

No. 25-677

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IN THE  
Supreme Court of the United States

CITY OF CLEVELAND, OHIO,  
*Petitioner,*

v.

ALBERT PICKETT, JR., *et al.*,  
*Respondents.*

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**On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Sixth  
Circuit**

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**BRIEF IN OPPOSITION**

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**RESTATEMENT OF QUESTION PRESENTED**

1. Whether the Sixth Circuit erred in affirming the certification of a Rule 23(b)(3) damages class where the record shows every class member has a concrete injury under Article III from the placement of a lien on their property pursuant to a racially discriminatory policy.

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## INTRODUCTION

This case arises out of the City of Cleveland’s (“Cleveland”) policy of attaching secured liens to homeowners’ property for unpaid water debt of as little as \$300. Under that policy, Cleveland Water, a department of the City of Cleveland, places disproportionately more water liens on the residential property of Black Cleveland Water customers than the residential property of white Cleveland Water customers in Cuyahoga County, a disparity that persists even when controlling for income.

The consequences of a water lien are significant. Water liens create a property interest that gives the lienholder the right to transfer or sell the liened property to satisfy the debt. *Pickett v. City of Cleveland*, No. 19 CV 2911, 2023 WL 11987525, at \*5 (N.D. Ohio Sept. 29, 2023) (hereinafter, “MSJ Order”). And they subject homeowners to penalties and interest that can increase their underlying debt and put them at an increased risk of losing their home through eviction or foreclosure. Moreover, a property with a water lien is 15 times more likely to undergo tax foreclosure than one without. MSJ Order, 2023 WL 11987525 at \*5.

Plaintiffs, four Black Cleveland homeowners and residents who had a water lien placed on their property, filed this class action lawsuit challenging Cleveland’s water lien policy under the Fair Housing Act (“FHA”) and Ohio Civil Rights Act (“OCRA”). They moved to certify two classes of Black homeowners and residents with water liens for both injunctive relief and damages under Rules 23(b)(2) and 23(b)(3) of the Federal Rules of Civil Procedure, respectively. The District Court granted Plaintiffs’ motion for class

certification, and the Sixth Circuit unanimously affirmed following an interlocutory Rule 23(f) appeal. The Sixth Circuit subsequently denied Cleveland’s petition for rehearing en banc.

Cleveland now asks this Court to grant certiorari to address an issue premised on a mischaracterization of the record, not addressed in the Sixth Circuit decision below, and for which there is no existing circuit split. The petition should be denied for the following reasons:

*First*, the Sixth Circuit expressly declined to address the circuit split raised by Cleveland—whether a class may be certified with uninjured members—because it instead found that every class member *was* injured, thereby satisfying Article III standing. App. 16a, 21a. As a “court of review, not first view,” this Court should decline to grant certiorari on a legal issue that was not considered by the court below. *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

*Second*, this case presents no cert-worthy issues for this Court to consider. Cleveland argues that because “up to twenty percent” of the class had no economic injury—and therefore had no concrete injury beyond the “mere” violation of the FHA—the certified 23(b)(3) class fails to meet the requirements of both Article III and Rule 23(b)(3). *See* App. 18a. Thus, Cleveland contends this case raises questions of whether all class members must have Article III standing at the class certification stage (i.e., the “*Lab-Corp* split”) or whether Article III requires a concrete injury beyond a statutory violation (i.e., the “*Acheson* split”). These arguments are pure sleight of hand. Not only is it factually incorrect that as much as 20 percent of the class lacked economic injury, but

Cleveland’s argument ignores that this Court has repeatedly stated racial discrimination itself causes a dignitary harm that is a concrete injury under Article III. *See, e.g., Haaland v. Brackeen*, 599 U.S. 255, 292 (2023); *Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984). Contrary to Cleveland’s assertions, this well-settled legal principle is unaffected by the fact that Plaintiffs challenge racial discrimination under a disparate impact theory because the dignitary harm of being treated unequally remains the same. Accordingly, the Sixth Circuit correctly held that every class member alleged an Article III injury.

Moreover, Cleveland’s argument overlooks the fact that every member of the class was also injured by the assessment of a lien against their property. A lien is a concrete and immediate incursion on property rights that undoubtedly rises above the “identifiable trifle” of harm required for Article III standing. *United States v. Students Challenging Regul. Agency Procs.*, 412 U.S. 669, 689 n.14 (1973). This is particularly so in the context of a claim under the FHA, which requires only “the [Article] III minima of injury in fact.” *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982). The presence of *two* class-wide concrete injuries—racial discrimination and lien attachment—makes the issues raised in both *LabCorp v. Davis*, 605 U.S. 327 (2025), and *Acheson Hotels LLC v. Laufer*, 601 U.S. 1 (2023), irrelevant to this case.

*Finally*, the interlocutory posture of this case weighs against review. This Court has long observed that declining to review an interlocutory appeal promotes judicial efficiency and accuracy because it allows courts to consider important legal issues with the benefit of a fully developed factual record. This principle is particularly important here because the

petition is premised on an unresolved factual issue that Cleveland mischaracterizes as “undisputed.” Pet. 3. The petition maintains that Plaintiffs’ expert admitted that “up to twenty percent” of the class has no economic injury because they incurred no penalties or interest on their liens. *Id.* But Plaintiffs’ expert made no such admission. Rather, he observed that one of the then-five<sup>1</sup> named plaintiffs had no penalties or interest. This named plaintiff did, however, endure an economic injury because her mortgage lender increased her monthly mortgage payments based on Cleveland’s placement of a lien on her home. Steil Dep., Record 65-10, PageID #1505. The record in this case does not establish—nor have there been any factual findings by any court—that there are “a substantial number of [class] members who suffered no economic injury” as claimed by Cleveland. Pet. at i.

