APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-1660

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

v.

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

NATIONAL HOUSING LAW PROJECT; THE UNITED STATES; JOHN D. TRASVINA, FORMER HUD ASSISTANT SECRETARY FOR FAIR HOUSING AND EQUAL OPPORTUNITY; NATIONAL FAIR HOUSING ALLIANCE; AMERICAN CIVIL LIBERTIES UNION; LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; EQUAL RIGHTS CENTER; HOUSING OPPORTUNITIES MADE EQUAL OF VIRGINIA, INC.; HABITAT FOR HUMANITY OF GREATER CHARLOTTESVILLE; PIEDMONT HOUSING ALLIANCE,
Amici Supporting Appellant.

NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER; THE REAL ESTATE ROUNDTABLE,
Amici Supporting Appellee.

Argued: December 7, 2023
Decided: January 23, 2024
Amended: January 24, 2024

Before: WILKINSON, KING, and HEYTENS, Circuit Judges.

Reversed and remanded by published opinion. Judge Wilkinson wrote the opinion in which Judge King and Judge Heytens joined.

WILKINSON, Circuit Judge:

Residents of Waples Mobile Home Park challenged the Park's policy that required all adult tenants to provide proof of their legal status in the United States in order to renew their leases. The residents argued that the policy violated the Fair Housing Act because it disproportionately ousted Latinos from the Park. The district court granted summary judgment in favor of the Park after finding that the policy was reasonably necessary for the Park to avoid criminal liability under a federal statute prohibiting the harboring of undocumented immigrants. But the district court's ruling rested upon a basic misapprehension of the statute. Moreover, the record was insufficient to establish the Park's proposed defense. For these reasons, we reverse.

I.

A.

Waples Mobile Home Park in Fairfax, Virginia, (the "Park") is owned and operated by Waples Mobile Home Park LP, Waples Project LP, and A.J. Dwoskin & Associates, Inc. (collectively, "Waples"). Waples leases land to mobile-home owners looking to domicile in the area and serves as landlord for the Park.

Between 2010 and 2015, four noncitizen Latino families from El Salvador and Bolivia (the "Families") moved into the Park. Each family consisted of a father with legal status in the United States, a mother who was undocumented and illegally residing in the United States, and children who were United States citizens. The fathers were the leaseholders. Each had provided a valid Social Security number and passed credit and criminal background checks as part of the routine application process. The Families had successfully renewed their leases without issue until 2015.

In 2015, Waples began enforcing a policy that required all adults living at the Park to present proof of legal status in the United States (the "Policy"). Specifically, the Policy required lease applicants and tenants seeking to renew their leases to identify all proposed adult occupants of the mobile home. It further required that every identified adult occupant provide proof of lawful status in the United States by presenting 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).

If an occupant did not comply with the Policy, Waples provided notice that the leaseholder had 21 days from receipt of the notice to cure the violation, or 30 days from receipt to vacate the Park. And if the household did not cure the violation or vacate the Park, Waples converted the lease from a year-long term to month-to-month and increased the rent by $100 per month. Waples threatened to increase the monthly rent by an additional $300 if the household did not comply with the Policy, but that additional surcharge was never imposed.

Though this Policy was new to tenants of the Park, it was not really a new policy. While the Policy as

written had always required documentation from all adult residents in the Park, it was actually implemented by requiring documentation from the leaseholder alone.

Apparently, this was the case for many of the Park's policies. For instance, the decision to begin enforcing the Policy against all occupants stemmed from a discovery that two tenants at different Waples properties committed sex offenses that should have been reported at the time of lease renewal. The occupants, however, were never asked to disclose those offenses. This was so even though another one of Waples's written policies required all adult lease applicants to disclose such offenses. The discovery of the sex offenses prompted a crackdown at all Waples sites, leading to a background check on all adult tenants when it came time to renew their leases.

Of course, the Policy posed a problem for the Families because the mothers could not provide proof of their legal status. The Families sought to use the mothers' Individual Taxpayer Identification Numbers ("ITINs") as an alternative way to comply with the Policy. The IRS issues ITINs to income-earning U.S. taxpayers irrespective of immigration status. The Families alleged that the ITINs could be used to run the requisite background checks. Waples declined to accept any alternative forms of identification, converted the leases to month-to-month terms, and imposed the $100 surcharge.

Eventually each of the Families chose to vacate their homes at the Park due to the rent increases and fear of eviction.

B.

The Families initiated this lawsuit against Waples in 2016. The complaint alleged, among other things,

that the Policy violated the Fair Housing Act ("FHA"), 42 U.S.C. § 3604. FHA claims can proceed under a disparate-treatment or a disparate-impact theory of liability. *Reyes v. Waples Mobile Home Park Ltd. P'ship*, 903 F.3d 415, 421 (4th Cir. 2018). "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.'" *Id.*

The Families proceeded under a disparate-impact theory, alleging the Policy violated the FHA by "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. 46. Waples moved to dismiss several counts in the complaint, including the FHA claim.

The district court denied Waples's motion to dismiss as to the FHA claim. It held, however, that the Families could proceed only under a disparate-treatment theory of liability, instead of the disparate-impact theory they had proposed. *See Wright v. Nat'l Archives & Recs. Serv.*, 609 F.2d 702, 711 n.6 (4th Cir. 1979) (noting that the trial court may determine that either theory of liability is unsupported by the evidence, effectively allowing the claim to continue only under one theory of liability).

After discovery, the parties cross-moved for summary judgment on the FHA claim. The district court granted Waples's motion for summary judgment on the Families' FHA claim, which, in accordance with its prior ruling, the court only considered under the disparate-treatment theory of liability. The Families

appealed, arguing that the district court's prior dismissal of their FHA claim under a disparate-impact theory of liability was in error.

