No. 25-677

In the Supreme Court of the United States

CITY OF CLEVELAND, OHIO
Petitioner,
v.
ALBERT PICKETT, JR., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, *ET AL.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE AMERICAN WATER WORKS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae American Water Works Association ("AWWA" or "the Association") is an international, nonprofit, scientific, and educational society that is dedicated to the effective management of water. AWWA, which was founded in 1881, is the largest organization of water supply professionals in the world, and its membership includes more than 4,300 water systems that supply approximately 80% of the United States' drinking water and treat nearly half of the nation's wastewater. The Association's approximately 50,000 membership includes, but is not limited to, public water systems, scientists, and environmental advocates.

AWWA works to unite the diverse water community to advance public health, safety, the economy, and the environment. As part of its mission, AWWA places a particular emphasis on ensuring that water systems operate equitably and are accessible to the public. The Association believes "in nondiscriminatory billing and collection procedures to ensure each customer pays for the services rendered by a utility under its rates and tariffs." AWWA Policy Statement on Discontinuance of Water Service for Nonpayment, https://bit.ly/4dcdO3p (revised Jan. 10, 2022). AWWA similarly "recognizes that providing reliable and high-quality water, wastewater, reclaimed water, and stormwater services at fair and reasonable rates and charges to all customers is fundamental to a utility's mission."

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. The parties were given timely notice of AWWA's intent to file this brief.

AWWA Policy Statement on Affordability, https://bit.ly/46ecfjl (revised Jan. 13, 2024). These and other policy statements underscore AWWA's commitment to promoting and supporting the equitable management of water.

This mission is furthered by the availability and appropriate use of liens. AWWA strongly opposes discrimination, including in the application of liens. See generally AWWA Policy Statement on Non-Discrimination and Anti-Harassment, https://bit.ly/3WeHrdt (adopted Oct. 2021); AWWA Policy Statement on Diversity and Inclusion, https://bit.ly/3WARLwT (revised June 10, 2021). But liens represent an important tool in water systems' toolboxes, and alternatives to liens, like discontinuing service, have potentially disruptive impacts on customers and communities. The Sixth Circuit's decision below affirming class certification threatens to upend this toolbox and chill the use of liens, when water systems might otherwise file for those liens in an appropriate and legally authorized manner. Given its broad, nationwide membership and longstanding focus on these issues, AWWA is well situated to aid the Court in understanding the nationwide use and importance of liens, and thus the implications of the lower court's decision.

SUMMARY OF ARGUMENT

Water systems have no perfect option when a customer does not pay for services. These systems—often public, quasi-public, or small entities—must manage their financial affairs in the face of sometimes substantial past-due bills. Liens are an important part of the toolbox of options available to water systems to facilitate the equitable recovery of unpaid bills. Liens

work within a broader framework of legal and procedural safeguards, and help water systems across the nation maintain responsible operating budgets. Using liens in this manner is a long-recognized, and legally authorized, practice. Use of liens has been long regulated by states and local governments, which are best suited to make the policy decisions and weigh the tradeoffs that accompany the use of liens.

Filing a lien for nonpayment is not a step that water systems take lightly. But the alternatives to liens place even greater burdens on customers; they include cutting off a customer's drinking water, using debt collection agencies, and increasing rates on other customers to recover the shortfalls that nonpayments create. In many cases, liens are paid at the time a property is sold, and do not impact the availability of the dwelling, either for the customer or for future occupants.

As the certiorari petition explains, the decision below erroneously lowered the legal requirements for obtaining certification of a damages class action claiming that a water system's use of liens violates the Fair Housing Act ("FHA"), 42 U.S.C. § 3601 *et seq*. See Pet. 23–28. By doing so, the decision threatens to effectively remove liens from water systems' collections toolkit and force them to rely instead on techniques that are more burdensome to customers for addressing nonpayment.

