APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-1723

ROSY GIRON DE REYES; ET AL.,
Plaintiffs - Appellants,

v.

WAPLES MOBILE HOME PARK
LIMITED PARTNERSHIP, ET AL.,
Defendants - Appellees.

LAURA E. GÓMEZ, ET AL.,
Amici Supporting Appellants,

NATIONAL APARTMENT ASSOCIATION,
Amicus Supporting Appellee.

[Argued March 21, 2018
Filed September 12, 2018]

Before KEENAN, WYNN, and FLOYD, Circuit Judges.

Vacated and remanded by published opinion. Judge Floyd wrote the opinion, in which Judge Wynn joined. Judge Keenan wrote a separate dissenting opinion.

FLOYD, Circuit Judge:

Four Latino couples who live or lived at Waples Mobile Home Park (the "Park") challenge the Park's policy requiring all occupants to provide documentation evidencing legal status in the United States to

renew their leases (the "Policy"). Plaintiffs contend that the Policy violates the Fair Housing Act ("FHA") because it disproportionately ousts Latinos as compared to non-Latinos. To state an FHA claim under a disparate-impact theory of liability, the plaintiff is required to demonstrate that the challenged practices have a "'disproportionately adverse effect on minorities' and are otherwise unjustified by a legitimate rationale." *Tex. Dep't of Housing & Cmty. Affairs v. Inclusive Communities Project, Inc.*, —— U.S. ——, 135 S.Ct. 2507, 2513, 192 L.Ed.2d 514 (2015) (quoting *Ricci v. DeStefano*, 557 U.S. 557, 577, 129 S.Ct. 2658, 174 L.Ed.2d 490 (2009)). Additionally, the plaintiff must demonstrate a robust causal connection between the defendant's policy and the disparate impact. The district court determined that Plaintiffs failed to make a prima facie case of disparate impact because they failed to show the required causation between the Policy and the disparate impact, and consequently granted Defendants' motion for summary judgment. For the reasons that follow, we now vacate and remand the district court's judgment.

I.

A.

The Park is owned and operated by several entities: Waples Mobile Home Park Limited Partnership; Waples Project Limited Partnership; and A.J. Dwoskin & Associates, Inc. (collectively, "Waples" or "Defendants"). Waples leases approximately 150 lots in Fairfax, Virginia, on which tenants park their mobile homes, and Waples serves as landlord for the Park. As part of its leasing and annual lease renewal policies, Waples requires all individuals who live at the Park to present either (1) an original Social Security card, or (2) an original (foreign) Passport,

original U.S. Visa, and original Arrival/Departure Form (I-94 or I-94W), which together evince legal status in the United States.[1] Under the Policy, tenants who have one or more occupants who do not provide the required documentation will not have their leases renewed and are subject to eviction. Waples asserts that the Policy is necessary to confirm lease applicants' identities, to perform credit and criminal background checks, to minimize loss from eviction, to avoid potential criminal liability for harboring illegal aliens, and to underwrite leases.

Previously, Waples only enforced this Policy against the leaseholder. In mid-2015, however, Waples started requiring this documentation for all occupants over the age of eighteen. When one or more occupants had not complied with the Policy, Waples provided notice that the leaseholder had 21 days from receipt of the notification to cure the violation, or 30 days from receipt to vacate the Park. These notifications were addressed to the entire household, including tenants who had complied with the policy. Waples also converted these leases to month-to-month leases, and charged leaseholders an additional $100 for each month a non-complying tenant had not vacated the lot, which Waples increased on June 1, 2016, to a $300 per month surcharge.

Plaintiffs are four couples who live or lived in the Park with their children: Jose Dagoberto Reyes and Rosy Giron de Reyes (the "Reyes family"); Felix Alexis Bolaños and Ruth Rivas (the "Bolaños family");

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[1] Waples later updated this policy to allow tenants to provide other documents to demonstrate legal presence, including a permanent resident card (Form I-551 or I-151), temporary resident card (Form I-688A), or border crossing card.

Esteban Ruben Moya Yrapura and Yovana Jaldin Solis (the "Yrapura family"); and Herbert David Saravia Cruz and Rosa Elena Amaya (the "Saravia Cruz family"). Plaintiffs are all non-citizen Latinos of Salvadorian or Bolivian national origin. The four male plaintiffs each have a Social Security number and have provided documentation to satisfy the Policy, and the ten children living with Plaintiffs are each U.S. citizens, but the four female plaintiffs cannot satisfy the Policy because each female plaintiff is an illegal immigrant.

When the male plaintiffs initially leased a lot in the Park, three of the female plaintiffs were not listed on the lease applications, despite the requirement to list all adult tenants on the application. The male plaintiffs had each renewed their year-long leases without complying with the Policy, though Waples knew at least some of the female plaintiffs were living in the Park. In mid-2015, when Waples began enforcing the Policy's requirement that all adult tenants provide the required documentation, the four female plaintiffs attempted to use alternative methods to comply with the Policy, including providing their U.S. government-issued Individual Taxpayer Identification Numbers ("ITINs"),[2] which Plaintiffs alleged can be used to run background checks and credit reports. Waples declined to accept any alternative forms of identification.

In March 2014, Waples notified the Reyes family that Rosy Reyes needed to comply with the Policy,

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[2] The IRS issues ITINs to all income-earning U.S. taxpayers who are ineligible to obtain a Social Security number, irrespective of immigration status. Before issuing an ITIN, the IRS requires IRS Form W-7, a copy of the individual's tax return, and proof of identity.

but permitted the Reyes family to renew their one-year lease without complying. In March 2015, at the expiration of the lease, Waples notified the Reyes family that they would be placed on a month-to-month lease and be subject to a $100 per month surcharge for non-compliance with the Policy. In early 2016, Waples sent notifications and placed the Yrapura, Saravia Cruz, and Bolaños families on month-to-month leases with a $100 per month surcharge for non-compliance with the Policy. Waples later sent all Plaintiffs notification that the monthly surcharge would increase to $300, but agreed not to charge or collect this increase during the pendency of this litigation.

At the time of filing the Complaint, only one Plaintiff couple had vacated the Park under threat of eviction; the other three Plaintiff couples continued to reside at the Park but feared eviction. By the time Plaintiffs filed their cross-motion for summary judgment, three Plaintiff families had been forced to move out of the Park because of threats of eviction and rent increases, and the remaining family was facing eviction but had not yet moved.

B.

Plaintiffs commenced this lawsuit on May 23, 2016, by filing a six-count complaint, including a claim under the FHA, 42 U.S.C. § 3604, which is the only claim involved in this appeal. As relevant to the procedural posture of this case, an FHA claim can proceed under either a disparate-treatment or a disparate-impact theory of liability, and a plaintiff is not required to elect which theory the claim relies upon at pre-trial, trial, or appellate stages. *See Wright v. Nat'l Archives & Records Serv.*, 609 F.2d 702, 711 n.6 (4th Cir. 1979). Under a disparate-

treatment theory of liability, a "plaintiff must establish that the defendant had a discriminatory intent or motive," whereas "a plaintiff bringing a disparate-impact claim challenges practices that have a disproportionately adverse effect on minorities and are otherwise unjustified by a legitimate rationale." *Inclusive Communities*, 135 S.Ct. at 2513 (internal quotation marks omitted). Under the disparate-impact theory, the plaintiff must also demonstrate a causal connection between the defendant's policy and the statistical disparity. *Id.* at 2523.

In their Complaint, Plaintiffs alleged that Waples' Policy violates the FHA because it "is disproportionately ousting Hispanic or Latino ('Latino') families from their homes and denying them one of the only affordable housing options in Fairfax County, Virginia." J.A. 27. To support their argument, Plaintiffs provided statistical evidence of the "strong link[] between the undocumented immigrant population and the Latino population" to demonstrate that "a policy that adversely affects the undocumented immigrant population will likewise have a significant disproportionate impact on the Latino population." J.A. 39. These statistics included that Latinos constitute 64.6% of the total undocumented immigrant population in Virginia, and that Latinos are ten times more likely than non-Latinos to be adversely affected by the Policy, as undocumented immigrants constitute 36.4% of the Latino population in Virginia compared with only 3.6% of the non-Latino population. Plaintiffs sought declaratory and injunctive relief, compensatory and punitive damages, fees, and other relief deemed appropriate.

Waples filed a partial motion to dismiss several counts in the Complaint pursuant to Federal Rule

of Procedure 12(b)(6), including the FHA claim. The district court denied the motion to dismiss as it related to the FHA claim. In its memorandum opinion, the district court stated that "the allegations in their Complaint are sufficient to state a claim under the FHA." J.A. 165. It went on to state, however, that "[a]lthough plaintiffs cannot rely solely on disparate impact to prove causation, they may use evidence of disparate impact to help prove that the Policy discriminates 'because of' race or national origin," and may use such evidence "to show that the apparently neutral Policy is in fact a pretext for intentional racial or national origin discrimination against plaintiffs." *Id.* (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)). In so doing, the district court seemed to suggest that Plaintiffs' FHA claim should continue under a disparate-treatment theory, rather than the disparate-impact theory Plaintiffs had argued. *See Wright*, 609 F.2d at 711 n.6 (noting that a trial court, in response to a motion to dismiss, may determine that either theory of liability is unsupported by the evidence, effectively allowing the claim to continue only under one theory of liability). In response to the denial of the motion to dismiss the FHA claim, Waples filed a motion for reconsideration, which the district court denied.

The parties then conducted months of discovery. Eventually, Waples moved for summary judgment on the FHA claim. In its motion, Waples addressed the FHA claim under both a disparate-impact theory of liability and a disparate-treatment theory of liability. In response, Plaintiffs opposed Waples' motion for summary judgment on their FHA claim under the disparate-treatment theory, and filed a cross-motion

for summary judgment on the FHA claim under the disparate-impact theory. To support their cross-motion for summary judgment, Plaintiffs submitted evidence that Latinos are nearly twice as likely to be undocumented compared to Asians, and twenty times more likely to be undocumented than other groups. They also submitted evidence that 60% of the tenants at the Park were Latino, and that eleven of the twelve tenants at the Park who were not in compliance with the Policy as of May 2016, or 91.7%, were Latino.

On February 21, 2017, the district court denied as moot the cross-motions for summary judgment as to the FHA claim under the disparate-impact theory, explaining that the "disparate impact claims [] failed to survive the Rule 12(b)(6) stage . . . ." J.A. 1099 (describing *de Reyes v. Waples Mobile Home Park Ltd. P'ship*, No. 1:16-cv-563, 2017 WL 4509869 (E.D. Va. Feb. 21, 2017) (Order)). During the motions hearing on the cross-motions for summary judgment, the district court further explained:

> As you all know, I disposed of disparate impact at the motion to dismiss stage. . . . I held explicitly that disparate impact could not be used to satisfy the causation requirement here, because to do so . . . would effectively erase the causation requirement. But I went on to say that disparate impact . . . could be used to help show disparate treatment in addition to other proof to meet the plaintiff's burden of demonstrating causation. . . . So I would think that the motion for summary judgment on that ground should be denied as moot.

J.A. 1149-50. On April 18, 2017, the district court granted Waples' motion for summary judgment as to the FHA claim, and its memorandum opinion makes

it clear that in doing so, the district court only considered the FHA claim under the disparate-treatment theory of liability. *See de Reyes v. Waples Mobile Home Park Ltd. P'ship*, 251 F. Supp. 3d 1006, 1013 (E.D. Va. 2017) (starting its analysis by stating that "Defendants have moved for summary judgment on plaintiffs' disparate treatment claims under the FHA"); *id.* at 1013 n.8 ("Thus, after full briefing and argument at the threshold stage, plaintiffs' housing discrimination claims were permitted to proceed as disparate *treatment* claims, and plaintiffs were further permitted to use evidence of disparate impact to support an inference of intentional discrimination." (emphasis in original)).

On appeal, Plaintiffs contend that the district court erred in granting Waples' motion for summary judgment on the FHA claim. Moreover, Plaintiffs argue that the district court erred in concluding that their FHA claim could not continue past the motion to dismiss stage under a disparate-impact theory of liability and thus erred in failing to substantively address this theory in considering the cross-motions for summary judgment. Plaintiffs do not argue that the FHA claim should have survived the motion for summary judgment under a disparate-treatment theory of liability and, thus, we decline to address this theory of liability for Plaintiffs' FHA claim.

II.

On appeal, the overarching question is whether the district court erred in granting Waples' motion for summary judgment on the FHA claim, which constitutes the legal action that prompted this appeal. But because the district court premised its grant of summary judgment on the fact that it had dismissed Plaintiffs' disparate-impact theory at the Rule

12(b)(6) stage and held that Waples was entitled to summary judgment under the disparate-*treatment* theory, our inquiry is more complicated. First, we must determine whether the district court erred in functionally dismissing Plaintiffs' disparate-impact theory at the motion to dismiss stage. Then, we must determine whether the district court erred in granting Waples' motion for summary judgment on the FHA claim because it did not consider Plaintiffs' disparate-impact theory of liability at this stage. We now hold that the district court erred on both occasions.

A.

We review a district court's ruling on a motion to dismiss de novo. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009). A complaint survives a Rule 12(b)(6) motion to dismiss when it "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). The complaint "has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955). On review, "we must assume all well-pled facts to be true," and "draw all reasonable inferences in favor of the plaintiff." *Nemet Chevrolet*, 591 F.3d at 253 (citations & internal quotation marks omitted).

We also review a district court's grant of summary judgment de novo. *Lawson v. Union Cty. Clerk of Court*, 828 F.3d 239, 247 (4th Cir. 2016). "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." Fed. R. Civ. P. 56(a). A genuine dispute of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "We apply the same legal standards as the district court while viewing all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party." *Lawson*, 828 F.3d at 247 (internal quotation marks omitted).

B.

We first examine whether the district court erred in dismissing Plaintiffs' disparate-impact theory of liability at the motion to dismiss stage on the grounds that they failed to show the required causality between the Policy and the disparate impact on Latinos. The FHA provides that it shall be unlawful

> [t]o 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.

42 U.S.C. § 3604(a).[3] In *Inclusive Communities*, the Supreme Court confirmed that disparate-impact

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[3] We need not decide whether discrimination against Latinos is discrimination on the basis of race, national origin, or both; it is sufficient that we agree that Latinos are a protected class under the FHA. *See*, *e.g.*, *Keller v. City of Fremont*, 719 F.3d 931, 948 (8th Cir. 2013) (acknowledging that Latinos are a protected class under the FHA); *see also Vill. of Freeport v. Barrella*, 814 F.3d 594, 606 (2d Cir. 2016) ("Most courts have

claims are cognizable under the FHA. 135 S.Ct. at 2525; *see also Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 986 (4th Cir. 1984); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982). In general, "a plaintiff bringing a disparate-impact claim challenges practices that have a disproportionately adverse effect on minorities and are otherwise unjustified by a legitimate rationale." *Inclusive Communities*, 135 S.Ct. at 2513 (internal quotation marks omitted).

In *Inclusive Communities*, the Supreme Court explained that an FHA disparate-impact claim should be analyzed under a three-step, burden-shifting framework.[4] Under the first step, the plaintiff must

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assumed that Hispanics [and Latinos] constitute a 'protected class' [under Title VII] but without saying whether that protection derives from race or national origin." (citation omitted)).

[4] In 2013, the Secretary of the U.S. Department of Housing and Urban Development ("HUD") issued a regulation interpreting disparate-impact liability under the FHA and detailing a three-step, burden-shifting framework to analyze these claims. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 24 C.F.R. § 100.500 (2014); *see also Inclusive Communities*, 135 S.Ct. at 2514-15. The HUD regulation is similar to the framework the Supreme Court ultimately adopted in *Inclusive Communities*, and indeed, some courts believe the Supreme Court implicitly adopted the HUD framework altogether. *See*, *e.g.*, *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 618 (2d Cir. 2016) ("The Supreme Court implicitly adopted HUD's approach . . . ."); *Crossroads Residents Organized for Stable & Secure ResiDencieS v. MSP Crossroads Apartments LLC*, No. 16-233 ADM/KMM, 2016 WL 3661146, at *6 (D. Minn. July 5, 2016) (explaining that *Inclusive Communities* "announced several 'safeguards' to incorporate into [HUD's] burden-shifting framework," including a "robust causality requirement" at the prima facie stage and "leeway" when the burden shifts to the defendant to explain the interests served by the policies). Without deciding whether there are meaningful differences between the frameworks, we note that the standard announced

demonstrate a robust causal connection between the defendant's challenged policy and the disparate impact on the protected class. *Id.* at 2523 (citing *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 653, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989)), *superseded by statute as stated in Inclusive Communities*, 135 S.Ct. 2507. Under the second step, the defendant has the burden of persuasion to "state and explain the valid interest served by their policies." *Id.* at 2522 (stating that this step is analogous to Title VII's business necessity standard). Under the third step of the framework, and in order to establish liability, the plaintiff has the burden to prove that the defendant's asserted interests "could be served by another practice that has a less discriminatory effect." *Id.* at 2515 (quoting 24 C.F.R. § 100.500(c)(3)).

In holding that disparate-impact claims were cognizable under the FHA using this framework, the

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in *Inclusive Communities* rather than the HUD regulation controls our inquiry. Under the HUD regulation, however,

> a plaintiff first must make a prima facie showing of disparate impact. That is, the plaintiff "has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect." 24 CFR § 100.500(c)(1) (2014). 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. After a plaintiff does establish a prima facie showing of disparate impact, the burden shifts to the defendant to "prov[e] that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests." § 100.500(c)(2). . . . Once a defendant has satisfied its burden at step two, a plaintiff may "prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect." § 100.500(c)(3).

Inclusive Communities, 135 S.Ct. at 2514-15.

Supreme Court emphasized that courts should only use disparate-impact claims to "'remov[e] [] artificial, arbitrary, and unnecessary barriers,'" rather than "displace valid governmental and private priorities . . . ." *Id.* at 2524 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971)). The Supreme Court expressed that adequate safeguards must be implemented at the prima facie stage to avoid hailing defendants into court for racial disparities they did not create and to prevent governmental and private entities from using numerical quotas to avoid disparate-impact challenges based solely on racial disparities—a practice it acknowledged that disparate-impact liability is intended to protect *against*, and a practice which would itself raise serious constitutional questions. *Id.* at 2523.

