UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ALBERT PICKETT, JR., *et al.*,	)	Case No.: 1:19 CV 2911
	)	
Plaintiffs	)	
	)	
v.	)	JUDGE SOLOMON OLIVER, JR.
	)	
CITY OF CLEVELAND,	)	
	)	
Defendant	)	ORDER

Currently pending before the court in the above-captioned case is Defendant's ("City of Cleveland" or "Defendant") Motion for Summary Judgment ("Motion") (ECF No. 64), pursuant to Federal Rule of Civil Procedure 56, on all of Plaintiffs' Counts. For the following reasons, the court denies Defendant's Motion.

I. BACKGROUND

A. Factual Background

On December 18, 2019, Plaintiffs Albert Pickett, Jr. ("Pickett"), Keyonna Johnson ("Johnson"), Jarome Montgomery ("Montgomery"), Odessa Parks ("Parks"), and Tiniya Shepard (formerly known as Tiniya Hall) ("Shepard") (collectively, "Plaintiffs") filed a Class Action Complaint in this court. (ECF No. 1.) Plaintiffs are all African-American current or former customers of Cleveland Water. (Compl. ¶¶ 22–26, 73–113, ECF No. 1.) Cleveland Water is a department of the City of Cleveland. (*Id.* ¶ 27.) The Cleveland Codified Ordinances (the "CCO") govern Cleveland Water's administration. (Mot. at PageID #104, ECF No. 8); *see also* CCO §§ 129.05, 535 *et seq.* In addition, Defendant is bound by a consent decree (the "*Colegrove* Order") as

a result of *Colegrove v. City of Cleveland*, No. 74-1007 (N.D. Ohio June 25, 1987). (Compl. ¶ 40, ECF No. 1.)

Together, the CCO and the *Colegrove* Order require Defendant to complete a series of procedural steps before terminating a customer's water service. (Mot. at PageID #104–05, ECF No. 8; Consent Decree at PageID #44, ECF No. 1-1.) Plaintiffs allege that Defendant has a pattern of not providing these procedural safeguards to customers before terminating their water service. (Compl. ¶¶ 42–49.) Plaintiffs also allege that customers of Defendant are frequently given extremely high water bills even after the customers confirm that there are no leaks anywhere on their properties. (*Id.* ¶¶ 37, 86, 93, 100, 108.) Some customers were even assessed high water bills after Cleveland Water had already shut-off their water service. (*Id.* ¶ 87.) Plaintiffs allege that these high water bills are erroneous and are caused by Defendant's water meters incorrectly recording water usage. (*Id.* ¶¶ 8, 38.) Plaintiffs further allege that Defendant never gives customers who believe that their meters are inaccurately recording water usage an opportunity to contest their bills. (*Id.* ¶ 46.)

Twice a year, Defendant converts certain overdue water bills into tax liens that are applied to the overdue customer's property ("water lien"). (Compl. ¶ 51, ECF No. 1.) Plaintiffs allege that there is no statutory minimum arrearage required to initiate the water lien process. (*Id.*) According to Plaintiffs, these water liens put properties at a higher risk of being taxed and/or property foreclosure and place the owner or tenant at risk of eviction. (*Id.* ¶ 52.) Further, Plaintiffs allege that the county treasurer can initiate foreclosure actions against the homeowner to recover unpaid water liens, but sometimes sells the water liens at auction to private investors who are also able to initiate foreclosure actions on a property themselves. (*Id.* ¶¶ 52–53, 57.)

Between 2014 and 2018, Cleveland Water placed more than 11,000 water liens on properties in Cuyahoga County, and nearly 6,000 residents were subject to property tax foreclosures as a result. (Compl. ¶ 14, ECF No. 1.) Plaintiffs provided statistical evidence demonstrating that a majority of

these water liens were placed in majority-Black Census blocks as compared to majority-White Census blocks, despite the fact that the majority of Cuyahoga County's population is White. (*Id.* ¶¶ 15–16, 64–69.) As a result, Plaintiffs allege that Defendant's policy of placing water liens on the properties of customers with overdue bills disproportionately impacts African-Americans. (*Id.* ¶¶ 124–132.)

Pursuant to Rule 23 of the Federal Rules of Civil Procedure, Plaintiffs seek to represent the following classes:

> (1) a class of all Black homeowners or residents in Cuyahoga County who have been obligated, within the last two years, to pay debt secured by their property stemming from amounts originally owed to Cleveland Water ("Water Lien Class");
>
> (2) a subclass of all Black homeowners or residents in Cuyahoga County who have been obligated, within the last two years, to pay increased mortgage escrow payments as a result of their mortgagee or mortgage service satisfying a debt secured by the property stemming from amounts originally owed to Cleveland Water ("Escrow Subclass");
>
> (3) a class of all persons who, within the last two years, had their water service disconnected by Cleveland Water and did not receive advance written notice of the shutoff or their right to request a hearing to dispute the impending disconnection ("Shutoff Class"); and
>
> (4) a class of all persons who, within the last two years, have been overbilled for water services by Cleveland Water and did not receive an opportunity to contest the bills through a hearing ("Overbilling Class").

(Compl. ¶ 115, ECF No. 1.)

Plaintiffs bring the following claims against Defendant on behalf of themselves and the putative class members: (1) violation of the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.* ("Count One") resulting from the alleged disparate impact that Defendant's water lien policy has on African-Americans; (2) violation of the Ohio Civil Rights Act, Ohio Rev. Code § 4112.02(H) ("Count Two") resulting from the alleged disparate impact that Defendant's water lien policy has on

African-Americans; (3) violation of the Due Process Clause of the U.S. Constitution and the Due Course of Law Clause of the Ohio Constitution ("Count Three") resulting from Defendant's alleged failure to provide customers notice and opportunity to be heard before terminating water service; and (4) violation of the Due Process and Equal Protection Clauses of the U.S. Constitution and the Due Course of Law Clause under the Ohio Constitution ("Count Four") resulting from Defendant's alleged failure to give customers an opportunity to refute their water bills. (Compl. ¶¶ 129, 135, 145, 157–58.)

B. Procedural Background

Defendant filed its Motion for Summary Judgment (ECF No. 64) on September 15, 2022. Plaintiffs submitted their Opposition (ECF No. 85) to Defendant's Motion for Summary Judgment on December 15, 2022. Defendant submitted its Reply (ECF No. 86) in support of its Motion for Summary Judgment on January 19, 2023.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 56(a) governs summary judgment motions and provides:

> The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

A party asserting there is no genuine dispute as to any material fact or that a fact is genuinely disputed must support the assertion by:

> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
>
> (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1).

In reviewing summary judgment motions, this court must view the evidence in the light most favorable to the non-moving party to determine whether a genuine issue of material fact exists. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153 (1970); *White v. Turfway Park Racing Ass'n, Inc.*, 909 F.2d 941, 943–44 (6th Cir. 1990). A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Determining whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. Thus, in most cases, the court must decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." *Id*. at 252. However, "[c]redibility judgments and weighing of the evidence are prohibited during the consideration of a motion for summary judgment." *Ahlers v. Scheibil*, 188 F.3d 365, 369 (6th Cir. 1999).

The moving party has the burden of production to make a prima facie showing that it is entitled to summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986). If the burden of persuasion at trial would be on the non-moving party, then the moving party can meet its burden of production by either: (1) submitting "affirmative evidence that negates an essential element of the nonmoving party's claim" or (2) demonstrating "to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim." *Id*.

If the moving party meets its burden of production, then the non-moving party must point out specific facts in the record which create a genuine issue of material fact. *Zinn v. United States*, 885 F. Supp. 2d 866, 871 (N.D. Ohio 2012) (citing *Fulson v. City of Columbus*, 801 F. Supp. 1, 4 (S.D. Ohio 1992)). The non-movant must show "more than a scintilla of evidence to overcome summary judgment;" it is not enough to show that there is slight doubt as to material facts. *Zinn*, 885 F. Supp. 2d at 871 (quoting *Fulson*, 801 F. Supp. at 4). Moreover, the trial court does not have "a duty to search the entire record to establish that it is bereft of a genuine issue of material fact."

Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479–80 (6th Cir. 1989) (citation omitted)).

III. ANALYSIS

A. Counts One and Two - FHA and Ohio Civil Rights Act on behalf of the Water Lien Class

Defendant moves for summary judgment on Plaintiffs' first and second Counts, arguing that the record contains no evidence to support Plaintiffs' disparate-impact discrimination claims under the Fair Housing Act ("FHA"), 42 U.S.C. §§ 3601 *et seq.*, or the Ohio Civil Rights Act ("ORCA"), O.R.C. § 4112.02(H). (Br. at PageID #617, ECF No. 64-1); *see Linkletter v. W. & S. Fin. Grp., Inc.*, 851 F.3d 632, 640–41 (6th Cir. 2017) (noting that courts evaluate O.R.C. § 4112.02(H) under the same disparate-impact burden shifting framework as the FHA). Defendant asserts that disparate-impact claims under the Fair Housing Act are evaluated under the same burden-shifting framework applied across a number of federal anti-discrimination statutes. (*Id.*) Under that framework, Plaintiffs must first establish a *prima facie* case of disparate-impact discrimination to carry their burden. (*Id.* at PageID #617–18.)

Defendant contends that summary judgment is appropriate here because the record shows that Plaintiffs cannot maintain a *prima facie* case of disparate-impact discrimination under the FHA or ORCA because they have not produced statistical evidence proving that Defendant's water lien policy makes housing "unavailable" to Black homeowners and residents. (*Id.* at PageID #618); *see also Texas Dept. of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 527 (2015) (noting that, "a disparate-impact claim that relies on statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity.") Defendant states that Plaintiffs' proffered statistical evidence fails to show that the placement of water liens by Defendant results in foreclosures that disproportionately impact Black homeowners and residents, thus making housing unavailable under the FHA. (*Id.* at PageID #619.) Specifically, Defendant

notes that Plaintiffs' evidence fails to show that Defendant's placement of water liens on Black homeowners and residents properties put those same individuals at a higher risk of foreclosure. (*Id.*) Instead, Plaintiffs' expert, Dr. Allan Parnell ("Dr. Parnell") only concluded that, "[w]ater liens are significantly more likely to be attached to residences in predominantly African American neighborhoods than in predominantly white neighborhoods," and that "[t]he racial disparities of water liens are substantial and statistically significant." (*Id.*) (Internal citations omitted). Additionally, Defendant maintains that Dr. Justin Steil ("Dr. Steil"), another of Plaintiffs' experts, performed no analysis regarding any connection between water lien placement and a disparate impact of foreclosures on Black homeowners. (*Id.* at PageID #621) As a result, Defendant concludes that Dr. Steil's "conclusion that foreclosures are correlated with lien placement generally (without any analysis of impact based on race) has no bearing on whether placement of liens causes a disparate impact on the rate of foreclosure among Black homeowners." (*Id.*)

Plaintiffs counter that the record contains several genuine issues of material fact regarding whether Defendant's water lien policy violates the FHA and OCRA. Specifically, Plaintiffs state that Defendant's argument—that Plaintiffs will not be able to provide evidence proving that placement of water liens makes housing unavailable to Black homeowners within the meaning of the FHA at a disproportionate rate—is unpersuasive. It states:

> Cleveland's argument misunderstands the applicable law and fails to disaggregate the threshold question of whether Cleveland's conduct (its lien policy) falls within the scope of § 3604 from the secondary question of whether Plaintiffs have established that the lien policy causes a disparate impact on the basis of race. Specifically, Cleveland fails to recognize that liens make housing unavailable under § 3604(a), and therefore misses the relevance of the evidence of a racial disparity in Cleveland's placement of liens.