Systems are funded by rates paid by customers, and failure to collect past due payments can ultimately result in higher bills for other customers. For water systems in small communities with a limited population across which to spread costs, raising rates among the customer base when a few customers do not pay

can have meaningful, negative effects on poor and minority households, thus harming the very households the FHA aims to protect.

The accumulation of compensatory and punitive damages claims through class certification carries the threat of substantial financial liability. Most systems would find it challenging to reallocate available funds to pay such claims, or to hire the costly and sophisticated counsel necessary to defend against such claims in prolonged litigation. While liens are a valuable tool for water systems, their benefit compared to other collection techniques (including those that may be more burdensome for consumers) often will not justify running the risk of such liability. Certification of damages class actions like the one in this case chills the use of liens by utilities, and may ultimately hurt the communities they serve. The Court should grant review and reverse the decision below.

ARGUMENT

I. Liens are an important and comprehensively regulated part of the toolbox available to water systems to facilitate the equitable recovery of unpaid bills.

The Sixth Circuit's decision will disincentivize water systems' use of liens because the financial consequences of class action lawsuits are substantial. As discussed below, state legislatures have generally authorized the use of liens as part of the options available to local governments and utility services facing delinquencies. The decision below threatens to disrupt the careful balances struck by legislators and inevitably

promotes the use of more burdensome tools like discontinuing service. Functionally removing liens from water systems' toolboxes will have numerous negative effects on both water systems and the communities they serve.

A. Water systems typically use liens only after reasonable efforts to resolve nonpayment.

Typically, when water systems provide services to customers, they do so on credit and rely on payment collection *after* customers receive their water. When residential or commercial customers fail to pay for services, water systems—when authorized within a particular jurisdiction—can file for liens with a county auditor (or other appropriate entity). That entity is then responsible for certifying a lien against the property that received the unpaid water services.

The typical practice within the water sector is to only file for a lien based on delinquent payments after all reasonable efforts have been made to contact the customer and resolve the nonpayment. For instance, some AWWA members provide multiple notifications to delinquent customers through text messages, phone calls, letters, bill stuffers, or door hangers, and some members do so for several months before filing a lien. Water systems also frequently engage in targeted outreach to nonpaying customers and employ broader programs designed to ensure customers understand (A) their financial obligations, (B) how to pay their water bills in a timely manner, and (C) the consequences of not paying their bills.

In concert with these efforts, many water systems offer financial assistance plans that help customers

pay past-due accounts and return to good standing. To that end, some AWWA members offer payment plans for delinquent customers, refer struggling customers to other entities for support (*e.g.*, private or public agencies), provide leak-forgiveness policies, or assist with in-home water conservation efforts. Some water systems also provide billing dispute mechanisms that allow customers to resolve their delinquent accounts before nonpayment prompts the system to file for a lien. Many AWWA members will internally assess customers' appeals of bills and escalate such appeals through multiple levels of review (for example, to intermediate offices, a utility review board, or a board of directors) as needed. Only once water systems have exhausted these outreach avenues do they file for liens, which are governed by federal, state, and local laws.

After a water system files for a lien, the remainder of the process is typically out of its control. State and local laws govern the process—the liens may be *filed* by water systems, but they are generally *certified* by third parties such as county auditors. The certification of liens is a highly variable process, as each jurisdiction has its own procedures. The role of state and local regulators is discussed in greater detail below.

B. Systems across the nation routinely rely on non-discriminatory liens as authorized by comprehensive state and local regulations.

Neutrally applied lien policies serve a legitimate and necessary business purpose—a reality acknowledged by jurisdictions across the nation. Many states

recognize liens as an important tool in local governments and utilities' toolboxes.[2] As these state laws demonstrate, liens are a legally authorized tool used by water, wastewater, and other systems to address delinquent payments. And as some AWWA members have noted, the mere availability of liens is often helpful in ensuring that customers become current on payments or agree to a payment plan after being educated about the potential for a lien to be filed. As a result, the availability of this tool can ensure that water systems do not have to employ *any* mechanisms for rectifying nonpayment.