As one safeguard to ensure that disparate-impact claims would be properly limited, the Supreme Court focused on the plaintiff's need to demonstrate a "robust causality requirement" under the first step of the framework in order to state a prima facie disparate-impact claim. *See id.* Understanding this robust causality requirement is at the crux of this appeal. Here, in dismissing Plaintiffs' disparate-impact theory, the district court concluded that Plaintiffs failed to make a prima facie case of disparate impact because they failed to satisfy the FHA's causation requirement, asserting that Plaintiffs did not show that the Policy was instituted "'because of' race or national origin[.]" J.A. 162.[5] We disagree.

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[5] Plaintiffs also argue that the district court erroneously concluded that they were "unable to state an FHA disparate impact claim because the Policy was not a 'remnant[] of the country's tragic and regrettable history of state-sanctioned intentional discrimination[.]'" Appellants' Br. 4-5 (alteration in original)

To establish causation in a disparate-impact claim, "[t]he plaintiff must begin by identifying the specific [] practice that is challenged." *Wards Cove*, 490 U.S. at 656, 109 S.Ct. 2115 (quoting *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 994, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988)). The plaintiff must also "demonstrate that the disparity they complain of is the result of one or more of the [] practices that they are attacking . . . , specifically showing that each challenged practice has a significantly disparate impact" on the protected class. *Id.* at 657, 109 S.Ct. 2115. In other words, "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." *Inclusive Communities*, 135 S.Ct. at 2523. Additionally, "the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion [complained of] because of their membership in a protected group. Our formulations, which have never been framed in terms of any rigid mathematical formula,

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(quoting J.A. 158); *see also* J.A. 159-60 (district court stating that "disparate impact theory is properly used to ferret out long-entrenched discrimination against historically disadvantaged groups," and that cases historically applying disparate impact theory are "very different from the context presented in this case"). We decline to specifically address this argument, but note that the burden-shifting framework for analyzing FHA claims under a disparate-impact theory, as described in *Inclusive Communities*, does not require an assessment of the historical discrimination of a group or a policy. *See Inclusive Communities*, 135 S.Ct. at 2518-20; *see also Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 988, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988) ("We have not limited [disparate-impact claims] to cases in which the challenged practice served to perpetuate the effects of pre-[Title VII] intentional discrimination.").

have consistently stressed that statistical disparities must be sufficiently substantial that they raise such an inference of causation." *Watson*, 487 U.S. at 994-95, 108 S.Ct. 2777.

"A plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact." *Inclusive Communities*, 135 S.Ct. at 2523. "A 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." *Id.* (alterations in original) (quoting *Wards Cove*, 490 U.S. at 653, 109 S.Ct. 2115); *see also Wards Cove*, 490 U.S. at 657, 109 S.Ct. 2115 (stating that a racial imbalance alone is insufficient to make a prima facie case of disparate impact under Title VII). Additionally, in *Inclusive Communities*, the Supreme Court hypothesized several situations in which it may be difficult for a plaintiff to demonstrate the required causal connection between the defendant's offending policy and the statistical disparity: (1) when a one-time decision rather than a *policy* is challenged; (2) when federal law "substantially limit[ed] the [defendant's] discretion" in creating the policy; and (3) when "multiple factors [went] into investment decisions about where to construct or renovate housing units." 135 S.Ct. at 2523-24.

The Supreme Court's opinion in *Wards Cove* provides a clear example of *Inclusive Communities*' robust causality requirement.[6] In *Wards Cove*, the

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[6] Although *Wards Cove* analyzes a Title VII disparate-impact claim, *Inclusive Communities* cited to *Wards Cove* in explaining the robust causality requirement. *Inclusive Communities*, 135

Supreme Court concluded that the Ninth Circuit erred in holding that plaintiffs had made out a prima facie case of disparate impact under Title VII using evidence that the percentage of salmon cannery workers in "noncannery jobs" (generally skilled) who were non-white was significantly lower than the number of workers in "cannery jobs" (unskilled) who were non-white, as this only demonstrated that a racial imbalance existed between the two jobs without demonstrating how a specific policy caused a racial imbalance in either job. 490 U.S. at 655, 109 S.Ct. 2115. The Supreme Court explained that a racial imbalance in the proportion of non-white workers hired for a position likely would not be considered a disparate impact on non-white workers as long as the proportion of non-white workers hired was similar to the proportion of non-white workers qualified for the job, and "[a]s long as there are no barriers or practices deterring qualified nonwhites from applying . . . ." *Id.* at 653, 109 S.Ct. 2115. Expounding the Supreme Court's explanation into a more concrete example, there would likely be no prima facie case of a disparate impact on nonwhites if 5% of the workers were non-white as long as approximately 5% of the qualified applicants were

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S.Ct. at 2523; *Wards Cove*, 490 U.S. at 645, 109 S.Ct. 2115. The Supreme Court also expressly stated that it used "[t]he cases interpreting Title VII . . . [to] provide essential background and instruction" in deciding *Inclusive Communities*, based on the similar language and anti-discrimination purposes in these Acts, and the short time period between the passage of each. *Id.* at 2518-19. *Inclusive Communities* also expressly acknowledged that its FHA burden-shifting framework closely resembles the Title VII framework for disparate-impact claims. *See id.* at 2523; *see also Wards Cove*, 490 U.S. at 656-61, 109 S.Ct. 2115 (describing the Title VII framework for disparate-impact claims).

non-white. It is irrelevant to the disparate-impact analysis, then, that 5% of the workforce was non-white and 95% of the workforce was white—a bare statistical discrepancy—if the plaintiff cannot identify a specific policy or practice that caused the discrepancy. "To 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.* at 657, 109 S.Ct. 2115 (quoting *Watson*, 487 U.S. at 992, 108 S.Ct. 2777). The Supreme Court opined, for example, that in this example, the discrepancy may have been due to a dearth of qualified non-white applicants. *Id.* at 651, 109 S.Ct. 2115.

Although this Court has not had occasion to address an FHA disparate-impact claim since *Inclusive Communities*, other courts have. In *Mhany Management, Inc. v. County of Nassau*, for example, the Second Circuit analyzed a disparate-impact claim in accordance with *Inclusive Communities* and affirmed that the plaintiffs "more than established a prima facie case" that a rezoning decision had a disparate impact on minorities because the original rezoning proposal "would have created a pool of potential renters with a significantly larger percentage of minority households than the pool of potential renters for the zoning proposal ultimately adopted . . . ." 819 F.3d 581, 607, 620 (2d Cir. 2016). The plaintiffs thus demonstrated that the specific rezoning policy disproportionately decreased the availability of housing for minorities as compared to whites, thereby satisfying the robust causality requirement to state a prima facie case of disparate impact. *See id.* at 619-20; *see also City of L.A. v. Bank of Am. Corp.*, 691 F. App'x 464, 465 (9th Cir. 2017) (affirming that plaintiffs failed to prove robust causality because the defendant's pol-

icies of marketing toward low-income borrowers and incentivizing loan officers to issue high-amount loans "would affect borrowers equally regardless of race"); *Binns v. City of Marietta Ga., (Hous. Choice Voucher Program)*, 704 F. App'x 797, 802 (11th Cir. 2017) (affirming dismissal of FHA disparate impact claim because the plaintiff "provided no comparative data, statistical or otherwise, to show that elderly and disabled participants are disproportionately impacted by the City's policy"); *Boykin v. Fenty*, 650 F. App'x 42, 44 (D.C. Cir. 2016) (affirming dismissal of FHA disparate impact claim because "[t]he complaint failed to allege facts suggesting that the [policy] affected a greater proportion of disabled individuals than non-disabled"); *Crossroads Residents Organized for Stable & Secure ResiDencieS v. MSP Crossroads Apartments LLC*, No. 16-233 ADM/KMM, 2016 WL 3661146, at *7-*8 (D. Minn. July 5, 2016) (stating that disparate impact is commonly shown in cases challenging a landlord's rental policy by "alleg[ing] that tenants at the complex harmed by Defendants' actions are disproportionately protected class members," and that allegations that the defendant's policies are the reason the plaintiffs are unable to remain at the complex present a straightforward causation argument); *Burbank Apartments Tenant Ass'n v. Kargman*, 474 Mass. 107, 48 N.E.3d 394, 412-13 (2016) (stating that the plaintiffs' allegations failed to meet the robust causality requirement because they "have not shown that the defendant's decision not to renew their [subsidized housing contract] has resulted in a disproportionately negative impact on members of protected classes").[7]

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[7] Some pre-*Inclusive Communities* cases also described the causality requirement in a way that parallels our understanding

Additionally, several of this Court's pre-*Inclusive Communities* FHA disparate-impact cases are consistent with this robust causality requirement and, as their holdings are still good law, we find them helpful in our analysis. In *Betsey v. Turtle Creek Associates*, for example, this Court reversed the district court's conclusion that the plaintiffs had failed to make a prima facie case of disparate impact. 736 F.2d at 988. The plaintiffs alleged that an apartment complex's institution of an all-adult rental policy had a disparate impact on non-whites in violation of the FHA, and introduced statistical evidence that 54.3% of non-white tenants received termination notices compared with 14.1% of white tenants, and that 68.3% of the tenants with children were non-white. *Id.* at 984, 988. This Court held that these statistics made the disparate impact of the policy "self-evident," and were sufficient to make a prima facie case of an FHA violation. *Id.* at 988. Essentially, plaintiffs had demonstrated that the specific policy of evicting tenants with children caused the protected class to be disproportionately evicted from the apartment complex, demonstrating robust

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of robust causality post-*Inclusive Communities*. *See*, *e.g.*, *Keller*, 719 F.3d at 948 (stating that in order to prove a disparate-impact violation of the FHA, "a plaintiff must first establish a prima facie case, that is, that the objected-to action results in, or can be predicted to result in, a disparate impact upon a protected class compared to a relevant population as a whole." (internal quotation marks omitted)); *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375, 381 (3d Cir. 2011) (analyzing an FHA disparate-impact claim and explaining that "[i]n order to determine whether action of this sort was 'because of race' we look to see if it had a racially discriminatory effect, i.e., whether it disproportionately burdened a particular racial group so as to cause a disparate impact." (citations & internal quotation marks omitted)).

causality sufficient to state a prima facie claim of disparate impact. *See also Crossroads Residents*, 2016 WL 3661146, at *7 (citing the statistical analysis in *Betsey*, 736 F.2d 983, as an example of how to show a disparate impact on a protected class).

Similarly, in *Smith v. Town of Clarkton*, this Court concluded that the plaintiff proved a disparate-impact claim under "any common sense analysis" by proving that the defendants' termination of a public housing project disparately impacted the black citizens of the county when the removal of low income housing in the county fell 2.65 times more harshly on the black population, and when the black population had the highest percentage of presumptively eligible applicants. 682 F.2d at 1064-66. Thus, the plaintiffs had demonstrated that the specific practice of terminating the public housing project caused affordable housing for the protected class to be disproportionately decreased.

Here, the Policy requires all occupants above the age of eighteen to provide documentation evidencing legal status, and failure to comply results in termination of the lease with Waples and eviction. In their Complaint, Plaintiffs alleged that this particular policy violates the FHA because it "is disproportionately ousting Hispanic or Latino ('Latino') families from their homes and denying them one of the only affordable housing options in Fairfax County, Virginia." J.A. 27. In their Complaint, Plaintiffs provided statistical evidence that Latinos constitute 64.6% of the total undocumented immigrant population in Virginia, and that Latinos are ten times more likely than non-Latinos to be adversely affected by the Policy, as undocumented immigrants constitute 36.4% of the Latino population compared with only 3.6% of

the non-Latino population. Based on this evidence, Plaintiffs asserted that "a policy that adversely affects the undocumented immigrant population will likewise have a significant disproportionate impact on the Latino population." J.A. 39.

At the motion to dismiss stage, we must accept all well-pled facts as true and draw all reasonable inferences in favor of the plaintiff. *See Nemet Chevrolet*, 591 F.3d at 253. Therefore, accepting these statistics as true, we conclude that Plaintiffs sufficiently alleged a prima facie case of disparate impact. Plaintiffs satisfied step one of the *Inclusive Communities* framework by demonstrating that Waples' Policy of evicting occupants that are unable to provide documentation of legal status in the United States caused a disproportionate number of Latinos to face eviction from the Park compared to the number of non-Latinos who faced eviction based on the Policy. Notably, the evidence did not merely allege that Latinos would face eviction in higher numbers than non-Latinos. Instead, Plaintiffs satisfied the robust causality requirement by asserting that the specific Policy requiring all adult Park tenants to provide certain documents proving legal status was likely to cause Latino tenants at the Park to be disproportionately subject to eviction compared to non-Latino tenants at the Park.[8]

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[8] The dissent implies that we should only consider whether Latino tenants who were undocumented immigrants were disproportionately impacted by the Policy as compared to non-Latino tenants who were undocumented immigrants. *See* Dissenting Op. at 433-34. We disagree. Plaintiffs alleged that the Policy requiring that *each occupant* provide certain documentation created a disparate impact on Latino occupants in the Park. Based on Plaintiffs' challenge to this Policy, then, we must compare whether Latinos that are subject to the Policy—

Accordingly, we now hold that Plaintiffs have made a prima facie case that Waples' Policy disparately impacted Latinos in violation of the FHA, satisfying step one of the disparate-impact analysis, and that the district court therefore erred in concluding otherwise.

C.

We also take this opportunity to correct the district court's grievous error in concluding that the female Plaintiffs' legal status precluded them from making a prima facie showing of disparate impact, which is a misinterpretation of the robust causality requirement described in *Inclusive Communities*. In determining that Plaintiffs were unable to demonstrate robust causality, the district court stated that "it is undisputed that the female plaintiffs are unable to satisfy the Policy—and prove legal presence in the United States—not *because of* their race or national origin, but because they are, in fact, unlawfully present in the country." J.A. 1080 (emphasis added). The district court continued:

> In the instant case, the disparate impact on plaintiffs *as Latinos* is incidental to the Policy's effect on all illegal aliens. That is, a disparate impact exists as to Latinos because Latinos have chosen in greater numbers than any other group to enter the United States illegally. . . . [I]t cannot fairly be said . . . that a policy targeting illegal aliens and thereby disproportionately making housing unavailable to a class of Latinos does so "because of race . . . or national origin."

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i.e., Latino tenants at the Park—are disproportionately impacted by the Policy as compared to non-Latinos that are subject to the Policy—i.e., non-Latino tenants at the Park.

J.A. 163 (quoting 42 U.S.C. § 3604(a)); *see also* J.A. 156 ("[A]llowing plaintiffs in this case to satisfy the FHA's causation element simply by proving that the Policy disparately impacts Latinos would effectively eliminate the statute's 'because of' requirement, as essentially any policy aimed at illegal aliens will have a disproportionate effect on Latinos."); J.A. 1152 ("The fact that [Plaintiffs are] illegal is what's at the heart of [this] case.").

In essence, the district court posits that courts should reject a disparate-impact claim if the plaintiff is impacted by the allegedly discriminatory policy for reasons that are distinct from the plaintiff's inclusion in a protected class, even if the protected class is disparately impacted by the challenged policy. Here, for example, even though the district court seemed to admit that Latinos *are* disparately impacted by the Policy, the district court dismissed the disparate-impact claim because the female plaintiffs were impacted by the Policy because they are illegal immigrants, which is distinct from their identity as Latinos (a protected class).

The district court's view threatens to eviscerate disparate-impact claims altogether, as this view could permit any facially neutral rationale to be considered the primary *cause* for the disparate impact on the protected class and break the robust link required between the challenged policy and the disparate impact. Thus, the district court's view of causation would seem to require an *intent* to disparately impact a protected class in order to show robust causality, thereby collapsing the disparate-impact analysis into the disparate-treatment analysis. *See Inclusive Communities*, 135 S.Ct. at 2513 (distinguishing intent-based disparate-treatment cases from effect-

based disparate-impact cases). This goes far beyond the "robust causality" requirement the Supreme Court described. *Id.* at 2523; *see also id.* at 2522 (cautioning courts to *properly* limit disparate-impact claims).

This interpretation of the causation requirement would undermine the very purpose of disparate-impact claims to "permit[] plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment" and "prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping." *Id.* at 2522. If we adopted the district court's understanding of robust causality, for example, we would have dismissed the claim in *Betsey* by reasoning that the fact that the plaintiffs *had children* is what actually *caused* them to receive the termination notice, and that therefore any disparate impact on the plaintiffs as non-white tenants was merely incidental to the policy's effect on all parents. 736 F.2d at 988. In other words, the district court would have us conclude that the disparate impact of the termination notices on non-white tenants existed because non-whites chose in greater numbers to have children, and therefore that their disparate-impact claim is foreclosed. Applying this logic to *Smith*, and parroting the district court's language, we would have similarly held that "it is undisputed that the plaintiffs are unable to obtain housing in the county not *because of* their race, but because they are, in fact, poor and unable to afford the available housing," and thus that "it cannot be fairly said that a policy terminating a public housing project and thereby disproportionately making housing unavailable to a class of the black population does so 'because of

race.'" *See* J.A. 163; *see also* 682 F.2d at 1064-66. This is plainly incorrect.

Rather, determining whether a plaintiff made a prima facie case of disparate-impact liability requires courts to look at whether a protected class is disproportionately *affected* by a challenged policy. *See Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375, 383-84 (3d Cir. 2011) (describing the error in conflating disparate-treatment with disparate-impact claims). This is so because in disparate-impact cases, "[e]ffect, not motivation, is the touchstone because a thoughtless housing practice can be as unfair to minority rights as a willful scheme." *Id.* at 385 (quoting *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231, 233 (8th Cir. 1976)); *Griggs*, 401 U.S. at 432, 91 S.Ct. 849 (describing disparate-impact claims as addressing the consequences of challenged practices, not simply the motivation). The extra step of determining whether such a practice that has a disparate impact on a protected class is *justified* is properly contained in steps two and three of the burden-shifting framework. *See Watson*, 487 U.S. at 996-98, 108 S.Ct. 2777 (describing the framework's constraints on the application of disparate-impact theory).