(*Id.* at PageID 3799.)

The court will first assess whether Defendant's water lien policy falls within the scope of

§ 3604 and is therefore subject to disparate-impact liability analysis under the FHA, before addressing whether Plaintiffs have presented a *prima facie* case of disparate-impact discrimination under the FHA and OCRA. *See Michigan Prot. and Advocacy Serv., Inc. v. Babin*, 18 F.3d 337, 345–46 (6th Cir. 1994) (noting that plaintiffs' argument failed because they failed to address the scope of the statute before advancing to the merits of their discrimination claim and stating that, "[a]n act done with discriminatory intent is not illegal unless it falls within the scope of a federal statute or runs afoul of the Constitution.").

1. 42 U.S.C. § 3604(a)

Title 42, § 3604(a) of the United States Code provides, in relevant part, that it shall be 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, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." (emphasis added.) While the matter herein does not involve the purchase or rental of homes, Plaintiffs base their claims on § 3604(a)'s "or otherwise make [housing] unavailable" language. (*See* Opp'n at PageID #3800, ECF No. 85) (noting that Defendant's argument—that Plaintiffs have failed to establish that the water lien policy is subject to liability under § 3604(a) because Plaintiffs have not provided statistical evidence of a robust causal relationship between water liens and a racial disparity in foreclosures—"misstates the legal standard because it fails to disaggregate the question of whether the water lien policy falls within the scope of § 3604(a) from the disparate impact analysis.").

In examining this "or otherwise make unavailable" language in the statute, the Sixth Circuit has recognized that "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." *Babin*, 18 F.3d at 344. Other courts have also recognized that the FHA covers activities other than the purchase or rental of homes that have the potential to adversely affect housing for minorities. *See 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."). *See also Texas Dept. of Hous. and Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 535 (2015) (explaining that Title VII's "adversely affect" phrase and the FHA's "otherwise make unavailable" phrase "serve the same purpose and bear the same basic meaning"). In determining what type of activity might fall within the phrase "otherwise make unavailable," the Sixth Circuit has stated that the operative question when assessing a plaintiff's claim comes down to the following: "[T]o what extent [does] the phrase 'otherwise make unavailable' reach[] out to make unlawful actions that are removed from the central event of purchasing or leasing a dwelling[,] *but nonetheless have some effect* on a person's ability to acquire housing." *Babin,* 18 F.3d at 344 (emphasis added).

Plaintiffs argue that Defendant's water policy, which converts a customer's unpaid water debt into a lien that is attached to the individual's property, makes housing unavailable under § 3604(a) in three ways. First, Plaintiffs allege that the placement of a water lien is itself a "transaction of ownership or disposition." (Opp'n at PageID #3802, ECF No. 85.) They state that, "[u]nlike most other debts, a lien creates a property interest that confers the right to transfer or sell

the liened property in order to satisfy the debt secured by that property." (*Id.*) Second, Plaintiffs acknowledge that while not every home subject to a water lien is subsequently subject to foreclosure, placement of the lien often precedes of municipal tax foreclosure. (*Id.*) They state that properties subject to water liens experience "municipal tax foreclosures at more than 15 times the rate of properties without water liens." (*Id.*) (citing Steil Suppl. Report at PageID #1718, ECF No. 65-14.) Accordingly, Plaintiffs posit that the connection between Defendant's practice of placing water liens on indebted properties and the municipal tax foreclosure rate supports a finding that Defendant's policy may make housing unavailable under § 3604(a). Third, Plaintiff contend that the attachment of a water lien makes housing unavailable under § 3604(a) by increasing the costs of home ownership. (Opp'n at PageID #3803, ECF No. 85.) Specifically, they state that:

> [i]n 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. 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.*) (internal citations omitted.)

Defendant counters that its placement of water liens does not make housing unavailable under § 3604 because neither Plaintiffs, nor their experts, have attempted to analyze whether Defendant's placement of water liens actually results in a disproportionate amount of foreclosures suffered by Black homeowners and residents. (Reply at PageID #4700, ECF No. 86.) Additionally, Defendant notes that Plaintiffs' theory is novel and that no court has found that the placement of a utility lien makes housing "unavailable" within the meaning of § 3604 of the FHA. (*Id.*) Finally, Defendant maintains that Plaintiffs' arguments are unavailing because § 3604 does not task the court with considering whether a challenged policy "affects a property interest." (*Id.*) Rather, § 3604 asks a court whether the challenged policy makes housing unavailable under the FHA. (*Id.*) After

considering the parties' argument and relevant case law, the court finds Plaintiffs' position to be well-taken.

As stated above, the Sixth Circuit has explained that, "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." *Babin*, 18 F.3d at 344. The court finds that the Defendant's policy of attaching liens to indebted properties could have an effect on a person's ability to maintain their housing. For example, Plaintiffs set forth evidence to suggest that the mere placement of a water lien increases a citizen's risk of municipal tax foreclosure by more than tenfold compared to properties without a water lien. (Opp'n at PageID #3802, ECF No. 85) (citing Steil Suppl. Report at PageID #1718, ECF No. 65-14.) Therefore, the *effect* of the water lien is what has the potential to make housing unavailable under § 3604, regardless of whether this effect has a disproportionate impact on Black residents. As Plaintiffs correctly point out, they do not have to establish the latter to satisfy the threshold question of whether Defendant's conduct falls within the scope of the FHA. Additionally, Plaintiffs present evidence showing that Defendant's placement of a water lien on a property increases the costs of home ownership by imposing penalties, fees, and interest, which are added to the lien's outstanding balance and must be paid in full to avoid a municipal foreclosure. (*Id.* at PageID #3803, ECF No. 85.)

It is therefore the court's view that Defendant's placement of a water lien not only potentially makes housing unavailable by significantly increasing an individual's risk of municipal tax foreclosure, but it also increases the costs associated with home ownership by imposing subsequent costs associated with the assessment of the water lien. While Plaintiffs' theory is novel, as stated above, other courts have recognized a range of activities that adversely affect or "have some effect" on denying housing opportunities to residents under the FHA. Therefore, the court finds that Defendant's water lien policy falls within the scope of § 3604(a).

Plaintiff's also argue that the City's water lien policy falls within the scope of 42 U.S.C. § 3604(b). However, having already determined that the policy falls within the scope of § 3604(a), the court next considers Defendant's claim that summary judgment is appropriate on Counts One and Two because the record contains no evidence to support Plaintiffs' claims of disparate-impact discrimination under the FHA or OCRA.

2. Disparate Impact Analysis

The Supreme Court has held that, consistent with other federal anti-discrimination statutes, disparate-impact claims are cognizable under the FHA. *Texas Dept. of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 545-46 (2015). Unlike a disparate-treatment case, where a "plaintiff must establish that the defendant had a discriminatory intent or motive," a plaintiff alleging a disparate-impact claim instead challenges practices that have a "disproportionately adverse effect on minorities" that are otherwise unjustified by a legitimate rationale. *Id.* at 524. Fair housing claims brought under a disparate-impact theory of liability serves two primarily goals: (1) it allows "plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment," *id.* at 540; and (2) it targets "'artificial, arbitrary, and unnecessary barriers' to minority housing . . . that can occur through unthinking, even if not malignant, policies," *Ave. 6E Invs., LLC v. City of Yuma*, 818 F.3d 493, 503 (9th Cir. 2016) (quoting *Inclusive Communities*, 576 U.S. at 540).

In *Inclusive Communities*, the Supreme Court outlined a framework for courts to address disparate impact claims under the FHA. *Id.* at 527. *See also Reyes v. Waples Mobile Home Park Limited Partnership,* 903 F.3d 415, 423-24 (4th Cir. 2018).[1] Under the FHA's three-step burden-

[1] While the Supreme Court did not expressly hold that courts should apply the three-step burden-shifting framework outlined in *Inclusive Communities*, many courts have since followed this framework in resolving disparate-impact claims brought under the FHA. *See e.g., Southwest Fair Hous. Council, Inc. v. Maricopa Domestic Water Improvement Dist.,* 17 F.4th 950, 960-61 (9th Cir.

shifting framework, Plaintiffs must first make a *prima facie* showing of disparate impact by establishing a robust causal connection between the Defendant's challenged policy and the disparate impact of the policy on a protected class. *Inclusive Communities*, 576 U.S. at 525; *Reyes,* 903 F.3d at 424. If Plaintiffs meet their initial burden, the burden then shifts to Defendant to prove that the challenged practice or policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest. *Inclusive Communities,* 576 U.S. at 526–27; *Reyes,* 903 F.3d at 424. If Defendant satisfies its burden, Plaintiffs may prevail by showing that Defendant's interest could be served by another practice that has a less discriminatory effect. *Inclusive Communities,* 576 U.S. at 525; *Reyes,* 903 F.3d at 424.

i. Plaintiff's Burden: Prima Facie Showing

The initial burden is on Plaintiffs to establish a *prima facie* disparate-impact claim. While recognizing that the FHA permits disparate-impact claims, the Supreme Court has described a set of "safeguards" to provide additional guidance for courts assessing the availability of a plaintiff's disparate-impact claims. *Inclusive Communities*, 576 U.S. at 542. The Court explained that these safeguards are necessary to "protect [ ] defendants from being held liable for racial disparities they did not create," and to prevent disparate-impact liability from "caus[ing] race to be used and considered in a pervasive way." *Id.* One of these safeguards is the "robust causality requirement," which requires a plaintiff to "produce statistical evidence demonstrating a causal connection"

