IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

DHD JESSAMINE, LLC, Plaintiff, and WILLIAM D. TALLEVAST, V, Intervenor-Plaintiff, v. FLORENCE COUNTY, SOUTH CAROLINA, *et al.*, Defendants.	)	Case No. 4:22-cv-01235-JD

STATEMENT OF INTEREST OF THE UNITED STATES

I. INTRODUCTION

The United States respectfully submits this Statement of Interest under 28 U.S.C. § 517[1] to assist the Court in interpreting the Fair Housing Act ("FHA"), 42 U.S.C. § 3601 *et seq.*

In this lawsuit, Plaintiff DHD Jessamine, LLC alleges that Defendants, including Florence County, South Carolina, have unlawfully prevented it from developing a multifamily apartment complex in violation of the FHA. *See* Compl., ECF No. 1, ¶¶ 155–61, 162–71. The Supreme Court has acknowledged that land use decisions that restrict the development of

[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."

multifamily housing can violate the FHA if they are unlawfully discriminatory because of race. *See Tex. Dep't of Hous. & Cmty. Affs. v. 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. 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 United States, therefore, has a strong interest in ensuring the proper application of the FHA in this context.[2]

II. STATUTORY BACKGROUND

Congress enacted the FHA "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601; *see also Inclusive Cmtys.*, 576 U.S. at 539 (recognizing the FHA is intended to "eradicate" discriminatory practices related to housing); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972) (recognizing the "broad and inclusive" language of the FHA). To that end, the FHA prohibits "zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification." *Inclusive Cmtys.*, 576 U.S. at 539; *see, e.g.*, *Town of Huntington, N.Y. v. Huntington Branch, NAACP*, 488 U.S. 15, 16–18 (1988) (per curiam) (invalidating zoning law preventing construction of multifamily rental units); *United States v. City of Black Jack, Mo.*, 508 F.2d 1179, 1182 (8th Cir. 1974) (invalidating ordinance prohibiting construction of new multifamily dwellings). Municipalities may be liable under 42 U.S.C. § 3604 if they "make

[2] To the extent Defendants wish to respond to the arguments raised in this Statement of Interest and request 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 that request.

unavailable or deny" housing through discriminatory zoning laws and may also be liable under 42 U.S.C. § 3617, which prohibits interference with housing rights. *See, e.g.*, *City of Black Jack*, 508 F.2d at 1188 (zoning ordinance that limited multifamily dwellings "denies persons housing on the basis of race" in violation of § 3604 and "interferes with the exercise of the right to equal housing opportunity" in violation of § 3617).

A plaintiff bringing an FHA claim may "proceed under either a disparate-treatment or a disparate-impact theory of liability, and a plaintiff is not required to elect which theory the claim relies upon at pre-trial, trial, or appellate stages." *Reyes v. Waples Mobile Home Park Ltd. P'ship* (*Reyes I*), 903 F.3d 415, 421 (4th Cir. 2018). Under a disparate treatment theory of liability, a plaintiff "must establish that the defendant had a discriminatory intent or motive." *Inclusive Cmtys.*, 576 U.S. at 524 (internal citation omitted). Disparate treatment may be shown either through direct or circumstantial evidence. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). The ability to prove disparate treatment based on circumstantial evidence is key in cases involving municipal actors because, as the Fourth Circuit has noted, "[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." *Smith v. Town of Clarkton, N.C.*, 682 F.2d 1055, 1064 (4th Cir. 1982).

Disparate impact claims challenge facially neutral practices that "have a disproportionately adverse effect on minorities and are otherwise unjustified by a legitimate rationale." *Inclusive Cmtys.*, 576 U.S. at 524 (internal citation omitted). In *Inclusive Communities*, the Supreme Court noted that suits targeting zoning laws and housing restrictions "reside at the heartland of disparate-impact liability." *Id.* 539. Disparate impact liability "allow[s] private developers to vindicate the FHA's objectives" by "stopping municipalities from

enforcing arbitrary and, in practice, discriminatory ordinances barring the construction of certain types of housing units." *Id.* at 540. Moreover, it allows plaintiffs to "counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment." *Id.*

III. FACTUAL BACKGROUND

Plaintiff DHD Jessamine, LLC alleges that Defendants, including Florence County, South Carolina, passed Florence County Ordinance No. 17-2021/22 ("the Ordinance") to specifically prevent the construction of the Jessamine, a proposed 60-unit multifamily affordable housing development. Compl. ¶¶ 1, 6.