Moreover, the district court's approach conflicts with the approach taken by the Supreme Court, Congress, and the U.S. Department of Housing and Urban Development ("HUD") in similar circumstances. First, the Supreme Court confronted a materially indistinguishable factual scenario, albeit under Title VII and not the FHA, and indicated that these facts would create a valid disparate-impact claim. *See Inclusive Communities*, 135 S.Ct. at 2518 (describing Title VII disparate-impact cases as "provid[ing]

essential background and instruction" in deciding *Inclusive Communities*). In *Espinoza v. Farah Manufacturing Co.*, the Supreme Court considered a resident alien's Title VII challenge alleging that an employer's policy of not hiring aliens amounted to discrimination against her because of her national origin of Mexico. 414 U.S. 86, 87, 94 S.Ct. 334, 38 L.Ed.2d 287 (1973), *superseded by statute on other grounds as stated in Cortezano v. Salin Bank & Tr. Co.*, 680 F.3d 936 (7th Cir. 2012). The Supreme Court stated that

> [c]ertainly Tit. VII prohibits discrimination on the basis of citizenship *whenever it has the purpose or effect of discriminating on the basis of national origin*. "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."

Id. at 92, 94 S.Ct. 334 (emphasis added) (quoting *Griggs*, 401 U.S. at 431, 91 S.Ct. 849). In *Espinoza*, the Supreme Court looked past the hiring policy's facial discrimination against non-citizens to determine whether the policy disparately impacted Mexicans, ultimately concluding it did not, because 97% of employees doing the work for which the plaintiff applied, and 96% of all employees in the San Antonio division, were of Mexican ancestry. *Id.* at 93, 94 S.Ct. 334. The same cannot be said of our facts here, where Plaintiffs allege that the Policy that overtly discriminates based on citizenship *also*—in operation—discriminates based on race and national origin, in violation of the FHA.

The FHA Amendments also discredit the district court's approach. *See* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 6, 102 Stat. 1619, 1622-23; *see also Inclusive Communities*, 135 S.Ct.

at 2520-21 (describing the FHA Amendments). For example, Congress amended the FHA to provide a specific exemption from liability for exclusionary practices aimed at individuals with drug convictions. 42 U.S.C. § 3607(b)(4). Despite that certain drug convictions are correlated with sex and race—both protected classes under the FHA—this exemption ensures that disparate-impact liability will not attach if a landlord excludes tenants with such convictions, even if a plaintiff could prove the exclusionary policy disparately impacted a protected class. *Id.*; *see also Inclusive Communities*, 135 S.Ct. at 2521 (explaining that the FHA Amendments constrain disparate-impact liability for certain criminal convictions that are correlated with sex and race); *Kimbrough v. United States*, 552 U.S. 85, 98, 128 S.Ct. 558, 169 L.Ed.2d 481 (2007) (discussing the racial disparity in convictions for crack cocaine offenses).[9] Here, the district court acknowledged that being an illegal immigrant, at least at this time in Virginia, correlates with being Latino (a protected class), which parallels the correlation between certain drug convictions and race and sex (protected classes). Notably, however, there is no exemption for liability under the FHA for policies aimed at illegal immigrants. Consequently, in the absence of a specific exemption from liability for exclusionary practices aimed at illegal immigrants, we must infer that Congress intended to permit disparate-impact liability for policies aimed at illegal immigrants when the policy disparately im-

[9] The other two relevant amendments relate to restrictions regarding the maximum number of occupants permitted to occupy a dwelling, and allowing an appraiser to consider factors other than race, color, religion, national origin, sex, handicap, or familial status. *See* 42 U.S.C. §§ 3605(c), 3607(b)(1); *see also Inclusive Communities*, 135 S.Ct. at 2520.

pacts a protected class, regardless of any correlation between the two. *See Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17, 100 S.Ct. 1905, 64 L.Ed.2d 548 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." (citing *Cont'l Cas. Co. v. United States*, 314 U.S. 527, 533, 62 S.Ct. 393, 86 L.Ed. 426 (1942))).

Similarly, HUD, the agency with the authority to interpret, administer, and enforce the FHA, signaled that disparate-impact claims may arise under circumstances in which the challenged policy, on its face, relates to conduct that was not protected under the FHA, but which may correlate with a protected class. For example, HUD stated that "[a] requirement involving citizenship or immigration status will violate the [FHA] when it has the purpose or unjustified effect of discriminating on the basis of national origin." *See* HUD Office of General Counsel, Guidance on Fair Housing Act Protections for Persons with Limited English Proficiency 3 (Sept. 15, 2016) (internal quotation marks omitted).[10] HUD, thus, counsels that Plaintiffs' disparate impact claim is not precluded simply because the female Plaintiffs cannot satisfy the Policy because they are illegal

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[10] Waples argues that the HUD regulation and guidance conflict with *Inclusive Communities* and thus cannot be relied upon, specifically noting that *Inclusive Communities* refers to a "robust" causality requirement. 135 S.Ct. at 2523. We disagree. To the extent the two conflict, *Inclusive Communities* controls, but we also afford the HUD regulation and guidance the deference it deserves. *See*, *e.g.*, *Griggs*, 401 U.S. at 433-34, 91 S.Ct. 849 (stating that the EEOC's interpretations of Title VII, as the enforcing agency of Title VII, was "entitled to great deference").

immigrants when they have alleged that the Policy disparately impacts Latinos.

Consequently, we believe the district court seriously misconstrued the robust causality requirement described in *Inclusive Communities* and erroneously rejected Plaintiffs' prima facie claim that Waples' Policy disparately impacted Latinos.

D.

In the ordinary case, once the Court has concluded that the plaintiffs established a prima facie showing of disparate impact, as we have done here, the Court then reviews whether the defendants met their burden under step two of the burden-shifting disparate-impact analysis to "state and explain the valid interest served by their policies." *Inclusive Communities*, 135 S.Ct. at 2522. Because the district court concluded that Plaintiffs failed to make a prima facie case of an FHA violation under a disparate-impact theory at the motion to dismiss stage, it never considered this second step. Similarly, the district court never considered the third and final step in the burden-shifting analysis, which would have allowed Plaintiffs to "prov[e] that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect." *Id.* at 2515 (quoting 24 C.F.R. § 100.500(c)(3)).

In such circumstances, it is prudent for this Court to remand to the district court for consideration of these issues in the first instance. *See Betsey*, 736 F.2d at 988-89. (remanding for further consideration after holding that the district court erred in concluding that the plaintiffs had not established a prima facie case of discriminatory impact). Here, even though the district court failed to fully analyze Plaintiffs'

disparate-impact theory at the motion to dismiss stage, this appeal is before us as a challenge to the district court's grant of Waples' motion for summary judgment. Consequently, because the district court concluded that the FHA claim survived the motion to dismiss stage, and because we conclude that Plaintiffs' submitted sufficient evidence of a prima facie case of disparate impact, the district court should have addressed the FHA claim under the disparate-impact theory of liability at the motion for summary judgment stage.[11] *See Wright*, 609 F.2d at 710-11 (stating that both theories can be analyzed by the trier of fact as alternative grounds of relief if sufficiently supported by evidence).

Therefore, we vacate the district court's grant of Waples' motion for summary judgment on the FHA claim and remand to allow the district court to consider the cross-motions for summary judgment under Plaintiffs' disparate-impact theory of liability in a manner consistent with this opinion.[12] Although

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[11] We note that Plaintiffs submitted additional, stronger statistical evidence in support of their cross-motion for summary judgment on the disparate-impact theory of liability, which may have been sufficient, on its own, for the district court to consider this alternative theory of liability on the FHA claim, regardless of whether the district court had determined that the evidence submitted at the motion to dismiss stage was insufficient to satisfy step one's robust causality requirement. *See Inclusive Communities*, 135 S.Ct. at 2523; *Wright*, 609 F.2d at 710-11. Most notably, Plaintiffs submitted evidence that Latinos comprised 91.7% of those unable to comply with the Policy and consequently facing eviction, despite comprising only 60% of those subject to the Policy.

[12] Despite the dissent's assertions otherwise, our holding does not extend FHA protection to individuals based on immigration status, nor does it even extend FHA protection to these Plaintiffs. *See* Dissenting Op. at 434. We merely hold that, under these

Plaintiffs did not argue that the FHA claim should have survived the motion for summary judgment under a disparate-treatment theory of liability and, thus, we declined to address this theory of liability on appeal, we express no opinion on whether the district court should also address this alternative theory of liability on remand.[13]

III.

For the foregoing reasons, the judgment of the district court is

VACATED AND REMANDED.

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facts, Plaintiffs have satisfied their burden under step one of the burden-shifting framework to make a prima facie showing of disparate impact. It is for the district court to determine in the first instance whether Plaintiffs have satisfied the additional steps in this inquiry and, thus, whether Waples' Policy requiring occupants to provide documentation evincing legal status violated the FHA by disproportionately impacting Latinos.

[13] On appeal, Waples argues that Plaintiffs have abandoned several arguments. First, Waples asserts that Plaintiffs "fail[ed] to raise any challenge to the district court's application of the controlling standards under *Inclusive Communities*," specifically contending that this was a failure under Federal Rule of Appellate Procedure 28(a) to include "an appropriately comprehensive" statement of issues presented for review, and thus, that Plaintiffs cannot obtain a reversal on this dismissal. Appellees' Br. 19. Waples' also argues that Plaintiffs waived their argument for reversal based on the HUD regulation and guidance by failing to raise these arguments in the district court or in the statement of the issue in their opening brief, and also by failing to develop an argument for deference to HUD. We disagree with these contentions and conclude that Plaintiffs sufficiently raised these arguments in their Complaint and in their briefs to this Court.

BARBARA MILANO KEENAN, Circuit Judge, dissenting:

I would affirm the district court's dismissal of the plaintiffs' disparate impact claim under Federal Rule of Civil Procedure 12(b)(6), because the plaintiffs have not alleged facts satisfying the "robust causality" standard required by *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, —— U.S. ——, 135 S.Ct. 2507, 2523, 192 L.Ed.2d 514 (2015). *See* Maj. Op. at 422-23 (addressing procedural history). Therefore, I respectfully dissent.

The Supreme Court has stated unequivocally that disparate impact liability under the FHA must be "limited in key respects" to avoid imposing liability "based solely on a showing of a statistical disparity." *Id.* at 2522. The Court accordingly instituted a "robust causality requirement," which "ensures that racial imbalance does not, without more, establish a prima facie case of disparate impact." *Id.* at 2523 (citation, alterations, and quotation marks omitted). This causality requirement "protects defendants from being held liable for racial disparities they did not create." *Id.*

In my view, the plaintiffs have not adequately alleged that the defendants' policy caused the statistical disparity that they challenge. The plaintiffs rest their claim of causality on statistics showing that Latinos constitute the majority of undocumented aliens in the geographic area of the park, and thus that Latinos are disproportionately impacted by a policy targeting undocumented aliens.[1] Despite this

[1] Although the plaintiffs rely in their complaint primarily on state-wide statistics, the summary judgment record includes additional statistics regarding the representation of Latinos in the immediate geographic area of the park.

statistical imbalance, however, all occupants of the park must comply with the policy addressing their immigration status, irrespective whether they are Latino. Not all Latinos are impacted negatively by the policy, nor are Latino undocumented aliens impacted more harshly than non-Latino undocumented aliens. Accordingly, I would conclude that the defendants' policy disproportionately impacts Latinos not because they are Latino, but because Latinos are the predominant sub-group of undocumented aliens in a specific geographical area.

Although Latinos constitute the majority of the undocumented population in the geographic area of the park, at different times and in different locales the "disparate impact" might have been on immigrant populations from many other parts of the world. *See Keller v. City of Fremont*, 719 F.3d 931, 949 (8th Cir. 2013) (opinion of Loken, J.). Such geographical happenstance cannot give rise to liability against an entity not responsible for the geographical distribution. Nor does linking disparate impact liability to the coincidental location of certain undocumented aliens further the aim of the FHA to avoid "perpetuating segregation." *Inclusive Cmtys.*, 135 S.Ct. at 2522. Thus, because the defendants' policy has not caused Latinos to be the dominant group of undocumented aliens in the park, the policy has not "caused" a disparate impact on Latinos.

Moreover, accepting the plaintiffs' theory of disparate impact liability would expand the FHA beyond its stated terms to protect undocumented aliens as a class, based solely on an allegation of disparate impact within that class. *See Keller*, 719 F.3d at 949. Yet, citizenship and immigration status are not protected classes under the FHA. *See* 42 U.S.C. § 3604. By holding that a policy targeting

undocumented aliens could violate the FHA based on the policy's impact on Latinos, the majority in effect extends FHA protection to individuals based on their immigration status. *See Keller*, 719 F.3d at 949 ("It would be illogical to impose FHA disparate impact liability based on the effect an otherwise lawful ordinance may have on a sub-group of the unprotected class of aliens not lawfully present in this country."). This Court is not authorized to reformulate the terms of the FHA by using undocumented status as a proxy for any protected class, thereby creating a new protected class under the statute. Instead, it is the role of Congress to consider whether, as a matter of public policy, the FHA should be amended to prohibit discrimination based on citizenship or immigration status.

I am sympathetic to the severity of the consequences the plaintiffs likely will suffer in this case, to the difficulty they may experience in obtaining other housing, and to the hardships they have faced after relying in good faith on the defendants' prior failure to enforce the policy. Nevertheless, under the FHA as currently written and the clear holding of *Inclusive Communities*, I cannot conclude that the plaintiffs have plausibly alleged that the policy caused a disparate impact on Latinos, or that the defendants should be "held liable for [statistical] disparities they did not create." 135 S.Ct. at 2523. Because the FHA "mandates the removal of artificial, arbitrary, and unnecessary barriers, not the displacement of valid" policies, *id.* at 2522 (citation and internal quotation marks omitted), I would affirm the district court's judgment.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Case No. 1:16-cv-563

ROSY GIRON DE REYES; ET AL.,
Plaintiffs,

v.

WAPLES MOBILE HOME PARK
LIMITED PARTNERSHIP, ET AL.,
Defendants.

[Filed April 18, 2017]

MEMORANDUM OPINION

T.S. Ellis, III, United States District Judge

At issue in this housing discrimination case are the parties' cross motions for summary judgment. On May 23, 2016, plaintiffs, eight current or former residents of Waples Mobile Home Park ("the Park"), filed a six-count Complaint against the Park's owners and operators[1] in response to defendants' enforcement of a policy (the "Policy") that, in plaintiffs' view, (1) impermissibly discriminates on the basis of race, national origin, alienage, and citizenship, (2) violates the terms of their lease agreements, and (3) violates a Virginia statute regulating mobile home parks. Plaintiffs comprise four married couples, and each

[1] Defendants are Waples Mobile Home Park Limited Partnership, Waples Project Limited Partnership, and A.J. Dwoskin & Associates, Inc. These parties are referred to collectively as "defendants."

plaintiff is a non-citizen of Salvadorian or Bolivian national origin.

The remaining causes of action are:

- Count I: Violation of the Fair Housing Act ("FHA"), 42 U.S.C. § 3601 *et seq.* (brought by all plaintiffs);
- Count II: Violation of the Virginia Fair Housing Law ("VFHL"), Va. Code § 36-96.3 *et seq.* (brought by all plaintiffs);
- Count III: Violation of the Virginia Manufactured Home Lot Rental Act (the "Rental Act"), Va. Code § 55-248.41 *et seq.* (brought by only the male plaintiffs);
- Count IV: Violation of 42 U.S.C. § 1981 (brought by all plaintiffs); and
- Count V: Breach of contract (brought by only the male plaintiffs).[2]

As the summary judgment motions have been fully briefed and argued orally, they are now ripe for disposition. For the reasons that follow, defendants' motion must be granted in part and denied in part, and plaintiffs' cross motion must be denied.

I.

The following undisputed material facts are derived from the parties' statements of fact, as well as the summary judgment record.

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[2] The Complaint alleged a sixth count for tortious interference with contract, but that claim was dismissed with prejudice by Order dated July 22, 2016. *See Reyes v. Waples Mobile Home Park LP*, No. 16-cv-563 (E.D. Va. July 22, 2016) (Order) (Doc. 34). Defendants' motion to dismiss Counts I, II, and IV was denied. *See id.*, 205 F.Supp.3d 782 (E.D. Va. 2016).

- Each plaintiff is an adult Latino of Salvadorian or Bolivian national origin who currently resides in Virginia. None of the plaintiffs is a United States citizen.
- The female plaintiffs entered the United States illegally and thus are unlawfully present in the country.
- The male plaintiffs have passed criminal background checks, have Social Security Numbers, and had sufficient income and credit to rent lots at the Park.
- The four male plaintiffs were able to enter leases at the Park. Their wives, the four female plaintiffs, were not signatories on the leases.
- The lease application forms required the male plaintiffs to list all adult occupants of the male plaintiffs' mobile homes.
- Three of the male plaintiffs did not list their wives on their lease applications.[3]
- Nevertheless, the female plaintiffs lived with their husbands in the Park, which is located within the Eastern District of Virginia.

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[3] There is a factual dispute whether the fourth male plaintiff, Mr. Saravia Cruz, listed his wife, Rosa Amaya, on the first page of his lease application as his spouse who would reside with him. Plaintiffs' Exhibit 17 in their cross-motion for summary judgment—a document produced by defendants—shows that Mr. Saravia Cruz listed his wife on the first page of his application materials. In response, defendants contend that this page was not part of the application. It is unclear, however, how defendants were able to produce this document if it did not comprise Mr. Saravia Cruz's rental application. For the reasons stated *infra*, this factual dispute is material to plaintiffs' Rental Act claims, but not the discrimination claims.

- Plaintiffs' children reside with plaintiffs and are United States citizens with Social Security Numbers.
- By 2014, defendants knew that Mr. Reyes's wife was living at the Park with her husband.[4]
- Before 2015, the male plaintiffs were also able to—and did—renew year-long leases at the Park until 2015.
- Yet, in 2015, defendants enforced the Policy for the male plaintiffs' lease renewals, requiring the male plaintiffs to submit documentation for all adult occupants in the plaintiffs' homes.[5]
- At the relevant time periods, the Policy required all applicants seeking to rent at the Park to provide government-issued photo identification (including a Passport), and proof of lawful presence in the United States, such as a Social Security Card.