2021); *Inclusive Communities Project, Inc. v. Lincoln Prop. Grp.,* 920 F. 3d 890, 903 (5th Cir. 2019). The Sixth Circuit has not yet addressed the issue. That said, having found the logic reasonable and consistent with the framework courts apply to address disparate-impact claims brought under other federal anti-discrimination statutes, the court similarly applies this three-step burden shifting framework here. *See Wards Cove Packing Co. v. Atonio,* 490 U.S. 642 (1989) (applying a burden-shifting framework to address a Title VII disparate-impact claim), *superseded by statute on other grounds*; *Smith v. Cty. of Jackson,* 544 U.S. 228 (2005) (applying a burden-shifting framework to address disparate-impact claim brought under the Age Discrimination in Employment Act).

between an identified neutral policy and any alleged disparities that affects members of a protected class. *Id.* at 542–43. The function of the robust causality requirement "is to limit disparate-impact claims only to instances where it is the defendant's policy or practice that causes an adverse, disproportionate effect." *Sw. Fair Hous. Council, Inc.*, 17 F.4th at 962; *Inclusive Communities*, 576 U.S. at 527 ("If a statistical discrepancy is caused by factors other than the defendant's policy, a plaintiff cannot establish a prima facie case, and there is no liability."). As the Ninth Circuit explained in *Sw. Fair Housing Council, Inc.*:

> [i]n other words, robust causality requires that plaintiffs prove with a preponderance of the evidence that the policy itself, and not some other factor (such as unrelated or uncontrollable societal determinants, government mandates that limit a defendant's discretion, or even other unchallenged policies of the defendant), created or exacerbated a disproportionate effect.

17 F.4th at 962; *see also Inclusive Communities*, 576 U.S. at 527 (noting that the "robust causality requirement ensures that '[r]acial imbalance . . . does not, without more, establish a prima facie case of disparate impact' and thus protects defendants from being held liable for racial disparities they did not create.") In *Sw. Fair Housing Council*, the Ninth Circuit succinctly set out a standard for evaluating whether a plaintiff has satisfied the robust causality requirement. In order to do so, the court held that a plaintiff must demonstrate:

> (1) the existence of a policy, not a one-time decision, that is outwardly neutral; (2) a significant, adverse, and disproportionate effect on a protected class; and (3) robust causality that shows, beyond mere evidence of a statistical disparity, that the challenged policy, and not some other factor or policy, caused the disproportionate effect.

17 F.4th at 962. Accordingly, the court considers each of the factors to determine whether Plaintiffs have satisfied their burden under the first prong of the burden-shifting framework.

a. Identification of an Outwardly Neutral Policy

The court begins by identifying the policy to which Plaintiffs take issue: Defendant's water

lien policy. *Sw. Fair Housing Council,* 17 F.4th at 962. *See also Wards Cove*, 490 U.S. at 656 ("[t]he plaintiff must begin by identifying the specific [ ] practice that is challenged."). Under this policy, the City of Cleveland coverts certain overdue water bills into tax liens that are applied to the overdue customer's property. (Compl. ¶ 51, ECF No. 1); (Ex. C to Def.'s Mot. at PageID #717, ECF No. 64-4) ("All active accounts that have been delinquent for 180+ days and has a balance of $300.00 (Water & Local Combine) or greater can be assessed to the current owner's property tax."). Under this policy, there is no statutory minimum arrearage required to initiate the water lien process. (Compl. ¶ 51, ECF No. 1.) Upon review, the policy appears to be outwardly neutral as it does not "explicitly treat customers differently based on their membership in any recognized protected class." *Sw. Fair Hous. Council, Inc.*, 17 F.4th at 963. Instead, Plaintiffs allege the impact of this policy disproportionately falls on Black residents and Black neighborhoods in Cleveland. (Compl. ¶ 67, ECF No. 1.) The practice is also more than "a one-time decision" as it is applied twice a year to thousands of homes. (Compl. ¶ 51, 55, ECF No. 1.) Accordingly, Plaintiffs have successfully identified an outwardly neutral policy.

b. Significant, Adverse, and Disproportionate Effect on Members of a Protected Class

Next, the court considers whether Plaintiffs have satisfied their burden of demonstrating a significant, adverse, and disproportionate effect on their identified protected class. For plaintiffs to satisfy their burden, they must produce statistical evidence showing a disparate impact between to two population groups: those allegedly harmed by the facially neutral policy and those allegedly unharmed by the challenged policy. *Sw. Fair Hous. Council, Inc.*, 17 F.4th at 963. *See also Reyes v. Waples Mobile Home Park Ltd. Partnership*, 903 F.3d 415, 425-26 (4th Cir. 2018); *Tsombanidis v. W. Haven Fire Dept.,* 352 F.3d 565, 575-77, superseded by regulation on other grounds (finding plaintiffs failed to establish a disparate impact claim by failing to provide any statistical evidence that the challenged policy produced a disparate impact on the protected class).

Defendant maintains that Plaintiffs cannot produce statistical evidence demonstrating that its water lien policy makes housing unavailable to Black homeowners because Plaintiffs' statistical evidence fails to provide a logical nexus between the placement of water liens subsequent foreclosures on Black homeowners. (Mot. at PageID #619, ECF No. 64-1.) Defendant notes that Plaintiffs' expert, Dr. Parnell, did not attempt to determine whether Defendant's placement of water liens subject Black homeowners and residents to a disproportionate risk of foreclosures. (*Id.*) Instead, Dr. Parnell only opined that water liens are significantly more likely to be attached to residences in predominantly African-American neighborhoods than in predominantly white neighborhoods. (*Id.*); (citing Parnell Report, Ex. I to Mot. at PageID #869, ECF No. 64-10) ("Water liens are significantly more likely to be attached to residences in predominantly African American neighborhoods than in predominantly white neighborhoods."). Accordingly, Defendant states that Dr. Parnell's analysis "does not demonstrate a *causal* connection between lien placement and race, nor does it demonstrate any relationship between lien placement and an alleged disparity in foreclosures or any other action that would make housing unavailable on Black residents." (*Id.* at PageID #620) (emphasis in original.)

Plaintiff counters that the evidence demonstrates that the water lien policy results in disproportionate placement of liens in majority-Black neighborhoods. (Opp'n at PageID #3805, ECF No. 85.) Importantly, Plaintiffs contend that Defendant's argument—that Plaintiffs must show a racial disparity in foreclosures—is incorrect because "Plaintiffs challenge the racial disparity in the *placement of liens*, not a racial disparity in the County's tax foreclosures." (*Id.*) (emphasis added). To that end, Plaintiffs maintain that the record shows a substantial statistical difference in the placement of water liens on Black-neighborhoods. (*Id.* at PageID #3805–06.)

Here, Dr. Parnell's analysis concluded that, "37.6% of water liens on residential properties [in Cuyahoga County] are in block groups where at least 90% of residents are African Americans,

while 2.6% of water liens on residential properties are in block groups where at least 90% of residents are white." (Parnell Report, Ex. I to Mot. at PageID #853, ECF No. 64-10.) Further, Dr. Parnell opined that the placement of water liens is statistically significant. (*Id.* at PageID #861.) More specifically, he found that:

> [b]lock groups where African Americans compromise between 16.2% and 53.8% of the population increase the expected number of water liens by 34.3% relative to block groups with less than 16.2% of African Americans, holding median household income and total population size constant. Block groups where African Americans compromise between 53.8% and 92.9% of the population have 110.6% more water liens than in block groups with less than 16.2% African Americans. Block groups where African Americans compromise more than 92.9% of the population have 161.3% more water liens than in block groups with less than 16.2% African Americans. All of these differences are statistically significant at the $p < .001$ level.

(*Id.* at PageID #861.) Based on his analysis, Dr. Parnell concluded that water liens are statistically more likely to be attached to residences in African-American neighborhoods than in predominantly white neighborhoods, and that in the City of Cleveland and Cuyahoga County, water liens are primarily concentrated in predominantly African American neighborhoods. (*Id.* at PageID #869.)

Upon review, the court finds that Plaintiffs' have set forth evidence demonstrating that Defendant's water lien policy has a significant, adverse, and disproportionate effect on Black homeowners and residents. Plaintiff's expert demonstrated and concluded that there are statistically significant disparities in which properties receive liens pursuant to Defendant's policy. Defendant did not offer its own statistical evidence, identify errors or omissions, or dispute Dr. Parnell's findings. (*See* Mot. at PageID #619, ECF No. 64-1.) Rather, Defendant contends that Dr. Parnell's evidence fails to find a nexus between the placement of water liens and a disproportionate impact of foreclosures on Black homeowners. (*Id.*) However, Defendant's contention misses the heart of Plaintiffs' complaint: Plaintiffs allege racial discrimination in Cleveland's placement of water liens,

not in the City's foreclosure process. (Opp'n at PageID #3787, ECF No. 85.) Given Defendant's lack of contrary evidence, the court concludes that Plaintiffs' statistical evidence adequately suggests "a material and significant disproportionate effect on members of [the] protected group." *Southwest Fair Hous. Council*, 17 F.4th at 964. Therefore, the court concludes that Plaintiffs have shown that Defendant's water lien policy has a significant, adverse, and disproportionate effect on Black homeowners and residents. *Id.*

c. Robust Causality

Finally, to establish a *prima facie* showing of disparate impact, Plaintiffs must demonstrate a "robust" casual link between Defendant's outwardly neutral policy and the statistical disparity they've identified. *Reyes,* 903 F.3d at 425-28 (collecting cases addressing the robust causality requirement). *See also Inclusive Communities*, 576 U.S. at 542. ("[A] disparate impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies *causing* that disparity.") (emphasis added). By having a "robust causality requirement," courts can ensure that "[r]acial imbalance...does not, without more, establish a prima facie case of disparate impact," thus protecting defendants from being held liable for "racial disparities they did not create." *Id.* (quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653 (1989)). Therefore, "[i]f a statistical discrepancy is caused by factors other than the defendant's policy, a plaintiff cannot establish a prima facie case, and there is no liability." *Inclusive Communities,* 576 U.S. at 527.

Defendant contends that there is no evidence of robust causality between water-lien placement and a disparate impact on Black homeowners because many societal factors contribute to foreclosures. (Mot. at PageID #601, ECF No. 64-1) ("[I]t is undisputed that lien placement tracks pre-existing income disparities and unemployment metrics, which are due to an array of societal determinants beyond Cleveland Water's influence.) Defendant also maintains that the mere presence

of a statistical disparity in this case is insufficient to establish FHA liability under a disparate-impact theory. (*Id.* at PageID #622-23.) Rather, Defendant argues Plaintiffs must "prove" that the statistical discrepancy is not caused by factors other than the Defendant's policy. (*Id.* at PageID #623.)