Because liens are widely used, they are also comprehensively regulated under state and local laws. See, *e.g.*, New York City Lien Sale Task Force, *Report of the Lien Sale Task Force* 6 (2016), https://perma.cc/T2SP-W72V (stating, with respect to the New York City Tax Lien Sale program, that "[a]s

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[2] See, *e.g.*, Mich. Comp. Laws § 123.162 (2024) ("A municipality * * * has as security for the collection of water or sewage system rates * * * a lien upon the house or other building and upon the premises * * * to which the sewage system service or water was supplied."); Tenn. Code Ann. § 7-35-202(a) (2024) (allowing "any municipality having a municipal sanitary sewer system," in certain circumstances, to "enforce the payment of fees or assessments charged for sewer or wastewater disposal utility services by filing an action," including for the sale of a property, provided the sewer system "give[s] notice to the property owner, if different from the service user," with "a statement to the effect that, unless the payments are brought up to date, a lien will attach to the property"); Ky. Rev. Stat. Ann. § 376.265(1)–(3) (2024) (providing that a municipal utility "shall have a lien on the real property of a retail business ratepayer served by the municipal utility" that "shall remain in place until the rates and charges for the services are paid in full"); see also Conn. Gen. Stat. § 7-239(b)–(c) (2024); Mass. Gen. Laws ch. 40, § 42A (2023); Fla. Stat. § 159.17 (2025).

of 2007, the sale of certain tax liens is prohibited for * * * water and sewer liens on any single-family Class 1 property or residential properties owned by certain senior citizen, disabled, or low-income homeowners as long as they receive one of * * * [certain] exemptions"). Such regulations (alongside water systems' own policies) provide appropriate safeguards for the equity considerations inherent in the imposition of liens. Indeed, liens are regulated alongside the other options available to water systems facing delinquent accounts (like service discontinuance) to create overarching collection mechanisms that seek to balance numerous competing public policy objectives. These objectives are determined by state and local governments and therefore vary across jurisdictions.

State and local laws, not water systems, reflect and control the policy decisions of when and how to implement liens. As such, water systems' use of liens is tailored to satisfy, and conducted in accordance with, applicable state and local laws.

C. Liens help water systems maintain responsible operating budgets.

The appropriate use of liens by water systems is "necessary to achieve" "valid" business interests. *Tex. Dep't of Hous. & Cmty. Affairs* v. *Inclusive Communities Project, Inc.*, 576 U.S. 519, 541 (2015) (holding that "private developers [should] be allowed to maintain a policy if they can prove it is necessary to achieve a

valid interest").[3] As entities responsible for providing critical services to individuals, families, and businesses, water systems must ensure they are self-sustaining and capable of providing water to customers for reasonable and appropriate rates. This mandate is not just a practical reality of operating a business—it is a function of various jurisdictions' regulations and policies requiring local governments to maintain financial solvency. But, if class-certification decision here is allowed to stand, the threat of classwide damages may chill the use of liens, or "coerce * * * costly settlements" based on even the valid use of liens. *Lab'y Corp. of Am. Holdings* v. *Davis*, 605 U.S. 327, 333 (2025) (*LabCorp*) (Kavanaugh, J., dissenting from dismissal of writ of certiorari as improvidently granted).

As the U.S. Environmental Protection Agency has recognized, one of the key attributes of an effectively managed water system is whether it is financially viable. See U.S. Env't Prot. Agency et al., *Effective Utility Management: A Primer for Water and Wastewater Utilities* 2, 5 (2017), https://bit.ly/46yoGXk (highlighting "Financial Viability" as one of "Ten Attributes of an Effectively Managed Utility"). Fiscally responsible