This case is also a particularly poor vehicle for interlocutory review because, other than delay, such review will have little impact on how the case proceeds. Even if this Court concluded Cleveland were correct about the law and the record (and it is wrong on both), there would be no impact on the district court’s certification of the 23(b)(2) class for injunctive relief, and the only impact on the 23(b)(3) class would be to modify the class definition in a way that would still include the vast majority of class members.

The Court should deny the petition.

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<sup>1</sup> Odessa Parks previously served as a plaintiff in this case and is now deceased. App. 5a n.3.

**STATEMENT OF THE CASE****I. Cleveland's Water Lien Policy Disproportionately Harms Its Black Customers.**

Cleveland Water provides water services to over a million customers within its service area, which includes Cuyahoga County as well as portions of other counties. App. 3a. Ohio law provides that municipal waterworks may collect unpaid water debt by either placing a water lien on the property or pursuing legal action, but neither is required. App. 4a n.2. Cleveland opts for the former. Cleveland's water lien policy specifies that any customer with an account balance of \$300 or more that has been delinquent for over 180 days may have their water charges converted into a lien on their home. App. 4a. Pursuant to this policy, Cleveland certifies a list of delinquent accounts to Cuyahoga County twice per year for the placement of a lien, which appears on the customer's property tax bill. App. 28a.

Cleveland's water lien policy harms homeowners and residents in several ways. The placement of a water lien creates a security interest in the customer's property that gives the lienholder the right to transfer or sell the lien property. Ohio Rev. Code Ann. §§ 5721.10, 5721.19; *see also* App. 29a. Cleveland's conversion of unpaid water charges into a lien thus transforms an unsecured debt into an encumbrance on a person's home that affects their property rights. In addition, once a water lien is placed, it begins to accumulate penalties and interest, App. 4a., which can significantly increase the amount of the underlying debt, inflating the balance owed by an average of 30 percent, *see* Steil Suppl. Report, Record 65-14, PageID

#1715. Properties with water liens face municipal foreclosure at more than 15 times the rate of properties without water liens. MSJ Order, 2023 WL 11987525 at \*5.

These harms disproportionately impact Black residents and homeowners in Cuyahoga County. Between 2012 and 2020, Cleveland certified over 17,000 water liens on its customers' properties. App. 4a. Cleveland places a disproportionate number of these water liens on homes in majority-Black neighborhoods. *See id.* Cuyahoga County is 29 percent Black and 59 percent white. App. 4a–5a. Yet, approximately 68 percent of water liens were placed on homes in majority-Black neighborhoods, while approximately 18 percent were placed on homes in majority-white neighborhoods. *Id.* There is a racial disparity in lien placement even when controlling for differences in income. MSJ Order, 2023 WL 11987525 at \*8. Cleveland has not disputed this statistically significant racial disparity. *Id.* at \*9. Because of this disparity, Black customers are more likely to be subject to the lien policy and resulting increased risk of property loss than white customers.

## II. Proceedings Below

### *a. District Court Proceedings*

On December 18, 2019, Plaintiffs, Black homeowners and residents of Cuyahoga County, filed this class action lawsuit alleging that Cleveland's disproportionate placement of water liens in majority-Black neighborhoods violates §§ 3604(a) and 3604(b) of the

FHA and § 4112.02(H) of OCRA.<sup>2</sup> App. 27a–31a. The complaint also raised federal and state constitutional challenges to Cleveland’s water service shutoff and overbilling practices that are not at issue here. *Id.* On behalf of themselves and a putative class, Plaintiffs sought declaratory, injunctive, and monetary relief, including both compensatory and punitive damages, as expressly permitted by the FHA. Compl., Record 1, PageID #38. The District Court denied Cleveland’s motion to dismiss the FHA and OCRA claims in their entirety. *Pickett v. City of Cleveland*, No. 19 CV 2911, 2020 WL 11627247, at \*11 (N.D. Ohio Sept. 29, 2020).

During discovery, Plaintiffs’ expert Dr. Justin Steil proposed a model to calculate monetary compensation for the economic harms caused by water liens. Under Dr. Steil’s proposal, compensation could be calculated by adding the sum of (1) the penalties and interest assessed against each water lien, and (2) if there had been a foreclosure, the lost equity attributable to the water lien in excess of the underlying debt amount. *See* Steil Dep., Record 65-10, PageID #1485. To illustrate his proposal, Dr. Steil applied his model to the five named plaintiffs as a sample. *Id.* at PageID #1497. His report explained that, under his model, one of the five named plaintiffs would receive no monetary compensation because her water lien was immediately paid by her mortgage company, avoiding the accumulation of penalties and interest and foreclosure.

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<sup>2</sup> Because the legal standards governing the FHA and OCRA are the same, this brief’s discussion of the FHA claim applies equally to the OCRA claim. *See Eva v. Midwest Nat’l Mortg. Bank, Inc.*, 143 F. Supp. 2d 862, 890–91 (N.D. Ohio 2001) (observing that courts “may rely upon the federal case law under the FHA” to interpret “Plaintiffs’ claims under Ohio’s equivalent fair housing statute in § 4112.”).

*Id.* at PageID #1505. However, Dr. Steil acknowledged that class members in this situation still incur economic harm because it is common practice for mortgage companies to pass the cost of paying off the lien onto the borrower. *Id.* at 1503. This economic injury is not captured by Dr. Steil’s model.

When deposed, Dr. Steil acknowledged the possibility that some class members may not receive compensation under his model because they—or their mortgage company—either paid their liens prior to any penalties, interest, and foreclosure, or they made no payments towards their liens and lost no equity in their home. *Id.* at PageID #1485, 1489–1491. Dr. Steil made no representations as to how many class members may have resolved their liens without incurring additional charges, nor did he opine whether those class members lacked other kinds of economic injuries. Rather, he stated only that one out of the five named plaintiffs used as the sample in his report paid no penalties or interest on her water lien. *See id.* at PageID #1505. (“I guess 20 percent of *our sample* had no *penalties and interest.*”) (emphasis added).