In February 2021, Plaintiff purchased over five acres of land at 421 [South] Cashua Drive in Florence County, South Carolina ("the Jessamine Property") with the intent of building the Jessamine. *Id.* ¶¶ 33–34. Plaintiff received confirmation from Florence County in April 2021 that the Jessamine Property was "unzoned" and suitable for multifamily housing. *Id.* ¶ 47. Plaintiff then applied for a Low-Income Housing Tax Credit ("LIHTC") award and proceeded to obtain the approvals, permits, and financing necessary to build the Jessamine, which included written support from Florence County. *Id.* ¶¶ 49–76. A May 2021 letter from the Florence County Director of Planning to Plaintiff noted that the Jessamine "would serve a great need by promoting housing for a mix of incomes and backgrounds in the community" and "aligns well with our targeted areas for new affordable and mixed income housing." *Id.* ¶ 54.

Plaintiff alleges that housing segregation is a problem in Florence County. Black residents—and affordable housing properties—are heavily concentrated in four of Florence County's twenty-one Census tracts, and these four Census tracts have lower average household incomes than the rest of Florence County. *Id.* ¶¶ 79–83. By contrast, the Jessamine Property is in an affluent neighborhood near the Florence Country Club in a Census tract that is 80% White

and 13% Black—a tract with a substantially higher share of White residents than Florence County as a whole. *See* Expert Report of Professor Justin Steil, Ph.D. ("Pl.'s Expert Report"), ECF No. 39-1, at 7. Plaintiff's expert estimates, based on the composition of other LIHTC properties in Florence County, that the Jessamine would have served a predominantly Black tenant population. *Id.* at 13–14. Plaintiff alleges that the Jessamine would have "increased access to affordable housing for the minority population of Florence County" and "decreased community segregation." Compl. ¶ 85.

In January 2022, Plaintiff's representatives were approached with an "oral offer" from a group of Florence County residents to abandon the project, which Plaintiff refused. *Id.* ¶¶ 88–91. Local news coverage subsequently criticized the Jessamine, including a quote from a resident that Plaintiff was "putting a glorified section eight complex in the middle of a very nice part of Florence." *Id.* ¶ 92. On January 18, 2022, Florence County residents and civic leaders met at the Florence Country Club. *Id.* ¶ 93. Plaintiff alleges that the goal of this meeting was to develop a plan to prevent the Jessamine's construction, focusing on ways to interfere, delay or block the approvals or permits Plaintiff would need. *Id.* ¶ 94. The same day, Plaintiff received a letter from the Chairman of the Florence County Council rescinding his support of the Jessamine. *Id.* ¶ 95.

Approximately one week later, on January 27, 2022, the Florence County Council called a special meeting to introduce the Ordinance, which proposed placing a moratorium on development permits for unzoned "donut holes"—pockets of unzoned county property surrounded on all sides by zoned land. *See id.* ¶ 103, 111. The Jessamine Property falls into this category. *Id.* ¶ 112. On February 25, 2022, the Florence County Director of Planning informed Plaintiff that the Jessamine could not be approved because of the moratorium, despite the fact that the Ordinance had not yet been passed. *Id.* ¶ 120. The Ordinance was passed unanimously

after its third reading on March 17, 2022. *Id.* ¶ 134. Plaintiff alleges that the Ordinance was drafted and enacted to target the Jessamine: while the Ordinance's moratorium would affect 211 parcels in the County, only six could even hypothetically support multifamily housing, and the Jessamine Property was the only one with a pending proposed development. *Id.* ¶¶ 141–44.