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[3] While the Sixth Circuit did not review the district court's denial of Cleveland Water's motion for summary judgment on Plaintiffs' FHA claims, Pet. App. 7a, 21a–22a, Cleveland Water's "legitimate business reason[s]" for using liens can defeat Plaintiffs' disparate-impact claims. *Graoch Assocs. # 33, L.P.* v. *Louisville/Jefferson Cnty. Metro Hum. Rels. Comm'n*, 508 F.3d 366, 374 (6th Cir. 2007) (under the FHA "if the plaintiff makes a prima facie case, the defendant must offer a 'legitimate business reason' for the challenged practice" (citation omitted)); see also *Inclusive Communities*, 576 U.S. at 541 ("housing authorities and private developers [must] be allowed to maintain a policy if they can prove it is necessary to achieve a valid interest").

and legally compliant operations are essential to the long-term sustainability of a community's water infrastructure. See *id.* at 21, 35 (noting that one of the measures to assess performance for "Product Quality," one of the "Ten Attributes of an Effectively Managed Utility," is "[r]egulatory compliance"). For water systems to equitably and effectively function, they must ensure their operations are conducted in a financially sustainable manner. To achieve this goal, water systems should, among other things, "implement efficient business practices * * * and prudently manage capital, operating, and financing costs." AWWA Policy Statement on Affordability, https://bit.ly/46ecfjl.

To that end, water systems must rely on the revenue they bring in from customers to pay for operational expenses and other costs (*e.g.*, capital improvements), and the costs of providing water services to customers must be equitably distributed. As AWWA has previously documented, the cost of restoring existing water systems throughout the United States, expanding them to meet growing populations, and making sure systems can maintain current water service levels will exceed $1 trillion dollars through 2037. See AWWA, *Buried No Longer: Confronting America's Water Infrastructure Challenge* 3–4, 9–10 (2012), https://perma.cc/G5PR-HYHZ. Much of the United States' more than one million miles of underground water pipes is near the end of its useful life. *Id.* at 3. The extraordinary costs of replacing those pipes to protect public health and ensure access to water reinforce the importance of water-system revenue and avoiding delinquency-caused budgetary shortfalls. See *id.* at 15.

As a result, systems must implement practices to financially protect their ability to function as stewards

of the public health and welfare, including when they face issues caused by nonpayments. See U.S. Env't Prot. Agency, *Assessing Water System Managerial Capacity* 22 (2012), https://bit.ly/3WOlnIo (highlighting indicators of "Strong Managerial Capacity" for water systems, including "[c]lear information on procedures for" the "collection of past due accounts"); see also AWWA Policy Statement on Discontinuance of Water Service for Nonpayment, https://bit.ly/4dcdO3p.

The more a water system's delinquency rates rise, the more its financial stability is eroded and its capabilities are compromised (*e.g.*, reduced borrowing capacity). As some AWWA members highlight, their overall collections performance is factored into their credit ratings. Credit ratings, in turn, affect water systems' ability to borrow and the interest rates they must pay on their debt. Thus, to balance "the fiscal sustainability of the utility" with efforts to ensure households "have access to utility services," "AWWA strongly recommends a combination of logical policies, procedures, and assistance programs by utilities, regulators, and governmental entities." AWWA Policy Statement on Affordability, https://bit.ly/46ecfjl.

Water systems recognize that certain debts for services rendered will not be repaid and build such debts into their operational budgets. But, systems must operate and set rates based on an understanding that most customers will pay for the services they receive. Individually small, past-due water bills can become significant in the aggregate. For instance, one AWWA member reported having to collect nearly $1.5 million dollars in unpaid water and wastewater bills over the past decade through liens. And another AWWA member highlighted an instance where it had to repeatedly

file liens for over a decade to "catch up" on unpaid balances at one property. Given the thin margins and increasing regulatory and capital costs for aging infrastructure many systems face, they can ill afford additional budgetary challenges.

In short, liens are necessary for water systems to achieve their "valid" business interests. *Inclusive Communities*, 576 U.S. at 541. Liens are one of the tools available to water systems that help them remain self-sustaining and capable of providing water to customers at reasonable and appropriate rates. But, if courts adopt the Sixth Circuit's approach, the threat of classwide damages could chill the use of liens—despite the important interests those liens advance.

