UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

STANTON SQUARE, LLC, Plaintiff, v. THE CITY OF NEW ORLEANS, THE NEW ORLEANS CITY COUNSEL, and FREDDIE KING III, in his official capacity as a member of the New Orleans City Council, Defendants.	)	Civil Action No. 2:23-cv-5733 SECTION D Judge Brandon S. Long MAGISTRATE 5 Judge Michael B. North

STATEMENT OF INTEREST OF THE UNITED STATES

I. INTRODUCTION

The United States respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517[1] to assist the Court in interpreting the Fair Housing Act ("FHA"), 42 U.S.C. § 3601 *et seq*., and Title VI of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. § 2000d *et seq*.

In this lawsuit, Plaintiff Stanton Square, LLC ("Stanton Square") alleges, in part, that Defendants, including the City of New Orleans ("City"), have unlawfully prevented it from developing a multifamily apartment complex in violation of the FHA and Title VI. *See, e.g.*, Revised Supplemental, Am., and Restated Compl. for Injunctive, Declaratory, and Monetary Relief ("Am. Compl."), ECF No. 44, ¶¶ 71-107, 172-192. The Supreme Court has acknowledged that land use decisions that restrict the development of multifamily housing can unlawfully discriminate because of race in violation of the FHA. *See Texas Dep't of Hous. & Cmty. Affs. v.*

[1] Under 28 U.S.C. § 517, "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

Inclusive Cmtys. Project, Inc., 576 U.S. 519, 539-40 (2015). The Attorney General has enforcement authority under the FHA, *see* 42 U.S.C. §§ 3612(o), 3614, and has pursued cases challenging actions by municipalities that unlawfully block the development of multifamily housing. *See, e.g.*, *United States v. Town of Franklinton, La.*, No. 2:24-cv-01633 (E.D. La. filed June 27, 2024); *United States v. City of Arlington, Tex.*, No. 4:22-cv-00030-P (N.D. Tex. filed Jan. 13, 2022); *United States v. Vill. of Tinley Park, Ill.*, No. 16-cv-10848 (N.D. Ill. filed Nov. 23, 2016). The Attorney General is also authorized to bring Title VI civil actions and is responsible for ensuring consistent enforcement of Title VI across all federal agencies. *See* 28 C.F.R. § 42.108; Exec. Order No. 12250, 45 Fed. Reg. 72, 995 (Nov. 2, 1980). The United States, therefore, has a strong interest in ensuring the proper application of the FHA and Title VI in this context.[2]

II. BACKGROUND

In March 2021, Stanton Square purchased a forested tract of land along a four-lane highway in Lower Coast Algiers ("LCA") for the purpose of developing multifamily rental housing.[3] Am. Compl. ¶¶ 39-40. The property has been zoned to allow for the development of lower-density multifamily housing since the 1980s. *Id.* ¶ 41. Such development is also consistent with the future land use designation for the property outlined in the Future Land Use Map ("FLUM") of the City's Master Plan. *Id.* ¶ 42.

[2] The United States previously filed a Statement of Interest addressing arguments put forth in Defendants' Motion to Dismiss Plaintiff's initial Complaint. *See* ECF No. 22. After Stanton Square amended its Complaint, Defendants filed a renewed Motion to Dismiss and the Court denied Defendants' prior motion as moot. *See* ECF No. 47. To the extent Defendants wish to respond to arguments raised in this Statement of Interest and seek leave from the Court for additional time to file a reply to do so, Plaintiff's counsel has represented to the United States that they will not oppose Defendants' request.

[3] As is appropriate at the motion to dismiss stage, this brief takes as true the factual allegations of Plaintiff's Amended Complaint. The United States otherwise takes no position on the underlying facts of this case.

In May 2022, Stanton Square submitted plans to the Design Advisory Committee ("DAC") of the City Planning Commission ("CPC") for the development of The Village at English Turn ("Village" or "Development"), a proposed 278-unit multifamily housing complex with affordable apartments. *Id*. ¶¶ 45, 63. Soon after, residents of the surrounding area and members of the English Turn Property Owners Association ("ETPOA") initiated a campaign to block the Development. *Id*. ¶¶ 64-66. These residents voiced their objections to the Development in communications to City officials and at a DAC hearing held in August 2022. *Id*. ¶¶ 67-68. Much of this opposition focused on the character of the likely residents of the Village, rather than traditional land use concerns. *See id*. In response to this opposition, in October 2022, the City Council passed a motion related to the establishment of an interim zoning district ("IZD") that froze multifamily development in the LCA area. *See id.* ¶¶ 71-78, 107. Specifically, the City Council's motion barred any City agency from accepting or granting any permits for the development of multifamily housing covered under the proposed IZD, including the Village. *See id*. ¶ 75.

