IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

CNY FAIR HOUSING, INC., Plaintiff, v. SWISS VILLAGE, LLC; THE ALPS AT SWISS VILLAGE, LLC; and JILL BUTLER, Defendants.	Case No. 5:21-cv-1217 (MAD/ML)

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

I. INTEREST OF THE UNITED STATES

Refusing to rent housing to individuals who are limited English proficient (LEP) can constitute illegal national origin and race discrimination under the Fair Housing Act (FHA), 42 U.S.C. § 3601 *et seq*. According to recent Census data, over thirteen million people living in the United States do not speak English at all or do not speak it well.[1] Nearly 90% of these LEP persons were born abroad. Indeed, for the nation as a whole, individuals born abroad are 46 times more likely to be LEP than are individuals born in the United States.[2] Additionally, Asian, Hispanic, and Black individuals are more likely than non-Hispanic Whites to be LEP.[3] In light of these disparities, courts must closely scrutinize policies that exclude LEP families from housing opportunities, as such exclusions are likely to have a harsher impact on those born outside of the United States, as well as on Asian, Hispanic, and Black applicants. These exclusionary policies may cause an unlawful disparate impact under the Fair Housing Act, and may be evidence of intentional discrimination based on national origin or race.

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[1] *See* United States Census, 2019 American Community Survey https://data.census.gov/cedsci/table?q=ACSDT5Y2019.B16005&tid=ACSDT5Y2019.B16005 (last visited April 1, 2022). For purposes of this Statement of Interest, the United States is using the same definition of "limited English proficient" that Plaintiff CNY Fair Housing uses in its Complaint. *See* ECF No. 1, Compl. p. 8, n 3.

[2] *Id.* (Census data show 0.58% of native-born residents are LEP, compared with 26.7% of foreign-born residents).

[3] *See* ECF No. 1, Compl. ¶¶ 32-33 (setting forth proportions of the population that are LEP in Syracuse and Onondaga County). National data bear this out as well. Using the Census definition of LEP—i.e., individuals who speak English less than "very well"—31.9% of Asians, 28.3% of Hispanics and 3.1% of Blacks are LEP, compared to just 1.5% of non-Hispanic Whites. *See* United States Census, 2020 American Community Survey, https://data.census.gov/cedsci/table?q=B16005D (Asian); https://data.census.gov/cedsci/table?q=C16006 (Hispanic); https://data.census.gov/cedsci/table?q=B16005B (Black); https://data.census.gov/cedsci/table?q=B16005H%20 (non-Hispanic White) (last visited April 1, 2022).

Plaintiff CNY Fair Housing alleges that Defendants Swiss Village, the Alps at Swiss Village and their leasing agent Jill Butler (collectively "Defendants"), refuse to rent apartments to applicants who are LEP unless someone who speaks and reads English lives in the unit. Plaintiff alleges that Defendants enforce this policy even when LEP applicants offer to provide their own translators. Plaintiff claims that Defendants' conduct constitutes discrimination on the basis of national origin or race, in violation of the FHA. Plaintiff alleges both disparate impact and intentional discrimination theories of liability, consistent with the Department of Housing and Urban Development's (HUD) 2016 *Office of General Counsel Guidance on Fair Housing Act Protections for Persons with Limited English Proficiency* ("2016 HUD LEP Guidance"), which explains how restrictive language policies may run afoul of the FHA. Defendants filed a Motion to Dismiss, arguing that their LEP exclusion policy cannot, as a matter of law, violate the FHA and that the 2016 HUD LEP Guidance is therefore wrong and deserves no deference by this Court.

The United States respectfully submits this Statement of Interest, pursuant to 28 U.S.C. § 517, to describe how policies that screen applicants on the basis of language ability, such as Defendants' LEP exclusion policy, may violate the FHA when they impose a disparate impact or serve as a pretext for intentional discrimination on the basis of national origin or race. This Statement of Interest also addresses the correct level of deference that should be afforded the 2016 HUD LEP Guidance.[4] The United States has a strong interest in promoting fair housing and preventing discrimination on the basis of race and national origin. 42 U.S.C. § 3601. Just last year, the President ordered federal agencies to address "[o]ngoing legacies of residential segregation and discrimination." 86 Fed. Reg. 7,487 (Jan. 26, 2021). He directed that agencies

[4] The United States does not take a position on the Plaintiff's state law claim.

seek to remove "systemic barriers to safe, accessible, and affordable housing for people of color [and] immigrants[.]" *Id.* The Department of Justice ("DOJ") and HUD share responsibility for the enforcement of the FHA, and therefore the DOJ has an interest in how courts interpret and apply the statute and how they construe HUD guidance documents pertaining to the FHA. 42 U.S.C. §§ 3612; 3613(e); 3614. The interpretation of the FHA and the 2016 HUD LEP Guidance in this case could affect enforcement actions brought by the DOJ and HUD.