This court vacated the district court's judgment and held that the claim should have been allowed to proceed under a disparate-impact theory. The court proceeded under the three-part burden-shifting framework established for disparate-impact claims in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 135 S.Ct. 2507, 192 L.Ed.2d 514 (2015). Under the *Inclusive Communities* framework, the plaintiff bears the initial burden of establishing a prima facie case of disparate impact. *Id.* at 527, 135 S.Ct. 2507. If satisfied, the burden shifts to the defendant to show that the discriminatory policy was necessary to achieve a legitimate nondiscriminatory interest. *Id.* If the defendant does so, the burden shifts back to the plaintiff to show that the interest could be served through less discriminatory means. *Id.*

The court concluded that the Families had satisfied Step One by demonstrating that the challenged Policy "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." *Reyes*, 903 F.3d at 428. Because the Families had established a prima facie case of disparate impact, the court remanded for the district court to consider Steps Two and Three of the *Inclusive Communities* framework in the first instance. *Id.* at 433.

On remand, the Families pursued only a disparate-impact theory for their FHA claim and Waples filed a renewed motion for summary judgment. Waples argued that it met its burden at Step Two because the Policy was necessary to serve several valid interests

"such as verifying identity, conducting criminal background checks, avoiding loss from eviction, and avoiding liability under the anti-harboring statute, 8 U.S.C. § 1324(a)(1)(A)(iii)." J.A. 1275.

The Families countered that summary judgment was improper because there were triable issues of fact as to whether Waples could satisfy Step Two of the *Inclusive Communities* framework. Specifically, whether the Policy served a valid interest and, if so, whether such an interest could be served through less discriminatory means by applying the Policy only to leaseholders as opposed to all tenants in residence. The district court sided with the Families and denied summary judgment to Waples.

As the parties were preparing for trial, the case was reassigned to a new district court judge who reversed course and granted summary judgment to Waples. The court found that Waples met its burden at Step Two because "implementing a policy to avoid increased criminal liability under the anti-harboring statute is a valid and necessary interest." *de Reyes v. Waples Mobile Home Park Ltd. P'ship*, 602 F. Supp. 3d 890, 899 (E.D. Va. 2022). The district court found it "unimportant" whether Waples's Policy was actually motivated by avoiding a harboring prosecution—it was sufficient that Waples was "presumed to have knowledge of the law at the time the Policy was implemented and enforced." *Id.* And at Step Three, the district court ruled that the Families' proposed reasonable alternative of allowing tenants to use ITINs would not "allow [Waples] to limit [its] criminal liability under the anti-harboring statute." *Id.* at 900.

The Families timely appealed.

II.

We review a grant of summary judgment de novo, applying the same legal standards as the district court while viewing all facts and reasonable inferences therefrom in the light most favorable to the non-moving party. *Reyes*, 903 F.3d at 423. Summary judgment is appropriate when "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 factual dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

III.

The FHA makes it unlawful to "refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person" on the basis of "race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a). In Inclusive Communities, the Supreme Court construed this provision to encompass not only intentional discrimination under a disparate-treatment theory of liability, but also disparate-impact discrimination claims. 576 U.S. at 545–46, 135 S.Ct. 2507.

Under a disparate-impact theory of liability, "a facially neutral employment practice may be deemed violative of [the FHA] without evidence of the employer's subjective intent to discriminate." *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 645-46, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989), *superseded by statute on other grounds*, 42 U.S.C. § 2000e-2(k) (Title VII case). Instead, such claims allow "plaintiffs to counteract unconscious prejudices and disguised

animus" by removing "artificial, arbitrary, and unnecessary barriers" to housing that create unjustified "discriminatory effects." *Inclusive Communities*, 576 U.S. at 540, 135 S.Ct. 2507. In other words, a defendant can be liable under the FHA for instituting policies that have a disproportionately adverse effect on minorities and are not otherwise justified by a legitimate rationale. *Id.* at 524, 135 S.Ct. 2507.

As discussed above, we analyze disparate-impact claims under a three-step burden-shifting framework. Step One requires the plaintiff to demonstrate "a robust causal connection" between a defendant's challenged policy and a disparate impact on a protected class. *Reyes*, 903 F.3d at 424. If the plaintiff establishes such a connection, the burden shifts to the defendant to "state and explain the valid interest served by their policies." *Id.* If this standard is met, the burden then shifts back to the plaintiff "to prove that the defendant's asserted interests 'could be served by another practice that has a less discriminatory effect.'" *Id.*

The first time this case came before the court, we determined that the Families had satisfied their burden at Step One to show a causal connection between the Policy and an attendant disparate impact on Latino residents. *Reyes*, 903 F.3d at 432. We start from that holding.

A.

As for Step Two of the *Inclusive Communities* proof scheme, Waples argues that the Policy of verifying its tenants' legal status was justified by the risk of prosecution under the federal anti-harboring statute, which provides criminal penalties for "[a]ny person" who "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, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation." 8 U.S.C.A. § 1324(a)(1)(A)(iii). Waples points to this court's decision in *United States v. Aguilar*, 477 F. App'x 1000 (4th Cir. 2012) (per curiam), which upheld a landlord's conviction under the anti-harboring statute, as proof that entering into a lease agreement with an undocumented immigrant could put it at risk. Thus, it contends, the Policy of verifying legal status before renewing a lease was necessary to serve its valid interest of avoiding criminal liability.

Step Two of the *Inclusive Communities* framework requires defendants to "state and explain the valid interest served by their policies." 576 U.S. at 541, 135 S.Ct. 2507. The "touchstone" of Step Two is "business necessity," *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), and business necessity in the context of the FHA is "analogous to the business necessity standard under Title VII," *Inclusive Communities*, 576 U.S. at 541, 135 S.Ct. 2507. "Just as an employer may maintain a workplace requirement that causes a disparate impact if that requirement is a 'reasonable measure[ment] of job performance,'" a housing policy can stand if the landlord "can prove it is necessary to achieve a valid interest." *Id.*

A business necessity need not be a do-or-die matter. A necessitous policy can be, but need not be, one that spells the difference between solvency and bankruptcy. The Ninth Circuit has put it well: "Although the Supreme Court in *Inclusive Communities* used the phrase 'business necessity' to describe this step of the analysis, that term is somewhat of a misnomer . . . the

defendant need not demonstrate that the challenged policy is 'essential or indispensable' to its business—only that the policy 'serves, in a significant way,' its legitimate interests." *Sw. Fair Hous. Council, Inc. v. Maricopa Domestic Water Improvement Dist.*, 17 F.4th 950, 967 (9th Cir. 2021).