In December 2022, the CPC recommended that the City Council's motion for the establishment of the IZD be denied and that the City Council grant Stanton Square's appeal of the moratorium. *Id*. ¶¶ 82-7. Although the CPC found that the Development was consistent with the City's zoning requirements and should be approved, in February 2023, the City Council voted to formally adopt the IZD and deny Plaintiff's appeal. *Id*. ¶¶ 85-91, 97.[4] Plaintiff has been prohibited from taking any action to further the Village because the City Council suspended multifamily development within the LCA area through its proposal for and establishment of the IZD. *Id*. ¶¶ 75, 106. Earlier this year, the City Council voted to extend the

[4] As discussed below, Plaintiff maintains that "this is the first time that Defendants have used an [IZD] to target and block a by-right, multifamily housing development." *Id*. ¶ 15.

moratorium until September 3, 2024. *Id*. ¶ 103. The City Council is empowered to extend the moratorium for an additional 180 days, until March 2025. *Id*. ¶ 106.

Defendants have also taken steps that would facilitate permanent downzoning of the property after the moratorium is lifted. *Id*. ¶¶ 139-155. Acting on the ETPOA's behalf, Councilmember Freddie King III requested to change the FLUM designation of all properties in the area zoned for multifamily housing. *Id*. ¶ 143. On July 9, 2024, following a hearing on the proposal, the CPC voted in favor of redesignating Plaintiff's property as single family. *Id*. ¶¶ 147-154. Amending the property's FLUM designation is a necessary condition for ultimately rezoning it to single family. *Id*. 155.

Defendants' Motion to Dismiss ("Motion") argues that Plaintiff's claims under the FHA and Title VI should be dismissed because: (1) Plaintiff's allegations based on circumstantial evidence are insufficient to raise an inference of discriminatory intent, Defs.' Mem. in Supp. of Mot. to Dismiss ("Defs.' Mem."), ECF No. 45-1, at 9-14; (2) Plaintiff's statistics showing that Black and Hispanic residents in the area are more likely to be renters who may reside at the Development than White residents are insufficient to allege a disparate impact on Black and Hispanic residents under the FHA, *see id.* at 17; and (3) even assuming a disproportionate impact on these residents, Plaintiff cannot demonstrate that Defendants' zoning decisions caused this impact, *id*. at 14-18.

As explained below, none of these arguments have merit. This Court should therefore reject these arguments in disposing of Defendants' Motion.[5]

[5] The United States expresses no opinion on the other issues raised in Defendants' Motion. As Defendants have represented that the Motion supersedes Defendants' prior Motion to Dismiss, which the Court denied as moot, this Statement of Interest also does not address arguments from the previous Motion to Dismiss that Defendants abandoned in the operative Motion. *See id*. at 1 n.1.

III. ARGUMENT

A. Plaintiff has plausibly alleged that the City acted with discriminatory intent in violation of the FHA and Title VI.[6]

In *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, a case brought under the Equal Protection Clause concerning an allegedly discriminatory rezoning denial, the Supreme Court outlined a non-exhaustive list of circumstantial evidence factors that may be probative of a government entity's discriminatory intent. *See* 429 U.S. 252, 266-68 (1977). The Fifth Circuit applied these factors in *Overton v. City of Austin*, a Voting Rights Act case, and identified them as follows: "(1) the historical background of the decision, (2) the specific sequence of events leading up to the decision, (3) departures from the normal procedural sequence, (4) substantive departures, and (5) legislative history. . . ." 871 F.2d 529, 540 (5th Cir. 1989) (citing *Arlington Heights*, 429 U.S. at 267-68). This framework also applies to allegations of disparate treatment against a local government under the FHA and Title VI. *See*, *e.g., Mhany Management, Inc. v. County of Nassau*, 819 F.3d 581, 605-616 (2nd Cir. 2016) (applying *Arlington Heights* framework in case alleging claims under the Fourteenth Amendment, the FHA, and Title VI); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 130, 141-45 (3d Cir. 1997) (applying framework to action raising claims under, *inter alia*, the FHA), *cert. denied*, 435 U.S. 908. Under the *Arlington Heights* framework, Plaintiff's Amended Complaint sufficiently

[6] Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. The City does not dispute, *see* Defs.' Mem. at 19-20, that the City is a recipient of a HUD Community Development Block Grant, a form of federal financial assistance. *See* 24 C.F.R. § 1.2(e) (HUD Title VI regulations defining "Federal financial assistance"); Am. Compl. ¶¶ 30, 190. Therefore, the only relevant issue in this Motion under Title VI is whether Plaintiff has adequately alleged intentional discrimination by Defendants. And that is the same issue raised by Defendants' Motion with respect to Plaintiff's intentional discrimination claim under the FHA.

alleges intentional discrimination based on race, color, or national origin under both the FHA and Title VI to defeat a motion to dismiss.