II. SUMMARY OF ARGUMENT

A "facially neutral language policy" can serve as the basis for a discrimination claim "when it has a disparate impact on a protected characteristic or is used as a proxy or pretext for discrimination based on a protected characteristic." *Davis v. Infinity Ins. Co*., No. 2:15-CV-01111-JHE, 2016 WL 4507122, at *5 (N.D. Ala. Aug. 29, 2016); *see also* 2016 HUD LEP Guidance at 1 (same). Supported by detailed Census data, CNY Fair Housing's Complaint plausibly alleges that Defendants' policy of refusing to rent to LEP persons and households, unless an individual who both speaks and reads English resides in the unit, inflicts a disparate impact on the basis of national origin or race. Specifically, Plaintiff alleges that the policy disproportionately burdens potential applicants who are foreign-born, compared to individuals born in the United States, and disproportionately harms Asian, Hispanic, and Black potential applicants, compared to their non-Hispanic White counterparts. *See* ECF No. 1, Compl. ¶¶ 1, 12, 19, 23-33. The alleged impact is substantial whether viewed at the town, city, county, or metropolitan statistical area (MSA) level.[5]

[5] The Census explains that generally speaking, an MSA is "a core area containing a large population nucleus, together with adjacent communities that have a high degree of economic and social integration with that core." *See* https://www2.census.gov/geo/pdfs/reference/GARM/Ch13GARM.pdf (last visited April 1, 2022).

Further, the Complaint plausibly alleges that Defendants' LEP exclusion policy is a pretext for intentional discrimination on the basis of national origin or race. According to the Complaint, the stated justification for the LEP exclusion policy—management's purported need to know that applicants understand the lease agreement and are able to communicate—was undermined by Defendants' rejections of the LEP applicants' offers to provide *their own translators* to accomplish those tasks. *Id*. ¶¶ 1, 12, 19, 23-24, 35, 37. The Complaint also alleges that Defendants were aware that two of the excluded LEP applicants spoke Spanish but were not fluent in English, that two other applicants had recently immigrated to the United States and did not speak English well, and that the language policy inflicted a disparate impact based on national origin and race. Compl. ¶¶ 12, 19, 23, 36.

Finally, Defendants' attack on the 2016 HUD LEP Guidance is misguided because CNY Fair Housing's claims do not depend on the validity of the Guidance. Moreover, Defendants mischaracterize the Guidance, which does not state that LEP status is a protected class under the FHA. To the contrary, citing relevant caselaw, the Guidance explains how a language restriction may violate the FHA when it imposes an unjustified discriminatory effect or is used as a pretext for intentional discrimination against "a protected class," such as national origin. *See* 2016 HUD LEP Guidance. Because the Guidance is thorough and well-reasoned, closely tracks and accurately synthesizes applicable legal authority on intentional discrimination and disparate impact, and is consistent with other HUD guidance, it is due deference under *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944).

III. ARGUMENT

A. Language Policies Can Discriminate on the Basis of National Origin and Race in Violation of Federal Civil Rights Laws

Courts have repeatedly recognized that language policies, including English-only rules, can discriminate on the basis of national origin and race in violation of federal civil rights laws. *See*, *e.g.*, *Sandoval v. Hagan*, 197 F.3d 484, 508, 510 (11th Cir. 1999), *rev'd on other grounds*, 532 U.S. 275 (2001); *EEOC v. Wisconsin Plastics, Inc.*, 186 F. Supp. 3d 945, 948 (E.D. Wis. 2016); *Davis v. Infinity Ins. Co.*, No. 2:15-CV-01111-JHE, 2016 WL 4507122, at *5 (N.D. Ala. Aug. 29, 2016); *Faith Action for Cmty. Equity v. Hawaii*, No. 13-00450 SOM/RLP, 2014 U.S. Dist. LEXIS 58817, at *32-33 (D. Haw. Apr. 28, 2014); *Rivera v. NIBCO*, 701 F. Supp. 2d 1135, 1141-1142 (E.D. Cal. 2010); *EEOC v. Synchro-Start Prod., Inc.*, 29 F. Supp. 2d 911, 912 (N.D. Ill. 1999).[6]

"Language-based discrimination is often closely aligned with national origin discrimination, and has been recognized as being worthy of close scrutiny by the courts." *Rivera v. NIBCO*, 701 F. Supp. 2d 1135, 1141 (E.D. Cal. 2010) (collecting cases). A "facially neutral language policy" can serve as the basis for a discrimination claim "when it has a disparate impact on a protected characteristic or is used as a proxy or pretext for discrimination based on a protected characteristic." *Davis,* 2016 WL 4507122, at *5. Indeed, as stated by the District Court in *Equal Emp. Opportunity Comm'n v. Wisconsin Plastics, Inc.*:

[6] Other such decisions include *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 944-48 (9th Cir. 1995), *vacated on other grounds*, 520 U.S. 43 (1997); *Faith Action for Cmty. Equity v. Hawaii*, No. CIV. 13-00450 SOM, 2015 WL 751134, at *6–7 (D. Haw. Feb. 23, 2015); *Colindres v. Quietflex Mfg.*, No. CIV. A. H-01-4319, 2004 WL 3690215, at *11-12 (S.D. Tex. Mar. 23, 2004); *EEOC v. Premier Operator Servs.*, 113 F. Supp. 2d 1066, 1073 (N.D. Tex. 2000); *Aghazadeh v. Maine Med. Center*, No. 98-421-P-C, 1999 WL 33117182, at *4 (D. Me. June 8, 1999); *Saucedo v. Bros. Well Serv., Inc.*, 464 F. Supp. 919, 922 (S.D. Tex. 1979).

> [L]anguage can sometimes serve as a proxy, or stalking horse, for discrimination against a protected class. For example, employees who are foreign-born often lack English fluency, and so there is a strong correlation between people who do not speak English, a non-protected class, and those of a given national origin, which is a protected class.