II. States and local jurisdictions are best suited to govern the use of liens and alternative collection methods by water systems.

There is no perfect solution when local governments or public utilities face mounting nonpayments. If they cannot use liens to elicit payments from delinquent customers, providers like water systems will be compelled to use other, more draconian methods. Forcing the use of these alternatives disrupts the policy balance struck by lawmakers in jurisdictions where liens are the preferred method of recovering late payments. And, as noted above, after a water system files for a lien, the remainder of the lien process is typically out of its control. This is because the way that liens are filed by water systems and subsequently certified is a creature of state and local law.

Once a water system files a request for a lien, the lien process is typically *entirely* out of the hands of that system. For example, some jurisdictions mandate that

unpaid municipal water bills "become[] lien[s] upon the lot[s] or parcel[s] of real estate." Wisc. Stat. Ann. § 66.0809(3)(b) (2024). Others give local governments the discretion to certify and collect liens in a manner of their choosing. See Colo. Rev. Stat. § 31-20-105 (2024) ("Any municipality, in addition to the means provided by law, if by ordinance it so elects, may cause any or all delinquent charges, assessments, or taxes made or levied to be certified to the treasurer of the county and be collected and paid over by the treasurer of the county in the same manner as taxes are authorized to be by this title."); Idaho Code § 42-3212(*l*) (2025) ("All such rates, tolls and charges not paid * * * shall become delinquent * * * and shall be * * * placed upon the tax roll and collected in the same manner and subject to the same penalties as other district taxes."). And others connect the collection of liens to the collection mechanism for real property taxes. N.C. Gen. Stat. § 160A-314 (2024). Various policy decisions—best made by state and local legislators—animate these state-specific mechanisms. But it is those state policies, rather than the mere filing of a lien, that have the potential to result in housing becoming "unavailable." 42 U.S.C. § 3604(a).

State law may also authorize other alternatives, all with tradeoffs. For instance, water systems sometimes employ third-party debt collection services to assist with unpaid bills, but using third-party debt collectors has disadvantages both for water systems and consumers. The use and characteristics of debt collection services vary state to state. See, *e.g.*, Md. Code Ann., Com. Law § 14-201 (2010) (regulating "'collector[s]' * * * collecting or attempting to collect an alleged debt

arising out of a consumer transaction"). When authorized by law within specific jurisdictions, water systems may refer delinquent accounts to debt collection companies, which in turn take over the process of securing repayment for water services. While some AWWA members use debt collection agencies to collect outstanding debts, others report that the use of such agencies can pose logistical issues that reduce their usefulness when compared to liens. And while water systems typically do not report billing issues to credit reporting agencies themselves, debt collection services may do so and thus harm customers' credit ratings.

When authorized, water systems may also directly file collections lawsuits against customers who have not paid their bills. See Ohio Rev. Code Ann. § 743.04(A)(1)(b) (2024) (authorizing such suits). Such suits may be more burdensome for consumers and systems alike than the imposition of a lien.

Another option available to water systems is to discontinue a customer's water service. Of the tools available to water systems, this likely has the most direct and immediate impact on customers and communities; shutting off a customer's water, even when implemented within the parameters of a given jurisdiction's laws, imposes financial and other hardships that are distinct from those associated with liens. For instance, discontinuing water service can cause a particular structure to become practically uninhabitable, even if only briefly, or disrupt important public health functions dependent on access to water. See Sharmila L. Murthy, *Disrupting Utility Law for Water Justice*, 76 Stan. L. Rev. 597, 611 (2024). It is for this reason that AWWA emphasizes that the "[d]iscontinuance of water service for nonpayment should be instituted with

sufficient customer notification, *and only after other reasonable alternatives have been exhausted*." AWWA Policy Statement on Discontinuance of Water Service for Nonpayment (emphasis added), https://bit.ly/4dcdO3p. Further emphasizing the importance of liens, some AWWA members report that in various situations these alternatives are unavailable to water systems. For example, discontinuing service may not be appropriate where water service is provided for multi-family residential properties or properties providing critical services, leaving liens as the only viable tool to recover unpaid debts. Thus, imposing liens is sometimes preferable to both debt collection and water discontinuance from an equity perspective, and doing so better effectuates the goal of the FHA to avoid making housing "unavailable." See 42 U.S.C. § 3604(a).