Defendant points to the testimony of its expert, Dr. Marsha Courchane's ("Courchane"), to bolster its position that in order to determine whether the water lien policy has a disparate-impact on Black homeowners and residents, the parties must utilize a "multivariate" analysis to obtain a more complete picture of the various social and economic hardship factors influencing foreclosures. (*Id.* at PageID #624–25) ("None of Plaintiffs' experts have conducted the multivariate analysis needed to prove robust causality."); *see also* (Courchane Dep., Ex. M to Mot. at PageID #953, 107:8–107:10, ECF No. 64–14) (in relevant part stating that, "to show discrimination requires a multivariate approach where you control for all those other factors.") According to Courchane's testimony, these "alternate social and economic hardship factors influencing foreclosures," such as the unemployment rate for minorities in Cleveland, are reported at a substantially higher rate by Black homeowners. (Mot. at PageID #624, ECF No. 64-1.) As a result, "they are more likely to lose their jobs...[,] more likely to find it hard to pay bills... [and] more likely to have a lien imposed." (*Id.*)

Plaintiffs argue they can satisfy robust causality by showing substantial statistical evidence to support the inference that Defendant's water policy caused the disparity in water lien placements. (Opp'n at PageID #3805, ECF No. 85.) In support of this assertion, Plaintiffs reiterate the statistically significant disparities Dr. Parnell identified in her expert report, noting that Dr. Parnell found that the racial disparity in the City's lien placements persisted across differences in income level. (*Id.* at PageID #3805-06) (citing Parnell Report, Ex. I to Mot. at PageID #869-70, ECF No. 64-10.) Plaintiffs also contend that Defendant overstates Plaintiffs' obligation of demonstrating robust causality. In Plaintiffs' view, while the purpose of the robust causality requirement is

intended to preclude liability for disparities unattributable to Defendant's conduct,

> it does not amount to a requirement that Plaintiffs categorically disprove the relevance of all other factors" because "it would be impossible for plaintiffs ever to prove the irrelevance of every possible additional correlating factor. Rather, the robust causality requirement directs courts to 'examine with care' whether a plaintiff has 'allege[d] facts' and 'produce[d] statistical evidence' sufficient to 'demonstrat[e] a causal connection' . . . .

(*Id.*) (citing *Inclusive Communities*, 576 U.S. at 543.) Further, Plaintiffs maintain that because the City sets the criteria by which unpaid water debt is converted into a lien, in the absence of the policy, no Cleveland Water customer would have their unpaid water debt converted into a lien. (*Id.* at PageID #3807–08.) It is therefore Plaintiffs' view that "the adverse outcome identified by Plaintiffs (disproportionate placement of water liens in majority-Black neighborhoods) 'derives wholly from' Cleveland's implementation of its water lien policy, even if it is true that here, as in *Southwest Fair Hous. Council*, additional societal factors may also be partially predictive of the adverse effect." (*Id.* at PageID #3808.) Additionally, Plaintiffs argue that they have provided evidence that sufficiently accounts for other societal and economic factors because Dr. Parnell's report accounted for income and the population sizes. (*Id.*)

To resolve this step in the disparate-impact analysis, the court looks to the Supreme Court's opinion in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), the "clear example of *Inclusive Communities*' robust causality requirement." *Reyes,* 903 F.3d 426. *See also Southwest Fair Housing*, 17 F.4th at 965 ("The robust causation requirement derives most notably from *Wards Cove*"); *Inclusive Communities,* 576 U.S. at 542 (citing *Wards Cove* in discussing the robust causality requirement). In *Wards Cove*, the Supreme Court reversed the Ninth Circuit's holding that the plaintiffs there had made out a prima facie case of disparate impact under Title VII. 490 U.S. at 650. The Court of Appeals in *Wards Cove* found evidence of disparate impact based on the existence of a racial imbalance between lower-paying "cannery positions," which were

disproportionately held by minorities, and higher-paying "non-cannery positions," which were higher-skilled managerial positions disproportionately held by White people. *Id.* at 655-57.

Critically, the plaintiffs in that case could not identify a *specific* policy or practice that *caused* this discrepancy. *Id.* at 657 (emphasis added); *Reyes*, 903 F.3d at 426. Accordingly, the Supreme Court questioned whether the employment discrepancy in that case might have been due to a dearth in non-white applicants to the non-cannery positions. 490 U.S. at 651. Rather than pointing to a specific policy, plaintiffs in *Wards Cove* pointed to several employment practices—including nepotism, separate hiring tracks, rehiring preferences, and subjective decision-making—they claimed caused the disparate impact they alleged. *Id.* at 657. In reversing the Ninth Circuit's conclusion, the Supreme Court explained that to maintain a disparate impact claim, plaintiffs must demonstrate that the disparity they complain of is the result of a specific policy that they are attacking. *Id. See also Southwest Fair Hous. Council*, 14 F.4th at 965-66 ("[W]e are [not] left wondering whether members of a protected class are subject to the increased fee because of this [challenged] policy or because of some other factor") (citing *Wards Cove*, 490 U.S. at 653-54). Plaintiffs must specifically show that "each challenged practice has a significantly disparate impact" because "[t]o hold otherwise would result in employers being potentially liable for 'the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces.'" *Id.* (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988).)

After reviewing the record, the court finds that Plaintiffs have demonstrated a robust causal link between the City's water lien policy and the disproportionate impact of the liens on Black homeowners. Despite Defendant's contention, Plaintiffs' claim is not based solely on a statistical disparity or racial imbalance. (Mot. at PageID #622-23, ECF No. 64-1.) Unlike the plaintiffs in *Wards Cove*, Plaintiffs here identify a specific policy that they've demonstrated creates a disparate impact: the City's water lien policy. There is no question regarding whether the Black residents are

subjected to the water lien because of the City's policy as opposed to some other factor because, but for the City's decision to impose water liens on households with a water arrearage greater than $300, households would not be subjected to the liens placements that result in a disparate impact.

Defendant's argument that many societal factors contribute to foreclosure misstates Plaintiffs' core allegation and misinterprets the "robust causality" requirement under *Wards Cove*. First, as already established, Plaintiffs allege that the City's placement of liens, not the resulting foreclosures, results in a disparate impact. Second, to the extent that Defendant argues societal factors like the unemployment rate or racial income disparities are the true cause of the water lien placements, that argument is not well-taken. Defendant's secondary argument focuses on the societal factors influencing the underlying water debts in this case—not the water liens resulting from the challenged policy. Moreover, the record indicates that Dr. Parnell accounted for other economic and social factors when conducting his analysis by controlling for median household income and size of block groups. (Parnell Report, Ex. I to Mot. at PageID #869-70, ECF No. 64-10.) Still, Dr. Parnell found that Defendant's water lien policy disproportionately affects Black homeowners and residents across differences in income level. (*Id.*); (Opp'n at PageID #3790, ECF No. 85.)

In its Reply (ECF No. 86), Defendant does not dispute Dr. Parnell's analysis, but rather reiterates its position that other factors contribute to the correlation between its placement of water liens on Black homeowners and residents. (Reply at PageID #4705, ECF No. 86.) However, as established above, that inquiry is irrelevant to the question of whether Plaintiffs have identified a specific policy that has caused a racial disparity. *Wards Cove,* 490 U.S. at 657. *See also Mhany Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581, 620 (2d Cir. 2016) (finding plaintiffs satisfied the robust causality requirement because the specific zoning policy disproportionately decreased the availability of housing for minorities residents as compared to White residents); *Cty. of Los Angeles*

v. Bank of Am. Corp., 691 F.App'x 464, 465 (9th Cir. 2017) (affirming that plaintiffs failed to prove robust causality where defendant's policies of marketing toward low-income borrowers and incentivizing loan officers to issue high-amount loans "would affect borrowers equally regardless of race.").

In light of the above, the court finds that Plaintiffs have established robust causality between Defendant's neutral water lien policy and the disparate-impact on the liens on Black homeowners and residents. Therefore, the court concludes that Plaintiffs have met their burden of showing that Defendant's water lien policy has caused a discriminatory effect.

ii. Defendant's Burden: Legitimate Non-discriminatory Interest

"Disparate-impact liability mandates the 'removal of artificial, arbitrary, and unnecessary barriers' not the displacement of valid governmental [or private] policies." *Inclusive Communities*, 576 U.S. at 540 (citing *Griggs v. Duke Power*, 401 U.S. 424, 431 (1971). Accordingly, once a plaintiff meets their burden of proving a *prima facie* case of disparate-impact, the burden shifts back to the defendant to show that the challenged policy significantly serves a legitimate, non-discriminatory interest or a valid "business necessity." *Southwest Fair Hous. Council*, 17 F.4th at 966. *See also Inclusive Communities*, 576 U.S. 541 ("This step of the analysis is analogous to the business necessity standard under Title VII and provides a defense against disparate-impact liability."). Although the Supreme Court has used the phrase "business necessity" to describe this step, the term is somewhat of a misnomer within the context of the FHA, for the following reasons. *Id.* First, the defense is available not only to businesses, but also to individuals and public entities. *Id.* Second, despite its name, the standard is not defined by its necessity because a defendant does not need to demonstrate that the challenged policy is "'essential' or 'indispensable'" to its businesses, only that the policy "serves, in a significant way," its legitimate interests. *Southwest Fair Hous. Council*, 17 F.4th at 967; *Wards Cove*, 490 U.S. at 659. If the court were to require a

business or government to show that the challenged policy is necessary to its interests, it would render the defense null. *Id.*; *see also Wards Cove*, 490 U.S. at 659 ("[T]here is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster: this degree of scrutiny would be almost impossible for most employers to meet."). Therefore, at this stage, it is Defendant's burden to show: (1) a legitimate business interest; and (2) that the practice or policy serves that legitimate interest in a significant way. *Id.* at 968.

a. The City's Stated Business Interests

Defendant argues that it has carried its burden because the water lien policy serves a legitimate and vital business interest for Cleveland Water. The City's expert, John M. Mastracchio ("Mastracchio"), highlighted three interests at stake with the City's water lien policy: (1) water liens produce revenue that assists with Cleveland Water's capital reinvestment and infrastructure; (2) the water lien serves as an alternative to disconnecting customers' water service, thus benefitting customers in the long run; (3) the water liens deter customers from potentially not paying their outstanding water debt. (Mot. at PageID #626-27, ECF No. 64-1); (Mastracchio Rebuttal Report ¶ 26, Ex. O to Mot. at PageID #1136, ECF No. 64-16.) As to the first interest, Mastracchio stated that:

> [i]f Cleveland Water were to lose the revenues collected from liens, it could have a significant impact on Cleveland Water's water main replacement program or other programs funded with user charge revenues. This impact would result in a greater frequency of infrastructure failures and disruption of water service affecting Cleveland Water's ability to provide safe and reliable drinking water.