1. Plaintiff adequately alleges that the specific sequence of events leading up to the City's zoning decisions demonstrate they were caused, at least in part, by discriminatory opposition from constituents.

a. *Plaintiff adequately alleges that there was discriminatory opposition to the proposed development*.

"Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266. Courts have acknowledged that direct evidence of discrimination is especially unlikely to be forthcoming in cases involving the racial motivation of public officials. *See, e.g.*, *Smith v. Town of Clarkton, N.C.*, 682 F.2d 1055, 1064 (4th Cir. 1982) (noting that "[m]unicipal officials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority."); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977) ("As overtly bigoted behavior has become more unfashionable, evidence of intent has become harder to find.").

Recognizing that expression of discriminatory sentiments is often more covert, courts—including in this circuit—have found that statements like those made by Defendants' constituents and included in Plaintiff's Amended Complaint may indicate discriminatory animus. For example, in *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Par.*, the court considered whether race was implicated in an editorial concerning proposed mixed-income housing developments, which was published in St. Bernard Parish's official newspaper. *See* 641 F. Supp. 2d 563, 571-72. Although the editorial did not directly mention race, the court determined that its references to "ghetto, crime, drugs, violence," and certain multifamily

housing developments "juxtaposed against their 'threat' and the 'shared values' of overwhelmingly Caucasian St. Bernard Parish" were "clearly . . . an appeal to racial as well as class prejudice." *Id*. at 572.

Other courts have similarly concluded that, in the context of opposition to affordable housing development, appeals to concerns about increased crime, in particular, can be discriminatorily motivated. *See, e.g.*, *Ave. 6E Invs., LLC v. City of Yuma, Ariz.*, 818 F.3d 493, 506-07 (9th Cir. 2016) (finding that, along with other allegations, complaints to the effect that the type of residents who would live in a development would "create a 'low cost, high crime neighborhood'" offered plausible circumstantial evidence of discriminatory animus); *see also Smith*, 682 F.2d at 1066 (affirming district court's interpretation of concerns about "undesirables" and "personal safety due to the influx of 'new' people" as "'camouflaged' racial expressions"); *Atkins v. Robinson*, 545 F. Supp. 852, 874 (E.D. Va. 1982), *aff'd*, 733 F.2d 318 (4th Cir. 1984) (noting that a county official's comments that "crime is on the rampage in housing projects" and expressing fear that they "would degenerate to slum-like conditions, with an abundance of crime" may "rest on a veiled reference to race.").

Here, Stanton Square alleges that constituents opposed the Village primarily because of the alleged character of the prospective residents, and not because of traditional zoning concerns regarding the use of the property. *See* Am. Compl. ¶¶ 66-68. Like the comments considered in the aforementioned cases, the statements referenced in the Amended Complaint assert that residents of the Development would be "an affront to [the] lifestyles" of current homeowners, bring "additional crime," "health concerns," and "deplorable conditions" to the neighborhood, "encourage disinvestment or flight from the area," and burden the community with having to "tak[e] care of the families" living in the complex. *Id*. ¶¶ 67-68. The current

residents' comments—expressing that the potential future residents who will occupy a housing development like the Village will be incompatible with the values or "lifestyles" of existing residents—are very similar to the remarks other courts have found to be evidence of discriminatory intent. *See* cases cited above, *supra* at 6-7; *see also Mhany Mgmt., Inc.*, 819 F.3d at 608-10 (upholding district court's finding that references to maintaining the "flavor" and "character" of a city were "code words for racial animus.").

Additionally, the constituents' emphasis on public safety and the assumed criminality of the Development's likely residents distinguishes these comments from the statements that the Eleventh Circuit determined were not indicative of discriminatory animus in *Hallmark Devs. v. Fulton Cnty., Ga.*, 466 F.3d 1276, 1281-82, 1284-85 (11th Cir. 2006). Despite Defendants' contentions to the contrary, *see* Defs.' Mem. at 13-14, Plaintiff plausibly alleges that "[t]he gist" of the constituents' comments here is not that "community members wanted the development to be more upscale," *Hallmark Devs.*, 466 F.3d at 1281 n.3, but that they believed the Village's prospective residents would commit crimes and otherwise contribute to neighborhood decline.

b. *Plaintiff adequately alleges that the City capitulated to the discriminatory objections of its constituents and that the reasons proffered by the City to justify its zoning decisions were pretextual*.

