *Byrd v. Brandeburg*, 922 F. Supp. 60 (N. D. Ohio 1996) (applying § 3604 to throwing a Molotov cocktail onto the porch of a plaintiff's home); *NAACP v. Am. Family Mut. Ins.*, 978 F.2d 287, 301 (E.D. Wis. 1992) (finding that § 3604 applies to insurance redlining and

discriminatory pricing); *Bowen v. Am. Title Co.*, No. 04-2575 D/P, 2007 WL 9706328, at *4 (W.D. Tenn. Mar. 28, 2007) (finding that the plaintiffs' "effort here to expand the scope of § 3604 to encompass transactions to 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 court's expansive view of § 3604's reach.").

Cleveland wrongly contends that the cases that the District Court cited mostly focus on housing acquisition. Cleveland argues that many courts have limited § 3604(a) to "cases that directly impact a plaintiff's ability to locate or secure housing." Appellant's Br. at 16. But all the cases Cleveland cites for this proposition are inapposite. First, Cleveland points to the Seventh Circuit's case *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n* to argue that § 3604(a) is limited to "access to housing" with a focus on "practice[s] of refusing to sell or rent homes." *Id.* at 17 (quoting 388 F.3d 327, 329 (7th Cir. 2004). That case was overruled, in relevant part, by the Seventh Circuit *en banc*, which clarified that *Halprin* recognized that § 3604(a) is not "constrained to purely pre-sale discrimination." *Bloch v. Frischholz*, 587 F.3d 771, 782 (7th Cir. 2009). Cleveland also relies on *Bloch*, but ignores that the Seventh Circuit in that case did not confine § 3604(a) to actions that "directly impact a plaintiff's ability to locate or secure housing," but recognized that § 3604(a) applies to post-acquisition conduct like

evictions. *Id.* While the claim in *Bloch* failed because the Plaintiffs, who argued that they had been constructively evicted, never vacated their home, the Seventh Circuit expressly declined to address whether "'unavailability' means that a plaintiff must, in every case, vacate the premises to have a § 3604(a) claim. *Id*. at 777–79.

In contrast to this case where the evidence shows an increased risk of foreclosure, Cleveland relies on cases where the challenged practices were so attenuated from the availability of housing that there was no risk that the challenged conduct would make housing unavailable. Appellant's Br. at 16; *see Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 192–93 (4th Cir. 1999) (recognizing that § 3604(a) focused on policies that are "housing-related," and a decision about where to build a highway was not linked directly enough to housing); *Clifton Terrace Assocs., Ltd. v. United Tech. Corp.*, 929 F.2d 714, 719 (D.C. Cir. 1991) (refusing to apply § 3604(a) to issues involving elevators at a housing complex). Similarly, Cleveland's reliance on *Southend Neighborhood Improvement Ass'n v. St. Clair County*'s quote about § 3604(a) not applying to "intangible interests" is misplaced because that case refused to apply § 3604(a) to the plaintiffs' claims about a county's actions towards *other* homes besides their own. 743 F.2d 1207, 1210 (7th Cir. 1984). These cases differ from the circumstances here, where Cleveland's placement of water liens increases the risk of foreclosure.

Cleveland wrongly asserts that the District Court did not consider whether Cleveland's water lien policy makes housing unavailable. Appellant's Br. at 18. In fact, the District Court in its class certification order recognized that "the mere assessment of the water lien on their property has the effect of making housing unavailable to them within the scope of 42 U.S.C. § 3604 and thereby allows them to pursue an action under the FHA." Class Certification Order, R. 93, PageID #4846. This reasoning flows from the District Court's analysis in its Summary Judgment Order issued the day before, which cited evidence that attachment of a water lien increases the risk of foreclosure by more than tenfold and increases the costs associated with home ownership by imposing penalties, fees, and interest. Summ. J. Order, R. 92, PageID #4784. Accordingly, the District Court concluded that "the *effect* of the water lien is what has the potential to make housing unavailable under § 3604(a)." *Id.* (emphasis in original). It was not an abuse of discretion, at this stage of the litigation, for the District Court to find that the water liens make housing unavailable.[7]

[7] Plaintiffs also argued that water liens make housing unavailable in another way, although the District Court did not address this theory in its decisions below. Summ. J. Order, R. 92, PageID #4782–83. Unlike a mere debt, a lien creates a property interest that confers to the lienholder the right to transfer or sell the property to satisfy the debt secured by the property. Ohio Rev. Code Ann. §§ 5721.10, 5721.19. Under *Babin*, "transactions of ownership and disposition" can "directly affect the availability of housing." 18 F.3d at 344–45. As such, water liens make housing unavailable because they create an ownership interest that allows the lienholder to dispose of the property, affecting the ability of homeowners to exercise the full set of property rights they would otherwise have. *See, e.g.*, *In re Ransford*, 194 F. 658, 660–61 (6th Cir. 1912) ("[A] lien is a right in one person to detain that which is in his possession belonging to another, until certain