186 F. Supp. 3d 945, 948 (E.D. Wis. 2016).

Courts have held that language policies can have an unjustified disparate impact on the basis of national origin or race. In *Sandoval v. Hagan*, for example, the Eleventh Circuit held that Alabama's policy of offering driver's license examinations only in English caused an adverse and disproportionate impact on non-English-speaking residents "of foreign descent" who applied for driver's licenses and therefore resulted in "an unlawful disparate impact based on national origin." 197 F.3d 484, 508, 510 (11th Cir. 1999), *rev'd on other grounds*, 532 U.S. 275 (2001). And in *EEOC v. Synchro-Start Prod., Inc*., the court found that a rule requiring that employees speak only English during work hours could form the basis of disparate impact claim under Title VII "[b]ecause any English-only rule unarguably impacts people of some national origins (those from non-English speaking countries) much more heavily than others . . . ." 29 F. Supp. 2d 911, 912 (N.D. Ill. 1999).

Other courts have recognized that language policies can serve as proxies or pretexts for intentional discrimination based on national origin or race. For example, in *Faith Action for Cmty. Equity v. Hawaii*, the court found the evidence sufficient to support a claim that Hawaii's policy of offering the state driver's license examination only in English was the product of intentional discrimination on the basis of national origin because the state had offered justifications for the policy that a jury a could find "pretextual." 2015 WL 751134, at *6–7. Similarly, in *Wisconsin Plastics*, the court found that the evidence was sufficient to sustain an intentional discrimination claim predicated on the defendant's decision to terminate "foreign-

born" employees who did not speak English because a jury could find the defendant's language requirement pretextual. 186 F. Supp. 3d at 948.

Defendants' argument that LEP status is not a protected class misses the point. Plaintiff asserts that Defendants' LEP exclusion policy discriminates on the basis of national origin or race, not that LEP status itself is a protected class under the FHA. Compl. ¶¶ 1, 8, 26, 35-36, 42. As discussed below, the Complaint plausibly alleges that Defendants' LEP exclusion policy inflicts a disparate impact on the basis of national origin and race and is also a pretext for intentional discrimination.

B. The Complaint Plausibly Alleges Disparate Impact and Intentional Discrimination Claims Under the FHA

The FHA makes it unlawful to refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race. . . or national origin." 42 U.S.C. § 3604(a). The FHA's prohibition on national origin discrimination includes discrimination against individuals on the basis that they were born abroad or immigrated from another country.[7] *See*, *e.g., Cabrera v. Alvarez*, 977 F. Supp. 2d 969, 977 (N.D. Cal. 2013) (allegations that defendant told plaintiff that she "should learn English now that she is in America" plausibly supported discrimination claim under the FHA); *Hous. Rts. Ctr. v. Donald Sterling Corp.*, 274 F. Supp. 2d 1129, 1134,

[7] Numerous cases have found that being born in or immigrating from another country qualifies as "national origin" and thus is a protected class under federal civil rights laws. *See Mumid v. Abraham Lincoln High Sch.*, No. 005-CV-2176 PJS/JJG, 2008 WL 2811214, at *6 (D. Minn. July 16, 2008), *aff'd*, 618 F.3d 789 (8th Cir. 2010) ("Plaintiffs are members of a protected class (foreign-born students)"); *Tiwari v. Mattis*, 363 F. Supp. 3d 1154, 1162–63 (W.D. Wash. 2019) (finding that security clearance rules, which only applied to military personnel "born outside the United States," discriminated "on the basis of national origin."); *Berke v. Ohio Dep't of Pub. Welfare,* No. C-2-75-815, 1978 U.S. Dist. LEXIS 17380, at *22 (S.D. Ohio June 6, 1978), *aff'd*, 628 F.2d 980 (6th Cir. 1980) (finding that plaintiff was a member of a protected class because defendant arguably knew that her "national origin was other than of the United States"); *Faruki v. Rogers*, 349 F. Supp. 723, 726 (D.D.C. 1972) (finding that challenged statute discriminated on the basis of national origin because it treated "citizens born abroad" worse that "native-born citizens").

1138 (C.D. Cal.), *aff'd* 84 F. App'x 801 (9th Cir. 2003) (finding that asking a tenant to state his or her "place of birth" as part of an application for apartment-related services violated the FHA). The FHA authorizes both disparate impact and intentional discrimination claims. *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 600 (2d Cir. 2016). CNY Fair Housing's Complaint plausibly alleges that Defendants' LEP exclusion policy disproportionally impacts foreign-born and Asian, Hispanic, and Black applicants and that Defendants' conduct constitutes intentional discrimination on the basis of national origin and race.

1. The Complaint Plausibly Pleads a Disparate Impact Claim On the Basis of National Origin or Race

The FHA authorizes disparate impact claims, which do not require a showing that the defendant intended to discriminate against a particular group. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project*, 576 U.S. 519, 535, 545 (2015) ("*Inclusive Communities*"). A disparate impact claim under the FHA has three basic elements: "(1) the occurrence of certain outwardly neutral practices . . . (2) a significantly adverse or disproportionate impact on persons of a particular type," *Mhany Mgmt., Inc.*, 819 F.3d at 617 (quotations omitted); and (3) "a causal connection between the facially neutral policy and the allegedly discriminatory effect." *Conn. Fair Hous. Ctr. v. CoreLogic Rental Prop. Sols., LLC*, 478 F. Supp. 3d 259, 287 (D. Conn. 2020) (quoting *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 575 (2d Cir. 2003)). A plaintiff can show a disparate impact by proving that the practice "actually or predictably results in discrimination." *Tsombanidis,* 352 F.3d at 575 (internal quotation and ellipsis omitted). To survive a motion to dismiss, a complaint alleging disparate impact must "set forth enough factual allegations to plausibly support each of the three basic elements of a disparate impact claim." *Mandala v. NTT Data, Inc.*, 975 F.3d 202, 209 (2d