Defendants further argue that, even assuming these statements were discriminatory, Stanton Square has not plausibly alleged that Defendants "acted upon a motive for racial animus." Defs.' Mem. at 13-14. Plaintiff, however, plausibly alleges that Defendants listened to and closely coordinated with those who opposed the Development to effectuate their discriminatory objectives. Am. Compl. ¶¶ 71-78, 137-38, 140-54. It is well established that government entities can be held liable for capitulating to the discriminatory motives of their

constituents, regardless of whether public officials explicitly endorse or personally agree with those motives. *See*, *e.g.*, *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 49 (2d Cir. 1997) (noting that a city "may not base its [zoning] decisions on the perceived harm from . . . stereotypes and generalized fears" and that "a decision made in the context of strong, discriminatory opposition becomes tainted with discriminatory intent even if the decisionmakers personally have no strong views on the matter.");[7] *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1124 (2nd Cir. 1987) (acknowledging that "[t]he Supreme Court has long held, in a variety of circumstances, that a governmental body may not escape liability . . . merely because its discriminatory action was undertaken in response to the desires of a majority of its citizens."); *Smith*, 682 F.2d at 1066-67 (affirming district court's finding that Town acted with discriminatory intent when it halted development of public housing in response to racially motivated opposition by residents); *United States v. City of Black Jack, Mo.*, 508 F.2d 1179, 1185 n.3 (8th Cir. 1974) (Eighth Circuit agreeing with Tenth Circuit's opinion that "it is enough for the complaining parties to show that the local officials are effectuating the discriminatory designs of private individuals.") (internal citations omitted).[8] "[C]itizen comments can demonstrate that public officials acted with bias" where "the circumstances

[7] *Recognized as superseded on other grounds in Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 171 n.7 (2d Cir. 2001).

[8] *See also Cmty. Hous. Tr. v. Dep't of Consumer & Regul. Affs.*, 257 F.Supp.2d 208, 227 (D.D.C. 2003) ("[T]he law is quite clear that 'even where individual members of government are found not to be biased themselves,' plaintiffs may demonstrate a violation of the FHA[] if they can show that 'discriminatory governmental actions are taken in response to significant community bias.'") (quoting *Tsombanidis v. City of W. Haven, Conn.*, 129 F. Supp 2d 136, 152 (D. Conn. 2001); *United States v. City of Birmingham, Mich.*, 538 F. Supp. 819, 828 (E.D. Mich. 1982), *aff'd as modified*, 727 F.2d 560 (6th Cir. 1984) (clarifying that plaintiff "need not prove that the [governing body] itself intended to discriminate on the basis of race[;] . . . it is sufficient to show that the decision-making body acted for the sole purpose of effectuating the desires of private citizens, that racial considerations were a motivating factor behind those desires, and that members of the decision-making body were aware of the motivations of the private citizen.").

surrounding those statements strongly suggest that the public officials either adopted the citizens' biases or acted directly in response to citizen's discriminatory desires." *Jim Sowell Constr. Co., Inc. v. City of Coppell*, 61 F. Supp. 2d 542, 551 (N.D. Tex. 1999).

For example, the court in *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Par.* considered the *Arlington Heights* factors in finding that St. Bernard Parish had, in violation of the FHA, acted with discriminatory intent in obstructing applications to re-subdivide properties for multifamily housing. *See* 648 F. Supp. 2d 805, 809-19 (E.D. La. 2009). In discussing "the specific sequence of events leading up to [St. Bernard Parish's] decision," the court noted that it was "troubled by the sudden and abrupt change in treatment" of the applications that followed a public hearing. *Id*. at 813. At this hearing, the court observed that "many of the public and official comments" in opposition to the applications included language that the court deemed to be "camouflaged racial expressions." *Id*. at 811. Here, Stanton Square has plausibly alleged a sequence of events culminating in the City's zoning decisions that demonstrates they were motivated, at least in part, by discriminatory opposition from residents. *See, e.g.*, Am. Compl. ¶¶ 64-68, 71-73, 76, 78, 103, 137-38, 140-43, 149, 151, 153-54; *cf* ¶¶ 29, 34-35, 41-43, 85, 88, 112 (alleging that promoting affordable housing options is among the City's top priorities; that the Development is consistent with its Master Plan; and that the CPC found that the Village met the review standards outlined in the City Council's initial IZD motion, including those related to traffic and environmental impacts). As the Amended Complaint notes, the City's failure to promptly initiate the studies purportedly needed to assess the impacts of multifamily housing development on areas subject to the IZD and its steps to downzone Plaintiff's property prior to completion of these studies offer further indicia of discriminatory intent. *See id.* ¶¶ 116, 150, 154.

2. Plaintiff adequately alleges that the City departed from its normal procedures.

Procedural departures "might afford evidence that improper purposes are playing a role." *Arlington Heights*, 429 U.S. at 267. Such departures can demonstrate invidious intent when they "occur[] in a context that suggests the decision-makers were willing to deviate from established procedures in order to accomplish a discriminatory goal." *Rollerson v. Brazos River Harbor Navigation Dist. of Brazoria Cnty. Tex.*, 6 F.4th 633, 640 (5th Cir. 2021).