Avoiding criminal liability can certainly serve as the basis for a business necessity defense. *See Coffey v. Norfolk S. Ry. Co.*, 23 F.4th 332, 340 (4th Cir. 2022) ("[C]omplying with . . . legally binding federal regulation[s] is, by definition, a business necessity.") (quoting *Bey v. City of New York*, 999 F.3d 157, 171 (2d Cir. 2021)). But it also cannot be the case that defendants can claim business necessity by rattling off inapplicable statutes as their justification for promulgating a challenged policy. *Inclusive Communities*, 576 U.S. at 524, 527, 135 S.Ct. 2507 (noting that the interest underlying a business necessity defense must be "legitimate"). A "legitimate" interest cannot be a phony. *Id.* Otherwise defendants could manufacture business necessity based on speculative, or even imagined, liability. It seems then that the risk of prosecution or liability under a statute must at least be plausible. Here, the anti-harboring statute simply does not apply to landlords merely leasing to undocumented immigrants, and Waples's risk of prosecution is too attenuated to cross the threshold of a plausible concern.

The text of the anti-harboring statute requires something more than merely entering a lease agreement with an undocumented immigrant. To violate the statute, one must "knowing[ly]" or "reckless[ly]" "conceal, harbor, or shield from detection" such a person. 8 U.S.C.A. § 1324(a)(1)(A)(iii). Conceal, harbor, and shield are all active verbs. Thus, the statute only

applies to those who intend in some way to aid an undocumented immigrant in hiding from the authorities. It involves an element of deceit that is not present in run-of-the mill leases made in the ordinary course of business.

Our decision in *Aguilar* does not suggest otherwise. 477 F. App'x. 1000. There we upheld a conviction under the anti-harboring statute of a woman who rented nine of the ten rooms in her home to undocumented immigrants. *Id.* at 1003. We held that substantial evidence supported her conviction because each of her tenants were undocumented, and she had been "repeatedly . . . warned by officials that numerous of her tenants were not properly documented." *Id.* Looking at the trial evidence, it was clear that the defendant in *Aguilar* was running a flophouse to help offset her mortgage payments. *See United States v. Aguilar*, 4th Cir. No. 11-4961, ECF 31 (citing district court record). In other words, evidence of an intent to harbor undocumented immigrants was present.

But *Aguilar* did not hold that *housing* was a synonym for *harboring* under the statute, and the case cannot be read to extend the threat of prosecution under the statute to merely renting to an undocumented immigrant. Indeed, every precedential appellate decision to address whether renting to an undocumented person, without more, violates the statute has come to the same conclusion. *See*, *e.g.*, *United States v. McClellan*, 794 F.3d 743, 751 (7th Cir. 2015) ("[W]hen the basis for the defendant's conviction under [the anti-harboring statute] is providing housing to a known illegal alien, there must be evidence from which a jury could conclude, beyond a reasonable doubt, that the defendant intended to safeguard that alien from the authorities."); *United States v. Vargas-*

Cordon, 733 F.3d 366, 382 (2d Cir. 2013) ("The mere act of providing shelter to an alien, when done without intention to help prevent the alien's detection by immigration authorities or police, is thus not an offense under [the statute]."); *DelRio-Mocci v. Connolly Props. Inc.*, 672 F.3d 241, 247 (3d Cir. 2012) ("We do not know of any court of appeals that has held that knowingly renting an apartment to an alien lacking lawful immigration status constitutes harboring."); *Lozano v. City of Hazleton*, 724 F.3d 297, 320 (3d Cir. 2013) ("Renting an apartment in the normal course of business is not, without more, conduct that prevents the government from detecting an alien's unlawful presence. Thus, it is highly unlikely that renting an apartment to an unauthorized alien would be sufficient to constitute harboring in violation of the [statute]."); *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 530 (5th Cir. 2013) ("Farmers Branch's prohibition on renting to non-citizens here contrary to law thus not only fails to facilitate, but obstructs the goal of bringing potentially removable non-citizens to the attention of the federal authorities.").

In light of the consensus reading of the anti-harboring law, giving credence to Waples's understanding of the statute would make us a distinct outlier in an area of law which should ideally be national in character and uniform in the circuits' interpretation of it.

It is instructive to contrast the extensive regulation of immigration status in employment with the lack of such regulation in housing. Since 1986, the Immigration Act has required employers to vet the immigration status of their employees or face civil and criminal sanctions. *See* 8 U.S.C. § 1324a. The government requires employers to complete and maintain a Form

I-9 Employment Eligibility Verification for each employee. It maintains an electronic database to allow employers to verify the immigration information that employees submit, and it provides extensive guidance to employers on complying with the statute. *See*, *e.g.*, U.S. Citizen and Immigration Services, *Handbook for Employers M-274* (updated July 2023).

In contrast, no similar verification requirement, regulatory regime, or elaborate penal structure exists in the context of housing. This makes good sense. A policy that discouraged or prohibited landlords from housing any undocumented individual would lead to homelessness on an even greater scale than we are presently experiencing. Congress can of course modify its approach to housing policy at any time it so desires. In the meantime, we shall not misread the anti-harboring statute to facilitate the gratuitous infliction of homelessness upon countless numbers of people residing in this country.

The Department of Justice has represented in an amicus brief in support of the Families that "residential landlords do not ordinarily risk exposure to liability under [the anti-harboring statute] merely for failing to proactively verify their tenants' immigration statuses." Brief of Amicus Curiae, Dep't of Justice at 11. "The Department of Justice does not prosecute residential landlords merely because they do not, in the normal course of business, check the immigration status of every person living in their rentals." *Id.* at 12. Waples does not point to a single instance that would lead us to question the Department's representation.