(*Id.* ¶ 36.) As to the second interest, Defendant's water affordability expert, Manny Teodoro ("Teodoro") testified that the water liens actually allow Cleveland Water to restore customers' water service and avoid potentially long-term service interruptions for nonpayment. (*Id.* at PageID #627); (Teodoro Report, Ex. Q at PageID #1171, ECF No. 64-18) ("Cleveland Water transfers long-outstanding customer balances to Cuyahoga County's property tax accounts. These 'water liens'

allow Cleveland Water to restore water services and avoid long-term service interruptions."). In his deposition, Teodoro also explained that the water liens are important from a housing perspective because the liens "allow[ ] service restoration while settling an account much faster than an indefinite shutoff." (Teodoro Dep. Tr. 120:25–121:2, ECF No. 64-19.) Finally, Tedoro explained that the water liens are purposeful because they do not pose the same housing and health risks that disconnection does. (*Id.*) As to the third interest, Mastracchio's report stated that the water lien policy creates a "moral hazard" that disincentivizes people, specifically low-income customers, from failing to pay their bill. (Mastracchio Rebuttal Report ¶ 33, Ex. O to Mot. at PageID #1136, ECF No. 64-16.)

Plaintiffs do not challenge whether Defendant has sufficiently stated a legitimate business interest justifying its water lien policy. (Opp'n at PageID #3809, ECF No. 85.) Instead, Plaintiffs maintain that Defendant has not met its burden of demonstrating that its water lien policy significantly serves its stated business interests. (*Id.*) Accordingly, upon review of the record, the court finds that the Defendant has satisfied the first prong of showing that a legitimate business interest justifies its water lien policy. The City's stated reasons for implementing its water lien policy are legitimate, and even more simply, "[i]t is self-evident that a business has a legitimate interest to be paid in full for services it has already provided pursuant to a valid contract." *Southwest Fair Hous. Council*, 17 F.4th at 968.

2. Significantly Serves Non-Discriminatory Interest

Next, the court considers whether Defendant's policy serves their stated business interest in a significant way. At this step, "[i]t is the [Defendant's] burden to establish that the challenged portions of the policy, *i.e.*, those 'practices causing the disparate impact,' significantly serve its business interest." *Southwest Fair Hous. Council*, 17 F.4th at 968. Here, Plaintiffs contend that, "Cleveland's water lien policy disproportionately causes Black customers to face conversion of

unpaid water debt into a lien." (Opp'n at PageID #3807, ECF No. 85) (explaining that in Counts I and II, "Plaintiffs do not allege racial discrimination in Cleveland's foreclosure process; Plaintiffs allege racial discrimination in Cleveland's placement of water liens."). Accordingly, Defendant must establish that its water lien policy, which results in alleged disproportionate placement of water liens on Black homeowners and residents, significantly serves its previously-identified legitimate business interests. *See Southwest Fair Hous. Council*, 17 F.4th at 968.

In *Southwest Fair Hous. Council*, the Ninth Circuit rejected plaintiff-appellants' argument that the municipal district's new security deposit policy was "arbitrary" after the court found that the new policy was substantially related to the district's stated interest. *Id.* at 968-69. In that case, the district raised the cost of refundable security deposits for public housing residents to $180 in order to recoup the financial loss from residents' delinquent water bills. *Id.* at 969 (finding the district's stated rationale supported by evidence in the record because the new policy's increased security deposit figure, $180, was "nearly equivalent" to the county's largest outstanding delinquency, $184.45). In finding that the district's new policy served its stated business interest in a significant way, the Ninth Circuit opined several scenarios where the district's policy might *not* have done so. Of note, the Ninth Circuit stated that:

> "had the District set the security deposit at clearly excessive amounts relative to predictable monthly water bills for individual units (say, $500 or $1000), or had the District failed to proffer evidence that its security deposit amount was keyed to the size of the largest delinquency (with accompanying documentary support), or had the District decided not to make the security deposit refundable to public housing tenants who did not leave behind delinquent accounts, then Appellants might have raised a triable issue as to whether the policy served the legitimate goal of preventing financial loss to the District from delinquencies. But Appellants did not provide any such evidence."

Id. Accordingly, the Court of Appeals concluded that "[a] plaintiff may attempt to rebut the defendant's proof that it has a substantial basis for setting the cost of the deposit at a certain dollar

figure by showing the cost is either not substantially related to the loss to be prevented or pretextually high—but plaintiffs may not simply assert a business's interest is illegitimate because the plaintiff does not believe the financial losses at issue are worth preventing. That is nothing more than subjective second-guessing the sound exercise of a business's discretion." *Id.* at 969-70.

Defendant succinctly argues that "[i]t is undisputed that water liens serve legitimate—and vital—roles for Cleveland Water." (Mot. at PageID #626, ECF No. 64-1.) Plaintiffs argue that Defendant has not met its burden of showing that the water liens significantly serves a legitimate business interest because the record presents a genuine factual dispute as to whether Defendant's water lien policy serves any three of Defendant's stated business interests. (Opp'n at PageID #3809, ECF No. 85.) As an initial matter, Plaintiff argues that Defendant admits that it does not know and has never conducted a study to determine whether its water lien policy is necessary or effective at recovering unpaid water debt. (*Id.*) Instead, Defendant's expert only opined that the loss of the water lien revenue *could* have a "significant impact on Cleveland Water's water main replacement program or other programs funded with user charge revenues." (*Id.* at PageID #3809–10) (citing Mastracchio Rebuttal, Ex. O to Mot. at PageID #1136, ¶ 36, ECF No. 64-16.) Therefore, Plaintiffs state that:

> Cleveland does not point to any evidence concerning the effectiveness of the program in recovering unpaid water debt, the uses to which recovered funds are put, or the effects, if any, on the programs funded by such revenues since water liens were paused during the COVID-19 pandemic. Cleveland admits that it does not know what percentage of unpaid debt recovered from assessment of liens would have been recovered even without a lien. Cleveland also speculates that the water lien policy serves a deterrant effect on customers but provides no evidence of such an effect and has never studied the deterrent effect of the policy. Indeed, Cleveland does not even know why it set the threshold for water liens at $300 or 180 days.

(Opp'n at PageID #3810, ECF No. 85.)

Next, Plaintiffs clarify that while they do not dispute Defendant's interest in recovering customers' unpaid water debt, Defendant's lack of analysis regarding whether the liens signficantly serve its stated business objective demonstrates that Defendant has not provided "sufficient unrebutted evidence of its business necessity." (*Id.*) (citing *Snyder v. Barry Realty, Inc.*, 953 F. Supp. 217, 222 (N.D. Ill. 1996)). Additionally, Plaintiffs contend that the record shows that the water liens do not actually avoid long-term service interruptions as Defendant contends. (Opp'n at PageID #3810, ECF No. 85.) To the contrary, Plaintiffs allege that Defendant ignores the fact that most customers who have their water shutoff continue to go without water even after the lien's assessment because customers must pay off their liens *and* their delinquent account charges before their water is restored. (*Id.*); *see also* (Standard Operating Procedure, Ex. C to Mot. at PageID #719, ECF No. 64-4) ("If the water service has been disconnected, and the certification generates a zero balance the customer must pay all delinquent charges in order to have the water restored."). Furthermore, Plaintiffs contend that Defendant has failed to provide any analysis regarding how the lien process shortens customers' service interruptions, how often those circumstances occur, the amount of time the lien process decreases service interruptions, "and whether the purported decreased in service interruption is attributable to the lien process as opposed to the shutoff." (Opp'n at PageID #3811, ECF No. 85.) Therefore, Plaintiffs argue that Defendant has no knowledge of whether its water liens actually help customers avoid long-term service interruptions.

Upon review of the record, the court determines that Defendant has not carried its burden to show that its challenged policy serves its stated business interest in a significant way. The record contains several issues of material fact regarding whether Defendant has established that its water lien policy is substantially tied to or significantly serves its business interests.

First, the court finds that the record contains a genuine dispute of material fact as to whether Defendant's water lien policy serves Defendant's stated interest in attempting to collect customers'

unpaid water debt, which Defendant asserts is "vital" for capital reinvestment into Cleveland water's infrastructure. (Mot. at PageID #626, ECF No. 64-1.) However, Defendant fails to point to any evidence demonstrating that its water liens is effective or "substantially related" to recovering unpaid water debt. *Southwest Fair Hous. Council*, 17 F.4th at 969-70. Defendant also does not offer evidence explaining how the point at which the City chooses to impose its liens—when a customer's account is both 180-days delinquent and in arrears of over $300—is tied to the amount of money the City hopes to recoup through the lien policy. In fact, the record demonstrates that Defendant is unaware of what percentage of its recovered water debt is attributable to the placement of water liens. (Def.'s Answer to Req. for Admission No. 8 at PageID #1462, ECF No. 65-8) (REQUEST: "Admit that You are unaware of what percentage of unpaid Water Debt recovered from the assessments of delinquent water bills as property tax liens on Customers' properties would have been recovered without its Water Lien policy. ANSWER: Subject to its Preliminary Statement and General Objections, admit."). Accordingly, the record is inconclusive regarding whether Defendant's lien policy substantially serves its interest in recovering outstanding water debt.

Second, the court finds that the record contains genuine issues of material fact regarding whether Defendant's lien policy significantly serves its interest in avoiding long-term service interruptions for its customers. In relevant part, Defendant's water lien policy provides that, "[i]f the water service has been disconnected, and the certification generates a zero balance the customer must pay all delinquent charges in order to have the water restored." (Standard Operating Procedure at PageID #719, ECF No. 64-4.) Accordingly, as Plaintiffs point out, there is a period of service interruption for all properties assessed with a water lien. (*See* Opp'n at PageID #3810, ECF No. 85.) Defendant acknowledges that the water liens do not entirely avoid long-term service interruptions. (Mot. at PageID #627, ECF No. 64-1) (citing Teodoro Export Report, Ex. Q at PageID #1171, ECF No. 64-18) ("[l]ien placement thus *may* allow Cleveland Water in *certain circumstances* to 'avoid

[ ] the long-term service interruptions that sometimes occur in places where property tax liens are not available to water utilities.'") (emphasis added).