Cir. 2020) (citation omitted).[8] The Supreme Court's decision in *Inclusive Communities* "did not alter the plausibility standard for pleading, which requires only that the plaintiff plead allegations that plausibly give rise to an inference that the challenged policy causes a disparate impact." *Winfield v. City of New York*, No. 15CV5236-LTS-DCF, 2016 WL 6208564, at *6 (S.D.N.Y. Oct. 24, 2016).[9]

A complaint alleging disparate impact may rely on statistical data "to show a disparity in outcome between groups." *Mandala*, 975 F.3d at 209. At the pleading stage, a plaintiff is not required to prove the methodological soundness of the statistical analysis to survive a motion to dismiss. *Id.* at 209-210 (citing *John v. Whole Foods Mkt. Gr., Inc.*, 858 F.3d 732, 737 (2d Cir. 2017)). Nor is a complaint alleging disparate impact required to rely on statistics derived from actual applications "because would-be applicants might refrain from applying for [an apartment] because of a 'self-recognized inability . . . to meet the very standards challenged as being discriminatory.'" *Id*. at 210 n.4 (quoting *EEOC v. Joint Apprenticeship Comm. of Joint Indus. Bd. Elec. of Indus*., 186 F.3d 110, 119–20 (2d Cir. 1999)). Indeed, when there is no reason to suspect that the general population of a geographic area is markedly different from the general population of potential renters, the use of general population data is acceptable. *Jones v. City of Faribault*, No. 18-1643 (JRT/HB), 2021 WL 1192466, at *19 (D. Minn. Feb. 18, 2021); *see*

[8] Although *Mandala* was a Title VII case, courts in the Second Circuit routinely rely on Title VII case in construing the FHA. *See, e.g., Orange Lake Associates, Inc. v. Kirkpatrick*, 21 F.3d 1214, 1227 (2d Cir. 1994) (confirming that Title VII framework provides the best model for disparate impact claims under the FHA, and collecting cases).

[9] In *Mandala*, the Second Circuit explained that while the pleading standard for a disparate impact claim contains the same three elements as that required to *prove* a *prima facie* case of disparate impact, "*prima facie* sufficiency is 'an evidentiary standard, not a pleading requirement.'" *Mandala*, 975 F.3d at 208 (quoting *Swierkiewicz v. Sorema N.A*.,534 U.S. 506, 510 (2002)). Accordingly, a complaint only needs to allege facts that plausibly support a disparate impact claim and does not need to satisfy the *prima facie* evidentiary standard required to *prove* one. *Id*.

CoreLogic Rental Prop. Sols., 478 F. Supp. at 291 (discussing appropriateness of using national or state general population data to simulate pool of potential applicants); *Banks v. City of Albany*, 953 F. Supp. 28, 34 (N.D.N.Y. 1997) ("where figures for the general population might accurately reflect the pool of qualified job applicants, courts have relied on such statistics as well"); *see also Fortune Soc'y v. Sandcastle Towers Hous. Dev. Fund Corp.*, 388 F. Supp. 3d 145, 170 (E.D.N.Y. 2019) (accepting plaintiff's use of demographic data of multiple nearby counties to show disparate impact on potential applicant pool).[10]

Here, the Complaint plausibly alleges all the elements necessary for a disparate impact claim. First, it identifies an "outwardly neutral" policy—Defendants' "refus[al] to rent to limited English proficient ("LEP") individuals and households," unless an English speaker and reader lives in the unit. Compl. ¶¶ 1, 12, 19, 23; *see Davis,* 2016 WL 4507122, at *6 (holding that a "Spanish/English-bilingualism requirement" was "a facially neutral employment practice" for the purposes of a disparate impact claim).

Second, the Complaint alleges that Defendants' LEP exclusion policy disproportionally impacts potential applicants in FHA-protected classes—those who were born outside the United States or immigrated from another country (national origin), Compl. ¶¶ 25-30, and Asian, Hispanic, and Black individuals (national origin and race).[11] *Id*. ¶¶ 31-33. Using recent Census

[10] Defendants do not argue that their rental requirements are such that the pool of potential rental applicants for Defendants' properties is substantively different from the general population living in the areas where the properties are located. Accordingly, the use of general Census data from nearby relevant local geographic areas—Dewitt, Syracuse, Syracuse MSA, and Onondaga County— to demonstrate a disparate impact is permissible. *Jones*, 2021 WL 1192466, at *19; *Banks*, 953 F. Supp. at 34; *Fortune Soc'y*, 388 F. Supp. 3d at 170.

[11] Courts have treated Hispanics as both a race and a national origin for purposes of federal civil rights statutes. *See*, *e.g.*, *Village of Freeport v. Barrella*, 814 F.3d 594, 606 (2d Cir. 2016); *Reyes v. Waples Mobile Home Park Ltd. P'ship*, 903 F.3d 415, 423 n.3 (4th Cir. 2018), cert. denied, 139 S. Ct. 2026 (2019).

data, the Complaint alleges that, in DeWitt, the town where the Defendants' properties are located, 23.6% of foreign-born residents are LEP, compared with less than 0.1% of residents born in the United States. Compl. ¶¶ 25, 27. Accordingly, Plaintiff alleges that the language policy is 500 times more likely to prohibit a DeWitt resident born outside the United States from renting at Defendants' properties than a DeWitt resident born in the United States. Compl. ¶ 27. The Complaint includes Census data supporting Plaintiff's allegation that the impact on potential applicants born outside the United States remains substantial when viewed at the City, County or MSA level: City of Syracuse, 26 times more likely to exclude individuals born abroad; *Id*. ¶ 28; Onondaga County, 50 times; *Id*. ¶ 29; Syracuse-MSA, which includes all of Onondaga, Oswego, and Madison Counties, 60 times. *Id*. ¶ 30.