In sum, the anti-harboring statute does not plausibly put Waples at risk for prosecution simply for leasing to families with undocumented immigrants.

Accordingly, we hold that Waples did not satisfy its burden at Step Two because its Policy did not serve in any realistic way to avoid liability under the anti-harboring statute. Because Waples did not meet its burden at Step Two, we need not reach Step Three to determine whether the Families could show that a less discriminatory alterative was available. For these reasons, the district court erred in granting summary judgment to Waples.

B.

There is a further infirmity in Waples's position specific to this case. The record here is simply too thin to support a business necessity defense.

To begin with, the circumstances surrounding Waples's enforcement of the Policy were dubious. The Policy seemed to come out of nowhere. The Families had lived at the Park for years before Waples began enforcing the long-dormant Policy provision. And the decision to begin enforcing the Policy stemmed, not from any immigration-related developments or discoveries at the Park, but from unrelated violations of other Waples policies at other Waples properties. Having a Policy on the books that required the verification of the legal status of all adult tenants in residence, but disregarding its enforcement for years, calls into question Waples's contention that it was concerned about avoiding harboring liability.

Even more puzzling is how Waples proceeded when it discovered that there were undocumented individuals living at the Park. If Waples was truly concerned about being prosecuted for housing undocumented immigrants, its expected course would be to remove such tenants from the Park as quickly as possible. But Waples did not evict a single person who failed to comply with the Policy from the Park. Instead, Waples

increased the rent payments that noncompliant tenants were charged every month. That meant that while Waples was representing that it could not house undocumented immigrants without facing criminal penalties, it was knowingly housing such immigrants and charging them a premium to stay. If Waples were at risk for prosecution under the anti-harboring statute, it would have a difficult time explaining to a prosecutor why, instead of evicting known undocumented immigrants, it opted to implement a surcharge instead.

On a record this thin, Waples cannot have met its burden to establish that the Policy served a legitimate interest. Proof schemes depend on record evidence and the record here falls short of anything approaching business necessity. For this reason too, the district court erred in granting summary judgment to Waples.

IV.

For the foregoing reasons, we reverse the grant of summary judgment for Waples and remand the case to the district court for further proceedings consistent with this decision.

REVERSED AND REMANDED

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 1:16-cv-00563

ROSY GIRON DE REYES, ET AL.,
Plaintiffs,

v.

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

[Filed May 6, 2022]

ORDER

LIAM O'GRADY, United States District Judge

Introduction

This action requires a recitation of this procedural history for context. The Plaintiffs filed their initial Complaint on May 23, 2016 and on July 22, 2016, the Court granted in part the Defendants' Motion to Dismiss. Dkt. 34. Specifically, the Plaintiffs' claims based upon a disparate impact theory of discrimination were dismissed. *Id.* The Parties proceeded through discovery and filed cross motions for summary judgment. After discovery was complete, the Defendants filed a Motion for Summary Judgment that was granted by the Court. *See* Dkt. 190. The Plaintiffs filed a timely appeal and the Fourth Circuit reversed the decision to grant the Defendants' Motion to

Dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *See de Reyes v. Waples Mobile Home Park*, 903 F.3d 415, 428 (4th Cir. 2018) ("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. Therefore, accepting these statistics as true, we conclude that Plaintiffs sufficiently alleged a prima facie case of disparate impact.") The Fourth Circuit also vacated the grant of summary judgment in favor of the Defendants on the Plaintiffs' Fair Housing Act claim, and remanded with the direction to "consider the cross motions for summary judgment under Plaintiffs' disparate-impact theory of liability in a manner consistent with [the Fourth Circuit's] opinion." *Id.* at 433.

On remand, the Parties' renewed motions for summary judgment were denied. Dkt. 283. The Defendants then moved to reconsider or clarify the denial of summary judgment and that Motion was taken under advisement. Dkt. 284; Dkt. 297. The case was then reassigned to this Court. *See* Dkt. 356. After reviewing the record and considering the Appellate Court's decision, this Court asked for supplemental briefing on the issues that will be addressed in this Order. Dkt. 413. The Parties diligently replied with the Court's request and further addressed these issues during multiple oral arguments.

Background

The Plaintiffs in this case are four married couples. Dkt. 1 at 4. They are Jose Reyes and Rosy Giron de Reyes; Alexis Bolanos and Ruth Rivas; Yovana Solis and Moya Yrapur; and Rosa Amaya and Herbert Cruz. *Id.* The Plaintiffs are Hispanic and have all immigrated to the United States from countries in Central America. *Id.* All the Plaintiffs live or have lived in a

mobile home park owned by the Defendants, Waples Mobile Home Park Limited Partnership, and other associated business entities (collectively "Waples").[1] *Id.* In 2015, the mobile home park, located in Fairfax, Virginia, implemented a policy (the "Policy") that requires every tenant living in residence to provide Waples with either a social security card, a passport, a U.S. visa, or an Arrival Departure Form (called an I-94 or I-94W). *Id.* at 6. Prior to 2015, Waples only required the lease holder to provide one of these identification documents. *Id.*

Waples changed the Policy in response to an incident at another trailer park which prompted Waples to re-examine the enforcement of the existing Policy.[2] Dkt. 142-21 at 3. After this reexamination, Waples began to require every adult who lived in the mobile home park to provide the required forms of identification where previously Waples had only required the person who signed the lease to provide the required identification. Dkt. 211 at 4. Residents of the mobile home park that lived with tenants who did not provide one of the forms of identification were sent letters informing those residents that they would be unable to renew their existing leases. *See e.g.* Dkt. 151-13 at 3; Dkt. 142-4; Dkt. 142-5; Dkt. 142-6. Those residents were told that their current leases would be converted

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[1] Waples is operated by A.J. Dwoskin & Associates, Inc. who is a co-defendant named in the case.