In light of this, the court determines that Defendant has failed to provide evidence regarding how its challenged policy serves its interest in avoiding long term service interruption. The record is devoid of any evidence detailing whether the lien process actually shortens service interruptions, how much time the lien actually decreases service interruptions, and whether any decrease in interruption is actually attributable to the lien. Instead, as Defendant notes, the record demonstrates that the lien process *may* in certain circumstances avoid long-term service interruptions. Further, Plaintiffs introduces evidence that Defendant's placement of a water lien does not always result in redemption of water service as demonstrated by Plaintiff Albert Pickett ("Pickett"), who avers that he continued to be deprived of water service for years after he paid offhis water lien. (Pls.' Resp. to Def.'s Interrog., Ex. N to Opp'n at PageID #4615–16, ECF No. 85-14.) Therefore, not only does the record fail to clearly articulate the extent to which the water liens avoid long-term service interruptions, but also fail to show how Defendant's disproportionate placement of water liens on Black homeowners and residents significantly serves its interest in avoiding long-term service interruptions.

Third, the record reflects a genuine issue of material fact regarding whether the disproportionate placement of water liens on Black homeowners and residents serves its business interest in deterring customers' nonpayment. For example, in his Rebuttal Report (ECF No. 64-16), Defendant's expert does not state that the City's water lien policy serves as a deterrent against nonpayment, nor does the City proffer evidence to support this assertion. Instead, Mastracchio's report states that the City's water lien policy *could* serve as a deterrent against nonpayment, and therefore be useful in collecting revenue. Specifically, Mastracchio stated that:

> [a]n example of moral hazard is the possibility that some Cleveland

> water customers *would* decide not to pay their water bills because of a lack of deterrent or consequences of not doing so (i.e., no risk of service disconnection or lien placement). Under the *hypothetical scenario* where Cleveland Water is not able to disconnect service for nonpayment or place a lien on the property, low-income customers with limited financial resources could decide to prioritize their payment of their other bills (e.g., electric, phone, internet, etc.) above paying their water bill under this scenario since there would be a lack of consequences for not paying their water bill.

(Mastracchio Rebuttal Report ¶ 33, Ex. O to Mot. at PageID #1138, ECF No. 64-16) (emphasis added.) Mastracchio also concluded that, "[l]imited information could be found to assess the significance of the impact of moral hazard or the halo effect . . . if Cleveland Water is not able to disconnect water service and place liens on customers that do not pay their water bill." (*Id.* ¶ 34). In other words, the record is inconclusive regarding whether the challenged portion of Defendant's policy serves its interest in deterring customers' nonpayment of their water bills.

In its Reply (ECF No. 86), Defendant argues that Plaintiffs cannot rebut its legitimate business interests by inviting the court to second-guess Defendant's business and policy decisions. (Reply at PageID #4706, ECF No. 86.) Defendant states that, "[j]ust as the burden is not to show 'necessity,' Cleveland is not required to prove that placing liens 'significantly serves' its interest. At this stage, the law only requires evidence of a more than 'insubstantial' connection between Cleveland Water's policy and its stated goal." (*Id.*) (citing *Southwest Fair Hous. Council*, 17 F.4th at 967). Defendant is correct that absolute necessity is not the applicable standard. As noted, Defendant only needs to show that the policy serves its legitimate interests in a significant way. *Southwest Fair Hous. Council*, 17 F.4th at 967. However, Defendant has failed to identify any evidence to demonstrate that the challenged portions of its policy—the disparate placement of its water liens on Black homeowners and residents—significantly serves its identified valid business interests. Therefore, the court does not second-guess Defendant's business, but only concludes that the record contains several genuine issues of material fact.

The court concludes that Defendant has not satisfied its burden of showing that its policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest. Because the City has failed to carry its burden, the court need not consider the third and final prong of the FHA burden-shifting framework. Accordingly, the court denies Defendant's Motion for Summary Judgment with respect to Plaintiffs Water Lien Class' Counts One and Two, for Racial Discrimination under the FHA and ORCA, respectively.

B. Count Three - Violation of Due Process on behalf of the Shutoff Class

Next, Defendant moves for summary judgment with respect to Plaintiffs Shutoff Class' third Count for Violation of Due Process—related to Cleveland Water's disconnection practices and Water Review Board ("WRB") procedures—arguing that summary judgment is appropriate because the record contains no issues of material fact that Cleveland Water's pre-disconnection notices comply with due process and are therefore constitutional. (Mot. at PageID #628, ECF No. 64-1.) Defendant notes that Cleveland Water may only disconnect a customer's water service after taking the steps outlined in the *Colegrove* Amended Consent Order, which mandates that customers be provided with "notice and an opportunity to be heard prior to termination of service, unless the reason for the termination is to prevent emergency waste." (*Id.* at PageID #629.) Specifically, Defendant states that:

> it is undisputed that *Colegrove* provides for pre-disconnection notice and an opportunity for customers to contest disconnection before Cleveland Water's Water Review Board. There is similarly no dispute that the notice and opportunity to be heard through the Water Review Board before having service disconnected satisfies the due process test set forth in *Craft*.

(*Id.* at PageID #630.)

Furthermore, Defendant states that Plaintiffs' expert witness, Roger Colton ("Colton"), fails to articulate any substantive basis for his opinion—which forms the basis of Plaintiffs' claim—that

Defendant must take further steps than *Colegrove* to provide pre-disconnection notices to customers. (*Id.*) Accordingly, Defendant contends that Colton's testimony opines on a matter of public policy, but does not show that Cleveland Water's pre-disconnection processes are either insufficient under *Colegrove* or unconstitutional. (*Id.* at PageID #631.) Additionally, Defendant notes that its expert, Mastracchio, testified that Cleveland Water's pre-disconnection policies are "above and beyond the recommended practices" issued by the American Water Works Association ("AWWA"). (*Id.*) (citing Mastracchio Rebuttal Report, Ex. O to Mot. at PageID #1134, ¶ 22, ECF No. 64-16.) Mastracchio also explained that Cleveland Water's procedures are "consistent with Ohio Revised Code requirements," including the dispute process requirements for governing bodies that assess water rents and charges. (*Id.* ¶¶ 22, 24.) Therefore, Defendant contends that summary judgment is appropriate because the record clearly shows that Defendant has complied with due process. (*Id.*)

Plaintiffs contend that *Colegrove* does not set the constitutional standard for what notice and procedure are sufficient under the Due Process Clause. (Opp'n at PageID #3815, ECF No. 85.) They acknowledge that *Colegrove* is instructive, but maintain that the court should deny Defendant's Motion for Summary Judgment with respect to the Shutoff Class' Third Count because the record demonstrates that customers fail to receive notice of their water liens and do not receive an impartial hearing. (*Id.*) Plaintiffs advance two primary arguments.

First, Plaintiffs argue that the record shows that Defendant routinely fails to notify water customers of impending shutoffs and availability of WRB hearing process before shutoff. (*Id.*) They allege that Defendant's policies violate due process because Defendant routinely fails to follow up with its customers when its written disconnection notices are returned as undeliverable. (*Id.*) They note that since 2017, an average of 20,000 letters per month, relating to billing and final notices, are returned as undeliverable. (*Id.* at PageID #3816.) Plaintiffs further note that Defendant despite the amount of returned mail, Defendant does not use certified mail for disconnection notices or track

the amount of returned mail to determine whether customers possess notice of their impending disconnection. (*Id.*) As a result, Plaintiffs argue that the return of the disconnection notice makes Defendant aware that its initial notice to a water customer is constitutionally insufficient and constitutes inadequate notice. (*Id.*) They contend that:

> [a]lthough Cleveland's witnesses testified that the City tries to reach out to water customers for whom Cleveland has received returned mail, they concede that if Cleveland was unable to reach out to the customer by alternative means, that customer would never receive ***any notice*** of impending water service disconnection. Thus, the evidence of Cleveland's notice delivery failures raises a genuine issue of material fact regarding the adequacy of Cleveland's water shutoff process.

(*Id.*) (emphasis in original) (internal citations omitted.) Moreover, Plaintiffs maintain that despite Defendant's argument, that its water disconnection policy is "above and beyond the recommended practices" of the AWWA, the record demonstrates that Cleveland Water customers do not always receive notice of their disconnection or ability to seek a hearing before the WRB. (*Id.*)

Second, Plaintiffs argue that the record contains a genuine factual dispute as to whether the WRB complies with Due Process's impartiality requirement. (*Id.* at PageID #3817.) Plaintiffs maintain that evidence shows that the WRB is not comprised of impartial individuals. (*Id.*) Specifically, they state that, "Cleveland's practice of selecting personnel from within DPU [Department of Public Utilities], and even from Cleveland Water itself, raises a genuine question of whether the WRB is 'impartial and disinterested.'" (*Id.*) Plaintiffs note that because employees are volunteered by their managers to serve on the WRB, their participation may create complicated allegiances, and that they may not possess the requisite knowledge to impartially adjudicate disputed because "[t]here is no record evidence that members have been trained on, or even have knowledge of, 'the procedures of the Water Division,' as required by *Colegrove*." (*Id.* at PageID #3817–18.)

Additionally, Plaintiffs contend that the evidence shows that the WRB's decision letters do not comply with *Colegrove*'s requirement to provide customers with an explanation of its decision. (*Id.* at PageID #3818); (Ex. I to Opp'n at PageID #4376, ECF No. 85-9.) As a result, Plaintiffs state that, "it is impossible for customers to determine whether an adjustment decision is based exclusively on the 'facts, evidence, and testimony which are presented at the time of the hearing,' as required by *Colegrove*." (*Id.*) Furthermore, Plaintiffs maintain that the letters fail to comply with *Colegrove* because they falsely state that all decisions are final and not appealable, despite *Colegrove* providing a method of appeal. (*Id.* at PageID #3819); (Ex. I to Opp'n at PageID #4376, ECF No. 85-9); (Ex. A to Compl., ECF No. 1-1.) Therefore, Plaintiffs argue that summary judgment is inappropriate because genuine issue of material fact regarding whether Defendant's pre-disconnection notices and WRB hearings comply with Due Process. (*Id.*)

The Fourteenth Amendment forbids a state from depriving any person of life, liberty, or due process of law. U.S. Const. amend. XIV, § 1. Generally, procedural due process requires that the state provide a person with notice and an opportunity to be heard before depriving that person of their property or liberty interest. *Warren v. City of Athens, Ohio*, 411 F.3d 697, 708 (6th Cir. 2005). To succeed on a procedural due process claim, a plaintiff must establish a constitutionally protected liberty or property interest and show that such an interest was deprived without the appropriate processes. *Bd. of Regents v. Roth*, 408 U.S. 564, 569–70 (1972); *LRL Props. v. Portage Metro Hous. Auth.*, 55 F.3d 1097, 1108 (6th Cir. 1995).This Circuit applies a two-part analysis to procedural due process claims. *See Midkiff v. Adams Cnty. Reg'l Water Dist.*, 409 F.3d 758, 762 (6th Cir. 2005). The Sixth Circuit has held that to prevail on a procedural due process claim a plaintiff must:

> establish three elements; (1) that [he] ha[s] a life, liberty, or property interest protected by the Due Process Clause of the Fourteenth Amendment ..., (2) that [he] w[as] deprived of this protected interest within the meaning of the Due Process Clause, and (3) that the state did not afford [him] adequate procedural rights prior to depriving

[him] of [his] protected interest.