Another reason some state and local legislatures favor liens is their potential to prevent rate increases. Without liens or the deployment of other means of collecting on unpaid bills, customers who do pay their bills are required to "bear the costs" of delinquent customers through higher rates. AWWA Policy Statement on Discontinuance of Water Service for Nonpayment, https://bit.ly/4dcdO3p. This is true for water systems, and it is especially true for systems in small communities with a limited population across which to spread costs. In those communities, raising rates among the customer base when a few customers do not pay can have meaningful, negative effects on poor and minority households, thus harming the very households the FHA aims to protect.

Requiring paying customers to effectively subsidize nonpaying customers through higher rates is also in

tension with the general principle that utility rates should be "just, reasonable, and nondiscriminatory." Murthy, *supra*, at 603. "[T]hese requirements are often interpreted as creating an explicit or implicit prohibition on cross-subsidization of water rates within the same rate class." *Ibid.* That is, while some water systems are authorized within their particular jurisdictions to adjust bills based on select factors (*e.g.*, the disparate costs of providing water services to different locations), state laws often expressly incorporate equity into water fee collection policies, and prohibit water systems from inequitably reducing or forgiving costs for select customers. See Ohio Rev. Code Ann. § 743.04(A) (providing that water fees may be collected and charged to "pay[] the expenses of conducting and managing the waterworks of a municipal corporation" in a "sufficient amount and in such manner as the director, other official, or body determines to be most equitable from all tenements and premises supplied with water"); see also Alaska Stat. § 42.05.391(a) (2024) ("Except as provided in AS 42.05.306, a public utility may not, as to rates, grant an unreasonable preference or advantage to any of its customers or subject a customer to an unreasonable prejudice or disadvantage.").

In summary, liens protect water systems' financial sustainability and provide a means for water systems to avoid violating their legal duties to treat customers fairly by not placing the burden caused by nonpayment onto paying customers. In both respects, liens serve an important governmental purpose and further the principles of equity. See *Graoch Assocs.*, 508 F.3d at 374. Without liens, water systems may be forced to use other tools to recover unpaid fees—a result many jurisdictions want to avoid.

III. The Sixth Circuit's affirmance of class certification of FHA claims based on the race-neutral use of liens is contrary to law and leaves systems with limited options to address delinquent payments.

The Sixth Circuit erred by affirming the district court's certification of a damages class action under the FHA, and its decision fundamentally jeopardizes the use of liens by water systems.

A. Class certification jeopardizes the use of liens.

The decision below threatens to chill the use of liens, even when they could otherwise be applied in an appropriate and legally authorized manner. "Classes that are overinflated with *uninjured* members raise the stakes for businesses" by threatening "potentially ruinous liability." *LabCorp*, 605 U.S. at 333 (Kavanaugh, J., dissenting) (citation omitted). The risk of a massive judgment through the accumulation of individual claims is particularly acute under the FHA because the FHA allows plaintiffs to recover both actual and punitive damages, plus attorney's fees.[4] See 42 U.S.C. § 3613(c). Further, as Cleveland Water notes, the costs of defending against a class-action suit are significant and can by themselves be a substantial burden on a water system's budget. See Pet. 31.

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[4] Below, Plaintiffs sought compensatory damages "for injuries including * * * monetary loss, humiliation, embarrassment, emotional distress, [and] the deprivation of statutory and constitutional rights," as well as punitive damages to "punish Defendant" and "deter Defendant from engaging in similar conduct in the future." Class Action Complaint at 38, *Pickett et al.* v. *City of Cleveland*, No. 1:19 CV 2911 (N.D. Ohio Dec. 18, 2019), ECF No. 1.