Here, Stanton Square plausibly alleges that the City's actions regarding the Village depart from the City's normal zoning procedures. *See, e.g.*, Am. Compl. ¶¶ 101, 114-15. The Amended Complaint sets forth, based on information from an organization that "regularly monitors City actions pertaining to zoning of affordable and multi-family housing," that "it is exceedingly rare for the City Council to overrule the Planning Commission's recommendation and move forward to block the development of housing." *Id.* ¶ 101. Members of the CPC allegedly "expressed incredulity at the use of an IZD to stop a by-right development," which also shows that the zoning decisions were "unorthodox." *Id.* ¶ 115.

Substantive departures may also be relevant, "particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." *Arlington Heights*, 429 U.S. at 267. For example, in *Dailey v. City of Lawton, Okl.*, the Tenth Circuit upheld a finding of racial motivation where the plaintiffs planned to build low-income housing, but the city refused to rezone the land to high-density residential, even though all of the surrounding area was zoned high-density residential and the present and former directors for the City's Planning Commission testified that there was no reason "from a zoning standpoint" why the land should not be rezoned. 425 F.2d 1037, 1040 (10th Cir. 1970). Here, Plaintiff has alleged that the CPC's "Executive Director found that the Development met

each of the six (6) review standards that [the] City Council established in the IZD Motion;" "that the Development would be consistent with the Master Plan;" and "that approving the Appeal would be consistent with the CPC's recommendation that the IZD Motion be denied." Am. Compl. ¶ 88. Stanton Square's allegations that the City reached contrary zoning decisions provide evidence of a substantive departure from the recommendations of the CPC and its Executive Director.[9] Plaintiff also alleges that this is the first time the City has adopted an IZD to block multi-family housing and that its use "marks a significant departure from the City's stated policies on supporting the development of affordable housing." *Id.* ¶¶ 114-15. Collectively, these alleged procedural and substantive departures provide circumstantial evidence of discriminatory intent under *Arlington Heights*.

3. Plaintiff's allegations related to the historical background of the City's zoning decisions provide further evidence of discriminatory intent.

The historical background of a decision may offer evidence of discriminatory intent, "particularly if it reveals a series of official actions taken for invidious purposes." *Arlington Heights*, 429 U.S. at 267. Here, Stanton Square alleges that the City Council has a "history of implementing restrictive policies in clear contravention of the City's stated public policy goals, and in spite of the growing need for housing." *Id*. ¶ 32. For example, in addition to failing to take steps to increase the supply of local affordable housing, Plaintiff claims that the City previously opted to terminate most of its social housing, a decision alleged to have almost exclusively impacted thousands of Black residents, and has been receptive to a number of

[9] Notably, Stanton Square claims in its Amended Complaint that CPC staff changed course *after* the City Council adopted the IZD and denied Plaintiff's appeal, concluding in connection with the FLUM proceedings that redesignating Stanton Square's property as single family was consistent with the Master Plan. *See id.* ¶¶ 151-52. The CPC's apparent reversal of its earlier determination—that Stanton Square's proposed use of the property was consistent with the Master Plan—may indicate yet another substantive departure from the City's usual decision-making on zoning-related issues. *See id*. ¶¶ 88, 152.

campaigns to block or delay affordable housing in recent years. *Id*. ¶¶ 31-2, 34, 36.[10] Plaintiff also alleges that the City has "acknowledged the effect of neighborhood associations lobbying [the] City Council for the use of restrictive zoning measures to exclude housing developments that would otherwise allow an influx of people of color into their neighborhoods," and pledged to advance zoning laws that facilitate the development of affordable housing. *Id*. ¶ 34. Against this backdrop, Stanton Square plausibly alleges that Defendants' efforts to bar construction of the Village and recent actions towards downzoning Plaintiff's property and others with a similar zoning designation in the area are part of the City's longstanding pattern of committing to support affordable housing, even as it takes official actions to curtail its availability. *See, e.g., id*. ¶¶ 29, 31-32, 34-37, 139, 148-55.[11]

Ultimately, "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts . . . ." *Washington v. Davis*, 426 U.S. 229, 242 (1976) (discussing analysis of intentional discrimination generally). Because the Amended Complaint sets forth factual allegations that courts regularly examine under *Arlington Heights* when evaluating intentional discrimination claims and plausibly alleges that the City's zoning decisions were enacted, at

[10] Plaintiff's Amended Complaint references a case that the United States filed against the City alleging violations of the FHA. *Id*. ¶ 33. Although Defendants are correct that this case, *United States v. City of New Orleans, La.*, No: 2:12-cv-02011 (E.D. La. filed Aug. 6, 2012), concerned allegations of discrimination based on disability, not race, and was resolved without a finding of liability or admission of wrongdoing, the matter itself—and more specifically, the court's denial of the City's motion to dismiss the United States' complaint—put the City on notice that it may be held liable under the FHA for blocking housing developments based on discriminatory opposition from its constituents. *See id*., 2012 WL 6085081, at *9 (E.D. La. Dec. 6, 2012).