Gunasekera v. Irwin, 551 F.3d 461, 467 (6th Cir. 2009) (citing *Med Corp. v. City of Lima*, 296 F.3d 404, 409 (6th Cir. 2002)). In the municipal context, procedural due process requires: (1) notice informing the customer of the possibility of termination and a procedure for challenging that disputed bill; and (2) an "'established [procedure] for resolution of disputes' or some specified avenue of relief for customers who 'dispute the existence of the liability.'" *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 12 (1978). Because the Due Course of Law Clause in Ohio Constitution is equivalent to the Due Process Clause of the U.S. Constitution, only one analysis is necessary. *In re Hua*, 405 N.E.2d 255, 258 (Ohio 1980).

Here, neither party contests that Plaintiffs possess a property interest protected by the Due Process Clause, (*See* Order at PageID #184, ECF No. 11) (noting that Plaintiffs have a property interest in continued water service under the Due Process Clause), or that Plaintiffs were deprived of that interest. Therefore, the narrow question before the court is whether the record contains a genuine dispute of material fact regarding whether Defendant afforded Plaintiffs adequate procedural process before depriving them of their water. *See Irwin*, 551 F.3d at 467. Upon review, the court finds that the record reflects several genuine disputes of material fact.

1. Notice

The Supreme Court has held that, "[a]n elementary and fundamental requirement of due process...is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Trust Co.*, 339 U.S. 306, 314 (1950); *Craft*, 436 U.S. at 13. In *Jones v. Flowers*, 547 U.S. 220 (2006), within the context of real property takings, the Supreme Court addressed the issue of whether due process entails further responsibility when the government becomes aware, prior to its taking, that its attempt at notice has failed. *Id.* at 227. In that case, the government, in compliance

with the state's statutory notice scheme, sent notice of the petitioner's tax delinquency and impending home sale to the registered address. *Id.* at 223-24. However, the notice letters repeatedly returned unopened and marked "unclaimed."

In addressing the issue of notice via post mail, the Court explained that once the government becomes aware that its initial notice was ineffective, any failure to provide follow up notice runs afoul of due process. *Id.* at 226–228. The Court stated when a notice letter is returned to the post office, despite the government's good faith attempt at reaching the petitioner, the government is aware that its notice was ineffective. *Id.* at 230. More specifically, the court held that, "the government's knowledge that notice pursuant to the normal procedure was ineffective triggered an obligation on the government's part to take additional steps to effect notice." *Id. See also Robinson v. Hanrahn*, 409 U.S. 38 (1972) (finding that the government had not provided constitutionally sufficient notice, despite having followed its reasonably calculated scheme, because it knew that the petitioner could not be reached at his address of record); *Covey v. Town of Somers*, 351 U.S. 141, 146 (1956) (citing *Mullane*, 339 U.S. at 314–15). "[W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane*, 339 U.S. at 315. *See also Flowers,* 547 U.S. at 229 ("No one 'desirous of actually informing' the owners would simply shrug his shoulders as the letters [to delinquent taxpayers] disappeared and say 'I tried.' Failure to follow up would be unreasonable, despite the fact that the letters were reasonably calculated to reach their intended recipients.").

Defendant maintains that because it complies with *Colegrove*—which simply states that "[w]ritten notice must be given personally or sent by U.S. mail to customers whose services are to be terminated for any reason except to prevent emergency waste—it has satisfied its notice requirements. (Ex. A to Compl. at PageID# 46, ECF No. 1.) (*See* Mot. at PageID #630, ECF No.

64-1) ("At no point, however, have Plaintiffs alleged that *Colegrove* provides constitutionally insufficient process... it is undisputed that *Colegrove* provides for pre-disconnection notice.") While not disputing the fact that large numbers of letters are returned as undeliverable, Defendant maintains it does have a process for follow-up with these types of customers. (*See* Reply at PageID #4711, ECF No. 86.) The City points to the deposition of its designated representative, Laquita Johnson, as evidence that the City does in fact follow-up with customers whose bills were returned as undeliverable. (*Id.*) (citing Ex. Johnson Dep. Tr. at 153:4-16, 171:16-172:12, ECF No. 65-21.) In particular, Defendant states that the City takes additional steps to contact customers by other means of communication associated with the customer's account such as their e-mail address or telephone number. (Reply at PageID #4711, ECF No. 86.)

The court finds Defendant's arguments unpersuasive. As established above, the Due Process clause requires more than a "mere gesture" of notice. *Mullane*, 339 U.S. at 315. Here, the record reflects that thousands of water customers' letters are returned as undeliverable every month. (Ex. D to Opp'n at PageID #4127, ECF No. 85-4.) Plaintiffs' outside consultant found that an average of 20,000 letters per month pertaining to billing statements and final notices are returned as undeliverable. (Ex. D to Opp'n at PageID #4127, ECF No. 85-4.) The consultant also found that for more than 65,000 unique customer accounts, at least 60 percent of users had more than one article of returned mail relating to their billing. (*Id.*) ("Average 789 returned mail items each day . . . 61.3% (39,871 of 65,044 unique accounts) have more than one piece of returned mail during this time period."). Although the City's initial method of notice was reasonably calculated to reach its customers, once the City became aware that its method had gone "awry," it would be unreasonable for it to do nothing more. *Flowers,* 547 U.S. at 229. Defendant's "knowledge that notice pursuant to the normal procedure was ineffective triggered an obligation on the government's part to take additional steps to effect notice." *Id.* at 230.

Defendant is correct that the *Colegrove* order is silent on follow-up procedures and does not address what the City must do once it becomes aware that its attempts at notice have been unsuccessful. (Reply at PageID #4711, ECF No. 86.) However, to suggest that mere compliance with a consent order would absolve a party from complying with a mandate from the Supreme Court would subvert our constitutional system. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 947 U.S. 682, 691 (1991), vacated on other grounds ("Decisions of the Supreme Court regarding…the Constitution are binding on the lower courts. There is no room in our system for departure from this principle, for if it were otherwise, the law of the land would quickly lose its coherence….The Supreme Court with its limited docket would become irrelevant in all but the handful of cases that reached it.") Moreover, in *Flowers*, the Court acknowledged that "we have required the government to consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the *ordinary* case." *Flowers*, 547 U.S. at 230 (emphasis added). However, in the extraordinary case where the government knows a person cannot be reached at a particular address, additional steps are required even if the government is in compliance with its stated scheme. *Id.* at 232.

Likely realizing how unreasonable it would be to abandon attempts to contact its customers after discovering its letters were undeliverable, the City contends that it *does* have follow-up procedures in place to contact these customers. (Reply at PageID #4711, ECF No. 86.) In particular, Defendant notes that it attempts to contact customers through e-mail or telephone when bills are returned as undeliverable. (*Id.*) (citing Ex. Johnson Dep. Tr. 171:16-23, ECF No. 65-21) ("Q: If the bill was mailed and returned as undeliverable, what steps does Cleveland Water take to ensure that this customer receives the disconnection notice? A: We will try to reach out to the customer with any other methods of communication we have on the account, such as a phone number or email address.") However, the record in inconclusive as to whether the City actually follows this practice

with all customers whose mail has been returned as undeliverable.

The City's representative, Laquita Johnson, twice testified that Cleveland Water *tries* to reach out to customers when they have other available contact information. (*Id.*) (*See also* Ex. Johnson Dep. Tr. 153:4-12, ECF No. 65-21.) However, its unclear whether "try" means the City follows up with these customers in all cases or just some of the time. Moreover, stating that the City *tries* to contact customers through alternative means does not clarify for the court whether the City actually *does* follow-up with these customers. Johnson also testified that Defendant does not track the percentage of disconnection notices returned as undeliverable. (Ex. Johnson Dep. Tr. 172:5–16, ECF No. 65-21) ("Q: Does Cleveland track the percentage of letters of disconnection notices returned as undeliverable? A: Not to my knowledge."). The court acknowledges that failure to track the percentage of disconnection notices that are returned as undeliverable does not mean that the City does not track these undeliverable notices *at all*. However, the City does not point to any evidence that it does track this information—it only states that this type of follow-up on "every notice returned as undeliverable" would require "substantial additional expense and staffing." (Reply at PageID #4712, ECF No. 86.) Without tracking what notices are deliverable, it would be difficult for the City to know whether it needs to follow-up with certain customers, and which customers it would need to follow-up which the Supreme Court has said would be "reasonable." *Flowers*, 547 U.S. at 226.

Plaintiffs posit that if the City is unable to reach a customer by alternative means (i.e. via e-mail or telephone), then those customers "would never receive *any notice*." (Opp'n at PageID #3816, ECF No. 85.) For example, Shepherd, a Named Plaintiff, attests that she never received notice of her two subsequent water service terminations. (Ex. 8, Def.'s Answer and Objections to Pls.' Request for Admission, Resp. No. 19, ECF No. 65-8); (SEALED Ex. 4, Shepherd Decl. ¶ 7, ECF No. 69) ("Cleveland Water has shut off my water service on more than one occasion. Each of

these times, I did not receive notice of the shutoff prior to the disconnection."). However, due process does not require "actual notice" before the government may take someone's property. *Flowers*, 547 U.S. at 226 (citing *Dusenbery,* 534 U.S. 161, 170 (2002). As stated above, due process simply requires "the government to provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Flowers*, 547 U.S. at 226. Here, the record is inconclusive as to whether Defendant follows up with its customers whose initial notices or bills have been returned as undeliverable.