Plaintiff filed this lawsuit on April 15, 2022, alleging Defendants' conduct discriminated on the basis of race in violation of the FHA, 42 U.S.C. § 3604, and alleging interference with housing rights under 42 U.S.C. § 3617. *Id.* ¶¶ 155–61, 162–71. On July 25, 2023, Plaintiff identified Professor Justin Steil, Ph.D. as an expert witness, and stated in its expert disclosure that Professor Steil was expected to testify, consistent with his report, that: (1) the Ordinance had a statistically significant adverse impact on the basis of race in making housing unavailable to Black South Carolinians; and (2) the Ordinance perpetuated residential segregation. ECF No. 39, at 2. On March 6, 2024, Defendants moved for summary judgment. ECF No. 89.

IV. ARGUMENT

Under Federal Rule of Civil Procedure 56, summary judgment is appropriate if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Defendants contend that they are entitled to summary judgment on all of Plaintiff's claims, including its FHA claims. *See* Defs.' Mem. in Supp. of Summ. J. ("Defs.' Mem."), ECF No. 89-1, at 13–18. They are not. Defendants misstate the legal standards for analyzing both disparate impact and disparate treatment claims under the FHA and base their arguments on material facts that are disputed. The Court should deny Defendants' motion for summary judgment on Plaintiff's FHA claims.[3]

[3] The United States expresses no opinion on the other issues raised in Defendants' Motion.

A. Defendants misstate the legal standard for a disparate treatment FHA claim and are not entitled to summary judgment on Plaintiff's claim.

Defendants use a legal framework for addressing disparate treatment that does not apply to this case and neglect to consider that a plaintiff may prove disparate treatment based on circumstantial evidence.

1. Defendants incorrectly apply the legal standard specific to the Attorney General's enforcement authority, which is not applicable to disparate treatment claims brought by private plaintiffs.

First, Defendants' statement of disparate treatment caselaw is incorrect. Defendants set out the legal standard as follows:

> In order to show disparate-treatment, a Plaintiff would need to show "more than the mere occurrence of isolated or accidental or sporadic discriminatory acts, and plaintiffs must show that racial discrimination was the [defendant]'s standard operating procedure—the regular rather than the unusual practice." *Nat'l Fair Hous. All. v. Bank of Am., N.A.*, 401 F. Supp. 3d 619, 631 (D. Md. 2019) (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977)) (internal quotations omitted).

Defs.' Mem. at 13.[4] The requirement that a plaintiff show "more than the mere occurrence of isolated or accidental or sporadic discriminatory acts" only applies when the plaintiff is the United States, bringing a claim under a provision of the FHA specific to the Attorney General's enforcement authority, 42 U.S.C. § 3614. It is not applicable in the present action, which is brought by a private plaintiff under a separate provision of the FHA. *See* Compl. ¶ 16 (bringing suit under 42 U.S.C. § 3613, which covers FHA enforcement by private persons).

Section 3614 of the FHA states that "[w]henever the Attorney General has reasonable cause" to believe that a defendant "is engaged in a pattern or practice" of discrimination, the Attorney General may file suit. 42 U.S.C. § 3614(a). When the United States as a plaintiff brings

[4] Defendants quote only a portion of the *Bank of America* court's full articulation of the legal standard and its FHA analysis. *See* 401 F. Supp. 3d at 631 n.8.

disparate treatment claims under this section, it must show that discrimination was not an "unusual practice"—and the original source of Defendants' quoted language reveals as much. *See Int'l Bhd. of Teamsters*, 431 U.S. at 336 & n.16. Consequently, the Court should disregard Defendants' articulation of the legal standard for assessing disparate treatment claims under the FHA because it does not apply to the present case.

2. Using the correct legal standard, Defendants have failed to show that material facts are undisputed regarding Plaintiff's disparate treatment claim.

Turning to the correct standard: to prove disparate treatment, a plaintiff must establish that "discriminatory purpose has been a motivating factor in the [defendant's] decision" to deny housing or make it unavailable. *Arlington Heights*, 429 U.S. at 265–66; *see Town of Clarkton*, 682 F.2d at 1065. This determination "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266. In *Arlington Heights*, an Equal Protection Clause case concerning an allegedly discriminatory rezoning denial, the Supreme Court outlined a non-exhaustive list of circumstantial evidence factors that may be probative of a municipal actor's discriminatory intent.[5] *See* 429 U.S. at 266–68. The Fourth Circuit has distilled these factors as follows:

> '[t]he historical background of the [challenged] decision'; '[t]he specific sequence of events leading up to the challenged decision'; '[d]epartures from normal procedural sequence'; the legislative history of the decision; and of course, the disproportionate 'impact of the official action—whether it bears more heavily on one race than another.'