Finally, Cleveland and its amici's contentions that certifying the Water Lien Class to bring an FHA claim will have nationwide effects on municipalities' abilities to assess water liens for unpaid water debt are misplaced. These arguments do not bear upon class certification issues, nor are they correct. To be clear, Plaintiffs' FHA claim is based on the particularly burdensome practice specific to Cleveland—its imposition of a draconian water lien policy that certifies liens for low levels of unpaid water debt, results in the disproportionate placement of liens in Black neighborhoods, triggers penalties and interest, and increases the risk of foreclosure. *Supra* Statement of the Case, § I.A–C. The racial disparity in Cleveland's water lien placement persists even when controlling for income in the analysis. Parnell Expert Report, R. 65-15, PageID #1755–56. And yet Cleveland has not shown—or even examined—whether its water lien policy significantly serves its claimed interest in collecting unpaid debts, especially where alternative collection methods exist. Summ. J. Order, R. 92, PageID #4801; Def.'s Resp. to Pls.' Reqs. for Admis. Nos. 3, 5, 7–9, R. 65-8, PageID #1461–63. Congress intended for the FHA to provide a cause of action in precisely these circumstances, and based on these facts, there is

demands…are satisfied."); *In re Evans*, 30 B.R. 744, 745 (Bankr. N.D. Ohio 1983) ("Clearly, the placing of a lien on property is, in essence, the taking of an interest in that property.").

no basis for the conjecture that there will be ripple effects nationwide to lien practices as a general matter.[8]

Accordingly, Cleveland has failed to show that the District Court abused its discretion in applying § 3604(a) to Cleveland's water lien policy.[9]

III. THE DISTRICT COURT PROPERLY CERTIFIED THE RULE 23(b)(3) WATER LIEN CLASS.

The District Court properly certified the Water Lien Class because it satisfied all elements of Rules 23(a) and 23(b)(3), including predominance.[10] *See* Fed. R. Civ. P. 23(b)(3). Cleveland's argument that the Water Lien Class fails to satisfy the predominance requirement of Rule 23(b)(3) muddles separate inquiries about the Article III standing required to bring a suit and the damages calculations conducted at the remedies stage. Cleveland argues that class certification was wrong because there are unnamed class members who did not suffer economic harm due to the placement of a water lien, are uninjured, and therefore lack standing. Because some

[8] Certainly, if other jurisdictions are employing liens in a racially discriminatory manner—either through disparate treatment or disparate impact—their practices should similarly be subject to scrutiny under the FHA. But the possibility that other jurisdictions are engaging in conduct prohibited by the FHA is not a reason to avoid applying the statute fairly in this case.

[9] Plaintiffs also challenged Cleveland's water lien policy under § 3604(b) of the FHA, Pls.' Summ. J. Opp., R. 85, PageID #3803–04, but the District Court declined to analyze this theory in the opinions below, *see* Summ. J. Order, R. 92, PageID #4785. Thus, should this Court decide to address the scope of the FHA in the context of its review of the class certification order and hold that § 3604(a) does not apply to Cleveland's water lien policy, it should remand for the District Court to consider whether § 3604(b) applies.

[10] Cleveland's arguments that the Water Lien Class fails to satisfy predominance have no bearing on the Rule 23(b)(2) Water Lien Class because Rule 23(b)(2) does not have a predominance requirement.

class members "did not experience money damages," Cleveland argues that the Water Lien Class cannot satisfy the predominance requirement of Rule 23(b)(3). Appellant's Br. at 1.

As an initial matter, Cleveland conducts the wrong standing inquiry by focusing on unnamed class members rather than the Named Plaintiffs. Cleveland also argues that predominance is not satisfied because of class member variation in money damages, disregarding the common questions of law and fact identified by Plaintiffs that predominate the class. Neither argument supports decertifying the Rule 23(b)(3) class. The trial court can winnow down the class members to be awarded monetary damages at the remedies stage. And even if something further were necessary before that point in the litigation, the appropriate remedy would be for the district court to modify the class definition, not decertify the class.