[2] "I proposed the policy in the meeting as a solution to the incident or the issue that came up at Forest Park Mobile Home Park. That incident was an—a child turned to – who became 18 was a registered sex offender, and it was not disclosed but a tenant notified us of them being a resident. So we discussed how do we find or look into tenants with a crime that were current residents instead of a tenant or other tenant notifying us." Dkt. 142-21 (deposition of Mark Jones).

to month-to-month leases and that those residents would also be required to pay a higher monthly rate for rent.[3]

The female Plaintiffs were unable to provide the types of identification required under the Policy as it was newly enforced. Dkt. 1 at 9. Waples did not accept alternative forms of identification offered by the female Plaintiffs; specifically, they did not accept an Individual Taxpayer Identification Number ("ITIN").[4] *Id.* at 6-7. When the female Plaintiffs were unable to comply with the Policy, the leases for the mobile homes where they resided were converted to the more expensive month-to-month leases. *Id.* at 11. In May of 2016, the Plaintiffs began this civil action, asserting claims of discrimination under the Fair Housing Act. Dkt. 1.

Legal Standard

The Parties have previously moved for Summary Judgment and the Motions were fully briefed. *See* Dkt. 247. Summary judgment will be granted "if the movant shows that there is no genuine dispute as to any material fact." Federal Rule of Civil Procedure 56(a). A party opposing a motion for summary

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[3] Based on deposition testimony, the Defendants' intent when raising the rental rates was to incentivize the tenants who did not comply with the Policy to vacate their homes in lieu of initiating eviction proceedings. *See* Dkt. 142-21 at 11-12. The Court finds these actions could fall within actions which "otherwise make unavailable or deny" the Plaintiffs' housing as contemplated by the Fair Housing Act. 42 USC § 3604(a). Whether or not these acts increased revenue for the Defendants does not factor into the Court's analysis of the claim made under the Fair Housing Act.

[4] The Internal Revenue Service issues ITINs to any individual earning income within the United States regardless of their immigration status. Dkt. 1 at 7.

judgment must respond with specific facts, supported by proper documentary evidence, showing that a genuine dispute of material fact exists, and that summary judgment should not be granted in favor of the moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). There is a genuine dispute of material fact when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248, 106 S.Ct. 2505. While "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Bouchat v. Baltimore Ravens Football Club, Inc.*, 346 F.3d 514, 519 (4th Cir. 2003) (quoting *Anderson*, 477 U.S. at 247-248, 106 S.Ct. 2505). "It is the responsibility of the party seeking summary judgment to inform the court of the basis for its motion, and to identify the parts of the record which it believes demonstrate the absence of a genuine issue of material fact." *Hyatt v. Avco. Fin. Servs. Mgmt. Co.*, 2000 WL 33912656, at *4, 2000 U.S. Dist. Lexis 13645, at 11 (E.D. Va. March 2, 2000) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)); aff'd, 22 F. App'x 81 (4th Cir. 2000). The Court may "consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute." Federal Rule of Civil Procedure 56(f)(3).

Discussion

The Fair Housing Act ("FHA") deems it unlawful to refuse to rent or sell a dwelling to any person based on race or national origin. 42 USC § 3604(a). A plaintiff can demonstrate a violation of the Fair Housing Act under a disparate impact theory of liability. *Texas*

Department of Hous. & Cmmty. Affairs v. Inclusive Communities Project, Inc., 576 U.S. 519, 539, 135 S.Ct. 2507, 192 L.Ed.2d 514 (2015) ("Recognition of disparate-impact claims is consistent with the FHA's central purpose.") (references omitted). A disparate impact claim is analyzed under a three-step burden shifting framework that was first articulated in *Wards Cove Packing Co., Inc. v. Atonio*. 490 U.S. 642, 653, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989). In the first step, the plaintiff demonstrates a "robust causality" between a challenged policy and the effect on a protected group. *de Reyes*, 903 F.3d at 424 (citations omitted). This causality can be proven through a statistical analysis. *Id.* at 425. If a plaintiff can show this causality, a district court will proceed to the second step of the burden shifting framework. At this step, the defendant must "state and explain the valid interest" achieved by the challenged policy. *Inclusive Communities*, 576 U.S. at 541, 135 S.Ct. 2507. If a neutral justification for the policy which is "substantial, legitimate, and nondiscriminatory" is advanced by the defendant, the plaintiff may then demonstrate that the defendant's interest can be achieved by an alternative practice with a less discriminatory effect. *Id.* at 527, 135 S.Ct. 2507. In the present case, the Court must evaluate the presence or lack of evidence that is relevant to all three steps of the burden shifting framework.[5] If there is no dispute of material fact

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[5] The Fourth Circuit vacated the grant of the motion for summary judgment for Waples on the Plaintiffs' Fair Housing Act claim, *de Reyes*, 903 F.3d at 433. The Fourth Circuit has directed the Court to "consider the cross motions for summary judgment under Plaintiffs' disparate-impact theory of liability in a manner consistent with [the Fourth Circuit's] opinion." Id. In its opinion, the Fourth Circuit did not resolve any factual issue under the standards used for summary judgment.

to one or more of the steps of the framework, summary judgment is appropriate and necessary to decide the disparate impact claim advanced by the Plaintiffs.

1. Do the Male Plaintiffs have Standing.

The Court first addresses the Defendants' argument that the male Plaintiffs lack standing to bring a suit under the Fair Housing Act ("FHA"). The Defendants have argued that "it is undisputed that the male Plaintiffs' alleged injuries arise solely because their wives cannot comply with the Policy." Dkt. 416 at 14. The Defendants believe that because the male Plaintiffs can comply with the Policy, the male Plaintiffs do not have standing in this case. *Id.* at 14-15.