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[4] With respect to Mr. Bolaños, there is a factual dispute regarding when defendants actually learned that Mr. Bolaños's wife was living at the Park. Although Mr. Bolaños testified that one of defendants' employees instructed him not to list his wife on his lease application, defendants have pointed to admissible testimony indicating that defendant did not learn that Mr. Bolaños's wife was living at the Park until 2015. Similarly, there is a factual dispute as to when defendants learned that Mr. Moya Yrapura's wife lived at the Park. Plaintiffs have cited evidence that Mr. Moya Yrapura's wife was the one who took the Moya Yrapura family's rent checks to the Park office to pay. By contrast, defendants have cited evidence indicating that defendants first learned of her presence in 2015, during a home inspection. For the reasons stated *infra*, this factual dispute is material to plaintiffs' Rental Act claims, but not the discrimination claims.

[5] Some version of the Policy had been in effect since 2006.

- The Policy further provided that "Applicants who do not have a Social Security number[] must provide their original Passport, original US Visa[,] and original Arrival/Departure Form (I-94 or I-94W)." Compl. Ex. A.
- Similarly, defendants' "Future Resident Information Guides" published on May 13, 2015 and March 31, 2016 also state that adults without a Social Security Number must provide an original passport, original U.S. Visa, and original I-94 forms in order to reside at the Park.
- Today, residents at the Park may satisfy the Policy by producing documents besides an original passport, such as (1) a permanent resident card (Form I-551 or I-151), (2) a temporary resident card (Form I-688A), or (3) a border crossing card.[6]
- Because the female plaintiffs entered the United States illegally, they cannot satisfy the Policy. In other words, because the female plaintiffs are illegal aliens, they do not have—and cannot acquire—a U.S. Visa, an original I-94 form, or any authentic document to prove their lawful residence in the United States.
- Once defendants began enforcing the Policy, the male plaintiffs would have been able to renew their leases provided they complied with the Policy and ensured that each adult occupant in

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[6] The factual record is unclear, however, whether defendants communicated these alternative methods of proving legal residence to plaintiffs at the relevant time periods. Yet, this point is immaterial to the resolution of plaintiffs' discrimination claims, as it is undisputed that there is no set of documents that the female plaintiffs—who are illegal aliens—could provide to prove legal presence in the United States.

their homes had supplied defendants with the requisite documents to show lawful presence in the United States.

- Defendants never used the male plaintiffs' statuses as Latinos to deny the male plaintiffs the right to enter into rental agreements at the Park.
- Defendants never used the male plaintiffs' statuses as non-U.S. citizens to deny the male plaintiffs the right to enter into rental agreements at the Park.
- Other Latinos and non-United States citizens entered into leases at the Park in 2015 and 2016—the same period of defendants' alleged discrimination against plaintiffs.
- Some of the individuals who entered into leases at the Park in 2015 and 2016 were Latino non-citizens.
- Approximately 60% of the residents at the Park are Latino.
- As of 2014, defendants advertised to Latinos for one of defendants' related properties.
- Defendants employ Latinos and Spanish-speakers in the Park's property management office.
- The male plaintiffs do not read English, but nonetheless were able to execute leases at the Park.
- Some of the male plaintiffs permitted adults to reside in plaintiffs' mobile homes in the Park even though those adults were not listed on the male plaintiffs' leases or rental agreements.

- In March 2014, defendants reminded plaintiff Reyes that his wife needed to satisfy the Policy for her to continue residing at the Park.
- Notwithstanding the fact that his wife could not satisfy the Policy, Mr. Reyes was permitted to renew his lease at the Park for another one-year term, from June 1, 2014 to May 31, 2015.
- In March 2015, Mr. Reyes was again reminded of the Policy. The Reyes family did not provide the requisite documents to satisfy the Policy.
- Later that same month, March 2015, defendants provided Mr. Reyes oral notice that he would be placed on a month-to-month lease and that his monthly rent would increase by $100 in part because an occupant in his residence could not comply with the Policy.
- On January 7, 2016, defendants sent plaintiff Moya Yrapura a letter, warning that his wife had not yet complied with the Policy. The January 7 letter advised that Mr. Moya Yrapura should submit his wife's occupant application and documentation by January 11, 2016.
- Because Mrs. Moya Yrapura is illegally present in the United States, she was unable to provide the documents required by the Policy.
- On January 18, 2016—13 days before Mr. Moya Yrapura's year-long lease was set to expire—defendants placed him on a month-to-month lease and increased his monthly rent by $100 in part because an occupant in his residence could not satisfy the Policy.
- In January 2016, defendants informed plaintiff Saravia Cruz that his wife would need to

comply with the Policy in order for him to renew his lease.

- Because Mr. Saravia Cruz's wife, Ms. Amaya, is illegally present in the United States, she was unable to provide the documents required by the Policy.
- On January 18, 2016—13 days before Mr. Saravia Cruz's lease was set to expire—defendants placed him on a month-to-month lease and increased his monthly rent by $100 in part because an occupant in his residence could not satisfy the Policy.
- On January 27, 2016, defendants sent Mr. Reyes a letter advising him that he had 21 days to "cure" his violation of his lease terms—namely, the fact that he had unauthorized occupants living at his residence—else he would face eviction.
- In February 2016, defendants informed plaintiff Bolaños that his wife would need to satisfy the Policy for Mr. Bolaños to renew his lease.
- Because Mr. Bolaños's wife is illegally present in the United States, she was unable to provide the documents required by the Policy.
- On March 2, 2016—29 days before Mr. Bolaños's year-long lease was set to expire—defendants placed him on a month-to-month lease and increased his monthly rent by $100 in part because an occupant in his residence could not comply with the Policy.
- Defendants subsequently sent plaintiffs a notice that their rent would increase by $300, but defendants agreed not to charge or collect the $300 increase during the pendency of this litigation.

- Thereafter, six plaintiffs—the Reyes, Bolaños, and Saravia Cruz families—moved out of the Park.
- By September 2016, defendants had produced a report reflecting that Latinos comprise the majority of tenants who had failed to comply with the Policy.
- Defendants assert several reasons for implementing the Policy: (1) to confirm lease applicants' identities, (2) to perform credit and criminal background checks, (3) to minimize loss from eviction, (4) to avoid potential criminal liability for harboring illegal aliens, and (5) to underwrite leases.

II.

Where, as here, the parties have filed cross motions for summary judgment, each motion must be reviewed "separately on its own merits to determine whether either of the parties deserves judgment as a matter of law." *Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003) (quotation marks omitted). Summary judgment is appropriate "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." Fed. R. Civ. P. 56(a). The movant bears the burden to show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). No triable issue exists if "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party[.]" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (quotation marks omitted). Once the movant meets its burden, the opposing party, in order to defeat the motion, must set

forth specific facts showing a genuine issue for trial. *Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 436 (4th Cir. 2007). In this respect, "a motion for summary judgment . . . necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits," and thus the inquiry here is "whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict," that is, whether reasonable jurors could find by a preponderance that defendants unlawfully discriminated against plaintiffs, violated the Virginia Rental Act, or breached the male plaintiffs' lease agreements. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Finally, "the facts, with reasonable inferences drawn," are viewed "in the light most favorable" to the non-moving party. *Lettieri v. Equant Inc.*, 478 F.3d 640, 642 (4th Cir. 2007).

Analysis now turns to plaintiffs' causes of action.

III.

A. Count I (FHA) & Count II (VFHL)

Defendants have moved for summary judgment on plaintiffs' disparate treatment claims under the FHA and VFHL. Because the FHA and VFHL are essentially similar,[7] the same analysis applies to both

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[7] Indeed, the relevant provisions of the FHA and VFHL are almost identical. Under the FHA, it is unlawful

> [t]o 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.

42 U.S.C. § 3604(a). And the VFHL makes it unlawful

disparate treatment claims. *See*, *e.g.*, *Moseke v. Miller & Smith, Inc.*, 202 F. Supp. 2d 492, 495 n.2 (E.D. Va. 2002) (applying the same standards to FHA and VFHL claims); *Bradley v. Carydale Enters.*, 707 F. Supp. 217, 222 (E.D. Va. 1989) (same). Plaintiffs do not seek summary judgment on their disparate treatment claims, but rather contend that there are triable issues of fact that preclude summary judgment.[8] In essence, plaintiffs contend that defendants'

> [t]o 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, national origin, sex, elderliness, or familial status.

Va. Code § 36–96.3.

[8] Plaintiffs' Complaint originally included a theory of disparate impact in support of the state and federal housing discrimination claims. Although it is true that disparate impact claims may be appropriate in "some cases," *Ricci v. DeStefano*, 557 U.S. 557, 577, 129 S.Ct. 2658, 174 L.Ed.2d 490 (2009), including some FHA claims, *see Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmties. Project, Inc.*, —— U.S. ——, 135 S.Ct. 2507, 192 L.Ed.2d 514 (2015), plaintiffs were precluded from relying exclusively on a disparate impact theory to prove housing discrimination. This is so because

> [g]iven the current correlation between the presence of illegal aliens in the United States and the predominantly Latino national origin of the illegal alien population, it cannot fairly be said—by the existence of a disparate impact alone—that a policy targeting illegal aliens and thereby disproportionately making housing unavailable to a class of Latinos does so "because of race . . . or national origin." 42 U.S.C. § 3604(a). To hold otherwise would, as *Inclusive Communities* warns, eliminate [the FHA's] robust causality requirement and make defendants answer for racial disparities they did not create.

Reyes v. Waples Mobile Home Park LP, 205 F. Supp. 3d 782, 793-94 (E.D. Va. 2016). Thus, after full briefing and argument at the threshold stage, plaintiffs' housing discrimination claims

implementation of the Policy constituted intentional housing discrimination on the basis of plaintiffs' race and national origin. *See*, *e.g.*, *Reyes v. Waples Mobile Home Park LP*, 205 F. Supp. 3d 782, 787 n.6 (E.D. Va. 2016) (noting that courts treat claims of discrimination against Latinos as encompassing both race and national origin discrimination). To succeed on these claims, plaintiffs must ultimately prove that race or national origin was a "motivating factor" for the challenged housing decisions. *See Hadeed v. Abraham*, 103 Fed. Appx. 706, 707 (4th Cir. 2004) (affirming summary judgment for defendants on FHA and VFHL gender discrimination claims because plaintiffs "failed to present any evidence from which a reasonable jury could conclude that gender was a motivating factor in [defendant's] decision"). For the following reasons, defendants' motion on the FHA and VFHL claims must be granted.

To begin with, plaintiffs correctly concede that there is no direct evidence in the summary judgment record of intentional discrimination. Accordingly, it is appropriate to analyze plaintiffs' disparate treatment claims under the *McDonnell Douglas*[9] burden-shifting framework. *See Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1452 (4th Cir. 1990) ("The *McDonnell Douglas* scheme . . . is routinely

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were permitted to proceed as disparate *treatment* claims, and plaintiffs were further permitted to use evidence of disparate impact to support an inference of intentional discrimination. *Id.* at 794 ("[T]he analysis here makes clear that plaintiffs cannot rely *solely* on disparate impact to satisfy the FHA's causation requirement [but] plaintiffs may use evidence of disparate impact, in addition to other proof, to meet their burden of demonstrating causation.").

[9] *See McDonnel Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

used in housing and employment discrimination cases alike."); *Martin v. Brondum*, 535 Fed. Appx. 242 (4th Cir. 2013) (similar). The purpose of the *McDonnell Douglas* scheme is to determine whether the factual record on summary judgment warrants an inference of discrimination sufficient to present a jury question. *See Miles v. Dell, Inc.*, 429 F.3d 480 (4th Cir. 2005). The *McDonnell Douglas* inferential proof scheme involves the following three steps.

First, plaintiffs must establish a prima facie case of intentional race or national-origin discrimination. *See Pinchback*, 907 F.3d at 1452. Here, a prima facie case comprises four elements:

(1) that plaintiffs belong to a protected class,

(2) that they sought and were qualified for a dwelling,

(3) that they were denied the opportunity to rent the dwelling, and

(4) that the dwelling remained available to others outside of plaintiffs' protected class.

See Martin, 535 Fed. Appx. at 244; *Mitchell v. Shane*, 350 F.3d 39, 47 (2d Cir. 2003) (similar); *see also Murrell v. Ocean Mecca Motel, Inc.*, 262 F.3d 253, 257 (4th Cir. 2001) (setting forth similar standard for a prima facie § 1981 claim). The purpose of this first step in the *McDonnell Douglas* test is to "screen for cases whose facts give rise to an inference of non-discrimination"; thus, satisfying a prima facie case creates a "rebuttable[] presumption of unlawful discrimination." *Miles*, 429 F.3d at 488 n.5.

Second, assuming plaintiffs state a prima facie case, "[t]he burden of production then shifts to [defendants] to articulate a legitimate, non-discriminatory justification for [their] allegedly dis-

criminatory action." *Merritt v. Old Dominion Freight Line, Inc.*, 601 F.3d 289, 294 (4th Cir. 2010).

Last, if defendants meet their burden of production, "plaintiff[s] then ha[ve] the opportunity to prove by a preponderance of evidence that the neutral reasons offered by [defendants] were . . . a pretext for discrimination." *Id.* (quotation marks omitted). Ultimately, "[t]he final pretext inquiry merges with the ultimate burden of persuading the court that the plaintiff has been the victim of intentional discrimination, which at all times remains with the plaintiff." *Id.*

This analysis, applied here, demonstrates that plaintiffs' FHA and VFHL claims are nonstarters, for the undisputed factual record fails to show a prima facie case of race or national origin discrimination. Although plaintiffs, as Latinos, are members of a protected class who were denied the opportunity to renew housing rental agreements, the undisputed factual record discloses that plaintiffs did not qualify to renew leases under the Policy and Park rules. *See Martin*, 535 Fed. Appx. at 244 (prima facie case requires evidence that plaintiffs were qualified for the dwelling). This is because some adult occupants in plaintiffs' households could not provide the requisite forms showing lawful status—a requirement that applied uniformly to every household and applicant seeking to rent at the Park. Nor have plaintiffs pointed to any evidence showing that the dwellings remained available to others outside of plaintiffs' protected class on different terms from those offered to plaintiffs.

Plaintiffs apparently concede this point. Indeed, plaintiffs do not even address or enumerate the ele-

ments of a prima facie claim.[10] They argue instead that plaintiffs have made a sufficient prima facie showing because (1) the Policy requires documents—namely, visas and I-94 forms—that are not especially probative of legal presence in the United States, and (2) the Policy is over-inclusive, as the male plaintiffs, despite proving their own legal presence, faced higher rent and potential eviction because their wives could not satisfy the Policy.[11] Neither argument is persuasive; neither argument rescues plaintiffs' failure to establish a prima facie case.

Plaintiffs' first contention—that the Policy reflects intentional racial or national origin discrimination because it does not ask for the most probative forms of lawful presence—does not help plaintiffs establish a prima facie case. The fact that the Policy does not require the most probative forms does not invite an inference or rebuttable presumption of unlawful discrimination. *See Miles*, 429 F.3d at 488 n.5. Indeed, this fact does not aid plaintiff in making a prima facie case because it is undisputed that the Policy is facially neutral and that it applies to all

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[10] To be sure, the Fourth Circuit has noted that "[c]ourts must . . . resist the temptation to become so entwined in the intricacies of the *McDonnell Douglas* proof scheme that they forget that the scheme exists solely to facilitate determination of the ultimate question of discrimination *vel non*." *Merritt*, 601 F.3d 289 at 295 (quotation marks and brackets omitted). Although this warning is important, it does not stand for the proposition that a party may survive summary judgment by ignoring the prima facie case altogether.

[11] At the summary judgment hearing, counsel for plaintiff emphasized that this second argument is plaintiffs' best proof of intentional anti-Latino discrimination. *See Reyes v. Waples Mobile Home Park LP*, No. 1:16-cv-563 (E.D. Va. Feb. 17, 2017) (Hr'g Tr.) at 45.

residents at the Park, regardless of race or national origin. In other words, *any* adult resident at the Park who lacks a Social Security Number must produce the same forms to demonstrate his or her lawful presence in the United States. And there is no evidence in the record that any person who is lawfully present in the country was unable to provide the requested documents, a fact that further belies any inference that the Policy targets *Latinos* as such, rather than targeting *illegal aliens*. *See United States v. Loaiza-Sanchez*, 622 F.3d 939, 941 (8th Cir. 2010) ("[A] person's legal status as a deportable alien is not synonymous with national origin.").

Notably, it is undisputed that the female plaintiffs are unable to satisfy the Policy—and prove legal presence in the United States—not because of their race or national origin, but because they are, in fact, unlawfully present in the country. Thus, plaintiffs' argument does not invite the inference or rebuttable presumption of race or national origin discrimination because the undisputed factual record confirms that the Policy burdens the female plaintiffs not because they are Hispanic, but rather because they entered the country illegally. *Cf. Anderson v. Conboy*, 156 F.3d 167, 180 (2d Cir. 1998) (noting that the refusal to contract on the basis of unlawful presence in the United States is permissible discrimination on the basis of immigration status, not illegal discrimination on the basis of a protected characteristic); 8 U.S.C. § 1324a(a)(1) (making it unlawful knowingly to hire an "unauthorized alien"); *id.* § 1324b(a)(1) (providing that employers may "discriminate" against an "unauthorized alien"). In short, plaintiffs' focus on the type of forms required ignores the undisputed record, which record discloses that the Latino plaintiffs were treated no differently from

non-Latinos. *See*, *e.g.*, *Roberson v. Graziano*, No. WDQ-09-3038, 2010 WL 2106466, at *2 (D. Md. May 21, 2010) (noting that a plaintiff, to establish an FHA disparate treatment claim, must show that "he is a member of a protected class and that he was treated differently [from] other tenants because of his membership in that class"), *aff'd*, 411 Fed. Appx. 583 (4th Cir. 2011).[12] Therefore, defendants' alleged failure to require more probative forms to prove legal presence does not reflect anything about intent to discriminate on the basis of race or national origin.[13]

Plaintiffs' second argument is equally unpersuasive. This argument, like the first, does not rescue plaintiffs from the failure to show a prima facie case and does not invite an inference or rebuttable presumption of unlawful discrimination. Here, plaintiffs argue that a reasonable jury could infer that defendants harbored discriminatory intent against Latinos because the male plaintiffs faced increased rent and eviction despite their ability to prove their own lawful presence. This contention overlooks the undisputed facts that defendants informed each male plaintiff that he was living with unauthorized occupants *before* defendants imposed higher rent or threatened eviction. Indeed, plaintiffs were forewarned that their wives needed to provide the requi-

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[12] *See also Coleman v. Md. Ct. of Appeals*, 626 F.3d 187, 190 (4th Cir. 2010) (stating that the elements of a prima facie case of disparate treatment under Title VII include "different treatment from similarly situated employees outside the protected class"); *Pinchback*, 907 F.2d at 1451 (noting that "[f]air employment concepts are often imported into fair housing law").