A. Cleveland Challenges Standing of Unnamed Class Members, which Is Immaterial for Class Certification.

At the class certification stage, Plaintiffs need only establish Article III standing for Named Plaintiffs, not for every absent class member. On appeal, Cleveland does not dispute the Named Plaintiffs' standing to pursue their FHA claims. Instead, Cleveland wrongly focuses on unnamed class members, asserting that their injury is merely a statutory violation that is insufficient to satisfy Article III.

1. At the Class Certification Stage, the Relevant Question Is Whether Named Plaintiffs Have Article III Standing.

Citing *TransUnion LLC v. Ramirez*, Cleveland argues that for a damages class to be certified, all class members must establish an injury in fact. 594 U.S. 413 (2021); *see* Appellant's Br. at 12. This argument, however, misstates *TransUnion*'s holding. The Supreme Court held in *TransUnion* that after a liability determination, "[e]very class member must have Article III standing *in order to recover individual damages*." *TransUnion* at 431 (emphasis added). The Court limited its holding, advising that it "do[es] not here address the distinct question whether every class member must demonstrate standing *before* a court certifies a class." *Id.* at 431 n.4 (emphasis in original). Contrary to Cleveland's assertions, *TransUnion* does not require Plaintiffs to show at the class certification stage that every unnamed class member suffered a "concrete harm" traceable to water liens, "such as expenses incurred due to a foreclosure, penalties, or interest." Appellant's Br. at 22. While the Supreme Court held that after a trial and before damages are awarded, each class member must demonstrate Article III standing in order to recover damages, the Court explicitly declined to require the same for a class to be certified.

Several circuits that have addressed the issue of standing at the class certification stage and have held—even after *TransUnion*—that only the named plaintiff or class representative needs Article III standing for the claim to be justiciable, not absent class members. *See* Newberg and Rubenstein on Class Actions

§ 2:3 (6th ed. 2023); *see also, e.g., Huber v. Simon's Agency, Inc.*, 84 F.4th 132, 155 (3d Cir. 2023) ("[A]t certification, . . . it is not necessary for each member to prove his or her standing for the class action to be justiciable."); *Barrows*, 24 F.4th at 127 (only one named plaintiff needs standing to satisfy Article III); *Curtis v. Propel Prop. Tax Funding, LLC*, 915 F.3d 234, 240 (4th Cir. 2019) ("In a class action case, we look to the standing of the named plaintiff."); *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 676 (7th Cir. 2009) ("But as long as one member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied. This is true even if the named plaintiff (the class representative) lacks standing, provided that he can be replaced by a class member who has standing." (internal citation omitted)); *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1273 (11th Cir. 2019) ("for a class action to be justiciable, 'all that the law requires' is that a named plaintiff have standing").

The Sixth Circuit's recent analysis of class member standing in *Speerly v. General Motors, LLC* is consistent with this basic proposition. __ 4th __, No. 23-1940, 2024 WL 3964115 (6th Cir. Aug. 28, 2024). There, the district court certified multiple subclasses of General Motors purchasers or current owners whose vehicles had an alleged transmission defect. In certifying the classes, the district court relied in part on the fact that each of the named plaintiffs had standing because each alleged that their vehicles "manifested" a transmission problem. *Id.* at *6. General Motors

argued that class certification was improper because the majority of the class members had not experienced a transmission problem with their vehicles and thus lacked Article III standing, citing *TransUnion.* In affirming the district court's certification of the classes, this Court relied in part on the fact that each of the named plaintiffs had alleged that their vehicles had alleged that they had experienced a problem with their transmission, and noted that class certification is not "the appropriate time to 'address claims of absent class members'" who may not have experienced a transmission issue. *See id.*

2. Named Plaintiffs Have Article III Standing to Pursue their FHA Claim.

Although Plaintiffs need only one named plaintiff with standing for class certification purposes, *all* the Named Plaintiffs have standing to pursue the FHA claim. To meet Article III standing requirements, each Named Plaintiff "need show only that he or she (1) has suffered an injury in fact (2) that is causally connected to the defendants' conduct and (3) that is likely to be redressed by a favorable ruling." *Hamad v. Woodcrest Condo. Ass'n*, 328 F.3d 224, 230–31 (6th Cir. 2003).

Each of the four Named Plaintiffs—Albert Pickett Jr., Keyonna Johnson, Jarome Montgomery, and Tiniya Shepherd[11]—was injured by the water lien policy.

[11] Odessa Parks previously served as a plaintiff in this case. Pursuant to Federal Rule of Civil Procedure 25(a) Plaintiffs filed a statement noting her death in the District Court. R. 88, PageID #4750. Prior to her death, Mrs. Parks brought claims on her own behalf and did not seek to be appointed as a class representative. Pls.' Corrected Class Certification Br., R. 79, PageID #3522 n.1.