Following discovery, Cleveland filed a motion for summary judgment on all of Plaintiffs’ claims, which the District Court denied. App. 7a.

Simultaneous with summary judgment briefing, Plaintiffs sought certification of “a class of all Black homeowners or residents in Cuyahoga County who have been obligated, within the last two years, to pay debt secured by their property stemming from amounts originally owed to Cleveland Water” (the “Water Lien Class”) under Rules 23(b)(2), for injunctive relief, and 23(b)(3), for damages. App. 29a, 47a. Plaintiffs also requested certification of two classes

relevant to Cleveland's shutoff and overbilling practices, which are not at issue here.

Cleveland did not challenge certification of the Water Lien Class under Rule 23(b)(2) but argued that the proposed Rule 23(b)(3) class could not be properly certified because it included individuals without economic injury and therefore failed to meet predominance. App. 49a. In making this argument, Cleveland mischaracterized Dr. Steil's testimony as an "admi[ssion]" that "as much as 20% of the Water Lien Class could have no economic damages." App. 58a.

Without making any findings about the extent of economic injuries to the class, the District Court rejected Cleveland's arguments and granted Plaintiffs' class certification motion in its entirety. *See* App. 66a. The District Court held that predominance was satisfied regardless of whether some class members lacked economic injury because the common question of whether Cleveland's disproportionate assessment of water liens on Black homeowners and residents violated the FHA was "more prevalent or important" than any individualized damages issues. App. 53a (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 452–455 (2016)), 58a.

### ***b. Court of Appeals Proceedings***

In October 2023, Cleveland filed a Rule 23(f) petition seeking interlocutory review of the District Court's certification of the Water Lien Class under Rule 23(b)(3). The Sixth Circuit granted permission to appeal the certification order in May 2024.

In its appeal, Cleveland again relied on its erroneous assertion that "up to twenty percent" of the Water Lien Class suffered no economic injury. Based

on this premise, Cleveland argued that certification of the Rule 23(b)(3) class was improper for two reasons. App. 8a. *First*, Cleveland argued that Rule 23(b)(3)'s predominance requirement could not be met unless all class members shared the same economic injury. App. 8a–9a. *Second*, Cleveland argued that the alleged “twenty percent” of class members who were not injured by penalties, interest, or foreclosure lacked Article III standing and could not be properly included in the class. *Id.* Cleveland asserted that those class members alleged injury from merely a statutory violation, which was insufficient to confer standing to recover damages. *Id.* (citing *TransUnion LLC v. Ramirez*, 594 U.S. 413, 426 (2021)).

The Sixth Circuit unanimously rejected Cleveland's arguments and affirmed the District Court's certification of the Water Lien Class under both Rules 23(b)(2) and 23(b)(3). App. 3a. Though the Rule 23(f) petition offered no arguments challenging certification of the Rule 23(b)(2) Water Lien Class, the Sixth Circuit briefly addressed the District Court's analysis and held that certification was proper. App. 11a–13a. With respect to the Rule 23(b)(3) Water Lien Class, the Sixth Circuit held that predominance was satisfied because the common question of whether Cleveland's disproportionate assessment of water liens against Black homeowners violated the FHA “predominates over individualized computations of damages, which can be assessed at a later date.” App. 16a. The Sixth Circuit emphasized that individualized damages issues do not defeat predominance when there is a common question of liability. App. 14a–15a (citing *Bouaphakeo*, 577 U.S. at 453–54).

The Sixth Circuit also held that Plaintiffs alleged a cognizable concrete injury and therefore

established Article III standing. Without taking a position on Cleveland’s assertion that “up to twenty percent” of the class lacked economic injury, the Sixth Circuit explained that Cleveland’s argument wrongly presumed that economic injury was necessary to have standing. App. 16a (“No matter the truth of [Cleveland’s] statement, it falsely assumes that Plaintiffs’ alleged injury under § 3604 is economic in nature.”).

Rather, the Sixth Circuit held that class members “have Article III standing by virtue of their FHA claim” that they have suffered racial discrimination from the water lien policy. *Id.* The Sixth Circuit stated that in *TransUnion*, the Supreme Court “addressed class member standing in the limited context of recovering damages, while offering virtually no guidance on standing at the class certification stage and disclaiming the intent to do so.” App. 18a–19a (citing *TransUnion* 594 U.S. at 431 n.4). Nonetheless, the Sixth Circuit reasoned that, assuming *TransUnion* applied and required every class member to have an injury at that class certification stage, Plaintiffs’ allegation of racial discrimination under the FHA was a “cognizable intangible harm” to all class members. App. 19a (quotation and citation omitted). The Sixth Circuit noted that the harm of racial discrimination in housing, as prohibited by the FHA, has a close relationship to constitutional harms of racial discrimination and has been recognized as a cognizable harm sufficient to confer Article III standing. *Id.* at 17a–20a (citing *Merck v. Walmart*, 114 F.4th 762, 773–74, 779–80 (6th Cir. 2024)). That Plaintiffs relied on a disparate impact theory did not affect the standing analysis because disparate impact claims are “cognizable under” and “fall[] squarely within the FHA’s scope.” App. 17a, 20a (citing *Tex. Dep’t of Hous. & Cmty. Affs. v.*

*Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 539, 545–46 (2015)).

Since it held that all Water Lien Class members had standing because they allege racial discrimination in violation of the FHA, the Sixth Circuit declined to address the question of whether all class members *must* have standing at the class certification stage. App. 18a–19a.

The Sixth Circuit denied Cleveland’s petition for rehearing en banc with no judges requesting a vote on the petition. App. 68a.