[13] No method of determining a person's legal presence is flawless, as nearly any form of identification may be fabricated. This same point is addressed below in the context of the second and third stages of the *McDonnell Douglas* framework.

site forms proving lawful presence. And the lease agreements and Policy clearly stated that the leaseholder may not reside with unauthorized occupants. The increased rents and threat of eviction thus occurred not because the male plaintiffs were Latino, but rather because the male plaintiffs understandably wished to continue living with their wives, all of whom happen to be unlawfully present in the United States and therefore unable to satisfy the Policy. And defendants have correctly noted that there is no evidence in the factual record that any plaintiff was treated differently from individuals outside plaintiffs' protected classes, as the Policy applied to all applicants and adult residents at the Park. Thus, the undisputed factual record discloses that plaintiffs are unable to establish a prima facie case of intentional discrimination and that defendants are entitled to summary judgment on the FHA and VFHL claims.

This conclusion is confirmed by the following undisputed facts: (1) that defendants regularly rent lots at the Park to Latinos and non-citizens, (2) that the majority—approximately 60%—of residents at the Park are Latino, notwithstanding the effects of the Policy, (3) that defendants aimed their housing advertisements to Latinos,[14] (4) that defendants

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[14] Plaintiffs correctly note that the record evidence of defendants' advertising relates to one of defendants' other rental properties, and not the Park. But plaintiffs incorrectly argue that this evidence is irrelevant in light of the Supreme Court's decision in *Connecticut v. Teal*, an employment case in which the Supreme Court noted that Title VII does not "give an employer license to discriminate against some employees on the basis of race . . . merely because he favorably treats other members of the employees' group." 457 U.S. 440, 455, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982). *Teal* is factually inapposite, as in that case the defendant attempted "to justify" racial discrimina-

employed Latino Spanish-speakers at the Park, (5) that defendants never used the male plaintiffs' race, national origin, or non-citizenship as a ground to deny them the right to enter rental agreements at the Park, and (6) that defendants re-leased lots at the Park to the male plaintiffs for years. *See*, *e.g.*, *Martin v. Long & Foster Real Estate, Inc.*, No. 1:11-cv-1118, 2012 WL 3991900, at *8 (E.D. Va. Sept. 11, 2012) (granting defendants summary judgment on housing discrimination claim and noting an eight-year contractual relationship between lessor and lessee constituted "strong evidence" that the lessor lacked racial animus), *aff'd sub nom. Martin v. Brondum*, 535 Fed. Appx. 242 (4th Cir. 2013). These undisputed facts belie any claim of intentional housing discrimination "because of" race or national origin. In sum, plaintiffs' disparate treatment claims under the FHA and VFHL fail as a matter of law.

Given that plaintiffs' FHA and VFHL claims fail to establish a prima facie case of disparate treatment, it is unnecessary to address the parties' arguments regarding the second and third stages of the *McDonnell Douglas* proof scheme. Yet even assuming, *arguendo*, the factual record supported a prima facie case, the FHA and VFHL claims would still fail. This is so

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tion "on the basis of [defendant's] favorable treatment of other members of [plaintiff's] racial group." *Id.* at 454, 102 S.Ct. 2525. Defendants in this case, unlike the defendant in *Teal*, point to the evidence of favorable treatment to other members of plaintiffs' class not to *justify* invidious discrimination, but rather to *negate* the accusation of unlawful discrimination. Plaintiffs' reliance on *Teal* is therefore misplaced. Importantly, however, the conclusion reached on the summary judgment record presented here does not depend on defendants' advertising; rather, defendants' advertising is but one of several undisputed facts that belie any claim of unlawful discrimination.

because defendants have met their burden of production to articulate legitimate, non-discriminatory justifications for the Policy, and plaintiffs have adduced no evidence that the stated reasons are pretext for discrimination on the basis of race or national origin. *See Merritt*, 601 F.3d at 294.

In this regard, defendants have identified several neutral reasons for implementing the Policy, namely, (1) to confirm lease applicants' identities, (2) to perform credit and criminal background checks, (3) to minimize loss from eviction, (4) to avoid potential criminal liability under 8 U.S.C. § 1324 for harboring illegal aliens,[15] and (5) to underwrite leases.[16] None of the evidence plaintiffs cite in response to defendants' stated justifications creates a genuine factual dispute regarding pretext for unlawful discriminatory intent.

To be sure, plaintiffs are correct to argue that the Policy's required documents—a passport, a Visa and I-94 forms—will not always disclose whether an individual is legally present in the United States; nor is a passport, visa, or I-94 form the only way to prove legal presence. But no method of determining a person's legal presence is unassailable. Indeed, practically any form of identification or proof of lawful presence may be fabricated. The fact remains, however, that plaintiff has not cited any evidence

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[15] Section 1324 imposes criminal liability on any person who harbors an alien with "know[ledge] or . . . reckless disregard of the fact that the alien has come to, entered, or remains in the United States in violation of law." 8 U.S.C. § 1324(a)(1)(A).

[16] Defendants have also submitted an expert report explaining that the Policy is reasonable. Although plaintiffs' motion to strike that report has been denied, that report played no role in this summary judgment analysis.

that a legal U.S. resident was unable to provide a document required by the Policy. Thus, the Policy's documentation requirements do not create an inference of pretext for discrimination on the basis of race or national origin.

Plaintiffs' next argument—that defendants' justifications regarding lease underwriting and losses from eviction are pretextual—is also unavailing. Specifically, plaintiffs contend that defendants, in enforcing the Policy, could not have truly been concerned with lease underwriting and losses caused by eviction because (1) the male plaintiffs were able to afford their rent, and (2) adopting defendants' position would mean that no family could ever qualify for a lease if one occupant were a stay-at-home spouse. But plaintiffs' argument is unpersuasive because there is no doubt that a lessor faces substantially greater financial risk if an occupant were deported (or threatened with deportation) and her husband understandably decided to abandon the lease to continue living with his wife.[17]

Plaintiffs' last contention regarding pretext fares no better. Specifically, plaintiffs contend that defendants could not have truly feared liability under the federal anti-harboring statute, 8 U.S.C. § 1324, because defendants, upon learning of the female plaintiffs' unlawful status, continued to rent to the male plaintiffs, albeit at higher rates. In this respect, plaintiffs contend that defendants should have immediately evicted plaintiffs. But plaintiffs seek to have it both ways: they contend that defendants invidiously discriminated by choosing the *less* drastic

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[17] Indeed, the plaintiff husbands' devotion to their wives explains the male plaintiffs' decisions not to ask their wives to vacate the Park to enable the households to satisfy the Policy.

option (changing the plaintiffs' rent terms in lieu of immediate eviction), and that defendants should have avoided liability under the anti-harboring statute by risking liability under the Virginia Rental Act. *See infra* Part III.D. Moreover, there is no question, given § 1324's imposition of liability for "reckless disregard of the fact that [an] alien has come to, entered, or remains in the United States in violation of law," that a lessor could properly and sensibly inquire into the immigration status of a lessee and his adult co-habitants. *See* 8 U.S.C. § 1324(a)(1)(A)(ii).[18] Thus, plaintiffs have not shown that defendants' stated justification is a pretext for unlawful animus against the very group—Latinos—to whom defendants rent most often.

It is worth noting, given the summary judgment record, that the Policy's alleged disparate impact on Latinos also does not support an inference of intentional discrimination on the basis of race or national origin.[19] As previously stated, it is undisputed

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[18] Indeed, in the employment context, employers may lawfully refuse to hire applicants on the basis of unauthorized presence in this country; it is in fact a crime knowingly to hire someone who is illegally present in the United States. *See* 8 U.S.C. §§ 1324a & 1324b.

[19] *Cf. Reyes*, 205 F. Supp. 3d at 795 ("[P]laintiffs are entitled . . . to use any evidence, including evidence of disparate impact, to show that the apparently neutral Policy is in fact a pretext for intentional racial or national origin discrimination against plaintiffs."). Plaintiffs now contend that their statistical evidence demonstrates that "Latinos are nearly twice as likely to be undocumented compared to Asians and 20 times more likely to be undocumented than other groups, and are thus substantially more likely to be adversely affected than any other group." P. Ex. 40-C at 2. As noted below, however, this evidence is insufficient to create an inference of intentional discrimination against Latinos.

(1) that defendants regularly rent to Latinos, (2) that the majority of residents at the Park are Latino, notwithstanding the effects of the Policy, (3) that defendants aimed their housing advertisements to Latinos, (4) that defendants employed Latino Spanish-speakers at the Park, (5) that defendants never used the male plaintiffs' race, national origin, or non-citizenship as a ground to deny them the right to enter rental agreements, and (6) that defendants re-leased lots at the Park to the male plaintiffs for years. Once again, these facts confirm that any disparate effect on Latinos caused by the Policy is incidental to the Policy's lawful effect on all illegal aliens and reflects nothing more than the fact that many illegal aliens in the U.S. happen to be Latino. Thus, plaintiffs' FHA and VFHL claims fail not only at the prima facie stage, but also at the pretext stage of the *McDonnell Douglas* inferential proof scheme.

This conclusion is supported by the Supreme Court's decision in *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 94 S.Ct. 334, 38 L.Ed.2d 287 (1973), an analogous Title VII employment case. *See Pinchback*, 907 F.2d at 1451 (noting that "[f]air employment concepts are often imported into fair housing law"). In *Espinoza*—on appeal from summary judgment—a lawfully admitted resident alien challenged an employer's policy that all hires must be U.S. citizens, contending that the policy discriminated on the basis of national origin. 414 U.S. at 87-88, 94 S.Ct. 334. The plaintiff in *Espinoza* relied on the Title VII provision which, like the FHA and VFHL, prohibits discrimination "because of" national origin and race, but not discrimination on the basis of citizenship.[20]

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[20] Title VII, like the FHA and VFHL, protects against discrimination "because of" race, color, religion, sex, or national

See 42 U.S.C. § 2000e-2(a)(1). In rejecting the plaintiff's discrimination claim, the Supreme Court held that there was "no indication . . . that [the] policy against employment of aliens had the purpose or effect of discriminating against persons of Mexican national origin," particularly where: (1) the employer "accept[ed] employees of Mexican origin, provided the individual concerned has become an American citizen," (2) "persons of Mexican ancestry ma[d]e up more than 96% of the company's" relevant division, and (3) "there [wa]s no suggestion . . . that the company refused to hire aliens of Mexican or Spanish-speaking background while hiring those of other national origins." *Id.* at 93 & n.5, 94 S.Ct. 334. Thus, the Supreme Court concluded that the plaintiff "was denied employment, not *because of* the country of her origin, but *because* she had not yet achieved United States citizenship." *Id.* at 93, 94 S.Ct. 334 (emphases added). In other words, the employment policy's impact on a Latina from Mexico was only incidental to the policy's then-legitimate focus on non-citizens.[21]

One need only replace the concepts of "citizenship" and "hiring" with "lawful presence" and "renting" to see that the logic in *Espinoza* obtains here. Specifi-

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origin. This statute, again, like the FHA and VFHL, does not protect against discrimination "because of" citizenship or alienage. *See* 42 U.S.C. § 2000e-2. Of course, Title VII, the FHA, and the VFHL are distinct in this manner from 42 U.S.C. § 1981, which prohibits discrimination against aliens and non-citizens, and is the subject of plaintiffs' Count IV, discussed *infra* Part III.B.

[21] Since then, Congress has clarified that discrimination based on citizenship status is generally impermissible. *See* 8 U.S.C. § 1324b(a)(1). Yet, § 1324b created an exception to allow employment discrimination against illegal aliens. *See id.*

cally, it is undisputed (1) that defendants "accept [adult residents] of [Latino] origin, provided the individual concerned [is lawfully present in the United States]"; (2) that "persons of [Latino] ancestry make up more than [half] of the [Park's residents]," and (3) that "there is no suggestion . . . that [defendants] refused to [rent to] aliens of [Latino] or Spanish-speaking background while [renting to] those of other national origins." *See id.* Here, similar to *Espinoza*, the Policy's impact on plaintiffs was only incidental to the Policy's legitimate focus on illegal status.[22]

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[22] Also worth noting in this respect is the District of Nebraska's decision in *Keller v. City of Fremont*, the most factually-apposite case to this matter. *See* 853 F. Supp. 2d 959 (D. Neb. 2012), *aff'd in part, rev'd in part on other grounds*, 719 F.3d 931 (8th Cir. 2013). There, the plaintiffs challenged a city ordinance that prohibited landlords from knowingly or recklessly permitting an illegal alien to rent or lease a dwelling unit. 853 F. Supp. 2d at 964. The plaintiffs alleged, among other things, that the ordinance constituted intentional discrimination against Latinos and thus violated the FHA. And at summary judgment, the plaintiffs "ask[ed] th[e] Court to infer that the Defendants . . . engaged in a scheme of unlawful discrimination by using the undocumented status of certain residents as a pretext to disguise what is in fact discrimination based on race or national origin." *Id.* at 977. The *Keller* court rejected this argument, noting that although "it is apparent that the Ordinance is likely to affect persons of Latino or Hispanic ethnicity more than persons of other races and national origins," this disparate impact was insufficient to prove "*inten*[*t*] to develop a scheme of unlawful discrimination." *Id.* at 977-78. In this respect, the district court found that the plaintiffs failed to "present[] sufficient evidence to demonstrate a genuine issue of material fact as to whether discriminatory animus was a motivating factor" behind the ordinance. *Id.* at 977-78. The same is true here: plaintiffs simply have not created a genuine dispute of material fact to preclude summary judgment on the FHA and VFHL claims.

Although the parties in *Keller* appealed the district court's conclusions on a number of other statutory and constitutional

In summary, defendants' motion for summary judgment on the FHA and VFHL claims must be granted. Nothing in this opinion, however, should be read as stating that no person could ever succeed on a housing discrimination claim challenging a policy similar to defendants'. Indeed, as noted at the motion to dismiss stage, the Complaint's allegations of discrimination against Latinos were plausible. *See Reyes*, 205 F. Supp. 3d at 794-796. Rather, the conclusion reached here is limited to the facts—or lack thereof—present in the summary judgment record. And this record discloses that there is no triable question on plaintiffs' FHA and VFHL claims. To be sure, this case presents difficult questions regarding race, national origin, and lawful presence in the United States—issues that have sparked significant debate and disagreement. Yet, at bottom, plaintiffs' claims of *intentional* race or national origin discrimination assert that defendants equated being Latino with being an illegal alien. That is an equation neither required by law[23] nor supported by the factual record presented here. Put differently, given the applicable legal standards and factual record presented here, no reasonable jury could conclude that defendants' Policy constitutes intentional discrimination "because of" plaintiffs' race or national

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issues, the plaintiffs did not challenge the district court's conclusion that their disparate treatment claim under the FHA failed to pass summary judgment muster. *See Keller*, 719 F.3d 931 (reversing in part and affirming in part the district court's conclusions regarding preemption and the plaintiffs' Article III standing).

[23] *See*, *e.g.*, *Loaiza-Sanchez*, 622 F.3d at 941 ("[A] person's legal status as a deportable alien is not synonymous with national origin."); 8 U.S.C. § 1324b (drawing a distinction between national origin and legal presence in the United States).

origin. *See* FHA, 42 U.S.C. § 3604(a); VFHL, Va. Code § 36-96.3. Summary judgment must therefore be entered for defendants because the record is devoid of evidence from which a reasonable jury could conclude that plaintiffs' race or national origin was a motivating factor in the challenged housing decisions.

B. Count IV (42 U.S.C. § 1981)

Defendants have also moved for summary judgment on plaintiffs' § 1981 claim.[24] Specifically, the Complaint alleges that the Policy reflects intentional discrimination on the basis of plaintiffs' alienage and non-citizenship.[25] This claim, like plaintiffs' FHA and VFHL discrimination claims, fails as a matter of law.

Section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State . . . to make and enforce contracts . . . ." 42 U.S.C. § 1981(a). As relevant here, § 1981 "prohibits private discrimination against aliens[.]" *Duane v. GEICO*, 37 F.3d 1036, 1044 (4th Cir. 1994). Thus, to prevail on their § 1981 claim, plaintiffs must ultimately prove (1) that defendants "intended to discriminate" on the basis of citizenship and alienage and (2) "that the discrimination interfered with a contractual interest." *Denny v. Elizabeth Arden Salons, Inc.*, 456 F.3d 427, 434 (4th Cir. 2006). Of course, "[Section] 1981 . . . can be violated only by

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[24] Plaintiffs have not moved for summary judgment on any of their intentional discrimination claims, including the § 1981 claim.