Each had a water lien placed on their home and was harmed from the increased costs to pay their water balance, and in some cases, suffered extensive periods without water service.[12] *See* Pls.' Class Certification Mot., R. 65, PageID #1402–03.

As to the other two elements of standing, the injury from the water lien was caused by Cleveland's water lien policy and would be redressed by a ruling that the policy violates the FHA and awarding appropriate relief. *See* Pls.' Corrected Class Certification Br., R. 79, PageID #3525–26, 3536–37. Accordingly, Plaintiffs satisfy the requirement that at least one Named Plaintiff have standing for class certification purposes.[13]

[12] To be clear, these injuries are not the only grounds for Article III standing in this case. The Sixth Circuit has recognized that being subject to a racially discriminatory housing practice is an injury for standing purposes. *Merck v. Walmart, Inc.*, 114 F.4th 762, 779 (6th Cir. 2024) ("Plaintiffs under the Fair Housing Act have standing under Article III because Congress identified and elevated an individual harm—private discrimination in the housing market on the basis of race. That harm is comparable to a harm found in the Constitution—racial discrimination by the government.").

[13] Cleveland's arguments about unnamed class members' standing are not relevant at the class certification stage and need not be addressed in this appeal. Plaintiffs briefly note, however, that Cleveland misapprehends Plaintiffs' arguments and the District Court's findings about the injury to Water Lien Class members. First, Plaintiffs argue that the discriminatory placement of liens causes an injury to the Black homeowners and residents who make up the class, in addition to the economic harms that flow from a lien. Whether or not the class members will be awarded damages for those harms will be determined at the damages stage, not at class certification. *See infra* Section III.C. Second, Cleveland wrongly recasts the District Court's findings about the effect of a water lien as a finding of injury-in-fact for Article III standing. Cleveland claims that the District Court "ratified Plaintiffs' theory" of standing in finding the "*assessment of water liens alone*, without any paid penalties or subsequent municipal foreclosure, *is the harm* that makes housing unavailable under 42 U.S.C. § 3604 and gives rise to damages." Appellant's Br. at 24 (quoting Certification Order, R. 93, PageID #4848 (emphases added by Cleveland)). The language Cleveland relies on, however, is not a finding about the injury to class members for standing purposes, but rather a finding that the assessment of a water lien is a harm that falls within the scope of FHA. *See* Certification Order, R. 93, PageID #4848.

B. Because There Are Common Questions of Law and Fact, Variation Among Class Members' Economic Harms Does Not Defeat Predominance.

Cleveland argues that the Water Lien Class cannot satisfy the predominance requirement when 20% of the class has suffered no monetary damages. Appellant's Br. at 9. As discussed above, Plaintiffs contest Cleveland's assertion about the record in the District Court. But more importantly, even if true, Cleveland's premise that 20% of the class has not suffered damages does not defeat a finding of predominance. Cleveland's assertions about the injury to absent Water Lien Class members who may not have experienced economic damage are irrelevant at the class certification stage.

The Sixth Circuit has determined that "the predominance requirement is met if [a] common question is at the heart of the litigation." *Powers v. Hamilton Cnty. Pub. Def. Comm'n*, 501 F.3d 592, 619 (6th Cir. 2007). In their Motion for Class Certification, Plaintiffs identified common questions at the heart of their FHA claim. R. 65, PageID #1417–19. Specifically, Plaintiffs asked whether Cleveland's water lien policy violates the FHA and OCRA and whether the water lien policy has a disparate impact on Black homeowners and residents in Cuyahoga County, relying on the same data analysis from Dr. Parnell. Additionally, there are common questions of fact as to the causal effect of imposing a water lien on homeowners and residents based on the statistical analysis of Dr. Steil. Finally, there is a common methodology

to determine damages stemming from Dr. Steil's model that can be applied to every class member.

Based on these commonalities, the District Court determined "that predominance is established here because Plaintiffs' disparate-impact claim present[s] the same common question that lies at the heart of this litigation: whether Defendant's disproportionate assessment of water liens on Black homeowners in Cuyahoga County, under Defendant's facially neutral water lien policy, violates the FHA." Class Certification Order, R. 93, PageID #4846. The Court found that this "inquiry presents the same essential elements of an FHA disparate-impact claim to all class members." *Id.*

In response to the common questions and evidence noted above, Cleveland merely points to the fact that there will be some variation in the ultimate damages awarded to class members. Appellant's Br. at 26–28. This Court's precedent is clear that the existence of some differences between class members does not defeat predominance where there are otherwise common questions to the class.