## ARGUMENT

### I. **This Case Is Not the Proper Vehicle to Resolve Either Circuit Split Raised by Cleveland Because Every Class Member Is Injured.**

This case is an improper vehicle to resolve either the “*LabCorp* split” as to whether all class members must establish Article III standing at the class certification stage, or the “*Acheson* split,” described by Cleveland as to whether Article III requires a concrete injury beyond the violation of a statute. The Sixth Circuit did not weigh in on either split, and this Court should decline to do so as well.

Neither of these splits are implicated here because all class members have suffered at least two independent concrete injuries that establish Article III standing to pursue an FHA claim. *First*, as the Sixth Circuit correctly recognized and this Court has repeatedly stated, racial discrimination is a concrete harm that provides a basis for Article III injury. *See Haaland*, 599 U.S. at 292; *Heckler*, 465 U.S. at 739–40. Contrary to Cleveland’s assertions, this well settled legal principle is unaffected by the fact that

Plaintiffs use a disparate impact theory to challenge racial discrimination because the dignitary harm is the same. *Second*, a water lien is a concrete injury that imposes an encumbrance on each class member's property rights. See *Connecticut v. Doehr*, 501 U.S. 1, 11 (1991) (noting that a clouded title can “significant[ly]” affect “property interests”). Given that every member of the Water Lien Class has standing due to these two concrete injuries, this case is an improper vehicle to resolve any questions about whether classes can be certified with uninjured members or whether statutory violations alone confer standing.

***a. The Issue of Whether a Court May Certify a Damages Class with Uninjured Class Members Is Not Presented Here.***

The petition's principal concern is with an issue that is not presented by this case: whether a class may be certified with uninjured members who lack Article III standing. See Pet. at 2–4, 6, 12–13, 15–19, 22–26. As an initial matter, this issue is not presented because the Sixth Circuit explicitly did not decide it. App. 19a n.9 (“This Circuit has not yet resolved the question of whether all class members must have standing at the class certification stage.”).<sup>3</sup> And as a

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<sup>3</sup> Even in opinions issued after the decision below, the Sixth Circuit has reiterated that it has not explicitly decided the issue of whether all class members must have Article III standing to certify a class. In *Generation Changers Church v. Church Mutual Insurance Company*, the Court noted that “[o]ne of our colleagues has suggested that our court has adopted the class certification approach,” meaning that if standing is established for named plaintiffs, then Article III standing is satisfied, and the injury of unnamed class members is determined for Rule 23 predominance

“court of review, not first view,” this Court should deny certiorari on a legal question the Sixth Circuit has clearly not yet decided. *Cutter*, 544 U.S. at 718 n.7 (citing *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 175 (2004) (“The Court of Appeals, however, did not address this argument, . . . , and, for that reason, neither shall we.”); *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 494 (2001) (“Because the Court of Appeals did not address these claims, we decline to do so in the first instance.”)). Moreover, as described below, certiorari should be denied because this is not a class with any uninjured members.

***b. Every Class Member Has Suffered a Concrete Injury.***

Every member of the Water Lien Class has suffered concrete injuries because they had a lien placed on their home due to a racially discriminatory policy.

Article III requires plaintiffs to show they have suffered an “injury in fact” that is “concrete and particularized”, and “actual or imminent.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). An injury is “obvious[ly]” concrete if it is a “traditional tangible harm[], such as physical. . . and monetary harms,” or property harms. *TransUnion*, 594 U.S. at 425, 427. Intangible harms “can also be concrete,” if they are “injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts,” including “harms specified by the

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purposes. 168 F.4th 354, 362 n.2 (6th Cir. 2026) (citing *Speerly v. Gen. Motors*, 143 F.4th 306, 343 (6th Cir. 2025) (Thapar, J., concurring)). “But [the Sixth Circuit] ha[s] yet to explicitly endorse this view in a published decision.” *Id.*

Constitution itself,” *id.* at 425,<sup>4</sup> or harms “elevate[d] to the status of legally cognizable” by Congress, *id.* at 425–26 (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016)). And while an injury must be concrete, it does not need to be large for standing purposes—in fact a “small,” “identifiable trifle is enough” to suffice for standing. *U.S. v. Students*, 412 U.S. at 689 n.14; *see also id.* (“We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, *see Baker v. Carr*, 369 U.S. 186; a \$5 fine and costs, *see McGowan v. Maryland*, 366 U.S. 420; and a \$1.50 poll tax, *Harper v. Va. Bd. of Elections*, 383 U.S. 663”). Moreover, in the FHA context, only “the [Article] III minima of injury in fact” is required. *Havens Realty*, 455 U.S. at 372.

Applying this Court’s precedent, all class members have standing. Cleveland’s adamantness that some class members were not economically harmed due to penalties and interests and thus lack standing, *see* Pet. 3, 5, 10, 11, is not only factually incorrect, but also a red herring. Given that Cleveland’s racially discriminatory lien policy causes cognizable injuries conferring standing, the possible variation in existence of penalties and interest does not defeat standing, nor does it cause individual issues to predominate over class-wide issues.

1. The Sixth Circuit Correctly Held that Race Discrimination Is a Cognizable Article III Injury.

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<sup>4</sup> *See, e.g., Spokeo*, 578 U. S. at 340 (citing *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (abridgment of free speech); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, (1993) (infringement of free exercise)).

As the Sixth Circuit correctly held, every member of the Water Lien Class has standing because each one was subject to the dignitary harm of racial discrimination from Cleveland’s discriminatory placement of water liens. This Court has “repeatedly emphasized” those “who are personally denied equal treatment” experience “serious non-economic injuries” that federal courts have long been empowered to recognize and remedy as cognizable dignitary harms, sufficient for standing. *Heckler*, 465 U.S. at 739–40; see also *Haaland*, 599 U.S. at 292. And despite Cleveland’s assertions to the contrary, the “serious” harm of being treated unequally does not become less harmful when challenged under a disparate impact theory.