[25] Although § 1981 protects against race-based discrimination and plaintiffs' FHA and VFHL claims allege such discrimination, plaintiffs' § 1981 count alleges discrimination only on the basis of alienage and non-citizenship.

purposeful discrimination." *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 391, 102 S.Ct. 3141, 73 L.Ed.2d 835 (1982). In the § 1981 context, actionable discrimination is "conduct motivated by a discriminatory purpose," rather than conduct that "merely result[s] in a disproportionate impact on a particular class." *Id.*

A § 1981 claim may be proven by direct evidence or pursuant to the *McDonnell Douglas* burden-shifting scheme. *See Murrell*, 262 F.3d at 257; *see also supra* Part III.A. Here, however, given that the undisputed facts did not establish a prima facie case of intentional discrimination on the basis of race or national origin, these same facts point convincingly to the conclusion that plaintiffs' have not established a prima facie case of discrimination on the basis of alienage or non-citizenship. Indeed, the Policy is facially neutral, as it requires *all* applicants, including U.S. citizens, seeking to qualify for a lease to provide proof of lawful presence in the United States. In this regard, all applicants can satisfy the Policy by presenting a Social Security Number—indeed, here the male plaintiffs did so. In addition, the Policy includes alternative methods for proving lawful presence in the United States, a fact that dispels, rather than supports, plaintiffs' accusation that defendants intended to discriminate against non-citizens as such.

Nor, on this record, is there any reasonable basis for an inference of unlawful discrimination on the basis of alienage or non-citizenship. To the contrary, it is undisputed that defendants never used the male plaintiffs' statuses as non-citizens as a ground to deny them the right to enter a rental agreement at the Park. The undisputed factual record further

discloses that defendants continually rent to and contract with non-citizens, including non-citizens of Latino national origin. Thus, any burden or barrier the female plaintiffs faced was the result of their status as illegal aliens, not because they were non-citizens. And § 1981 does not prohibit this. *See Anderson*, 156 F.3d at 180 (noting that § 1981 permits discrimination on the basis of unlawful presence in the United States); *cf. Espinoza*, 414 U.S. at 93, 94 S.Ct. 334. To adopt plaintiffs' view—that the Policy's effect on illegal immigrants is sufficient for a reasonable inference of discrimination against non-citizens—would lead to the anomalous result that any private contracting party would be subject to § 1981 liability simply for inquiring whether the other contracting party is lawfully present in the United States. But, as federal law makes clear, such an inquiry is not only lawful, but sometimes necessary for prudent behavior.[26] And, as stated *supra*, the increased rents and threat of eviction that the male plaintiffs faced occurred not because they were non-citizens, but rather because they wished to continue living with their wives, who were illegally present in this country and therefore could not satisfy the Policy. Accordingly, defendants' motion for summary judgment on plaintiffs' § 1981 claim must be granted.

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[26] *See*, *e.g.*, 8 U.S.C. § 1324(a)(1)(A) (imposing criminal liability on any person who harbors an alien with "know[ledge] or . . . reckless disregard of the fact that the alien has come to, entered, or remains in the United States in violation of law"); *id.* § 1324a(a)(1)(A) (making it unlawful "to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien"); *id.* § 1324b(a)(1) (permitting employment policies requiring new hires to be lawfully present in the United States).

* * *

In sum, no reasonable jury presented with this undisputed factual record could conclude that defendants engaged in intentional discrimination on the basis of race, national origin, alienage, or non-citizenship.

C.

It remains to resolve plaintiffs' final two claims, both of which arise under state law: Count III (an alleged violation of the Virginia Rental Act) and Count V (breach of contract). Because the Complaint invoked supplemental jurisdiction[27] over these counts, it is first necessary to determine whether subject matter jurisdiction still exists over these claims, given the dismissal of the federal causes of action. *See*, *e.g.*, *Brickwood Contractors, Inc. v. Datanet Eng'g, Inc.*, 369 F.3d 385, 390 (4th Cir. 2004) (en banc) ("[Q]uestions of subject-matter jurisdiction may be raised at any point during the proceedings and . . . must[] be raised *sua sponte* by the court."); *Lovern v. Edwards*, 190 F.3d 648, 654 (4th Cir. 1999) ("[A] federal court is obliged to dismiss a case whenever it appears the court lacks subject matter jurisdiction.") (citing Fed. R. Civ. P. 12(h)(3)).[28] It is axiomatic that federal courts are "courts of limited subject matter jurisdiction, and as such there is no presumption that the court has jurisdiction." *Pinkley, Inc. v. City of Frederick, Md.*, 191 F.3d 394, 399 (4th Cir. 1999). Thus, "the facts providing the court jurisdiction must

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[27] *See* 28 U.S.C. § 1367 (courts may exercise supplemental jurisdiction over claims forming "part of the same case or controversy" as the cause of action that provided original jurisdiction).

[28] Rule 12(h)(3), Fed. R. Civ. P., provides that "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."

be affirmatively alleged in the complaint." *Id.* In this regard, a plaintiff generally must allege facts supporting at least one of two potential bases for subject matter jurisdiction: federal question jurisdiction or diversity jurisdiction. *See* 28 U.S.C. § 1331 (federal question); *id.* § 1332 (diversity).

It is apparent that diversity jurisdiction does not exist over these state-law claims; the Complaint alleges no facts relating to diversity of citizenship, nor do plaintiffs allege a specific amount in controversy.[29] Instead, plaintiffs allege that the basis for original subject matter jurisdiction over this action is federal question jurisdiction by virtue of plaintiffs' FHA and § 1981 claims. *See* Compl. ¶ 9 (citing 28 U.S.C. §§ 1331 & 1343; 42 U.S.C. § 3613). The Complaint further alleges that supplemental jurisdiction exists over the state-law claims pursuant to 28 U.S.C. § 1367, as these claims stem from the same nucleus of operative fact giving rise to plaintiffs' federal claims. *See* Compl. ¶ 10. Nevertheless, a district court "*may* decline to exercise supplemental jurisdiction" if the court "has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3) (emphasis added). Indeed, where, as here, "all federal claims have been extinguished" and there is no independent ground for subject matter jurisdiction, "trial courts enjoy wide latitude in determining whether or not to retain jurisdiction over state

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[29] It is blackletter law that a federal district court has diversity jurisdiction only where "the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs[.]" 28 U.S.C. § 1332(a). In addition, to establish diversity jurisdiction, plaintiffs must satisfy the centuries-old "complete diversity rule," which requires that all plaintiffs be diverse from all defendants. *See, e.g.*, *Strawbridge v. Curtiss*, 7 U.S. 267, 3 Cranch 267, 2 L.Ed. 435 (1806).

claims[.]" *Shanaghan v. Cahill*, 58 F.3d 106, 109 (4th Cir. 1995). Among the relevant factors to consider are "convenience and fairness to the parties, the existence of any underlying issues of federal policy, comity, and considerations of judicial economy." *Id.* (citing *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988)).

Although it would be proper to dismiss plaintiffs' remaining causes of action without prejudice pursuant to § 1367(c)(3), it is appropriate to decline to do so in the circumstances of this case. The *Shanaghan* factors, applied here, point persuasively to the conclusion that it is appropriate to retain jurisdiction over plaintiffs' state-law claims. *See* 58 F.3d at 109. Specifically, plaintiffs filed the Complaint almost one year ago, the parties have already completed discovery, the claims are ripe for summary judgment or trial, and it would be unfair to dismiss these claims at this advanced stage. Thus, the summary judgment analysis now turns to the merits of plaintiffs' final two counts.

D. Count III (Rental Act) and Count V (Breach of Contract)

Defendants and the male plaintiffs have filed cross motions for summary judgment on the Rental Act and breach of contract claims.[30] Because these claims are essentially similar, they are addressed in tandem. The male plaintiffs allege in essence (1) that defendants violated the Rental Act by increasing plaintiffs' rent and changing the lease terms without providing proper notice, and (2) that the male plaintiffs' rental agreements automatically

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[30] Only the male plaintiffs purport to bring these claims, as only the male plaintiffs signed leases at the Park.

renewed pursuant to the Rental Act, and thus defendants' unilateral changes to those agreements constitute breach of contract. Because there are triable issues of fact precluding an award of summary judgment, the cross motions must be denied on Counts III and V.

Analysis of the Rental Act and breach of contract claims depends on a close reading of the Virginia Code. To begin with, the Rental Act provides:

> Upon the expiration of a rental agreement, such agreement shall be *automatically renewed* for a term of one year *with the same terms* unless the park operator provides *written notice* to the tenant of any change in the terms of the agreement at least *sixty days* prior to the termination date.

Va. Code § 55-248.41:1(B) (emphases added). In other words, if a mobile home park resident in Virginia has a year-long rental agreement, the mobile home park operator must provide written notice of any changes to the rental agreement terms at least 60 days before that rental agreement expires; otherwise, the agreement automatically renews for a one-year period on the previously-existing terms. *See id.* Similarly, § 55-248.46(A) provides:

> Either party may terminate a rental agreement which is for a term of 60 days or more by giving written notice to the other at least 60 days prior to the termination date; however, the rental agreement may require a longer period of notice.

Id. § 55–248.46(A). Put differently, if a mobile home rental agreement establishes a tenancy for a period exceeding 60 days, a landlord must provide at least 60 days' notice before terminating that rental agreement. *See id.*

Here, the male plaintiffs contend that defendants violated the Rental Act by increasing the male plaintiffs' rent and by changing the year-long leases to month-to-month terms without providing statutorily-required, written notice. Defendants did not comply with these notice requirements—defendants instead provided oral notice to some plaintiffs and fewer than 60 days' notice to the others. Given this, the male plaintiffs contend that defendants' actions also constituted breach of contract because defendants' notice was ineffective. Thus, in the male plaintiffs' view, their leases statutorily renewed on identical terms for another year, and as a result defendants could not unilaterally raise rent or impose month-to-month terms without breaching those rental agreements.

In response, defendants contend that the Park needed not provide 60 days' notice before changing the rental agreements because the Rental Act afforded defendants the greater power to *evict* plaintiffs and to terminate the leases *immediately*. To support their argument, defendants invoke two independent grounds for evicting plaintiffs, namely, Va. Code §§ 55-248.50:1(4) & (5), which permit defendants to evict a resident for a "[v]iolation of any rule or provisions of the rental agreement materially affecting the health, safety and welfare of himself or others," or "[t]wo or more violations of any rule or provision of the rental agreement occurring within a six-month period." Va. Code §§ 55-248.50:1(4) & (5). Defendants claim that the male plaintiffs' failure to disclose their wives' presence at the Park violated Park rules and posed material safety risks. Defendants also contend that they were not required to provide notice because the male plaintiffs defrauded defendants by failing to

disclose that the female plaintiffs would be living at the Park.

Unfortunately, the parties have dedicated more ink to labeling each other's positions as "preposterous" than to identifying the key statutory provisions that help cut this Gordian knot. Here, defendants are incorrect to assert that their alleged power to evict permitted defendants to circumvent statutory procedures and notice requirements. To be sure, Virginia Code § 55–248.31—a provision explicitly incorporated by the Rental Act—provides that if

> a breach of the tenant's obligations under . . . the rental agreement involves or constitutes a criminal or a willful act, which is not remediable and which poses a *threat to health or safety*, [then] the landlord may *terminate the rental agreement immediately* and proceed to obtain possession of the premises.

Va. Code § 55-248.31(C) (emphases added); *see also id.* § 55-248.48 (providing that § 55-248.31 applies to the Rental Act). Yet, as relevant here, in the absence of such a "threat to health or safety" Virginia law requires defendants to provide *notice* of eviction, *id.* § 55-248.31, and 60 days' notice of termination of a rental agreement, *id.* § 55-248.46(A). Moreover, the Rental Act provides that "acceptance of periodic rent payments with knowledge in fact of a material noncompliance by the tenant shall constitute a waiver of the landlord's right to terminate the rental agreement." *Id.* § 55-248.46:1. Thus, a full factual inquiry is necessary to determine whether defendants were entitled to terminate the male plaintiffs' rental agreements in the first instance.

Indeed, summary judgment on the Rental Act claim is inappropriate because there are genuine

disputes of material fact whether the male plaintiffs' alleged misconduct—permitting their wives to live in the Park ostensibly without disclosing the wives' presence to defendants—posed a "threat to health or safety" such that defendants could have terminated plaintiffs' leases without 60 days' notice. *See id.* § 55-248.31. There is also a triable issue on the question of defendants' waiver, as there are factual disputes regarding whether defendants accepted rent payments despite "knowledge in fact" of the female plaintiffs' presence at the Park or plaintiffs' inability to satisfy the Policy. *See id.* § 55-248.46:1.

For essentially similar reasons, plaintiffs' breach of contract claims must proceed to trial. Indeed, whether the leases were automatically renewed cannot be determined without first resolving whether defendants were entitled to terminate the leases immediately. And insofar as defendants assert that they were entitled to rescind the leases because the plaintiffs committed *fraud*, this argument also glosses over a factual dispute incapable of resolution on this record. Specifically, there are factual disputes concerning (1) whether and when defendants learned of the female plaintiffs' presence at the Park, and (2) whether defendants actually and detrimentally relied on the male plaintiffs' alleged fraudulent representations. *See Bank of Montreal v. Signet Bank*, 193 F.3d 818, 827 (4th Cir. 1999) ("In all cases of fraud the [victim] must prove that it acted to its detriment in *actual and justifiable reliance* on the [alleged fraudster]'s misrepresentation." (emphasis added)).

Accordingly, the cross motions for summary judgment on Counts III and V must be denied.

IV.

Nothing in this Opinion should be construed as passing judgment on the wisdom of defendants' Policy. There is no question that state and federal law prohibit landlords from discriminating against tenants and prospective tenants on the basis of race or national origin; nor is there any doubt that the law forbids interfering with a contractual interest by discriminating on the basis of, among other things, citizenship or alienage. But the law does *not* prohibit defendants from refusing, for legitimate business reasons, to rent to, or to contract with, illegal aliens. And the factual record reflects that precisely this occurred. Put simply, the summary judgment record discloses that there is no triable issue of fact that defendants engaged in intentional discrimination on the basis of race, national origin, alienage, or non-citizenship.

And although federal question jurisdiction over this action no longer exists, it is appropriate to retain jurisdiction over plaintiffs' state-law causes of action. Here, the parties' cross motions on the Rental Act and breach of contract claims must be denied, given the material factual disputes presented in the summary judgment record. The matter must therefore proceed to trial on Counts III and V.

An appropriate Order will issue.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Case No. 1:16-cv-563

ROSY GIRON DE REYES; ET AL.,
Plaintiffs,

v.

WAPLES MOBILE HOME PARK
LIMITED PARTNERSHIP, ET AL.,
Defendants.

[Filed September 1, 2016]

MEMORANDUM OPINION

T.S. Ellis, III, United States District Judge

Plaintiffs, eight current or former residents of Waples Mobile Home Park ("the Park"), filed a six-count Complaint against the Park's owners and operators[1] in response to defendants' enforcement of a policy that, in plaintiffs' view, (i) impermissibly discriminates on the basis of race, national origin, alienage, and citizenship, (ii) violates the terms of their lease agreements, and (iii) violates Virginia law regulating mobile home parks. Specifically, the Complaint alleges the following causes of action:

- Count I: Violation of the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*;

[1] Defendants are Waples Mobile Home Park Limited Partnership, Waples Project Limited Partnership, and A.J. Dwoskin & Associates, Inc. These parties are referred to collectively as "defendants."

- Count II: Violation of the Virginia Fair Housing Law, Va. Code § 36-96.3 *et seq.*;
- Count III: Violation of the Manufactured Home Lot Rental Act, Va. Code § 55-248.41 *et seq.*;
- Count IV: Violation of 42 U.S.C. § 1981;
- Count V: Breach of contract; and
- Count VI: Tortious interference with contract.

Defendants moved to dismiss Counts I, II, IV, and VI for failure to state a claim pursuant to Rule 12(b)(6), Fed. R. Civ. P. The motion has been fully briefed and argued orally, and the motion is therefore now ripe for disposition.[2]

I.

Plaintiffs in this action are Jose Dagoberto Reyes, Rosy Giron de Reyes, Felix Alexis Bolanos, Ruth Rivas, Yovana Jaldin Solis, Esteban Ruben Moya Yrapura, Rosa Elena Amaya, and Herbert David Saravia Cruz.[3] These eight individuals are the heads of four households that currently reside or once resided in the Park. All plaintiffs are non-citizen Latinos of Salvadorian or Bolivian national origin.

The Park is located in Fairfax, Virginia and provides a relatively low-cost option for housing when compared to other options in the surrounding

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[2] Plaintiffs did not oppose defendants' motion to dismiss Count VI, and Count VI was therefore dismissed with prejudice by Order dated July 22, 2016. *See Giron de Reyes v. Waples Mobile Home Park Ltd. P'ship*, No. 16-cv-563 (E.D. Va. July 22, 2016) (Order) (Doc. 34). That same Order took under advisement the motion to dismiss Counts I, II, and IV. *See id.*

[3] The facts recited here are derived from the Complaint, the factual allegations of which are assumed true for purposes of resolving a motion to dismiss. *See Columbia Venture, LLC v. Dewberry & Davis, LLC*, 604 F.3d 824, 827 (4th Cir. 2010).

area. This action focuses on a policy ("the Policy") that defendants began enforcing at the Park in 2015. Under the Policy, defendants require as a condition of entering into or renewing a lease at the Park that all adults living or seeking to live in the Park present either (i) an original social security card or (ii) an original passport, U.S. visa, and original arrival/departure Form I-94 or I-94W. Although defendants once applied the Policy only to leaseholders, in mid-2015 defendants began applying the Policy to all residents over the age of eighteen. As currently enforced, the Policy provides that all tenants of a mobile home lot in the Park must at the time of lease renewal (i) complete a new rental application, (ii) submit the required documentation, and (iii) pass a criminal background and credit check. Tenants who cannot satisfy the Policy's documentation requirement have attempted without success to use alternative means of satisfying the Policy. For instance, some tenants have attempted to provide alternative documents such as an Individual Taxpayer Identification Number, an expired Form I-94, or old criminal background check reports. Defendants have declined to accept such documents as substitutes.

If a tenant cannot satisfy the Policy, defendants then issue a letter to the tenant affording the tenant twenty-one days to cure the deficiency; tenants who cannot do so are then given thirty days to vacate the Park. If defendants determine that a person who has not satisfied the Policy is living in the Park, then defendants inform the leaseholder of the lot on which the non-compliant tenant lives that the leaseholder's year-long lease will not be renewed and will instead convert into a month-to-month lease. Once the lease is converted to a month-to-month tenancy, leasehold-

ers with non-compliant tenants are charged $300 per month above their former monthly rental rates.[4]

Each male plaintiff in this action satisfies the Policy, but each female plaintiff does not. In fact, the Reyes household vacated the Park under the threat of eviction because plaintiff Rosy Giron de Reyes could not satisfy the Policy. The remaining plaintiffs continue to reside at the Park, but they fear eviction or that they will be unable to afford to rent their lots because of the increased monthly charges associated with any tenant's non-compliance with the Policy.