The court is cognizant of Defendant's argument that its alleged compliance with *Colegrove* is constitutionally sufficient to satisfy Due Process. In Defendant's view, its compliance with *Colegrove* goes above and beyond those pre-disconnection protections employed by other municipalities. (Mot. at PageID #631, ECF No. 64-1); (citing Mastracchio Rebuttal Rep., Ex. O to Mot. at PageID #1134, ¶ 22, ECF No. 64-16.) However, that inquiry is not relevant to the court's analysis because despite Defendant's alleged adherence to its "reasonably calculated scheme" outlined in *Colegrove*, the court determines that genuine issues of material fact exists as to whether Defendant afforded Plaintiffs adequate notice of their disconnection. In the presence of genuine material facts regarding whether Plaintiffs were adequately noticed under the Due Process clause, the court need not consider the parties' remaining arguments as to whether the WRB's adjudication process complied with Due Process. *See Craft*, 436 U.S. at 12. Accordingly, the court denies Defendant's Motion with respect to Count III in regard to the issue of notice under the Due Process Clause.

C. Plaintiffs' Fourth Count - Violation of Due Process with the Overbilling Class

Next, Defendant moves for summary judgment on Plaintiffs' fourth Count which alleges that the City of Cleveland violates customers' due process rights by engaging in a "policy of erroneously

and arbitrarily overbilling its customers." (Mot. at PageID #631, ECF No. 64-1) (citing Compl. ¶ 157, ECF No. 1.) Defendant argues that the record is devoid of any evidence of such a policy and, thus, summary judgment is warranted. (Mot. at PageID #631, ECF No. 64-1.) Defendant also contends that judgment as a matter of law is appropriate "even if this Court credits Plaintiffs' alternative allegation that Cleveland Water 'further' violates the Plaintiffs' due process rights 'by failing to give them an opportunity to contest their erroneously high bills through a hearing before the Water Review Board.'" (*Id.* at PageID #632) (citing Compl. ¶ 158, ECF No. 1.) Defendant argues that due process does not require an in-person hearing or any "formalistic" hearing for Plaintiffs to contest their bills. (*Id.* at PageID #632.) Even if it did, Defendant maintains that "the Sixth Circuit has confirmed that pre-deprivation protections are not a due process prerequisite when the alleged deprivation is caused 'by means of a random and unauthorized act,'" which is precisely what Defendant alleges a billing error is. (*Id.* at PageID #633.)

Defendant then states that the record clearly shows that when Cleveland Water customers identify potential billing errors, its representatives are able to investigate the issue, correct errors if confirmed, adjust the customer's account, and set up a payment plan. (*Id.* at PageID #633.) Specifically, the record demonstrates that customers can contest their water bills via multiple channels—such as visiting Cleveland Water, calling a representative, or sending a letter—that can not only aid in correcting potential billing errors, but also prevent a shutoff or termination of service. (*Id.*) Defendant concludes by stating that Plaintiffs lack evidence of a Cleveland Water policy of systematic overbilling and that if billing errors are random and unauthorized, then there is no pre-deprivation requirement for due process "which makes Cleveland Water's current *post-hoc* process for resolving billing errors adequate from a due process perspective." (*Id.* at PageID #634.)

Plaintiffs argue that summary judgment is improper on this count because the record demonstrates that the City fails to provide customers with notice and an opportunity to be heard

before depriving customers of their property interest in accurate billing. (Opp'n at PageID #3821, ECF No. 85.) With respect to notice, Plaintiffs argue Defendant does not inform customers of their right to contest billing errors, nor does the City notify customers of the process they can use to dispute their contested bills. (*Id.* at PageID #3821-22.) With respect to customer's right to an opportunity to be heard, Plaintiffs allege that Defendant's hearing opportunities are woefully deficient, thus depriving customers of their due process right to a hearing. (*Id.*) Plaintiffs then list a number of examples of customers experiencing allegedly inadequate opportunities to be heard including one customer failing to obtain an explanation from Cleveland Water for their sudden high bills, and instead receiving an offer of a payment plan when they called to dispute a bill. (*Id.* at PageID #3822.) In other cases, Plaintiffs allege the City frequently informs customers that their bill spikes were due to a leak "without any apparent evidence" or investigation. (*Id.* at PageID #3823.) Plaintiffs claim that the City's purported process for resolving customer disputes about their erroneous bills is arbirtrary, offers no just determination, and fails to afford customers an opportunity to contest their objections. (*Id.* at PageID #3823-24) ("Cleveland's failure to provide a formal hearing process for overbilled customers is also insufficient because it does not 'afford them an opportunity to present their objections.' ... A system that ties opportunity to be heard to the threat of a water disconnection is not one that provides a fair hearing opportunity.") (citing *Memphis Light, Gas, & Water Div., et al. v. Craft et al.,* 436 U.S. 1, 13 (1978)).

Plaintiffs also counter Defendant's argument that the Sixth Circuit's exemption for potential due process violations caused by random and unauthorized acts does not apply here because the City's overbilling errors are not random. (Opp'n at PageID #3820-21, ECF No. 85.) Rather, Plainitffs allege that Defendant's overbilling errors are the "predictable result of its own policies." (*Id.* at PageID #3820.) Specifically, Plaintiffs allege the City takes no proactive steps to ensure bills are accurate before they are sent despite acknowledging that such steps would uncover billing

errors. (*Id.* at PageID #3820.) Plaintiffs also point to the City's policy of sometimes billing customers on the basis of meter read *estimates* as opposed to *actual* meter reads despite knowing that estimated reads are "by definition" less accurate than actual reads. (*Id.* at PageID #3821.)

The court previously found that Plaintiffs posses a property interest in receiving accurate billing. (Order at PageID #185, ECF No. 11.) Moreover, the parties do not dispute that Defendant deprives customers of that interest by issuing erroneous bills. (Mot. at PageID #631-633, ECF No. 64-1) (arguing that the City does not have a policy of issuing erroneous bills because such acts are inherently random); (Opp'n at PageID #3820, ECF No. 85) ("[T]here is ample evidence in the record that Cleveland does indeed deprive customers of their right to accurate water bills.") Having already established that Plaintiffs have a property interest in accurate billing, and that Defendant deprives them of that right by issuing erroneous bills, the court must next determine what process is due when the government deprives customers of their property interest.[2] *See Craft*, 436 U.S. at 11-12.

The Due Process Clause requires a public utility company to provide customers with (1) notice of a procedure for challenging a disputed bill, as well as notice of the possibility of a service termination, and (2) an established procedure for resolving disputes, or some specified avenue of relief for customers who dispute the existence of their delinquency. *Id.* at 12, 22 (affirming the Sixth Circuit's reading of these requirements into the Due Process clause). As discussed above, here Plaintiffs allege the City has failed on both accounts.

1. Notice

[2] Defendant alleges it is entitled to summary judgment on Plaintiffs' fourth count because Plaintiffs fail to produce any evidence of a policy or pattern of overbilling its customers. However, that is not the proper inquiry before the court on summary judgment, nor does *Craft* require Plaintiffs to do so. Plaintiffs need only establish that they have a property interest at stake (which they have), and demonstrate that the City has deprived customers of their due process rights to that purported interest. *See Craft*, 436 U.S. at 9-12.

"An elementary and fundamental requirement of due process in any proceeding...is notice reasonably calculated, under all circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 13 (citing *Mullane*, 339 U.S. at 314). The purpose of notice is to inform the affected individual of an impending hearing, and permit them adequate preparation for it. *Craft*, 436 U.S. at 14. "Notice in a case [involving erroneous billing] does not comport with constitutional requirements when it does not advise the customer of the availability of a procedure for protesting a proposed termination of utility service as unjustified." *Id.* at 14-15. In *City of West Covina v. Perkins*, 525 U.S. 234, 242 (1999), the Supreme Court clarified its decision in *Craft* regarding what notice is required of available administrative procedures. There, the Court explained that:

> in requiring notice of the administrative procedures, however, we relied not on any general principle that the government must provide notice of the procedures for protecting one's property interests but on the fact that the administrative procedures at issue were not described in any publicly available document.

Id.

Upon review of the record, the court finds that a genuine dispute of material fact exists as to whether Defendant has provided notice to customers of its internal administrative procedure for resolving accounting disputes that complies with due process. The court finds that Defendant's billing notices did not provide Plaintiffs adequate notice because they failed to "inform the customer[s] not only of the planned termination, but also of the availability and general contours of the internal administrative procedure for resolving the accounting dispute." *Perkins*, 525 U.S. at 242. Although the City provides customers with a phone number and an address for customer service, there is no mention of a procedure for customers to dispute their potentially erroneous bills. (Ex. O to Opp'n, ECF No. 85-15.) While the bill indicates how customers can pay their bill, as well as a number they can contact for "Billing Questions," the bill contains no language that would signal

to customers that they *could* dispute their bill, nor does the bill notify customers of the appropriate process for doing so. *See Craft*, 436 U.S. at 13-14 (finding the government's notification procedure, which informed customers of how they could pay their delinquent bills, was not "reasonably calculated" to inform them of the availability of an "opportunity to present their objections" because "[n]o mention was made of a procedure for the disposition of a disputed claim.")

Defendant's argument that customer service representatives are available to assist customers with their disputed bills is therefore not well-taken because the existence of such a procedure is insufficient for due process purposes if customers are not aware of their right to contest their bill. The resources Defendant's point to in its Reply (ECF No. 86) are similarly unavailing as they also do not inform customers of the availability of an opportunity to dispute their charges. (*See* Reply at PageID #4712-13, ECF No. 86.) In fact, the "Contact Us" page of the Cleveland Water website lists twelve options for a customer's "Inquiry Type," but none of them "appraise the affected individual" of their right to dispute the charges or the procedure for doing so. *See* Cleveland Water Contact Us, https://www.clevelandwater.com/customer-service/contact-us (last visited September 29, 2023). Accordingly, the court finds summary judgment is improper on this count because the record indicates a dispute of material fact regarding whether Defendant adequately notifies its customers of their right to dispute their bills.

In the presence of genuine material facts regarding whether Defendants adequately notified customers under the Due Process clause, the court need not consider the parties' remaining arguments regarding whether the City adequately afforded customers an opportunity to be heard with respect to their erroneous bills. Accordingly, the court denies Defendant's Motion with respect to Count IV on account of the issue of notice under the Due Process Clause.

IV. CONCLUSION

For the foregoing reasons, the court denies Defendant's Motion for Summary Judgment (ECF No. 64) on Counts I and II, and denies Defendant's Motion with respect to notice under the Due Process Clause on Counts III and IV.

IT IS SO ORDERED.

/s/ SOLOMON OLIVER, JR.
UNITED STATES DISTRICT JUDGE

September 29, 2023