The FHA allows for an "aggrieved person" to file a civil action under the statute. 42 U.S.C. § 3613(a)(1). A person cannot be discriminated against on "the terms, conditions, or privileges" of a rental because of "race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604. Further, under the FHA the term "person" is defined as "one or more individuals." 42 U.S.C. 3602. The Supreme Court notes that the term "aggrieved person" has been interpreted broadly in its prior decisions. *Bank of Am. Corp. v. City of Miami*, —— U.S. ——, 137 S.Ct. 1296, 197 L. Ed. 2d 678, 687 (2017) (The Court held that a city had standing under the FHA to pursue a discrimination claim). The Supreme Court has previously found standing for white tenants who alleged harm from a loss of association in rental complexes that did not offer housing to racial minorities. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972) ("the alleged injury to existing tenants by exclusion of minority persons from the apartment complex is the loss of important benefits from interracial associations.")

The male Plaintiffs argue that their standing derives from a loss of association caused by the Policy. Dkt. 417 at 15 (The decision to remain in the park was a "Hobson's choice" that would require the male Plaintiffs to leave their wives). Based on the loss of association with their spouses because of the enforcement of the Policy, the Court finds that the male Plaintiffs have adequately alleged interests which are within the zone of interest contemplated by the FHA. *See City of Miami*, 137 S.Ct. 1296, 197 L. Ed. 2d at 689. Accordingly, the male Plaintiffs have met the requirements to fall within the broad category of an "aggrieved person" who have standing to bring suit under the FHA. Therefore, the male Plaintiffs have standing to bring the current civil action.

2. Is there a genuine dispute of material fact as to whether the Plaintiffs can show a disparate impact of the Policy.

The Court next addresses the first prong of the burden shifting framework to evaluate a claim brought under the Fair Housing Act ("FHA"). For a disparate impact claim, a Plaintiff may use statistical analyses to prove that a challenged policy disproportionately affects a protected class. The Plaintiffs are Hispanic, which is a protected class under the FHA. *de Reyes*, 903 F.3d at 423 n. 3 (*ref Keller v. City of Fremont*, 719 F.3d 931, 948 (8th Cir. 2013); *Vill. of Freeport v. Barrella*, 814 F.3d 594, 606 (2d Cir. 2016)).

The Fourth Circuit has discussed the methods of the statistical analysis proposed by the Plaintiffs in a previous decision, *de Reyes*, 903 F.3d at 428. The Fourth Circuit explained that in the present case—assuming what was plead in the complaint is true—the "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." *Id.* at 429 (footnote omitted). This finding is based on the Fourth Circuit's previous holding that "the correct inquiry is whether the policy in question had a disproportionate impact on the minorities in the total group to which the policy was applied." *Betsey v. Turtle Creek Associates*, 736 F.2d 983, 987 (4th Cir. 1984) (It was proper to analyze the disproportionate impact of a policy on a specific building where it was applied, as opposed to the entire multi-building complex or the community in general). It follows that a *prima facie* case of discrimination can be shown when there is a statistically significant difference in the effect of a policy on a minority group within the specific area in question. *Id.* at 988; citing *Hazelwood School District v. United States*, 433 U.S. 299, 307-8, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977) ("When gross statistical disparities can be shown, they alone may in a proper case constitute *prima facie* proof of a pattern or practice of discrimination." (citations omitted)).

The Parties disagree on the accuracy of the statistical methods used by the Plaintiffs' expert witness, Dr. William Clark, to support the claim of disparate impact. The Plaintiffs rely on Dr. Clark's expert report to show that there is a statistically significant difference of the effect of the Policy on the Hispanic population within the mobile home park. *See* Dkt. 142-40 at 51. Dr. Clark bases his opinion on two sets of data, the United States Census, and a study of percentages of undocumented immigrants (based on data from the Pew Foundation, the Center for Migration Studies, and Migration Policy Institute). *Id.* at 52. Dr. Clark uses a small area of the census (a Public

Use Microdata Area) to approximate the population of the mobile home park. *Id.* at 55. From this data, Dr. Clark estimates the percentage of undocumented immigrants within the smaller geographic area of the mobile home park to approximate the percentages of Latinos affected by the policy. *Id.* Dr. Clark then compares that result to an estimated percentage of affected non-Latinos. *Id.* Dr. Clark also argues that the disparate impact might be greater within the mobile home park than the impact found in his final calculation. This is because that small area analyzed within the census tract has many single-family homes (as opposed to mobile homes), and single-family homes may have a lower percentage of Hispanic residents. *Id.* Based on his analysis, Dr. Clark concludes that there is a statistical disparity, within the mobile home park, in the effect of the Policy on the Hispanic residents within the park compared to non-Hispanic residents. This evidence is sufficient to demonstrate a *prima facie* claim of disparate impact from the Policy within a specific geographical location that is closely correlated to the mobile home park under the first step of the burden shifting framework.

The Defendants' expert, Dr. Weinberg, argues that Dr. Clark's estimates are unreliable, and the estimates have too large of a margin of error to show statistical significance. Dkt. 248-3 at 2. Dr. Weinberg believes that Dr. Clark did not appropriately estimate his margin of error and therefore did not correctly calculate the disparate impact within the smaller area of data that Dr. Clark uses for his analysis. *Id.* However, even a valid critique of the statistical methods offered by the Plaintiffs does not inherently demonstrate that Plaintiffs could not meet the requirements of the first step of the burden shifting framework. *See National Fair Housing Alliance v. Bank of America, N.A.*, 401

F. Supp. 3d 619, 637 (D. Md. 2019). The disagreement between the Parties' experts shows that there is a genuine dispute of material fact as to whether the statistical analysis of the Plaintiff can support a *prima facie* case of disparate impact.