As explained above, liens are a valuable tool in collecting payments for unpaid water bills. For many water systems, however, the benefit of liens as compared to other collection tools may not warrant the risk of a class action suit under the FHA. If the class-certification decision here is allowed to stand, many water systems will likely reconsider their use of liens. And as explained above, if water systems cease or reduce their use of liens, they will need to rely on other collection techniques that may ultimately be more burdensome for consumers. In other words, the decision below *disincentivizes* systems from filing for liens and *incentivizes* the use of more burdensome approaches for obtaining delinquent payments (like discontinuing service).

Though the Sixth Circuit's decision empowers class-action plaintiffs to force settlements without needing to litigate the merits of their claims, neutrally applied liens rarely, if ever, violate the FHA. As relevant here, the FHA prohibits "mak[ing] unavailable or deny[ing] a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a). The mere filing of liens does not deprive residents of the continued use of their dwellings. A lien is merely a security interest, and the occupant can continue to reside in a dwelling where a lien is in place. Typically, a lien only remains in place "until [the] debt * * * that it secures is satisfied," and "the creditor does not take possession of the property on which the lien has been obtained." *Lien*, *Black's Law Dictionary* (12th ed. 2024); see also Ohio Rev. Code Ann. § 743.04(A)(1)(a) (providing that a lien "shall be released immediately upon payment in full of the certified amount").

Unpaid water bills secured by liens are most often collected when a particular property is sold or refinanced. While liens may reduce the equity available to be paid to an owner when a property is sold, they do not prevent any present or future use of the property. In addition, when a lien is assessed against a property comprised of rental units, usually efforts are made to protect both renters and landlords from the effects of nonpayment by individual customers. Therefore, merely filing liens does not "make unavailable or deny[] a dwelling" within the meaning of the FHA. 42 U.S.C. § 3604(a).

Plaintiffs' FHA claims here rely on a disparate-impact theory, recognizing that there was no intentional racial discrimination. Although the FHA allows for disparate-impact claims, see *Inclusive Communities*, 576 U.S. at 545–546, such claims are "limited." *Id.* at 540. "Disparate-impact liability mandates the 'removal of artificial, arbitrary, and unnecessary barriers,' *not the displacement of valid governmental policies*." *Ibid.* (emphasis added) (quoting *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971)). The displacement of "valid governmental and private priorities" through disparate-impact liability untethered from "the safeguards discussed" by this Court "set[s] our Nation back in its quest to reduce the salience of race in our social and economic system." *Id.* at 544. As the Sixth Circuit acknowledged when granting the petition to appeal the district court's class-certification order, "while [circuit] precedent's application of the FHA is broad, it is not limitless; we expressly rejected the assertion that '*any* action that results in the unavailability of housing for protected classes is actionable, no

matter how attenuated.'" Order 3, *In re City of Cleveland*, No. 23-0309 (6th Cir. May 7, 2024), ECF No. 19 (quoting *Mich. Prot. & Advoc. Serv., Inc.* v. *Babin*, 18 F.3d 337, 345 (6th Cir. 1994)). Unfortunately, however, the Sixth Circuit's decision below declined to reach the merits of Plaintiffs' FHA claims, see Pet. App. 21a–22a, and it is unclear whether the Sixth Circuit will have another opportunity to do so, given the settlement pressure that class certification imposes. See *LabCorp*, 605 U.S. at 333 (Kavanaugh, J., dissenting).

In sum, the decision below risks a significant *in terrorem* effect: the prospect of a large damages award in a class-action suit will likely deter water systems from using liens, even if claims that the liens violate the FHA lack merit. By merely *alleging* a disparate impact—regardless of whether the underlying utility practice violates the FHA—plaintiffs could effectively block the continued use of a widely recognized, state-sanctioned practice. And, as discussed below, the class certification itself is erroneous.