The Complaint also details how Asian, Hispanic, and Black potential applicants in Syracuse and central and northern Onondaga County are much more likely to be LEP than non-Hispanic White applicants and "are therefore 25.9, 14.0, and 2.1 times more likely, respectively, than non-Hispanic White residents to be excluded by Defendants' refusal to rent to LEP individuals and households." Compl. ¶¶ 32, 33. Accordingly, the Complaint pleads facts supporting a reasonable inference that Defendants' LEP exclusion policy disproportionally impacts foreign-born, Asian, Hispanic, and Black potential applicants.

These alleged disparities (at least for foreign-born, Hispanic, and Asian individuals) are greater in magnitude than the disparities that courts have found sufficient for a *prima facie* case of disparate impact based on national origin or race. *Compare Reyes*, 903 F.3d at 428 (finding that plaintiffs sufficiently alleged a disparate impact claim under the FHA on the basis of national origin by showing that Latinos were 10 times more likely to be excluded by defendant's policy than non-Latinos); *Jones*, 2021 WL 1192466, at *21 (holding that evidence that Black

residents were approximately 4.4 times more likely than White residents to be excluded by defendants' criminal screening policy was sufficient to defeat summary judgment motion as to disparate impact claim).

Finally, the Complaint plausibly alleges "a causal connection between the facially neutral policy and the allegedly discriminatory effect." *Corelogic*, 478 F. Supp. 3d at 287. To plead a causal connection, a complaint must allege facts plausibly showing a disparity "between populations that are relevant to the claim the plaintiff seeks to prove." *Mandala*, 975 F.3d at 210. As discussed above, the Complaint compares the impact of Defendants' LEP exclusion policy on foreign-born potential applicants (a protected class) versus native-born potential applicants, Compl. ¶¶ 26-30, and Asian, Hispanic, and Black potential applicants (protected classes) to non-Hispanic White potential applicants. *Id*. ¶¶ 31-33. According to Plaintiff's allegations, the disparate effect remains robust whether viewed at the town, city, MSA, or county level. *Id*. ¶¶ 26-33. Thus, the Complaint plausibly alleges that Defendants' LEP exclusion policy causes an adverse, disproportionate effect on foreign-born and Asian, Hispanic, and Black potential applicants. Moreover, the Complaint pleads facts supporting an inference that the impact is not just theoretical and that Defendants have applied their LEP exclusion policy and turned away Hispanic applicants and recent immigrants. Compl. ¶¶ 12-13, 19, 23; *see Syeed v. Bloomberg L.P.*, No. 1:20-CV-7464-GHW, 2021 WL 4952486, at *22, __F.Supp.3d__ (S.D.N.Y. Oct. 25, 2021) ("Plaintiffs are free to rely on anecdotal or qualitative allegations, rather than statistical analysis, in alleging a disparate impact claim.") (citing *Gittens-Bridges v. City of New York*, No. 19 CIV. 272 (ER), 2020 WL 3100213, at *16 (S.D.N.Y. June 11, 2020)).

Defendants argue that the Complaint must be dismissed because the Complaint fails to identify the specific national origin or race of persons who Defendants allegedly discriminated

against. ECF No. 17, Reply Br. at 5. The Complaint does, in fact, allege discrimination against foreign-born applicants and prospective applicants as well as Asian, Hispanic, and Black applicants and prospective applicants. Compl. ¶¶ 28-30; 32-33. Moreover, courts have rejected the argument that plaintiffs must identify the specific countries or regions of the world from which they or their ancestors originated in order to state a disparate impact claim based on national origin. For example, in *Salas v. Wisconsin Dep't of Corr*., the Seventh Circuit held that a plaintiff "alleging that he is Hispanic sufficiently identifies his national origin to survive summary judgment" even though he "did not identify the 'Hispanic' nation from which he hailed." 493 F.3d 913, 923 (7th Cir. 2007). In *Faith Action for Cmty. Equity*, the court held that an English-only language policy plausibly imposed a disparate impact, even though that impact was felt by multiple different national origins where English was not the primary language, because otherwise "any policy would be immune from challenge so long as it casts its discriminatory net widely enough." 2014 U.S. Dist. LEXIS 58817, at *33. "If a policy differently affects individuals from nations where English is the primary language and nations where it is not, then the policy has a disparate impact." *Id*.[12]

[12] In the Rule 12(b)(6) context, a plaintiff alleging a disparate impact is not required to show "the absence of any legitimate business need" for the challenged policy. *Synchro-Start Prod., Inc*., 29 F. Supp. 2d at 912 n. 4; *see also Mhany Mgmt., Inc*., 819 F.3d at 617 (discussing evidentiary burdens associated with proving legitimate business need and less discriminatory alternatives for purposes of summary judgment). Plaintiff's Complaint nonetheless alleges facts supporting an inference that Defendants' LEP exclusion policy is unnecessary and that there are less discriminatory alternatives. Specifically, Plaintiff alleges that the LEP applicants offered to provide their own translation services, but that Defendants inexplicably and unreasonably rejected these offers. Compl. ¶¶ 1, 12, 23-24, 26; *see also* 2016 HUD LEP Guidance at 8 ("Allowing a tenant . . . a reasonable amount of time to take a document, such as a lease, to be translated, could be a less discriminatory alternative . . . . Similarly, if the family . . . brings another person along to interpret, agreeing to communicate through these individuals could be an alternative to refusing to deal with anyone who does not speak English.").