3. Is there a genuine dispute that the Policy achieves a valid interest.

The Court next evaluates whether a genuine issue of material fact exists as to the second step of the disparate impact burden shifting framework. The Supreme Court has held that the second step of the burden shifting framework is analogous to the business necessity standard used to evaluate disparate-impact liability in employment actions brought under Title VII of the civil rights act. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities. Project, Inc.*, 576 U.S. 519, 541, 135 S.Ct. 2507 (2015). The business necessity standard is addressed by the Supreme Court in *Ricci v. Stefano*. 557 U.S. 557, 578, 129 S.Ct. 2658, 174 L.Ed.2d 490 (2009) (A test that is related to job performance is a valid business necessity) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971)). Therefore, the Court must decide the issue of whether a genuine dispute of material fact exists as to whether the Defendants can establish a valid reason for the challenged Policy. *See Inclusive Communities*, 576 U.S. at 541, 135 S.Ct. 2507 (". . . so too must housing authorities and private developers be allowed to maintain a policy if they can prove it is necessary to achieve a valid interest.") To prevail on summary judgment, the Defendants must show that there is no dispute that the Defendants can prove "a business necessity sufficiently compelling to justify the challenged practice." *Betsey v. Turtle Creek Associates*, 736 F.2d 983, 988 (4th Cir. 1984) (citations omitted).

Several district and appellate courts have evaluated the valid interest that private housing providers have advanced to defend FHA claims brought under a disparate impact theory of liability. Although these courts have articulated slightly different standards to evaluate the stated valid interest for a challenged policy, all the courts have required that the policy is legitimate and tied to the policy.

Summary judgment has been granted for plaintiffs bringing FHA claims when the district courts rejected a justification for a housing policy with occupancy limits when the defendants were unable to provide evidence that the occupancy limit was tied to any financial hardship or was necessary to comply with a specific Municipal Code. *Fair Hous. Ctr. Of Wash. v. Breier-Scheetz Props.*, 2017 WL 2022462, at *4, *LLC*, 2017 U.S. Dist. LEXIS 73037 at *9 (W.D. Wash. May 11, 2017). Other district courts have denied summary judgment based upon the existence of a disputed issue of material fact as to a challenged housing policy with occupancy limits. *See Treece v. Perrier Condo. Owners Ass'n*, 2020 WL 759567, at *18, 2020 U.S. Dist. LEXIS 26515 at *40 (E.D. La. February 14, 2020) ("Nevertheless, a defendant's proffered reasons for a policy cannot be merely speculative and must be supported by facts or documentation.") In *Treece*, plaintiff's summary judgment motion was denied when it was found that evidence might support that the challenged policy was tied to the quality of life in the defendant's condominiums or that increased occupancy would lead to increased wear and tear on the condominium infrastructure. Summary judgment has also been denied after district courts rejected the proposed valid interests that supported a defendant's challenged policy. Summary judgment was improper for the defendants when there is no evidence to support that policy or the

evidence flatly contradicts the defendant's assertion of the interest. *R.I. Comm'n for Human Rights v. Graul*, 120 F. Supp. 3d 110, (D.R.I. 2015) (Complying with state building codes was not a valid interest to justify occupancy limits, when higher occupancy limits would comply with those codes); *Gashi v. Grubb & Ellis Prop. Mgmt. Servs.*, 801 F. Supp. 2d 12, (D. Conn. 2011) (The district court viewed a subjective rationale "skeptically" and granted summary judgment for plaintiffs when no evidence could support the stated valid interests).

The Court looks at these decisions in other districts to evaluate the second step of the burden shifting framework. In accord with this line of cases, summary judgment should be denied for a defendant when a challenged policy cannot be shown either to aid in the compliance with a law or there is no evidence to support the valid interest as legitimate. However, if it is unquestioned that a federal law guides the actions of the Defendants, there will be no issue of material fact to preclude summary judgment for the Defendants, as the interpretation and application of a federal statute and relevant case law is not a question for the jury. The Defendants have proffered that their Policy is necessary to assure compliance with a federal statute, so the Court will look at the record to decide if that statute is connected to the valid policy based on undisputed facts in the record.

In the present case, the Defendants have argued that the valid interest of the challenged policy is to avoid criminal liability. The federal anti-harboring statute holds liable any person who houses an unauthorized alien knowingly or in reckless disregard of their immigration status. 8 USC § 1324. The Defendants in this case argue that the challenged policy is necessary to avoid criminal liability under this

statute. The Defendants have argued that the decision in *United States v. Villalobos Aguilar* definitively shows that a landlord can be held liable under this statute. 477 Fed. Appx. 1000 (4th Cir. 2012). In *Aguilar*, the defendant's guilty verdict for harboring an unauthorized alien was upheld when the Fourth Circuit found that substantial evidence supported the verdict. *Id.* at 1002-1003. To find a defendant guilty under the statute, circumstantial evidence is sufficient to show the "reckless disregard" *mens rea* that is required to be proven. *Id.* at 1003 (citing *United Sates v. De Jesus-Batres*, 410 F.3d 154, 161 (5th Cir. 2005)). Specifically, the Appeals Court considered the fact that the landlord "took no steps to ascertain the status of her tenants even after being warned by officials that numerous of her tenants were undocumented." Like the Defendants in the present case, the only action the landlord took in *Aguilar* was the receipt of a financial benefit as rental payments in exchange for housing. *Id.* at 1002. In the present case, the Defendants argue that it is necessary to take steps to ascertain the authorization status of the tenants within the mobile home park to avoid a prosecution and conviction like the landlord in *Aguilar*.

The Plaintiffs argue that *Aguilar* is factually distinct from the circumstances of the present case and that the *Aguilar* decision has been criticized by other circuits. Dkt. 417 at 9. However, this argument is unavailing. Circumstantial evidence is sufficient to support a finding of criminal liability under the statute. *Id.* at 1003 (evidence that defendants were aware persons were kept in their home until the persons paid a smuggling fee was sufficient circumstantial evidence to demonstrate a reckless disregard to the immigration status of those persons)); *see also Ricchio v. McLean*,

853 F.3d 553, 558 (1st Cir. 2017) (Circumstantial evidence plead in a complaint plausibly could support the claim that an immigrant victim of trafficking had been harbored under a separate immigration statute); *United States v. Tipton*, 518 F.3d 591, 594-596 (8th Cir. 2008) (A conviction for illegal harboring was upheld when the evidence that appellants knew aliens were unauthorized for employment was also sufficient to show reckless disregard or knowledge that the aliens did not have legal status in the country). It is undisputed that the Defendants in the present case leased housing to unauthorized immigrants for profit like the defendant in *Aguilar*. The Defendants cannot be forced to hope that there is a lack of circumstantial evidence to show the Defendants had the requisite *mens rea*, and subsequently face a conviction under the statute. In addition, the facts of the *Aguilar* case make it clear that the Department of Justice will pursue criminal charges against a lessor of housing who does not take affirmative steps to verify the authorization of those immigrants—potentially like the Defendants in the present case.