Racial discrimination causes concrete dignitary harms because being treated differently “deprives persons of their individual dignity.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984). “[D]iscrimination itself” treats those who experience it “as ‘innately inferior’ and therefore as less worthy participants in the political community.” *Heckler*, 465 U.S. at 739 (citation omitted). And illegal discrimination deprives individuals of a personal right to the “equal treatment” that has been “guaranteed by” law. *Sessions v. Morales-Santana*, 582 U.S. 47, 72 n.21 (2017). The dignitary harm caused by being treated less-than is among the most serious injuries recognized by law, and federal courts have long provided a forum to remedy this sort of harm. See, e.g., *Roberts*, 468 U.S. 609.

Federal courts’ Article III authority to remedy the inherent dignitary harm of discrimination is especially clear when Congress recognizes and elevates that harm by passing an antidiscrimination statute like the FHA. See *TransUnion*, 594 U.S. at 425–26. Indeed, a major purpose of such statutes is to

“vindicate the deprivation of personal dignity.” 303 *Creative LLC v. Elenis*, 600 U.S. 570, 590 (2023) (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964)). By passing the FHA, Congress elevated the dignitary harm caused by racial discrimination in housing practices, which is analogous to the constitutional harm of racial discrimination found in both the Fourteenth and Thirteenth Amendments.<sup>5</sup>

Under the FHA, Congress enabled plaintiffs to remedy the cognizable harms of discrimination in the housing market with disparate impact claims. *Inclusive Cmtys.*, 576 U.S. at 539 (explaining that “[r]ecognition of disparate-impact claims is consistent with the FHA’s central purpose.”). As this Court has explained, “Congress is well positioned to identify intangible harms that meet minimum Article III

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<sup>5</sup> Legislative history confirms that Congress relied in part on its authority under the Fourteenth Amendment to pass the FHA. See 114 Cong. Rec. 2534–37 (1968), available at <https://www.govinfo.gov/app/details/GPO-CRECB-1968-pt2/GPO-CRECB-1968-pt2-7-2>. And this Court has held that the Thirteenth Amendment provides a basis for Congress to address racial discrimination in housing. Indeed, in an opinion issued the same year the FHA was enacted, this Court held that Congress had the power to enforce the Thirteenth Amendment by “appropriate legislation” barring “all racial barriers” in the acquisition of property. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968). Lower courts relied upon *Jones* to defend the FHA against constitutional attack in the years immediately after its enactment. See, e.g., *United States v. Hunter*, 459 F.2d 205, 214 (4th Cir. 1972) (“The Fair Housing Title was designed to provide fair housing throughout the nation and is a valid exercise of congressional power under the Thirteenth Amendment to eliminate badges and incidents of slavery.”) (citing *Jones*, 392 U.S. at 439–40); see also *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115, 120–21 (5th Cir. 1973) (holding that Congress had the authority to enact Section 3604(e) of the FHA under the Thirteenth Amendment).

requirements.” *Spokeo*, 578 U.S. at 341. And notably, when Congress amended the FHA in 1988, it retained language that nine Courts of Appeals had interpreted as encompassing disparate impact claims. *Inclusive Cmtys.*, 576 U.S. at 535–36. By doing so, Congress recognized that disparate impact claims under the FHA “play[] an important role in uncovering discriminatory intent [as] it permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment.” *Id.* at 521.

Applying these precedents, the Sixth Circuit correctly held that all members of the Water Lien Class “have standing under Article III” because “the harm of [racial] discrimination in the housing market” is comparable to the “constitutional harm of racial discrimination by the government.” App. 17a (quoting *Merck*, 114 F.4th at 779–80 (citing U.S. Const. amend. XIV; *Inclusive Cmtys.*, 576 U.S. at 528–30)). As the Sixth Circuit explained, Cleveland’s water lien policy creates a “notable disparity in water liens placed on Black versus White homes,” which is a harm that “falls squarely within the FHA’s scope and is thus comparable to traditional harms found in the Constitution.” App. 19a–20a.

Cleveland now, for the first time, argues that racial discrimination does not cause concrete and cognizable harms when it is challenged under a disparate impact theory. *See, e.g.*, Pet. 4. It contends that the Sixth Circuit “elevated the mere existence of an intangible, disparate effect of a race-neutral policy” and that should not confer standing. *Id.* This Court should reject these arguments.

Contrary to Cleveland’s contentions, plaintiffs challenging racial discrimination via a disparate

impact claim have still experienced dignitary harms from being subject to a policy that impacts them differently because of their race. Disparate impact requires much more than a mere disproportionate impact. *Contra* Pet. 4. Plaintiffs must also prove that the policy is impacting them differently because of their race; the policy is not justified by a legitimate interest, like a business necessity; and that the defendant’s interest could be served by another less-discriminatory practice. *Inclusive Cmty.*, 576 U.S. at 533–34. The District Court, in denying Cleveland’s motion for summary judgment, held that a factfinder could conclude that Plaintiffs satisfied these requirements. MSJ Order, 2023 WL 11987525 at \*12–13. Thus, even without specific discriminatory intent, Plaintiffs have produced evidence of the deprivation of “equal treatment,” which is an injury to a person’s dignity. *Heckler*, 465 U.S. at 739–40.

To the extent Cleveland is asking this Court to determine whether racial discrimination is a cognizable Article III injury when plaintiffs pursue a disparate impact theory, it should decline to do so. Cleveland has not identified a single lower court case finding that racial discrimination alleged under a disparate impact theory is not a cognizable injury. And it did not raise this question before the Sixth Circuit, giving the Sixth Circuit no opportunity to weigh in. This Court should not grant certiorari to decide the issue in the first instance. *See, e.g., Glacier Nw., Inc. v. Int’l Bhd. of Teamsters Loc. Union No. 174*, 598 U.S. 771, 784 n.3 (2023) (declining to review a question not yet answered by the lower courts).