[11] Defendants claim that the "historical background" of Plaintiff's property, including that its zoning designation had not been amended for several decades, shows that their zoning decisions were made pursuant to "a normal sequence of events." Defs.' Mem. at 10. On the contrary, the City's abrupt departure from its forty years of allowing multifamily housing development on the property shortly after Stanton Square proposed the Village suggests an improper motive—even the case Defendants cite in support of this argument, *Arlington Heights*, concerned a single family zoning classification that had been in effect for over a decade. *See* 429 U.S. at 269.

least in part, with discriminatory intent, Plaintiff should be permitted to engage in discovery on these claims.

B. Plaintiff has plausibly alleged that the City's actions have a disparate impact on Black and Hispanic residents and perpetuate segregation in violation of the FHA.

"[D]isparate-impact claims are cognizable under the [FHA]" and are "consistent with the FHA's central purpose." *Inclusive Comtys.*, 576 U.S. at 539, 545. Among other things, the FHA's provisions prohibiting discriminatory housing practices proscribe "zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification." *Id*. at 539. "Suits targeting such practices[,]" including restrictions on multifamily rental housing, "reside at the heartland of disparate-impact liability." *Id*. at 539-40 (citing, in part, *Town of Huntington, N.Y. v. Huntington Branch, N.A.A.C.P.*, 488 U.S. 15, 16-18 (1988) (per curiam) (invalidating zoning law preventing construction of multifamily rental units); *City of Black Jack*, 508 F.2d at 1182-88 (invalidating ordinance prohibiting construction of new multifamily dwellings)).

Disparate impact liability targets housing practices that "arbitrarily creat[e] discriminatory effects or perpetuat[e] segregation." *Inclusive Communities*, 576 U.S. at 540. *Accord Inclusive Cmtys. Project v. Lincoln Prop. Co*., 920 F.3d 890, 909 (5th Cir. 2019) (noting that disparate impact claims under the FHA may "alleg[e] an adverse impact on a particular [protected] group" or "assert[] 'harm to the community generally by the perpetuation of segregation'") (quoting *Huntington Branch, N.A.A.C.P. v. Town of Huntington, N.Y.*, 844 F.2d 926, 937 (2d Cir. 1988)); *Ave. 6E Investments, LLC v. City of Yuma, Ariz.*, 818 F.3d 493, 503 (9th Cir. 2016) (stating that disparate impact liability "forbids actions by private or governmental bodies that create a discriminatory effect upon a protected class or perpetuate

housing segregation without any concomitant legitimate reason."). Consistent with these standards, Department of Housing and Urban Development ("HUD") regulations provide that "[a] practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, . . . familial status, or national origin." 24 C.F.R. § 100.500(a). A plaintiff has the initial "burden of proving that a challenged practice caused or predictably will cause a discriminatory effect." *Id*. § 100.500(c)(1). Once the plaintiff satisfies this requirement, the burden shifts to the defendant, who must "prov[e] that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the . . . defendant." *Id.* § 100.500(c)(2).[12]

Contrary to Defendants' claims, Plaintiff plausibly alleges that the City's zoning actions and their application to Stanton Square's property are likely to have a disparate impact on Black and Hispanic residents of New Orleans and the area surrounding the Village in violation of the FHA. Plaintiff does so by alleging statistics that show that Black and Hispanic households are more likely than White households to rent housing in the New Orleans area, Am. Compl. ¶ 119, that households making less than 100% of the Area Median Income ("AMI") and within a twenty-minute drive of the Village are disproportionately Black and Hispanic, *id*. ¶ 120, and that residents of the Development would likely be predominantly Black and Hispanic. *Id*. ¶ 121. For example, Plaintiff alleges that, within the City, Black households and Hispanic households are 1.24 times and 1.35 times more likely to rent housing than White households, respectively. *Id*. ¶ 119. Additionally, Plaintiff claims that, of the households that are within a twenty-minute drive

[12] Even if the defendant meets this burden, the plaintiff "may still prevail upon proving that the[se] . . . interests . . . could be served by another practice that has a less discriminatory effect." *Id*. § 100.500(c)(3).

of the Development, the Black households are 1.58 times and the Hispanic households are 1.36 times more likely than the White households to have incomes less than 100% of AMI. *Id*. ¶ 120. Since the Village is designed as an affordable, multifamily rental complex, it stands to reason that Black and Hispanic residents of New Orleans—particularly households already living nearby the Development, to whom apartments in the Village would be especially attractive—are disproportionately likely to live in the Development after it is built. *See id*. ¶¶ 7, 23, 57, 121.