Complying with federal law is unquestionably a valid interest for the Defendants. *Inclusive Communities*, 576 U.S. at 543, 135 S.Ct. 2507 (A case should be dismissed if "federal law substantially limits" a defendant's discretion). The Defendants are right to rely on federal law when stating a valid interest for their challenged policy. Even if the *Aguilar* decision is in conflict with the decisions of other Appellate Courts, it is reasonable for the Defendants to rely on a prior decision of the Fourth Circuit, the Judicial Circuit within which they reside, to determine the scope of liability the Defendants could be exposed to at the time they enacted or enforced their policy.

The language used within the anti-harboring statute also supports a finding that the Defendants could face criminal liability. Statutory language is interpreted using its plain meaning. *Artis v. District of Columbia*, —— U.S. ——, 138 S. Ct. 594, 603, 199 L.Ed.2d 473 (2018). The anti-harboring statute itself criminalizes the act of harboring undocumented aliens for profit. 8 USC § 1324(a)(1)(A)(iii). Harboring is defined as "the act of affording lodging, shelter, or refuge to a person." Black's Law Dictionary (9th Edition 2009). The language of the statute indicates that housing and collecting rent from unauthorized aliens are predicates of the criminal act for which the Defendants could face liability.

Furthermore, it is unimportant whether the Defendants can provide evidence that they possessed the valid interest at the time the Defendants adopted the challenged policy. The anti-harboring statute was in effect at the time the challenged policy was implemented. *Aguilar* had been decided at the time the challenged policy was enforced and that decision would inform the Defendants that they could face liability in a Virginia Federal Court. The Defendants are presumed to have knowledge of the law at the time the Policy was implemented and enforced.

The question of whether the anti-harboring statute could apply to the Defendants in the instant case is a matter of law to be decided by the Court. *See North Carolina v. Virginia Beach*, 951 F.2d 596, 601 (4th Cir. 1991) (application of the law to the facts in question is a matter of law). Based on prior decisions in this judicial circuit and the language Congress used when the law was passed, the Court finds the Defendants could be found liable under the anti-harboring statute. Therefore, implementing a policy to avoid increased

criminal liability under the anti-harboring statute is a valid and necessary interest that satisfies the second step of the burden shifting framework. Accordingly, there is no genuine dispute of material fact as to whether the Defendants can proffer a valid interest that is served by the Policy.

4. Is there evidence that supports the existence of a reasonable alternative to the Policy.

As there is not a genuine issue of material fact as to whether the Defendants can state a valid interest for instating the challenged policy, the Court must turn to the third step of the disparate impact burden shifting framework. The third prong of the burden shifting framework requires the Plaintiffs to produce evidence that shows the valid interest achieved by the Policy could be met "by another practice that has a less discriminatory effect." *Inclusive Communities*, 576 U.S. at 527, 135 S.Ct. 2507.

The Plaintiffs have argued that the interests of the Policy could have been achieved by allowing the female Plaintiff's to use ITINs. The only evidence that the Plaintiffs have produced to support this assertion regarding ITINs is through the affidavit of an attorney, Ivan Yacub. Yacub is an immigration attorney who represents many Hispanic individuals in the Northern Virginia area. Dkt. 326-1 at 2. Yacub explains the process through which a non-citizen can obtain an ITIN while residing in the United States for the purposes of paying taxes to the IRS. *Id.* at 3. In his affidavit, Yacub concludes that the Policy will exclude immigrants with both lawful and unlawful status from housing at the mobile home park. *Id.* at 10. Yacub at no time asserts that accepting ITINs as identification will allow the Defendants to comply

with the anti-harboring statute. Yacub's affidavit unquestionably shows that possession of an ITIN will not demonstrate legal status in the country.

Accepting ITINs as identification is the Plaintiffs' proposed reasonable alternative to the Policy and is the only evidence of a reasonable alternative presented by the Plaintiffs. There is no evidence that the proposed reasonable alternative would allow the Defendants to limit their criminal liability under the anti-harboring statute. As there is no evidence from which a factfinder could conclude that the proposed reasonable alternative would allow Defendants to achieve their valid interest, there is no genuine dispute of material fact that would preclude summary judgement in favor of the Defendants.

A moving party may meet their burden on summary judgment by "pointing out" the "absence of evidence that supports a nonmoving party's case." *Celotex Corp.*, 477 U.S. at 325, 106 S.Ct. 2548; *see also* Fed. R. Civ. P. 56(c)(1)(B). As correctly indicated by the Defendants, there is no evidence that the Plaintiffs have produced that can satisfy the requirements of the third step of the disparate impact burden shifting framework. Accordingly, a reasonable factfinder could not return a verdict in favor of the Plaintiffs. As such, it is proper to grant summary judgment for the Defendants.

Conclusion

There is a legitimate interest, based on federal law, for the implementation of the Policy. The Plaintiffs have produced no evidence upon which a reasonable jury could find that there is an alternative to the policy that would allow the Defendants to avoid liability under relevant law within this judicial Circuit. For the Court to hold otherwise would place

the Defendants in the "double-bind" of liability that the burden shifting framework that evaluates a disparate impact claim is structured to avoid. *Inclusive Communities*, 576 U.S. at 542, 135 S.Ct. 2507. Therefore, Summary Judgment is **GRANTED** for the Defendants. The Plaintiffs' Motion for Summary Judgment is **DENIED**.

It is so **ORDERED**.

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.