2. The Complaint Plausibly Pleads an Intentional Discrimination Claim Under the FHA

The Complaint alleges that "Defendants refuse to rent to LEP individuals and households with the intent of excluding potential renters on the basis of national origin and/or race," Compl. ¶ 35, and contains facts sufficient to support an allegation that Defendants' LEP exclusion policy was a pretext for intentional discrimination.[13] "Since language is a close and meaningful proxy for national origin, restrictions on the use of languages may mask discrimination against specific national origin groups or, more generally, conceal nativist sentiment." *Yniguez,* 69 F.3d at 944-48; *see also Rivera,* 701 F. Supp. 2d at 1141 (discussing how language-based discrimination is closely aligned with national origin discrimination). A "facially neutral language policy" may be "discriminatory when it . . . *is used as a proxy or pretext for discrimination based on a protected characteristic*." *Davis,* 2016 WL 4507122, at *5 (emphasis added).

Because "rarely is there direct, smoking gun, evidence of intentional discrimination," to state a claim for disparate treatment, a plaintiff need only allege "enough facts to provide at least minimal support for the proposition that the [defendant] was motivated by discriminatory intent." *Mandala*, 975 F.3d at 209 n.3 (internal quotation omitted). "Discriminatory intent may be inferred from the totality of the circumstances," *CoreLogic Rental Prop. Sols., LLC*, 478 F.

[13] Defendants contend that "Plaintiff concedes that its claims against Defendants 'are not premised on disparate treatment.'" Reply Br. at 2. But that mischaracterizes CNY Fair Housing's argument. Plaintiff explained that its claims against Defendants "are not premised on disparate treatment *of similarly situated prospective tenants*." ECF No. 16, CNY Fair Housing Opp. Br. at 12 (emphasis added). Indeed, an intentional discrimination claim does not require evidence of a similarly situated comparator and may be supported by facts showing that "animus against the protected group was a significant factor" in the housing decision made by the defendant. *Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 49 (2d Cir. 2002); *see also James v. New York Racing Ass'n*, 233 F.3d 149, 156 (2d Cir. 2000) ("[T]he governing standard is simply whether the evidence, taken as a whole, is sufficient to support a reasonable inference that prohibited discrimination occurred.").

Supp. 3d at 303 (quoting *L.C. v. LeFrak Org., Inc.*, 987 F. Supp. 2d 391, 400 (S.D.N.Y. 2013)), and may be proved with circumstantial evidence. *Mhany Mgmt., Inc*., 819 F.3d at 606.

The Complaint pleads enough circumstantial evidence to plausibly allege that Defendants' LEP exclusion policy was a proxy or pretext for discrimination based on national origin or race. While evidence of a disparate impact alone is not sufficient to show an intent to discriminate, "[s]uch impact may be an important starting point." *United States v. Yonkers Bd. of Educ*., 837 F.2d 1181, 1221 (2d Cir. 1987). As discussed above, Plaintiff alleges that Defendants' LEP exclusion policy imposes a disparate impact on the basis of national origin and race. Further, according to the Complaint, Defendants were aware that their LEP exclusion policy had "a disproportionate impact on the basis of national origin and/or race." Compl. ¶ 36. *See Faith Action for Cmty. Equity,* 2014 U.S. Dist. LEXIS 58817, at *32 (holding that allegation that "Defendants know or should know that their English-only policy disproportionately adversely affects people of national origins other than the United States" was "a relatively intuitive allegation" that "need not be supported by statistical evidence at the pleading stage to meet the plausibility standard."); *see also Faith Action for Cmty. Equity,* 2015 WL 751134, at *6–7 ("Foreseeable knowledge of disparate impact can provide some basis for inferring discriminatory intent.").

Moreover, Plaintiff alleges that Defendants knew that two of the LEP applicants spoke Spanish but not fluent English, Compl. ¶¶ 12, 19, and that two other LEP applicants "had recently immigrated and did not speak English well." Compl. ¶ 23; *Cabrera,* 977 F. Supp. 2d at 977 (allegations that plaintiff was "a native Spanish speaker with limited English proficiency" who was told by defendants that she "should learn English now that she is in America" plausibly supported national origin discrimination claim under the FHA); *Berke,* 1978 U.S. Dist. LEXIS

17380, at *22 (finding that plaintiff's accent supported an inference that defendants knew that plaintiff was born abroad). Accordingly, one can reasonably infer from the Complaint's allegations that Defendants knew that their language policy was excluding Hispanics and recent immigrants.

A plaintiff may also show intentional discrimination "by persuading the trier of fact that the [defendant's] proffered explanation is unworthy of belief." *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1181 (2d Cir. 1992) (citations omitted); *see also Wolf v. Buss (Am.) Inc.*, 77 F.3d 914, 919 (7th Cir. 1996) (pretext can be shown with evidence that "the proffered reasons are factually baseless" or "the proffered reasons were not the actual motivation for the discharge") (citation omitted).