Plaintiff also alleges sufficient facts to support its claim that the City's zoning actions perpetuate segregation. The property where the Village would be located is situated on a peninsula, roughly half of which is within the City with the remaining portion, to the southwest, in Plaquemines Parish. *Id*. ¶ 52. The English Turn community, which is at the center of the peninsula, is more than 60 percent white and approximately 32.8 percent Black and Hispanic, and the adjacent Plaquemines Parish is only 20 percent Black or Hispanic. *Id*. ¶¶ 25, 53, 55. By contrast, the area directly to the west of English Turn is disproportionately (85.8%) Black and Hispanic, *id*. ¶ 25, the population of the City overall is 53.6% Black and 8.1% Hispanic, *id.* ¶ 118, and households within a twenty-minute drive of the property are 43.9% Black and 11.7% Hispanic. *Id*. In short, the Village would be an affordable housing option located in a predominantly—and disproportionately, relative to surrounding areas and the City as a whole—White peninsula.

Defendants assert that the statistics in Plaintiff's Amended Complaint are inadequate because Stanton Square's allegations concerning the likely demographics of the Village's residents are "wholly speculative" and "no basis is given to conclude that the development's racial makeup will be the same as the demographics of renters within 20 miles" of the Village.

Defs.' Mem. at 17. Defendants attempt to hold Plaintiff to an unduly onerous standard—actual knowledge of the exact racial and ethnic demographics of the Village's future residents—that is unsupported by case law. Here, the court's decision in *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Par.*, 641 F. Supp. 2d 563, 567-68 (E.D. La. 2009) is instructive. In finding that a Parish moratorium on multifamily housing development had a disparate impact on Black people, the court relied on statistical evidence that Black households and families in the New Orleans metropolitan area were more likely to live in multifamily dwellings and fall within the income ranges for the proposed housing, respectively, and trial testimony from the developer's managing director that he expected, based on his experience and the market for similar units in Louisiana and Texas, that approximately 50% of the housing's renters would be Black. *Id*. (including premise that "African-Americans are disproportionately affected because the moratorium reduces the supply of rental properties," in this analysis).

For purposes of a motion to dismiss, Plaintiff's allegations based on both City-wide and more concentrated statistics are plausible and consistent with the analysis adopted in *St. Bernard Parish*. Plaintiff alleges that, because Black and Hispanic households are more likely to be renters than White households in New Orleans, the renter households that live in close proximity to the Village are predominantly Black and Hispanic, and Black and Hispanic households within a short distance of the Development are both more likely to be renters and have incomes below AMI than White households, not building the Village would adversely impact Black and Hispanic residents more than White residents. *See* Am Compl. ¶¶ 7, 117-21, 124, 171. And they plausibly allege that these facts, coupled with the segregated housing patterns in the peninsula, *id*. ¶¶ 22-25, 55, 118, mean that the development of an almost 300-unit apartment complex in English Turn, *id*. 45, will significantly increase the percentage of

Black and Hispanic families in that area, *id*. ¶¶ 50, 56-58, 117-21, and that blocking it will perpetuate segregation there. *id*. ¶¶ 7, 23, 121, 123.

C. Defendants' reliance on *Lincoln Property* is misplaced and Plaintiff has adequately alleged a robust causal connection between Defendants' zoning actions and a disparate impact on Black and Hispanic residents.

Defendants assert that, in *Inclusive Cmtys. Project v. Lincoln Prop. Co*., 920 F.3d 890, 901-09 (5th Cir. 2019), the Fifth Circuit interpreted the Supreme Court's decision in *Inclusive Communities* as modifying the HUD regulations' burden-shifting framework for disparate impact claims "to require a showing of robust causation," and that Stanton Square's claim of disparate impact under the FHA should be dismissed because Plaintiff's allegations fail to meet this more exacting standard. *See* Defs.' Mem. at 14-18. This argument ignores the distinction that the Fifth Circuit drew in *Lincoln Property* between FHA cases that seek to "impose affirmative housing obligations on private actors," *id*. at 908, or "compel a governmental defendant to build housing," *id*. at 908 n.11 (emphasis omitted), and those that endeavor "to remove indefensible government policies that operate[] to perpetuate segregation by *unreasonably* restricting *private* construction of multi-family housing that would increase affordable housing options" for people of color. *Id*. at 908. By challenging the defendant companies' alleged policy of refusing to participate in the "Section 8" Housing Choice Voucher Program, the court determined that the plaintiff in *Lincoln Property* had brought the first type of case and deemed it appropriate to "impose[] a heavier pleading burden on [the plaintiff's] efforts to require *private* defendants to take . . . *affirmative* action" and accept the vouchers. *Id*. at 895-96, 908 n.11. In contrast, the court acknowledged the latter type of cases as "resid[ing] at the heartland of disparate-impact liability," *id*. at 908 (quoting *Inclusive Comtys.*, 576 U.S. at 521), and indicated that they were "materially distinguishable" from the case presented. *Id*.