In response to defendants' enforcement of the Policy, plaintiffs filed this lawsuit on May 23, 2016. Defendants' partial motion to dismiss attacks plaintiffs' Fair Housing Act, Virginia Fair Housing Law, and 42 U.S.C. § 1981 claims, each of which is addressed in turn.

II.

Count I alleges that defendants' enforcement of the Policy violates the federal Fair Housing Act ("FHA"), which provides that it is unlawful, *inter alia*,

> [t]o 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.

42 U.S.C. § 3604(a). Under the FHA, "a landlord's housing practice may be found unlawful . . . either because it was motivated by a racially discriminatory

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[4] Counts III and V, which are not at issue in the instant motion, allege that this conversion to a month-to-month tenancy with altered monthly rental rates violates Virginia's Manufactured Home Lot Rental Act and the terms of plaintiffs' lease agreements.

purpose or because it is shown to have a disproportionate adverse impact on minorities." *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 986 (4th Cir. 1984); *see also Tex. Dep't of Hons. & Cmty. Affairs v. Inclusive Cmties. Project, Inc.*, —— U.S. ——, 135 S.Ct. 2507, 2525, 192 L.Ed.2d 514 (2015) (affirming that "disparate-impact claims are cognizable under the [FHA]"). In other words, FHA plaintiffs may pursue claims for either disparate treatment or disparate impact. *See Inclusive Cmties.*, 135 S.Ct. at 2525. The choice between these two approaches is not inconsequential, as "[t]he burden confronting defendants faced with a *prima facie* showing of discriminatory impact is different and more difficult than what they face when confronted with a showing of discriminatory intent." *Betsey*, 736 F.2d at 988. Specifically, whereas a disparate treatment defendant can "overcome a *prima facie* showing of discriminatory intent by articulating some 'legitimate nondiscriminatory reason for the challenged practice,'" a disparate impact defendant "must prove a business necessity sufficiently compelling to justify the challenged practice." *Id.* Moreover, the threshold for a *prima facie* case of disparate impact is lower than the threshold for a *prima facie* case of disparate treatment because in the former the defendant's intent is not part of the plaintiff's case. *See Holder v. City of Raleigh*, 867 F.2d 823, 826 (4th Cir. 1989).

Given these differences between disparate treatment and disparate impact claims, plaintiffs unsurprisingly couch their FHA claim primarily in terms of disparate impact. *See* Comp. ¶¶ 114-15. Where disparate impact theory properly applies, showing that a facially neutral policy causes a statistical disparity adverse to protected minorities is sufficient to make out a *prima facie* case of discrimination "because of" a

plaintiff's protected status. *See Inclusive Cmties.*, 135 S.Ct. at 2523; *Holder*, 867 F.2d at 826. In this regard, to show that defendants' enforcement of the Policy—which targets illegal aliens—made housing unavailable to plaintiffs "because of race . . . or national origin,"[5] plaintiffs rely on statistics illustrating that illegal aliens are disproportionately Latino. *See* Comp. ¶¶ 58-63. In other words, defendants' enforcement of the Policy allegedly discriminates "because of race . . . or national origin" because the Policy aims at illegal aliens, the vast majority of whom are of Latino national origin, and thus disparately impacts Latinos.[6]

At the same time, a fair reading of the Complaint reflects that defendants' enforcement of the Policy is also alleged to constitute disparate treatment. This is so because (i) Count I can be read to say as much, *see* Comp. ¶ 113, (ii) the entire basis of plaintiffs' § 1981 claim is that defendants are engaged in intentional discrimination, and (iii) plaintiffs contend that the stated rationale for the Policy is merely a pretext for a discriminatory intent, *see* P. Opp. at 28. Nevertheless, the parties appear to agree that the thrust of plaintiffs' claim is based on the disparate impact theory, under which plaintiffs bear a lighter burden to state a *prima facie* case and defendants bear a heavier burden in justifying the Policy.

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[5] 42 U.S.C. § 3604(a).

[6] As plaintiff's point out, other courts "have treated claims of discrimination on the basis of being Latino as encompassing both race and national discrimination and have not differentiated between the two concepts." Comp. ¶ 113 n.21 (citing *Cent. Ala. Fair Hous. Ctr. v. Magee*, 835 F. Supp. 2d 1165, 1185 n.15 (M.D. Ala. 2011) (quotation marks and alterations omitted)). The following analysis proceeds as though both race and national origin are implicated by plaintiffs' FHA claim.

Defendants' motion to dismiss Count I focuses chiefly on whether the Complaint states a valid disparate impact claim. Specifically, defendants attack plaintiffs' reliance on a disparate impact theory on three grounds. First, defendants argue that recognition of plaintiffs' disparate impact claim would conflict with the policies of the United States Department of Housing and Urban Development ("HUD") and with certain criminal penalties under federal immigration law. Second, defendants maintain that in the context of this case, where the challenged Policy facially targets illegal aliens, Latinos cannot state a valid FHA disparate impact claim as a matter of law. And finally, defendants contend that even assuming a disparate impact claim is appropriate in this context, the allegations of a disparity alleged here are insufficient to state a plausible claim for relief. These arguments are addressed in turn.

A.

Defendants first argue that recognizing plaintiffs' FHA claim requires the recognition of "illegal immigrants as a class" protected by the FHA, which would therefore create a conflict among certain federal laws and policies. D. Reply at 17. Specifically, defendants argue that (i) accepting plaintiffs' view about the scope of disparate impact liability under the FHA necessarily leads to the conclusion "that the policies of the HUD also violate the FHA because HUD explicitly excludes undocumented immigrants from participation in many of its programs," D. Reply at 7, and (ii) protecting illegal aliens under the FHA would be inconsistent with the Immigration Reform and Control Act, which criminalizes the reckless harboring of such aliens. *See* 8 U.S.C. § 1324(a)(1)(A)(iii). These arguments fail.

First, permitting plaintiffs' FHA claims to proceed would not, as defendants contend, require the recognition of a new class—namely, illegal aliens—protected by the FHA. To be sure, the Policy challenged here draws a facially legitimate distinction on the basis of lawful presence in the United States. For the reasons discussed below, however, this facially lawful distinction may nonetheless be an impermissible pretext for discrimination on the basis of race or national origin—two classes that the FHA does protect. Thus, defendants' argument fails because it adopts a false premise, that plaintiffs' claims require the creation of a new class covered by the FHA's antidiscrimination provision.

Second, there is no conflict between HUD policies and the FHA. To be sure, HUD excludes illegal aliens from many of its programs because federal law prohibits HUD from "mak[ing] financial assistance available for the benefit of any alien unless that alien is a resident of the United States" and is lawfully present in this country. *See* 42 U.S.C. § 1436a(a). But this in no way creates a contradiction between HUD policies and the FHA. The latter prohibits discrimination in the provision of housing on the basis of, *inter alia*, race or national origin, whereas the former simply prohibits certain expenditures of funds based on an alien's unlawful presence, regardless of that alien's race or national origin.[7]

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[7] *See Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88, 94 S.Ct. 334, 38 L.Ed.2d 287 (1973) (holding that "national origin," as defined in Title VII's employment antidiscrimination provision, refers to a person's ancestry, not his citizenship status); *Inclusive Cmties.*, 135 S.Ct. at 2521 (observing that the text of Title VII's and the FHA's antidiscrimination provisions are nearly identical).

Finally, the federal prohibition on recklessly harboring illegal aliens, 8 U.SC. § 1324, does not require the conclusion defendants seek here. Once again, there is no conflict because the FHA prohibits discrimination on the basis of protected categories, such as race and national origin, whereas the prohibition against recklessly harboring illegal aliens focuses on an alien's lawful presence, not his race or ancestry. The FHA and § 1324(a)(1)(A)(iii) have different purposes and are not inconsistent. Nonetheless, it is worth noting that defendants' obligations under § 1324 may constitute a basis to argue that the Policy is supported by a legitimate nondiscriminatory reason and is a business necessity.

In sum, neither the HUD policy regarding illegal aliens' ineligibility for certain financial assistance, nor § 1324(a)(1)(A)(iii) are a basis for dismissing plaintiffs' FHA claim.

B.

Defendants next argue that plaintiffs' FHA cause of action based on disparate impact must be dismissed for failure to state a claim. In this regard, defendants in essence argue that plaintiffs' disparate impact claim is inconsistent with the history and purpose of the judicially-created theory of disparate impact. Although this argument does not warrant threshold dismissal of plaintiffs' FHA claim, defendants' contention in this regard nonetheless must be carefully addressed, as it presents an important question as to the proper application of disparate impact theory to plaintiffs' FHA claim in the context of this case.

Analysis properly begins by recognizing that certain disparate impact claims are undoubtedly cognizable under the FHA to satisfy the statute's requirement that an actionable housing decision be

made "because of" a protected status. *See Inclusive Cmties.*, 135 S.Ct. at 2525; *Betsey*, 736 F.2d at 986. Yet, importantly, it must also be noted that the Supreme Court has expressed concern about the scope and application of the disparate impact theory in certain circumstances. *See Inclusive Cmties.*, 135 S.Ct. at 2523. In this regard, the Supreme Court noted that FHA disparate impact claims are subject to a "robust causality requirement," which "protects defendants from being held liable for racial disparities they did not create." *Id.* (quotation marks and alterations omitted). In other words, in determining whether the FHA permits a disparate impact cause of action, the Supreme Court in *Inclusive Communities* did not squarely address the limits or proper scope of such claims.

In this case, there are compelling reasons to conclude that plaintiffs' FHA disparate impact claim arises in a context different from that which prompted courts to apply the disparate impact theory to discrimination cases. Indeed, as the analysis that follows demonstrates, courts devised the disparate impact theory to ferret out long-entrenched racial discrimination that might otherwise have escaped scrutiny by using facially neutral policies to hide or shield already entrenched discrimination. Moreover, the analysis that follows also shows that allowing a disparate impact claim to operate in the context of this case would essentially erase the FHA's requirement that discrimination be "because of" race, color, religion, sex, familial status, or national origin. 42 U.S.C. § 3604(a). This is so for the obvious reason that the vast majority of illegal aliens in the United States are persons of Latino descent; thus, any policy that targets illegal aliens in the United States will disparately impact Latinos. In other words, allowing

plaintiffs in this case to satisfy the FHA's causation element simply by proving that the Policy disparately impacts Latinos would effectively eliminate the statute's "because of" requirement, as essentially any policy aimed at illegal aliens will have a disproportionate effect on Latinos.

To begin with, it is important to note that disparate impact theory arose as a judicially-created doctrine to ferret out historically-entrenched racial discrimination that was perpetuated by facially neutral policies. The Supreme Court made this clear in the seminal case of *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). There, the Supreme Court interpreted Title VII to prohibit employment testing policies with unjustifiable and adverse disparate impacts regardless of an employer's subjective intention to discriminate.[8] At issue in *Griggs* was the Duke Power Company's policy that

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[8] It is interesting to note that the disparate impact theory was applied in the Title VII context as long ago as 1968. *See Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968). There, African-American employees challenged their employer's seniority system as discriminatory because, in effect, it froze into place previously legal discriminatory practices. Before the enactment of Title VII, the employer in *Quarles* maintained a facially discriminatory policy that segregated African-Americans into certain less desirable departments. *See id.* at 514. Once such policies became illegal, the employer continued to enforce a facially neutral seniority policy which essentially maintained segregated departments, because the policy calculated an employee's seniority based on his length of service in his specific department. In finding this facially neutral policy unlawful, Judge Butzner, sitting by designation, reasoned that facially neutral seniority policies can "operate unfairly because of the historical discrimination that undergirds them." *Id.* at 518. Put simply, Judge Butzner concluded that in enacting Title VII, "Congress did not intend to freeze an entire generation of [African-American] employees into discriminatory patterns that existed before [Title VII]." *Id.* at 516.

only high school graduates who scored above a certain level on certain aptitude tests could be employed in higher wage and higher status positions within the company. *See* 401 U.S. at 427, 91 S.Ct. 849. In concluding that this policy violated Title VII, the Supreme Court in *Griggs* decided to apply the judicially-created disparate impact theory as a backward-looking doctrine concerned with "removing barriers that have operated in the past to favor an identifiable group," namely white employees. *See id.* at 429-30, 91 S.Ct. 849. The pre-existing barriers in *Griggs* were clear—the employees were segregated in the first instance through enforcement of a facially discriminatory policy, and the segregation endured because the *Griggs* plaintiffs "long received inferior education in segregated schools" as a result of *de jure* discrimination. *Id.* at 430, 91 S.Ct. 849. The Supreme Court observed that "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Id.* Thus, the goal of disparate impact, as *Griggs* tells it, is to remove long-entrenched barriers that are responsible for perpetuating the effects of past intentional discrimination.

The rationale for the disparate impact theory as articulated in *Griggs* and the underlying rationale for the FHA are essentially the same. *See Inclusive Cmties.*, 135 S.Ct. at 2521 ("Recognition of disparate-impact claims is consistent with the FHA's central purpose."). As the Supreme Court noted recently in *Inclusive Communities*, the FHA's purpose is to address the "vestiges" of "[*d*]*e jure* residential segregation by race" that remain "intertwined with the country's economic and social life." *See id.* at 2515. In other words, the disparate impact theory in FHA cases is designed to remove barriers to housing

that endure as remnants of the country's tragic and regrettable history of state-sanctioned intentional discrimination. *See id.* at 2515-16.

Similarly, the facts in *Inclusive Communities* fit well within the conception of disparate impact theory as a doctrine designed to ferret out long-entrenched discrimination. The litigants in *Inclusive Communities* had disputed whether a Dallas low-income housing development should be built in the inner-city or in the suburbs. *Id.* at 2513. Specifically, the plaintiffs alleged that the Texas Department of Housing and Community Affairs, in determining where to place such developments, had perpetuated segregated housing patterns among whites and African-Americans. *Id.* at 2514. Thus, the Supreme Court in *Inclusive Communities* applied disparate impact theory as a means of ferreting out entrenched segregated housing patterns.

Also instructive in this regard is the Tenth Circuit's holding in *Livingston v. Roadway Express, Inc.*, 802 F.2d 1250 (10th Cir. 1986). There, the Tenth Circuit recognized that disparate impact theory in Title VII cases is concerned with tearing down the "means by which historical discrimination is perpetuated." *Id.* at 1252. Thus, a plaintiff member of a "disfavored group" carries a lighter burden than does a member of a "favored group" in establishing a *prima facie* case of disparate impact. *Id.* Members of a historically disadvantaged group make out a *prima facie* case of disparate impact simply by showing that "a neutral practice has a disproportionate impact on his or her class[.]" *Id.* By contrast, members of a historically favored group, such as white males, cannot make a *prima facie* case of disparate impact unless they show "background circumstances supporting the inference that a facially neutral policy with a dispar-

ate impact is in fact a vehicle for unlawful discrimination."[9] *Id.* This is so even though civil rights statutes "prohibit[] discrimination against groups that historically have not been socially disfavored." *Id.* (citing *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278-80, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976)). In other words, *Griggs*, *Inclusive Communities*, and *Livingston*, taken together, reflect that disparate impact theory is properly used to ferret out long-entrenched discrimination against historically disadvantaged groups.

Indeed, the Supreme Court has observed that, even within the Title VII context, in which the Supreme

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[9] This difference—between what must be shown by members of historically disfavored groups and by members of historically favored groups—arguably implicates constitutional questions about disparate impact theory that are neither reached nor decided here. It also bears mentioning that the Fifth Amendment "subject[s] to detailed judicial inquiry" all laws traceable to a racially discriminatory purpose, even if the motive is benign and even if the law is facially neutral. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995); *Washington v. Davis*, 426 U.S. 229, 240, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). And it is widely accepted that disparate impact theory is racially allocative and encourages the use of quotas. *See*, *e.g.*, Richard Primus, Equal Protection and Disparate Impact: Round Three, 117 Harv. L. Rev. 493, 536 (2003) ("[L]egislation intended to break down inherited racial hierarchies . . . is at greater risk of being found to have an unconstitutional motive. Such motives are racially allocative."). Because it is "axiomatic that [the government] may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish," it is easy to see why the disparate impact theory may in certain circumstances present a constitutional problem under current equal protection doctrine. *Norwood v. Harrison*, 413 U.S. 455, 465, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973). Indeed, Justice Scalia once flagged these very concerns. *See Ricci v. DeStefano*, 557 U.S. 557, 594-96, 129 S.Ct. 2658, 174 L.Ed.2d 490 (2009) (Scalia, J., concurring).

Court first recognized disparate impact theory as a viable cause of action, disparate impact claims are available only "in some cases." *See Ricci v. DeStefano*, 557 U.S. 557, 577, 129 S.Ct. 2658, 174 L.Ed.2d 490 (2009).[10] In sum, a review of the history, purpose, and application of the disparate impact theory in discrimination cases reflects that the theory has properly been invoked and relied on in contexts—long-entrenched discrimination—very different from the context presented in this case.

Further demonstrating the proper limited scope of disparate impact theory in the FHA context is the fact that the Supreme Court has instructed that disparate impact claims are subject to a "robust causality requirement." *Inclusive Cmties.*, 135 S.Ct. at 2523. A robust causality requirement, as the Supreme Court puts it, "ensures that racial 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." *Id.* (quotation marks and alterations omitted). Plaintiffs' use of the disparate impact theory in this case is not consistent with a robust causality requirement; it operates instead to eliminate the statute's explicit requirement that the bar to housing be "because of" race or national origin.

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[10] As Justice Kennedy put it in *Ricci*, "Title VII prohibits both intentional discrimination (known as 'disparate treatment') as well as, *in some cases*, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as 'disparate impact')." 557 U.S. at 577, 129 S.Ct. 2658 (emphasis added). The Supreme Court further observed that "in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849 . . . the Court interpreted [Title VII] to prohibit, in some cases, employers' facially neutral practices that, in fact, are 'discriminatory in operation.'" *Id.* at 577-78, 129 S.Ct. 2658 (emphasis added) (quoting *Griggs*, 401 U.S. at 431, 91 S.Ct. 849).