[5] The *Arlington Heights* analysis is applicable in the FHA disparate treatment context. *See, e.g.*, *Town of Clarkton*, 682 F.2d at 1065; *Thompson v. U.S. Dep't of Hous. & Urb. Dev.*, 348 F. Supp. 2d 398, 417 (D. Md. 2005) ("intent" under the FHA "is defined consistently with the definition used in Equal Protection Cases").

N.C. State Conf. of NAACP v. McCrory, 831 F.3d 204, 220–21 (4th Cir. 2016) (quoting *Arlington Heights*, 429 U.S. at 266–67).

Defendants' argument—that Plaintiff's disparate treatment claim fails because there is no overt evidence to "indicate that Florence County made its decision based on race"—is not determinative when analyzed under the correct legal standard. *See* Defs.' Mem. at 15. Defendants overlook the fact that direct or overt evidence is not required to establish a disparate treatment claim. Disparate treatment may also be established based on circumstantial evidence—the point of the *Arlington Heights* analysis is to assess whether a municipal defendant may have engaged in intentional discrimination even in the absence of overtly racial language. *See Town of Clarkton*, 682 F.2d at 1064 ("Even individuals acting from invidious motivations realize the unattractiveness of their prejudices when faced with their perpetuation in the public record.").

In short, Defendants fail to engage with the heart of Plaintiff's argument in this case: that Florence County departed from the "normal procedural sequence" to pass an Ordinance that specifically targeted the Jessamine through a development moratorium. *See* Compl. ¶¶ 103–19; *Arlington Heights*, 429 U.S. at 267. Moreover, in its expert report, Plaintiff has put forth evidence that the "impact of the official action"—the Ordinance's moratorium—is borne much more heavily by Black residents of the surrounding communities than by White residents. *See* Pl.'s Expert Report at 16–23; *Arlington Heights*, 429 U.S. at 266. Defendants do not address any of the arguments or circumstantial evidence in the record that would support an *Arlington Heights*-based showing of discriminatory intent.

Given that Defendants have misstated the legal standard and have failed to show that material facts are undisputed regarding Plaintiff's disparate treatment claim, Defendants' summary judgment motion should be denied.

B. Defendants misstate the legal standard for a disparate impact FHA claim and are not entitled to summary judgment on Plaintiff's claim.

As with disparate treatment, Defendants put forth an incorrect legal standard for assessing disparate impact under the FHA and fail to show that summary judgment is appropriate.

1. *Inclusive Communities* is the appropriate framework to assess disparate impact claims.

Defendants assert that in evaluating disparate impact, a court will apply the Fourth Circuit's four-factor test articulated in *Town of Clarkton*, 682 F.2d at 1065.[6] *See* Defs.' Mem. at 14. *Town of Clarkton* preceded the Supreme Court's decision in *Inclusive Communities* by several decades. While the Fourth Circuit has noted that its earlier disparate impact "holdings are still good law"—including *Town of Clarkton*—courts in this circuit evaluate disparate impact claims using the framework set out by *Inclusive Communities*. *Reyes I*, 903 F.3d at 428; *see id.* at 424–29 (applying *Inclusive Cmtys.*); *see also, e.g.*, *S.C. State Conf. v. Georgetown Cnty.*, No. 2:22-CV-04077-BHH, 2023 WL 6317837, at *12 (D.S.C. Sept. 28, 2023) (analyzing disparate impact claim using the *Inclusive Communities* "three-step, burden shifting framework" (citing *Reyes I*, 903 F.3d at 424)). Consequently, and contrary to Defendants' assertion, this Court

[6] In *Town of Clarkton*, the Fourth Circuit concluded that proof of discriminatory effect was sufficient to prove a violation of the FHA. *See* 682 F.2d at 1065–66. The Fourth Circuit set forth these factors to determine whether a violation has occurred: "(1) how strong is the plaintiff's showing of discriminatory effect; (2) is there some evidence of discriminatory intent, though not enough to satisfy the constitutional standard of *Washington v. Davis*; (3) what is the defendant's interest in taking the action complained of; and (4) does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing." *Id.* (internal citation omitted).

should begin its evaluation of Plaintiff's disparate impact claim by looking to *Inclusive Communities*.