Finally, Cleveland’s reliance on *Washington*<sup>6</sup>, *Arlington Heights*<sup>7</sup>, and *Feeney*<sup>8</sup> to argue class members do not have standing to pursue a racial discrimination claim based on a disparate impact theory is misplaced. *See* Pet. 13, 27–28. The fact that plaintiffs in these Equal Protection cases could not prevail *on the merits* based on “disproportionate impact” alone does not negate the fact that racial discrimination, regardless of whether challenged via a disparate treatment or disparate impact claim, creates a cognizable injury *for standing*. The Sixth Circuit and District Court properly found so here.

## 2. The Placement of the Lien, with Nothing More, Is a Concrete Tangible Injury.

Separate from the harm of racial discrimination recognized by the Sixth Circuit, the placement of a lien on every class member’s property interest is unquestionably a “concrete,” “real,” and “not abstract” harm under this Court’s precedents. *TransUnion*, 594 U.S. at 424 (quoting *Spokeo*, 578 U.S. at 340). As this Court has consistently recognized, injuries to property are cognizable under Article III. *See Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 381 (2024) (explaining that “an injury to one’s property” is a “common example[]” of an “injury in fact” under Article III); *TransUnion*, 594 U.S. at 427–28 (citing injury to a person’s property as an example of a “concrete harm” under Article III’s standing doctrine).

Cleveland is incorrect that the “[m]ere placement of a water lien has no immediate legal or

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<sup>6</sup> *Washington v. Davis*, 426 U.S. 229, 239 (1976).

<sup>7</sup> *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270–271 (1977).

<sup>8</sup> *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979).

economic consequence for a customer.” Pet. 10. Rather, the placement of the water lien immediately converts an unsecured debt into a secured tax lien that uses the class member’s property as collateral. See App. 37a. (explaining that the “water liens” here are “an act that legally binds an individual”). As a secured interest on the property, the water lien injures class members by restricting their property rights. See Cris de la Torre & Rutilio Martinez, *How the Mortgage Crisis Has Affected the Tax Lien Market*, 14 J. Real Estate Prac. & Educ. 141, 141 (2020), <https://www.tandfonline.com/doi/abs/10.1080/10835547.2011.12091695> (“Specifically a tax lien is a legal restriction on property rights used by a governmental entity to secure repayment of a debt owed to the entity.”).

And, per Ohio law, a tax lien is also an encumbrance on a property title. See *In re Estate of Carpenter*, 719 N.E.2d 20, 21 (Ohio Ct. App. 1998) (listing “tax liens” as an example of an encumbrance on a property). Accordingly, the lienholder gains an interest in the class member’s property that confers the right to transfer or sell the lien property to satisfy the secured debt. Ohio Rev. Code Ann. §§ 5721.10, 5721.19; *In re Evans*, 30 B.R. 744, 745 (Bankr. N.D. Ohio 1983) (“Clearly, the placing of a lien on property is, in essence, the taking of an interest in that property.”).

Further, the lien downgrades the property owner or occupant’s interest in the property by giving the lienholder a first priority claim against the value of the encumbered property, allowing the lienholder to precede all other interests. Ohio Rev. Code Ann. § 5721.10 (providing that “the state shall have the first lien on the lands and lots described in the delinquent

land list, for the amount of taxes, assessments, interest, and penalty charged prior to the delivery of such list”).

Thus, the encumbrance on class members’ property itself is a tangible harm and Cleveland’s assertion to the contrary is wrong. *See Doebr*, 501 U.S. at 11; *see also Toste v. Beach Club at Fontainebleau Park Condo. Ass’n, Inc.*, No. 21-14348, 2022 WL 4091738, at \*4 (11th Cir. Sept. 7, 2022) (holding that an “encumbrance on [one’s] property [i]s a tangible harm sufficient to give [a plaintiff] standing for his claims.”); *Plaisted v. Harper*, No. 24-cv-634, 2025 WL 1378473 at \*4 (S.D. Ohio May 13, 2025) (same).

Every class member had a lien placed on their property which created a secured financial obligation, clouded their title, and downgraded their property interest. These real-world harms are cognizable and concrete. Whether some class members experienced additional economic injuries due to penalties and interests can be addressed at the damages stage, *see* App.16, but those additional injuries are not required at the class certification stage. For these reasons, the placement of a lien is a concrete and tangible harm for all Water Lien Class members, conferring standing.

***c. Because Every Class Member Has Suffered a Concrete Injury, This Case Is Not the Right Vehicle to Decide the LabCorp or Acheson Circuit Splits.***

Cleveland claims that granting certiorari in this case will allow this Court to clarify the circuit splits left open by the dismissal of *LabCorp* and *Acheson*. Not so. Every Water Lien Class member is

injured and has standing, so this case presents an improper vehicle to address these issues.

1. This Case is Not the Right Vehicle to Decide the *LabCorp* Split Because Every Class Member Is Injured.

This case does not present the question of “whether a federal court may certify a damages class . . . when the class includes both injured and uninjured class members,” *LabCorp*, 605 U.S. at 328 (Kavanaugh, J. dissenting), because there are no uninjured members in the Water Lien Class. The Water Lien Class, by definition, comprises of members who have been subjected to Cleveland’s racially discriminatory lien policy *and* had a water lien placed on their home. Thus, there are no class members who have not experienced at least those two injuries that confer standing.