B. Plaintiffs failed to show that common questions predominate over individual inquiries.

The Sixth Circuit should not have affirmed the district court's certification of Plaintiffs' damages class action under the FHA because Plaintiffs have failed to show that common questions predominate over individual inquiries. See Fed. R. Civ. P. 23(b)(3). As Justice Kavanaugh has explained, "common questions do not predominate" where, as here, "a damages class includes both injured and uninjured members." *LabCorp*, 605 U.S. at 328 (Kavanaugh, J., dissenting).

As the certiorari petition explains, the decision below violates that principle—and, in doing so, compounds two separate circuit splits—because it affirmed the certification of a damages class in which up to 20% of class members suffered no injury other than an intangible harm based on the asserted disparate impact of a race-neutral policy. See Pet. 14–28. The decision below held that all class members have established an Article III injury "by virtue of their FHA [disparate-impact] claim." Pet App. 16a.

As the petition explains, that holding "untethers disparate-impact liability from its moorings and leaves the doctrine adrift." Pet. 28. The Sixth Circuit reasoned that Congress has "elevated" disparate-impact claims under the FHA to the level of Article III injury. Pet. App. 17a. But even in instances where "Congress's views may be 'instructive'" in deciding "whether a harm is sufficiently concrete to qualify as an injury in fact," *TransUnion LLC* v. *Ramirez*, 594 U.S. 413, 425 (2021) (citation omitted), a court must attend to the precise nature of the harm that Congress has addressed in the statute at issue.

The Sixth Circuit did not do that here. As relevant, the FHA prohibits "*mak[ing] unavailable or deny[ing] a dwelling* to any person because of race." 42 U.S.C. § 3604(a) (emphasis added). If, as the Sixth Circuit reasoned, the class members' standing is founded on the core harm that Congress addressed in the FHA, then—to establish a concrete injury for purposes of Article III standing—the class members should have been required to show that Cleveland Water's lien practices caused the tangible harm of denying them housing or rendering their housing unavailable.

If the Sixth Circuit had engaged in the proper inquiry and focused on whether Cleveland Water's lien practices caused a concrete injury by depriving class members of housing, the court would have been compelled to conclude that individual questions predominate over common ones, foreclosing certification of a damages class. See Fed. R. Civ. P. 23(b)(3). That is because, as explained above, the mere imposition of a lien does not interfere with a resident's continued occupation and use of the property. See pp. 18-19, *supra*. To the extent that the imposition of a lien ever denies an individual housing or makes their housing unavailable, whether a particular class member incurred such injury would require an individualized inquiry.

A court cannot tell whether liens make housing unavailable without examining the unique situation of individual customers. Answering this question would require "members of [the] proposed class * * * to present evidence that varies from member to member." *Tyson Foods, Inc.* v. *Bouaphakeo*, 577 U.S. 442, 453 (2016) (citation omitted). How liens might generate housing unavailability for customers is therefore not "an objective issue susceptible to common, classwide proof." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258, 282 (2014).

Where, as here, class members are "exposed to different [alleged harms], in different ways, over different periods," and some suffer no injuries at all, courts cannot say a common question predominates. *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 609–610 (1997). For example, in *Amchem Products*, although all class members were exposed to asbestos products, factual differences in the manner of exposure and symptoms caused individual concerns to dominate. 521 U.S. at

623–624. Rule 23 seeks to avoid these individualized inquiries, and, accordingly, does not authorize the damages class here because it "consist[s] of both injured and uninjured members." *LabCorp*, 605 U.S. at 332.

Although Cleveland Water imposed liens on all class members, questions of whether the liens rendered housing "unavailable" predominate over the question of disparate impact. The mere existence of a "shared experience" is far from sufficient to satisfy Rule 23(b)(3)'s "demanding" predominance requirement. *Amchem Products*, 521 U.S. at 623–624. Because the effects of a water-system lien change with the circumstances of the customer, individualized questions predominate over questions common to the class.

CONCLUSION

For the foregoing reasons and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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