The Sixth Circuit has repeatedly held that a plaintiff "need not prove that every element can be established by classwide proof." *Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460, 468 (6th Cir. 2017); *In re Whirlpool Corp.*, 722 F.3d at 858 (same). Rather, predominance is satisfied where "issues subject to generalized proof and applicable to the putative class as a whole predominate over

those issues that are subject to only individualized proof." *Randleman v. Fid. Nat'l Title Ins. Co.*, 646 F.3d 347, 352–53 (6th Cir. 2011); *Young v. Nationwide Mut. Ins. Co*, 693 F.3d at 544 (same).

Indeed, "[a] class may be certified based on a predominant common issue even though other important matters will have to be tried separately, such as damages . . . peculiar to some individual class members." *Hicks v. State Farm Fire & Cas. Co.*, 965 F.3d 452, 460 (6th Cir. 2020) (cleaned up); *see also Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (same); *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 564 (6th Cir. 2007) ("Common issues may predominate when liability can be determined on a class-wide basis, even when there are some individualized damages issues.") (cleaned up); *Olden*, 383 F.3d at 508 (class certification not precluded by evidence that "individual *damage* determinations might be necessary") (emphasis in original).

For these reasons, where common issues otherwise predominate, as they do here, variation in economic damages does not preclude class certification.

C. The Inclusion of Class Members Who Will Not Receive Damages in the Rule 23(b)(3) Class Should Be Addressed at the Damages Stage or, in the Alternative, By Modifying the Class Definition.

That the Rule 23(b)(3) Water Lien Class definition may encompass some class members who ultimately will not receive damages is of no consequence at this stage as those members may be winnowed out at the damages stage. Cleveland's argument

to the contrary is wrong and goes against precedent. *See Bittinger v. Tecumseh Prod. Co.*, 123 F.3d 877, 885 (6th Cir. 1997) ("[T]he level of claimed injury may vary throughout the class—a common feature of class actions routinely dealt with at a remedial phase"); *see also* Newberg and Rubenstein on Class Actions § 2:3 ("possibility that a well-defined class will nonetheless encompass some class members who have suffered no injury . . . is generally unproblematic as the noninjured parties can just be sorted out at the remedies phase of the suit.").

Additionally, the type of inquiry required to ascertain each class member's economic harm, as Cleveland's argument would suggest is necessary, is counter to a key purpose of class proceedings: maximizing judicial efficiency by focusing on common legal questions shared by all class members. Cleveland's argument implies that all class members must prove they are economically harmed for Plaintiffs to demonstrate predominance under Rule 23(b)(3). This would force a full-blown merits inquiry at the class certification stage, which the Supreme Court has expressly forbidden. *See Amgen*, 568 U.S. at 466 ("Rule 23 grants courts no license to engage in free ranging merits inquiries at the certification stage."). The Court should therefore deny Cleveland's request for decertification.

Alternatively, if this Court determines that the Rule 23(b)(3) class definition is overbroad because it may encompass class members who suffered no economic damages, then this Court should remand to the District Court to modify the class

definition, not decertify the class. Both the Rule 23(b)(2) and 23(b)(3) certified classes were defined as: "All Black homeowners or residents in Cuyahoga County who have been obligated, within two years of the filing of the Complaint, to pay a debt assessed against their real property, wherein the debt arises from monies originally owed to Cleveland Water." Pls.' Class Certification Mot., R. 65, PageID #1390. The district court may modify the Rule 23(b)(3) class to exclude those who did not lose equity through foreclosure or did not pay any water lien penalties or fees. *See* Wright & Miller, 7AA Fed. Prac. & Proc. Civ. § 1785.4 (3rd ed. 2023 update) (district court has authority to modify classes "at the close of plaintiff class's case-in-chief, and at the completion of the trial on the merits"); *cf. Powers*, 501 F.3d at 618 (modifying overbroad class definition on appeal). Thus, even if this Court agrees with Cleveland's arguments concerning damages of members of the Rule 23(b)(3) class, decertification is unwarranted.

CONCLUSION

Because the district court did not abuse its discretion in certifying the Rule 23(b)(2) and 23(b)(3) Water Lien Classes, this Court should affirm the class certification order below. In the alternative, should this Court accept Cleveland's argument that there is untenable variation among damages for members of the Rule

23(b)(3) class, Plaintiffs respectfully request this Court remand for the district court to modify the class definition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Federal Rule of Appellate Procedure 32(a)(7) because, excluding parts of the document exempted by Fed. R. App. P. 32(f), this document contains 10,317 words.

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I hereby certify that on October 4, 2024, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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