By contrast, in *LabCorp* and the other cases cited by Cleveland, the class definitions at issue were written such that class members could be included who did not experience the class-wide injury. In *LabCorp*, there was an open question about whether the class definition would sweep in class members who had not used the kiosk system that allegedly violated the Americans with Disabilities Act (“ADA”) and thus could not have been injured. *See LabCorp*, 605 U.S. at 329 (Kavanaugh, J., dissenting). A similar issue occurred in the court of appeal cases Cleveland cites as holding “that a damages class may not be certified if it contains a significant number of uninjured members.” Pet. 15–17. In those cases, the court denied class certification because the class definition could have included members who did not suffer the injury the class was seeking to remedy. *See id.* (citing *Denney*

*v. Deutsche Bank AG*, 443 F.3d 253, 264–65 (2d Cir. 2006) (class definition included members who had not yet been assessed tax penalties being challenged); *Johannesson v. Polaris Indus. Inc.*, 9 F.4th 981, 987–988 (8th Cir. 2021) (held class could not be certified where the injury was alleged heat defects in all-terrain vehicles, but “not all of the ATVs manifested” the alleged defect); *In re Asacol Antitrust Litig.*, 907 F.3d 42,53 (1st Cir. 2018) (members of the class could not have been harmed by the unavailability of a generic drug because they would not have switched to the generic drug even if it was available); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619, 624-26 (D.C. Cir. 2019) (class alleging injury due to conspiracy to fix rate-based surcharges could not be certified because some members of the class actually paid *less* due to the conspiracy); *Freeman v. Progressive Direct Ins. Co.*, 149 F.4th 461, 468–69 (4th Cir. 2025) (class could not be certified because it was possible that some members of the class were not injured by contract breach)).

Cleveland attempts to shoehorn this case into the purported *LabCorp* circuit split by focusing on whether all class members have penalties or interest. *See* Pet. 3, 5, 10, 11. That attempt should be rejected because penalties and interests are not the class-wide injury that confers standing for each class member. *See supra* Argument § I.a. Thus, it is irrelevant as part of the *standing* inquiry whether or how many class members were assessed penalties and interest on their lien.

Further, Cleveland’s focus on penalties and interests obfuscates the existence of other economic injuries class members may have suffered. As Dr. Steil recognized, his model only “focused on two sets of

damages . . . [o]ne related to penalties and interests and one related to . . . municipal tax foreclosures.” Steil Dep., Record 65-10, PageID #1485. But he “believe[s] there are other economic harms that class members may have suffered.” *Id.* Thus, there is no basis for Cleveland’s assertion that class members lack economic injuries because they may not have been assessed penalties and interests.

Penalties and interest may be relevant to the amount of damages a class member may get, but compensatory damages are not the only ones that can redress Plaintiffs’ harms. Even if this Court were to agree with Cleveland that not all class members suffered economic injury sufficient to recover compensatory damages, Pet. 11, every class member is eligible to receive nominal damages, which are available in FHA cases. *See Alexander v. Riga*, 208 F.3d 419, 429 (3d Cir. 2000) (recognizing the availability of nominal damages in FHA cases to remedy racial discrimination) (citing *The Civil Rights Cases*, 109 U.S. 3, 22–23 (1883)); *see also Hamad v. Woodcrest Condo. Ass’n*, 328 F.3d 224, 237 (6th Cir. 2003); *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 431 (2d Cir. 1995). And as this Court has recognized, nominal damages are sufficient to confer standing. *Uzuegbunam v. Preczewski*, 592 U.S. 279, 292 (2021). Accordingly, any questions about the future availability of compensatory damages for the Rule 23(b)(3) class does not warrant a grant of certiorari.

2. This Case Is Not the Right Vehicle to Decide the *Acheson* Split Because All Class Members Have Personally Experienced the Injuries at Issue.

Cleveland’s attempt to apply *Acheson* to this case should also be rejected. *Acheson* presented a vastly different factual scenario that did not raise the question of whether the dignitary harms caused by racial discrimination are cognizable. In *Acheson*, the plaintiff visited a hotel website, which she alleged violated the ADA, but she had no intention of visiting the hotel for a stay. *Acheson*, 601 U.S. at 3. Petitioner in that case questioned whether a one-time visit to a hotel’s website created sufficient injury under Article III. *Id.* Many of the cases in the circuit split involved the same plaintiff and addressed the same question petitioner raised. *See id.* (“[Plaintiff] has singlehandedly generated a circuit-split.”).

While the courts of appeals in the *Acheson* split disagreed about whether the alleged statutory violation of the ADA was sufficient for standing, none of the courts of appeals that rejected standing did so because racial discrimination is not a cognizable injury—which is the relevant issue here. In fact, in *Carello*, the Seventh Circuit stated that “[t]here is no doubt that dignitary harm is cognizable.” *Carello v. Aurora Policemen Credit Union*, 930 F.3d 830, 833-34 (7th Cir. 2019). Thus, the *Acheson* cases do not challenge the longstanding precedent that racial discrimination is a cognizable dignitary harm for standing. Instead, the court of appeals in these cases rejected standing on grounds that do not apply here. These courts reasoned that the plaintiff did not personally experience the alleged injuries because a one-time visit to a website when the plaintiff did not intend to either stay at a hotel or use a credit union’s services could not cause the plaintiff a cognizable injury. *See, e.g., Laufer v. Mann Hosp., LLC*, 996 F.3d 269, 272–73 (5th Cir. 2021); *Laufer v. Looper*, 22 F.4th 871,

880–81 (10th Cir. 2022); *Carello*, 930 F.3d at 834 (holding “in the absence of any personal impact on [the plaintiff], his alleged injury is necessarily abstract”).

The alleged standing defects that the court of appeals in the *Acheson* split focused on do not apply here. In this case, there is no question that the class members suffered cognizable harms. Cleveland placed a lien pursuant to a racially discriminatory policy on each class member’s home, in violation of the FHA. Each class member thus personally experienced dignitary harm by being subject to racial discrimination and tangible property harms caused by the water lien. Contrary to Cleveland’s assertions, this is not a case where “many class members allege a ‘violation of a legal entitlement’ but undisputably cannot show resulting ‘adverse effects.’” Pet. at 22.