The court's analysis in *Wisconsin Plastics, Inc.*, 186 F. Supp. 3d 945, is instructive on the issue of pretext in a language classification case. There, during a lay-off, the defendant had selectively terminated employees, who were all either Hispanic or Hmong, based on "their inability to speak English." 186 F. Supp. 3d at 946-47. On summary judgment, the court found that "the ability to speak English does not materially impact the employees' ability to do their job as production operators," and held that the language justification defendant gave for firing employees could have been pretextual because "if English speaking is irrelevant to job performance, a juror might reasonably question why the employer seized on that factor as the reason given for the employees' termination." *Id*.

Here, the Complaint pleads facts from which one can reasonably infer that Defendants' purported justification for the LEP exclusion policy and rejection of the LEP applicants—management's purported need to know that prospective residents understand the lease and have a means of communicating—was unworthy of belief and thus pretextual. The Complaint alleges

that, in two separate instances, Defendants rejected the callers' offers to provide translation services on behalf of the LEP applicants, which would have solved the interpretation problem identified by the rental agents. Compl. ¶¶ 1, 12, 23-24. Accordingly, these facts plausibly support an inference that Defendants' justification was pretextual. *Wisconsin Plastics, Inc*., 186 F. Supp. 3d at 946-47; *Faith Action for Cmty. Equity*, 2015 WL 751134, at *7 (denying defendant's motion for summary judgment and holding that a reasonable juror could find defendant's stated reasons for giving driving exam only in English was a pretext for intentional discrimination); *Beckles-Canton v. Lutheran Soc. Servs. of New York, Inc*., No. 20 CIV. 4379 (KPF), 2021 WL 3077460, at *10 (S.D.N.Y. July 20, 2021) (stating that because the complaint "alleges that the 'stated reasons' for Plaintiff's termination were 'abundantly false' . . . Plaintiff has satisfactorily pleaded that Defendant's bases for her dismissal were pretextual.").

C. The 2016 HUD LEP Guidance is Due *Skidmore* Deference

While HUD's 2016 LEP Guidance accurately states the law regarding how language restrictions may give rise to liability under the FHA, Defendants' attack on the Guidance is misplaced, because the Court can resolve Defendants' Motion to Dismiss—and indeed Plaintiff's case—without relying on the Guidance.

In any event, the 2016 HUD LEP Guidance is thorough, well-reasoned and consistent with applicable caselaw and other HUD guidance, and is therefore entitled to *Skidmore* deference. Agency interpretations and opinions contained in policy statements, agency manuals, and enforcement guidelines may be entitled to deference under *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944). *Boykin v. KeyCorp*, 521 F.3d 202, 208 (2d Cir. 2008). Under *Skidmore*, the weight a court gives an agency interpretation "depends upon 'the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements,

and all those factors which give it power to persuade.'" *Id*. (quoting *Skidmore*, 323 U.S. at 140). "The validity inquiry looks to whether an agency interpretation is well-reasoned, substantiated, and logical." *Id*. (citation omitted).

As the Fourth Circuit has properly recognized, the 2016 HUD LEP Guidance warrants deference. *See Reyes*, 903 F.3d at 432. There, in finding that the plaintiffs had plausibly alleged that defendants' policy of requiring tenants to show proof of legal immigration status imposed a disparate impact on the basis of national origin, the Fourth Circuit gave deference to the 2016 HUD LEP Guidance for the proposition that "disparate-impact claims may arise under circumstances in which the challenged policy, on its face, relates to conduct that was not protected under the FHA, but which may correlate with a protected class." *Id*. As discussed above, CNY Fair Housing's complaint alleges a similar claim—that Defendant's refusal to rent to LEP individuals imposes a disparate impact on the basis of national origin and race.

Here, the 2016 HUD LEP Guidance meets all the criteria for *Skidmore* deference. Contrary to Defendants' assertion that the Guidance states that language alone is a protected class (ECF No. 15, Motion to Dismiss ("MTD") at 5-6), the Guidance begins with the acknowledgement that "[i]ndividuals who are LEP are not a protected class under the [Fair Housing] Act." 2016 HUD LEP Guidance at 1. At no point does the Guidance purport to create liability under the FHA on the sole basis of a language classification. Instead, it "addresses how the disparate treatment and discriminatory effects methods of proof apply in [FHA] cases in which a housing provider bases an adverse housing action – such as a refusal to rent or renew a lease – on an individual's limited ability to read, write, speak or understand English." *See* 2016 HUD LEP Guidance at 1.

Further, the Guidance accurately explains how housing providers might use language classifications "as a pretext for intentional discrimination." 2016 HUD LEP Guidance at 3. "In such cases, the use of the language-related criteria is analyzed under the Act *the same as is the use of any other potentially discriminatory criteria*." *Id.* at 3 (emphasis added). The Guidance states that "[o]ften, lack of English proficiency is used as a proxy for national-origin discrimination" but that "[t]he key question . . . is whether the plaintiffs have presented sufficient evidence to permit a reasonable jury to conclude [they] suffered an adverse housing action *because of their protected class*." *Id*. (citing *Lindsay v. Yates*, 578 F.3d 407, 416 (6th Cir. 2009) (emphasis added)). Accordingly, rather than asserting that LEP status itself constitutes a protected class, the Guidance makes clear that LEP status may be a proxy for discrimination based on a protected class, and a plaintiff must still prove discrimination on the basis of a protected class, like national origin or race. As discussed above, this is a correct and succinct synthesis of the law. *See CoreLogic Rental Prop. Sols., LLC*, 478 F. Supp. 3d at 298–99 (giving *Skidmore* deference to HUD's Nov. 2, 2015 *Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions*) ("2015 HUD Arrest Record Guidance") because "it is thorough, synthesizing a review of the relevant case law" with "careful . . . reasoning.").[14]

The Guidance also thoroughly and accurately explains how a language classification may violate the FHA under a disparate impact theory. 2016 HUD LEP Guidance at 6-8. Based on *Inclusive Communities* and other cases, the Guidance discusses the elements of a disparate impact claim and how a litigant might demonstrate that an "LEP-related policy" has a

[14] *See* https://www.hud.gov/sites/documents/PIH2015-19.PDF (last visited April 1, 2022).

disproportionate impact on the basis of a protected class. *Id*. The 2016 HUD LEP Guidance is therefore consistent with relevant authorities regarding disparate impact.