In *Inclusive Communities*, the Supreme Court explained that an FHA disparate impact claim should be analyzed under a three-step, burden-shifting framework. At the first step, "the plaintiff must demonstrate a robust causal connection between the defendant's challenged policy and the disparate impact on the protected class." *Reyes I*, 903 F.3d at 424 (citing *Inclusive Cmtys.*, 576 U.S. at 542). At the second step, "the defendant has the burden of persuasion to 'state and explain the valid interest served by their policies.'" *Id.* (quoting *Inclusive Cmtys.*, 576 U.S. at 541). Finally, at the third step, to establish liability, "the plaintiff has the burden to prove that the defendant's asserted interests 'could be served by another practice that has a less discriminatory effect.'" *Id.* (quoting *Inclusive Cmtys.*, 576 U.S. at 527).

Defendants' memorandum engages with some, but not all, of *Inclusive Communities*' framework. They argue, first, that the Ordinance's moratorium is not a "policy or practice" for the purpose of disparate impact; second, that Florence County's actions are justified by a legitimate rationale and that Plaintiff is unable to show any robust causal connection to any disparate impact; and finally, that Plaintiff's claim fails the *Town of Clarkton* test.[7] *See* Defs.'

[7] As addressed in this section, *Town of Clarkton* does not provide the appropriate framework for a disparate impact claim. But even if it did, Defendants' cursory argument fails. Defendants claim, without any record citation, that they are entitled to summary judgment because the "second and third [*Town of Clarkton*] prongs weigh heavily" in their favor. Defs.' Mem. at 18. Both prongs—which examine whether there is "some evidence of discriminatory intent" and "the defendant's interest in taking the action," *see Town of Clarkton*, 682 F.2d at 1065—involve disputed material facts. Plaintiff has alleged and put forth evidence that Florence County deviated from normal legislative procedures to pass an Ordinance that targeted the Jessamine, which may indicate discriminatory intent, and that Defendants' "interest" was not safety or traffic, but rather to prevent construction of housing that would serve Black residents. *See* Part IV.A., *supra.*

Mem. at 15–18. All of Defendants' arguments are unavailing and, at a minimum, demonstrate only that material facts are disputed.

2. The Ordinance is a "policy" for the purpose of assessing disparate impact and not a "one-time decision."

Defendants claim that Florence County's Ordinance is not the kind of "policy" that can cause a disparate impact under the FHA. *See* Defs.' Mem. at 15–16. They are incorrect. The Ordinance, on its face, restricts housing development in a particular part of a community, which is precisely the type of policy the Supreme Court has recognized as potentially causing a disparate impact. *See Inclusive Cmtys.*, 576 U.S. at 539 (lawsuits challenging zoning laws and housing restrictions "reside at the heartland of disparate-impact liability"). Courts have regularly—and historically—found that municipal zoning decisions may violate the FHA by making housing unavailable to protected classes, including people of color. *See, e.g.*, *Town of Huntington*, 488 U.S. at 16–18; *City of Black Jack*, 508 F.2d at 1182; *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Par.*, 641 F. Supp. 2d 563, 568 (E.D. La. 2009).

Defendants point to the language of *Inclusive Communities*, which cautions that a plaintiff "challenging the decision of a private developer to construct a new building in one location rather than another will not easily be able to show this is a policy causing a disparate impact because such a one-time decision may not be a policy at all." Defs.' Mem. at 15 (quoting *Inclusive Cmtys.*, 576 U.S. at 543). Defendants argue that the Ordinance is a "one-time decision." *Id.* at 15–16. This assertion is flawed. The example in *Inclusive Communities* is not analogous: there, the Supreme Court raised a concern in the context of a private developer's site choice, which may involve a multitude of actors and investment considerations, distinct from a situation where a municipality, like Florence County, has control over every aspect of a zoning process, including passing the very laws that determine development outcomes.