(referring to *Huntington Branch, N.A.A.C.P. v. Town of Huntington, N.Y.*, 844 F.2d 926 (2d Cir. 1988), *aff'd in part*, 488 U.S. 15 (1988), which predates *Inclusive Comtys.*, and citing to the court's ruling in favor of the plaintiffs with approval). Thus, Defendants' insistence that Stanton Square's FHA disparate impact claim, pleaded in the context of a suit in which Plaintiff "merely seeks to eliminate [a] governmental obstacle to housing that the plaintiff would build," should be held to the same, heightened pleading standard as the plaintiff's claim in *Lincoln Property*, is misguided. *see id*. at 908 n.11 (emphasis omitted).

Moreover, Stanton Square has adequately alleged a robust causal connection between Defendants' zoning actions and a disparate impact on Black and Hispanic residents. Specifically, Plaintiff alleges that, through its moratorium freezing multifamily development, denial of Plaintiff's appeal of this moratorium, and subsequent extension of this moratorium, the City has blocked development of the Village to the detriment of especially the Black and Hispanic residents likely to reside there but also the broader community, which suffers from segregation and a housing shortage. *See* Am Compl. ¶¶ 7, 21, 26-28, 71-72, 74-75, 77, 97, 102-03, 106, 117-121, 123-24. Defendants argue that their zoning actions "merely temporarily paused" multifamily development "to evaluate [its] impact . . . on the infrastructure," Defs.' Mem. at 16-17, and that the City's IZD "cannot be argued . . . [to have] created any racial disparities or housing shortages for [people of color] because [it] did not change anything; the IZD kept the status quo." *Id*. at 18. However, Plaintiff alleges that, taken together, the City's actions have barred it from developing the property since October 2022, and will continue to do so until at least September 2024. *See* Am. Compl. ¶ 106. It defies logic to maintain that such a lengthy delay is harmless as a matter of law, particularly in light of Plaintiff's claims that the Village was consistent with the City's stated priorities, Master Plan, and initially-established

review standards for IZD appeals, which plausibly allege that the City's efforts to bring the Development to a halt were unnecessary, arbitrary, and pretextual. *See id*. ¶¶ 29, 34-35, 41-43, 85, 88, 107, 112, 159, 171. Finally, as alleged, Defendants' zoning actions did not uphold the "status quo"—rather, absent Defendants' interventions in the zoning process, Stanton Square could have taken steps to develop the property years ago, and the Village's predominantly Black and Hispanic future residents would not have been harmed by the loss of housing opportunities associated with the City's conduct. *See id.* ¶¶ 106, 171.

Accepting Defendants' argument that a municipality cannot be held liable under a disparate impact theory of liability under the FHA for taking affirmative steps to block multifamily rental housing development—including seeking to retroactively change the zoning rules in the middle of the game to stop the development—unless the plaintiff demonstrates that it is responsible for broader demographic disparities in the housing market would strike at the heart of the FHA's disparate impact liability "heartland." *See Inclusive Comtys*., 576 U.S. at 539; cases cited above and by the Supreme Court, *supra* at 14. Under this logic, there would have been no disparate impact liability in *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971), because Duke Power was not itself responsible for the fact that Black potential applicants were disproportionately far less likely than White potential applicants to have a high school diploma or to score well on the company's employment tests.

As the Supreme Court noted, one of the key advantages of the availability of disparate impact liability is that it "has allowed developers to vindicate the FHA's objectives and to protect their property rights by stopping municipalities from enforcing arbitrary and, in practice, discriminatory ordinances barring the construction of certain types of housing units." *See Inclusive Comtys*., 576 U.S. at 540. And as noted above, a court in this District has

recognized that a moratorium on the development of multifamily housing has an unjustified disparate impact on Black homeseekers in the New Orleans area. *See Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Par.*, 641 F. Supp. 2d 563, 567-68 (E.D. La. 2009). Nothing in *Lincoln Property*, which involved the alleged disparate impact of a landlord refusing to participate in the voluntary federal Housing Choice Voucher Program, supports rendering disparate impact liability under the FHA unavailable in cases alleging unjustified restrictions on multifamily housing, cases that "reside at the heartland of disparate-impact liability." *Inclusive Comtys*., 576 U.S. at 539-40.

IV. CONCLUSION

For the reasons stated above, the United States respectfully requests that the Court dispose of Defendants' Motion in a manner consistent with the views expressed in this Statement.

Dated: September 16, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2024, I electronically filed this document using the CM/ECF system, which automatically serves counsel of record.

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