The 2016 HUD LEP Guidance is also consistent with other HUD guidance documents. *Skidmore*, 323 U.S. at 140 (stating that "consistency with earlier and later pronouncements" is a factor under deference analysis). For example, the 2016 HUD LEP Guidance analyzes language restrictions under the FHA in the same manner as HUD's 2016 *Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions* ("2016 HUD Criminal Record Guidance").[15] The guidance documents contain similar discussions of how language ability and criminal history screening policies are facially neutral criteria that may form the basis of liability under the FHA when they are a pretext for intentional discrimination or impose a disparate impact on the basis of a protected class. *Compare* 2016 HUD LEP Guidance *with* 2016 HUD Criminal Record Guidance.

Courts have also given deference to similar HUD guidance documents. *See CoreLogic Rental Prop. Sols., LLC*, 478 F. Supp. 3d 259, 298–99 (giving *Skidmore* deference to 2015 HUD Arrest Record Guidance); *Simmons v. T.M. Assocs. Mgmt., Inc*., 287 F. Supp. 3d 600, 605 (W.D. Va. 2018) ("Because HUD and the DOJ administer and enforce the FHA . . . their guidance on the direct threat exception is entitled to some deference") (citing 2004 Joint Statement of DOJ and HUD on Reasonable Accommodations Under the FHA).[16]

Defendants argue that the 2016 HUD LEP Guidance is contrary to cases holding that "language-based classifications do not implicate race or national origin under the FHA." MTD

[15] *See* https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF (last visited April 1, 2022).

[16] *See* https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint_statement_ra.pdf (last visited April 1, 2022).

at 6. Courts have rejected similar arguments. For example, in *Sandoval*, the Eleventh Circuit rejected defendant's argument that "an English language policy cannot discriminate on the basis of national origin as a matter of law." *See Sandoval,* 197 F.3d at 491. Similarly, in *Davis*, the court held that a "facially neutral language policy" can serve as the basis for a discrimination claim "when it has a disparate impact on a protected characteristic or is used as a proxy or pretext for discrimination based on a protected characteristic." *Davis,* 2016 WL 4507122, at *5; *see also Synchro-Start Prod*., Inc., 29 F. Supp. 2d at 912 (stating that no "court has knocked the plaintiff out of the running at the very outset by finding that English-only rules could never violate" civil rights laws). And, in any event, as discussed by Plaintiff in its opposition brief, none of the cases cited by Defendants *actually* stand for the proposition that a language classification can *never* form the predicate for an intentional discrimination or disparate impact claim on the basis of national origin or race. *See* ECF No. 16, Pl.'s Opp. Defendants' MTD does not identify any statement made in the 2016 HUD LEP Guidance that is contrary to law.

For all these reasons, the 2016 HUD LEP Guidance merits deference. *See Reyes*, 903 F.3d at 432. The Guidance is "well-reasoned, substantiated, and logical," closely tracks relevant caselaw on disparate impact and intentional discrimination, and is consistent with other HUD guidance documents. *Boykin,* 521 F.3d at 208; *CoreLogic Rental Prop. Sols.,* LLC, 478 F. Supp. 3d at 298–99. Accordingly, it satisfies all the criteria for *Skidmore* deference.

IV. CONCLUSION

For the reasons stated above, the United States respectfully requests that the Court deny Defendants' Motion to Dismiss consistent with the legal analysis set forth above.

Dated: April 1, 2022

Respectfully submitted,

CARLA B. FREEDMAN
United States Attorney
Northern District of New York

KRISTEN CLARKE
Assistant Attorney General
Civil Rights Division

SAMEENA SHINA MAJEED
Chief

R. TAMAR HAGLER
Deputy Chief

/s/ John D. Hoggan, Jr.
JOHN D. HOGGAN, JR.
Assistant United States Attorney
Bar Roll No. 511254
United States Attorney's Office
James T. Foley U.S. Courthouse
445 Broadway, Room 218
Albany, NY 12207
Telephone: (518) 431-0247
Email: john.hoggan@usdoj.gov

/s/ Noah Sacks
NOAH SACKS
Trial Attorney
Housing and Civil Enforcement Section
Civil Rights Division
U.S. Department of Justice
150 M Street, N.E.
Washington, D.C. 20002
Telephone: (202) 305-1901
Email: noah.sacks@usdoj.gov

Counsel for the United States

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the United States District Court for the Northern District of New York through the CM/ECF system, which will send a Notice of Electronic Filing to registered CM/ECF participants.

/s/ John D. Hoggan, Jr
JOHN D. HOGGAN, JR.
Assistant United States Attorney
Bar Roll No. 511254
James T. Foley U.S. Courthouse
445 Broadway, Room 218
Albany, NY 12207-2924
Telephone: (518) 431-0249
Counsel for the United States