In sum, because the Sixth Circuit correctly found that every class member is personally injured by the placement of a lien pursuant to the alleged racially discriminatory policy, satisfying standing, neither split is implicated and this case does not warrant this Court’s review.

***d. Because All Class Members Are Injured, This Case Does Not Present the Policy Concerns Raised by Cleveland.***

Finally, the Sixth Circuit’s decision will not allow droves of uninjured class members to obtain damages from Cleveland or other municipalities who use water lien collection policies. *Contra* Pet. at 6, 29–30. As discussed above, the Water Lien Class does not include any uninjured members because every member

was injured by racial discrimination and the placement of a lien on their property. And even under Cleveland's assertion of the facts, at least 80 percent of the class was also injured by penalties and interests. *See supra*, at 15.

Far from opening the floodgates, the decision appropriately applied the elements of Article III and Rule 23 in accordance with this Court's precedent. *See* App. 16a–20a (applying *TransUnion* to determine Article III standing); *id.* at 14a (applying *Bouaphakeo* to determine predominance under Rule 23). For these reasons, none of Cleveland's policy concerns warrant the Court's intervention.

**II. The Court Should Deny Certiorari for This Interlocutory Appeal Because It Is Based on Unresolved Factual Issues Before a Finding of Liability or Damages.**

The interlocutory posture of this case provides several additional reasons for denying the petition: it is premised on a factual dispute before any factual findings; it is concerned with future awards of damages before there has even been a finding of liability; and with multiple other certified classes proceeding to trial, a decision at this juncture will not promote judicial efficiency.

*First*, Cleveland's argument hinges on a disputed factual claim, making this case unworthy of this Court's consideration. Petitions for certiorari are "rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." U.S. Sup. Ct. R. 10. A question that "turns entirely on an interpretation of the record in one particular case, is a quintessential

example of the kind that [this Court] almost never review[s].” *Taylor v. Riojas*, 592 U.S. 7, 11 (2020) (Alito, J., concurring); see also *Kennedy v. Bremerton Sch. Dist.*, 586 U.S. 1130, 1132 (2019) (statement of Alito, J., respecting the denial of certiorari) (this Court “generally do[es] not grant such [discretionary] review to decide highly fact-specific questions”).

Yet Cleveland’s argument asks this Court to accept as “undisputed fact” that a “substantial percentage” of class members have no economic injury, see Pet. at 3, 11, when this is erroneous. Instead, Cleveland’s claim is based on a mischaracterization of expert testimony and has not been endorsed by any court below. See *supra*, at 17. As discussed above, Plaintiffs’ expert made no representations as to how many class members may not have damages from penalties and interest, nor did he opine whether those class members lacked other kinds of economic injuries. Thus, to call it an “undisputed fact” that up to 20 percent of the class suffered no economic injury is wrong. Moreover, the District Court and Sixth Circuit both determined that the class members were injured without deciding precisely how many class members would be entitled to compensatory damages based on penalties and interest because that question did not need to be answered at the class certification stage. See App. 16a, 61a–62a. Ultimately, with the benefit of trial, a factfinder could determine that every class member suffered an economic injury in the form of penalties and interests, foreclosure, increased mortgage payments, or something else.

*Second*, this case is in stark contrast to the posture in *TransUnion*, which was presented to this Court after a trial, determination of liability, and award of damages. 594 U.S. at 421–22. With the

benefit of a fully developed record, this Court held “every class member must have Article III standing in order to recover individual damages.” *Id.* at 431. Applying that standard, the Court determined there were still some class members for whom there was no possibility of harm, and they were thus ineligible for damages. 594 U.S. at 417 (finding that 6,332 of 8,185 class members could not suffer reputational harm because their credit file had not been provided to third-party businesses). Here, all class members satisfy Article III standing, but there is no ruling from a lower court that they are entitled to relief or that they will recover damages.

Further, to the extent an issue develops with the certified damages class as the case continues through trial, the District Court is in a better position to resolve that issue in the first instance. Rule 23(c)(1)(C) states that a class-certification order “may be altered or amended before final judgment.” Fed. R. Civ. P. 23(c)(1)(C). Under that rule, the District Court retains full authority to address any standing, manageability, or proof-related issues that may arise as the case proceeds through trial, including to modify or decertify the class. The Court should therefore deny the petition on this interlocutory appeal because it is very likely that additional evidence impacting standing and damages will develop as the case progresses through trial, making any ruling at this stage premature.

*Finally*, deciding the question presented at this stage will not resolve this case or promote judicial efficiency because the question only implicates one of the four certified classes, and the other three classes may still proceed to trial. *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106–07 (2009) (“Permitting

piecemeal, prejudgment appeals, we have recognized, undermines efficient judicial administration.”) (citation and internal quotation marks omitted). Cleveland only challenges the Rule 23(b)(3) Water Lien Class, leaving the Rule 23(b)(2) Water Lien Class and two classes related to Cleveland’s overbilling and shutoff practices unaffected by this appeal. App. 11a n.6; Pet. at 11. Even if this Court were to rule that the Rule 23(b)(3) Water Lien Class certification was improper, as discussed above, the remedy would simply be a modest modification of the class definition such that a damages class can proceed. Accordingly, deciding the question presented will not promote judicial efficiency.

In sum, this petition presents no issue deserving this Court’s review because it relies on a mischaracterization of the factual record and asks this Court to use its resources to weigh in on hypothetical future damages before there has even been a finding of liability. This Court should deny the petition.

### **CONCLUSION**

The petition for writ of certiorari should be denied.

Respectfully Submitted,

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