Indeed, to permit plaintiffs to use disparate impact in this case to establish causation results in essentially writing out of the FHA its robust causation requirement altogether. *See id.*

The Supreme Court in *Espinoza v. Farah Manufacturing Co.* wrestled with a similar causation problem in the employment discrimination context. *See* 414 U.S. 86, 94 S.Ct. 334, 38 L.Ed.2d 287 (1973). There, the Supreme Court was required to construe and apply Title VII's prohibition against employment discrimination "because of" a person's national origin. 42 U.S.C. § 2000e-2. In *Espinoza*—a post-*Griggs* case on appeal from summary judgment—a lawfully admitted resident alien mounted a Title VII challenge to an employer's policy that all hires must be U.S. citizens. 414 U.S. at 87, 94 S.Ct. 334. The plaintiff, a Latina citizen of Mexico, had alleged that the employment policy discriminated against her "because of her 'national origin.'" *Id.* at 87-88, 94 S. Ct. 334. She relied on the Title VII provision which, like the FHA, prohibits discrimination "because of" national origin and race, but not alienage discrimination.[11] *See* 42 U.S.C. § 2000e-2(a)(1). In rejecting the plaintiff's discrimination claim, the Supreme Court held first that the term, "national origin," refers to a person's ancestry, not his citizenship. *Id.* at 88, 94 S.Ct. 334. Thus, even though Title VII permitted

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[11] Title VII, like the FHA, protects against discrimination "because of" race, color, religion, sex, or national origin. This statute, again, like the FHA, does not protect against discrimination "because of" citizenship or alienage. *See* 42 U.S.C. § 2000e-2. Of course, Title VII and the FHA are distinct in this manner from 42 U.S.C. § 1981, which prohibits discrimination against aliens and non-citizens, and is the subject of plaintiffs' Count IV, discussed *infra* Part IV.

disparate impact claims,[12] the Supreme Court held that the disparate impact theory provided "no support" to the plaintiff, because there was "no indication in the record that [the] policy against employment of aliens had the purpose or effect of discriminating against persons of Mexican national origin." *Id.* at 92, 94 S.Ct. 334. Rather, the Supreme Court concluded that the plaintiff "was denied employment, not *because of* the country of her origin, but *because* she had not yet achieved United States citizenship." *Id.* at 93, 94 S.Ct. 334 (emphasis added). In other words, the employment policy's impact on a Latina from Mexico was only incidental to the policy's legitimate focus on non-citizens, and the employer could not be held liable for its policy's incidental adverse effect on a person of Latino national origin.

The *Espinoza* opinion, of course, does not directly address the Fair Housing Act, but the analogy between the discrimination provisions of Title VII and the FHA is extremely close. *See Inclusive Cmties.*, 135 S.Ct. at 2521. Thus, the causation logic articulated in *Espinoza* is persuasive here. Just as disparate impact theory could not carry the burden of showing that an employment policy discriminated "because of" national origin where the policy lawfully targeted non-citizens (and thereby incidentally affected a Mexican of Latino origin), the disparate impact theory can hardly meet the FHA's requirement to show discrimination "because of" race or national origin when a housing policy lawfully targets illegal

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[12] The Court specifically observed that Title VII "proscribes not only overt discrimination, but also practices that are fair in form, but discriminatory in operation." *Espinoza*, 414 U.S. at 92, 94 S.Ct. 334 (citing *Griggs*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158).

aliens (the vast majority of whom, incidentally, are Latinos).

Judge Loken, in *Keller v. City of Fremont*—the precedent closest on point factually to this case—addressed the same issue. *See* 719 F.3d 931 (8th Cir. 2013). There, plaintiffs brought an FHA disparate impact claim to challenge a Nebraska city ordinance that made it "unlawful for any person or business entity to rent to, or permit occupancy by, 'an illegal alien, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law.'" *Id.* at 938. Judge Loken—the only member of the panel majority to reach the merits of the FHA claim[13]—concluded that a policy "that restricts or disadvantages aliens not lawfully present in the country has no . . . historic ties to the purposes of the FHA." *Id.* at 949. He continued, observing that there is

> no hint in the FHA's history and purpose that . . . a law or ordinance, *which is valid in all other respects*, violates the FHA if local statistics can be gathered to show that a disproportionate number of the adversely affected aliens are members of a particular ethnic group. In most cases today, that would of course be Latinos, but at various times in our history, and in various locales, the "disparate impact" might have been on immigrants from Ireland, Germany, Scandinavia, Italy, China, or other parts of the world. It would be illogical to impose FHA disparate impact liability based on the effect an otherwise lawful

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[13] The remaining judge in the *Keller* panel majority concluded that the plaintiffs there lacked standing to bring the FHA claim. *See Keller*, 719 F.3d at 951-53 (Colloton, J., concurring in part and concurring in the judgment).

> ordinance may have on a sub-group of the unprotected class of aliens not lawfully present in this country.

Id. (citing *Espinoza*, 414 U.S. 86, 94 S.Ct. 334).

As Judge Loken correctly recognized, the imposition of disparate impact liability for policies that impact Latinos only incidentally to the impact on illegal aliens decouples disparate impact theory from its original and central purpose. When properly applied, the disparate impact theory should target only those policies with effects that cannot fairly be explained other than as resulting at least in part "because of" a protected characteristic. *See* 42 U.S.C. § 3604(a); *Inclusive Cmties.*, 135 S.Ct. at 2523 (requiring a "robust causality requirement" to "protect[] defendants from being held liable for racial disparities they did not create.") (quotation marks and alterations omitted).

In the instant case, the disparate impact on plaintiffs *as Latinos* is incidental to the Policy's effect on all illegal aliens. That is, a disparate impact exists as to Latinos because Latinos have chosen in greater numbers than any other group to enter the United States illegally.[14] Given the current correlation between the presence of illegal aliens in the United States and the predominantly Latino national origin of the illegal alien population, it cannot fairly be said —by the existence of a disparate impact alone—that a policy targeting illegal aliens and thereby disproportionately making housing unavailable to a class of Latinos does so "because of race . . . or national origin." 42 U.S.C. § 3604(a). To hold otherwise

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[14] The Complaint recognizes this point in observing that "[a] strong link exists between the undocumented immigrant population and the Latino population . . . ." Comp. ¶ 61.

would, as *Inclusive Communities* warns, eliminate a robust causality requirement and make defendants answer for racial disparities they did not create.

In summary, the history and purpose of disparate impact theory, and the application of that theory in the decided cases, make clear that it would be inappropriate to permit plaintiffs to use disparate impact theory alone to satisfy the FHA's "because of" requirement. Disparate impact theory, applied in this case, would be insufficient by itself to satisfy the FHA's causation requirement. This is not to say that landlords have free reign to discriminate against illegal aliens as Latinos, nor that Latinos or illegal aliens are categorically precluded from the benefits of the FHA, including the disparate impact theory. To the contrary, an illegal alien who can prove discrimination on the basis of his or her race or national origin is undoubtedly a "person" entitled to the benefit of the FHA's protection. *See* 42 U.S.C. § 3604(a) (protecting "any person"). Also, there may well be cases in which the adversity Latinos face in obtaining housing stems from the same sources of historical, state-sanctioned intentional discrimination faced by, for example, African-Americans. *Cf. Griggs*, 401 U.S. at 430, 91 S.Ct. 849 (noting the lasting effects of *de jure* educational segregation on African-American workers). In those cases, disparate impact theory may be sufficient, by itself, to carry the burden of satisfying the FHA's causation requirement. But in this case, the analysis here makes clear that plaintiffs cannot rely *solely* on disparate impact to satisfy the FHA's causation requirement; plaintiffs must still show that the Policy was instituted "because of"

race or national origin.[15] In doing so, plaintiffs may use evidence of disparate impact, in addition to other proof, to meet their burden of demonstrating causation.

Although plaintiffs may not rely exclusively on disparate impact, the allegations in their Complaint are sufficient to state a claim under the FHA. Indeed, the Complaint alleges that plaintiffs have been denied renewals of their leases and subjected to increased monthly rates and threats of eviction that could—and for one set of plaintiffs, did—drive them from their homes. *See*, *e.g.*, Comp. ¶¶ 2, 53, 88, 107, 115. And as to defendants' motive or intent, the Complaint alleges that the Policy is a pretext for discrimination against Latinos. *See id.* ¶¶ 61-63. Indeed, the Policy challenged here draws a facially legal distinction on the basis of lawful presence in this country. It may well nonetheless be an impermissible pretext for discrimination on the basis of race or national origin. Thus, if defendants in this case establish a legitimate non-discriminatory reason or justification for the Policy, plaintiffs are entitled to attack it as pretextual, and to use any evidence, including evidence of disparate impact, to show that

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[15] Because plaintiffs cannot rely solely on the disparate impact theory to satisfy the FHA's causation requirement, defendants' alternative argument that the Complaint does not plausibly state a disparate impact claim is neither reached nor decided. It does warrant mentioning that the statistics alleged, which focus on the composition of the entire Commonwealth of Virginia, are likely insufficient to prove a disparate impact claim because they do not demonstrate a disparity in the community to which the Policy is applied. *See Edwards v. Johnston Cnty. Health Dep't*, 885 F.2d 1215, 1223 & n.20 (4th Cir. 1989); *Betsey*, 736 F.2d at 987. Yet, these figures may well be sufficient to support a plausible inference that the Policy is a pretext to discriminate against Latinos.

the apparently neutral Policy is in fact a pretext for intentional racial or national origin discrimination against plaintiffs. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

In essence, therefore, plaintiffs' complaint states a proper cause of action for a claim under the FHA. Although plaintiffs cannot rely solely on disparate impact to prove causation, they may use evidence of disparate impact to help prove that the Policy discriminates "because of" race or national origin, and to counter any claim of the Policy's legitimate, nondiscriminatory reason or justification. For these reasons, defendants' motion to dismiss Count I is denied.

III.

Count II alleges that defendants' enforcement of the Policy violates the Virginia Fair Housing Law ("VFHL"). Similar to the FHA, the VFHL makes it unlawful

> [t]o 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, national origin, sex, elderliness, or familial status.

Va. Code § 36-96.3. The parties' arguments as to whether the Complaint states a disparate impact claim under the VFHL are essentially identical to the arguments they made regarding Count I, with the added wrinkle that it is unsettled whether the VFHL authorizes disparate impact liability at all. Assuming without deciding that the VFHL authorizes a

cause of action based solely on disparate impact,[16] Count II states a claim for disparate treatment, and the evidence as to disparate impact may be used for Count II as it may for Count I—namely, to help establish causation or to counter any claim of the Policy's legitimate, non-discriminatory reason or justification. Disparate impact, however, cannot by itself satisfy the causation requirement in the VFHL. Plaintiffs will still have to prove that the bar to the sale or rental of space at the Park was "because of race [or] national origin [.]" *Id.* Thus, for the reasons previously stated, the motion to dismiss Count II must be denied.

IV.

Count IV alleges that defendants' enforcement of the Policy violates 42 U.S.C. § 1981, which provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . ." Specifically, Count IV alleges intentional discrimination against aliens and non-citizens, which § 1981 prohibits. *See Duane*

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[16] There is good reason to think that the VFHL recognizes a disparate impact cause of action that is identical to the FHA's disparate impact cause of action. The relevant portion of the VFHL was enacted by the Virginia General Assembly in 1991 and tracks the operative language of the FHA almost word-for-word. *See* 1991 Va. Laws Ch. 557 (H.B. 1153). By the time of the VFHL's enactment, "all nine [federal] courts of appeals to have addressed the question had concluded the Fair Housing Act encompassed disparate-impact claims." *Inclusive Cmties.*, 135 S.Ct. at 2519 (observing that this was so as of 1988). As the Supreme Court noted in *Inclusive Communities*, where statutory language has been given a uniform and well-known interpretation by lower courts, the subsequent enactment of that same language is presumed to carry forward that interpretation. *See id.* at 2520.

v. GEICO, 37 F.3d 1036, 1044 (4th Cir. 1994) ("[W]e conclude that section 1981 prohibits private discrimination against aliens[.]"). To state a claim under § 1981, the Complaint must allege both (i) that defendants "intended to discriminate" on the basis of citizenship and alienage and (ii) "that the discrimination interfered with a contractual interest." *See Denny v. Elizabeth Arden Salons, Inc.*, 456 F.3d 427, 434 (4th Cir. 2006). Consistent with these requirements, the Complaint alleges sufficient facts to support the plausible inference that defendants violated § 1981.

The Complaint alleges that the Policy is designed to be more burdensome on non-citizens than on citizens to the point that non-citizens are essentially excluded from qualifying to lease a lot in the Park. *See* Comp. ¶¶ 26-39. Specifically, whereas citizens need only obtain a Social Security card (which any citizen can obtain for free), non-citizens must present three documents, namely (i) a passport, (ii) a U.S. visa, and (iii) an original I-94 or I-94W "arrival/departure" form. *Id.* ¶ 27. In this regard, the burden arises from the fact that copies of original I-94 and I-94W forms cost $330, and aliens with immigrant visas do not even need to acquire I-94 or I-94W forms in the first instance.[17] Moreover, the Complaint

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[17] At the same time, plaintiffs appear to concede that immigrant visa holders can obtain Social Security cards, which mitigates the burden on these aliens. *See* P. Opp. at 27. It is also worth noting that the allegations about the difficulty in obtaining I-94 forms are not found in the Complaint and are raised for the first time in plaintiffs' memorandum in opposition to dismissal. Yet, because plaintiffs rely on federal government publications for their information, these facts "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned," and therefore it is appropriate to

alleges that the Policy's burdensome design is inconsistent with its stated purpose to facilitate criminal background and credit checks in that those objectives could be achieved via less burdensome means. *See id.* ¶ 39. Thus, plaintiffs contend that the Policy is a pretext to remove aliens and non-citizens from the Park. The Complaint further alleges that an agent of the Park rationalized the Policy on the ground that illegal aliens "might be criminals," which in plaintiffs' view evinces an intent to discriminate against aliens.[18] *Id.* ¶ 71.

The Complaint's allegations of intentional discrimination on the basis of alienage or non-citizenship, though not conclusive, are nonetheless sufficient to state a plausible claim under § 1981. Although each of the plaintiff husbands is a foreign national and

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take judicial notice of this information. *See* Rule 201(b)(2), Fed. R. Evid.; *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007) (noting that it is appropriate on a motion to dismiss to consider "matters of which a court may take judicial notice").

[18] Of course, illegal aliens are in fact criminals, albeit not necessarily dangerous or convicted ones. *See* 8 U.S.C. § 1325(a) (making unauthorized entry into the United States by an alien a crime). Moreover, as defendants correctly note, the statement alleged is specific to illegal aliens and therefore might suggest, at most, an intent to discriminate only against illegal aliens. *Cf. Anderson v. Conboy*, 156 F.3d 167, 180 (2d Cir. 1998) (refusing to contract on the basis of unlawful presence in the United States is permissible discrimination on the basis of immigration status, not illegal discrimination on the basis of a protected characteristic). In any event, at the motion to dismiss stage in which all reasonable inferences are drawn in the non-movant's favor, there is a reasonable and plausible inference here that the alleged statement by the Park's agent conveys a general intent to reduce the number of aliens in the Park for fear of increased crime. Of course, defendants are free to attempt to rebut this inference on the merits.

non-citizen who satisfies the Policy and therefore qualifies to enter into a lease, the Complaint alleges improper denial of year-long lease renewals on the basis that the plaintiff wives do not satisfy the Policy. *See*, *e.g.*, Comp. ¶¶ 51-53, 73, 79, 85, 95, 107. One plausible and reasonable inference, therefore, is that defendants are attempting to reduce the number of aliens or non-citizens in the Park via enforcement of the Policy because even though certain members of immigrant households will satisfy the Policy, if only one member does not satisfy the Policy then the entire family will likely vacate the Park. To be sure, the fact that the Park would, in general, enter into a contract with the alien non-citizen husband plaintiffs also supports a reasonable inference of intent to discriminate against *only* illegal aliens, which § 1981 permits. *Cf. Anderson*, 156 F.3d at 180. But at this stage the allegations are sufficient to state a plausible claim that can proceed to the merits.[19]

Accordingly, Count IV states a plausible claim for relief under § 1981, and defendants' motion to dismiss Count IV must therefore be denied.

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[19] Defendants also argue that plaintiffs' § 1981 claim, like plaintiffs' FHA cause of action, requires the recognition of a new protected class—illegal aliens—which would create a conflict between § 1981 and federal immigration law. D. Reply at 17. Defendants are correct in observing that § 1981 does not protect illegal aliens as a class, but incorrect in arguing that plaintiffs' § 1981 claim in this case requires the creation or recognition of such a class. Rather, a person's alienage and citizenship are distinct from that person's immigration status. Of course, as previously stated, defendants are free to argue at the merits stage that the Policy was intended to discriminate only against illegal aliens, and thus does not run a foul of § 1981.

V.

For the foregoing reasons, defendants' partial motion to dismiss Counts I, II, and IV must be denied.

An appropriate Order will issue.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-1723
(1:16-cv-00563-TSE-TCB)

ROSY GIRON DE REYES; ET AL.,
Plaintiffs - Appellants,

v.

WAPLES MOBILE HOME PARK
LIMITED PARTNERSHIP, ET AL.,
Defendants - Appellees.

LAURA E. GÓMEZ, ET AL.,
Amici Supporting Appellants,

NATIONAL APARTMENT ASSOCIATION,
Amicus Supporting Appellee.

[Filed December 19, 2018]

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Keenan, Judge Wynn, and Judge Floyd.

For the Court

/s/ Patricia S. Connor, Clerk

STATUTORY PROVISIONS INVOLVED

Section 804(a) of the Fair Housing Act, 42 U.S.C. § 3604(a), provides:

§ 3604. Discrimination in the sale or rental of housing and other prohibited practices

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—

(a) 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.

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