Moreover, courts have held that a municipality's course of conduct on a zoning decision particular to one piece of property "falls well within a classification of a 'general policy.'" *Mhany Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581, 619 (2d Cir. 2016); *see also, e.g.*, *S.C. State Conf.*, 2023 WL 6317837, at *13 n.4 (finding defendant's argument in municipal zoning case that disparate impact claim "should be dismissed because a one-time denial of a zoning application is not a 'policy' of discrimination" is "without merit"). In *Mhany Management*, the Second Circuit found that a municipal zoning decision was clearly a "general policy" by pointing, among other factors, to hearings and meetings airing concerns that development "would harm traffic conditions and increase school overcrowding" and that "the [zoning] change required passage of a local law." 819 F.3d at 619; *see also Reyes I*, 903 F.3d at 427 (citing approvingly to *Mhany Management* to illustrate disparate impact prima facie case). This case presents analogous circumstances: the Ordinance's moratorium was purportedly aimed at traffic and safety concerns, *see* Defs.' Mem. at 3, 14; community members and the Florence County Council held meetings to discuss the proposed moratorium and air these alleged concerns, *see* Compl. ¶¶ 86, 93, 103, 130; and finally, preventing the development of the Jessamine "required passage of a local law"—namely, the Ordinance, *see id.* ¶ 6. Consequently, the Ordinance is a "general policy" that may cause a disparate impact in violation of the FHA.

3. Under *Inclusive Communities*, Defendants are not entitled to summary judgment.

The first step of the *Inclusive Communities* analysis requires that the plaintiff demonstrate a "robust causal connection" between the challenged policy and the disparate impact. *See Reyes I*, 903 F.3d at 424. Defendants claim that Plaintiff fails this prong because "tax credits issued to Plaintiff were returned to the Housing Authority to be re-awarded to another low-income housing project," which would ultimately benefit Black residents at "another LIHTC

development[]" elsewhere. Defs.' Mem. at 17. Defendants' argument misses the point. In *Reyes I*, the Fourth Circuit addressed the requirements of robust causality in depth; relevant here is that robust causality turns on whether "a protected class is disproportionately *affected* by a challenged policy." 903 F.3d at 430 (emphasis in original). Here, the challenged policy is the Ordinance and the ensuing moratorium, not the use of the LIHTC. Plaintiff has more than sufficiently alleged and put forth evidence that Black residents were disproportionately affected by the challenged policy and that if Defendants had not enacted the Ordinance, Plaintiff would have been able to develop the Jessamine to the benefit of Black residents. *See* Compl. ¶¶ 6, 32, 77–85; Pl.'s Expert Report at 16–23. Defendants do not counter Plaintiff's argument or address this evidence, which stands apart from speculative claims as to how the tax credits that funded the Jessamine may be used—and who may benefit from them—in the future.

At the second *Inclusive Communities* step, the defendant has the burden of persuasion to show a valid interest for the policy. *See Reyes I*, 903 F.3d at 424. The Supreme Court and the Fourth Circuit have made clear that step two is "analogous to the business necessity standard under Title VII," *Reyes v. Waples Mobile Home Park Ltd. P'ship* (*Reyes II*), 91 F.4th 270, 277 (4th Cir. 2024) (quoting *Inclusive Cmtys.*, 576 U.S. at 541), and a defendant must demonstrate "that the policy 'serves, in a significant way,' its legitimate interests," *id.* (quoting *Sw. Fair Hous. Council, Inc. v. Maricopa Domestic Water Improvement Dist.*, 17 F.4th 950, 967 (9th Cir. 2021)). "A 'legitimate' interest cannot be a phony." *Id.* "Otherwise defendants could manufacture business necessity based on speculative, or even imagined, liability." *Id.* Courts have denied summary judgment on step two based upon insufficient factual evidence supporting a defendant's alleged legitimate interest. *See, e.g.*, *Treece v. Perrier Condo. Owners Ass'n, Inc.*, No. CV 17-10153, 2020 WL 759567, at *18 (E.D. La. Feb. 14, 2020) ("[A] defendant's

proffered reasons for a policy cannot be merely speculative and must be supported by facts or documentation."); *Gashi v. Grubb & Ellis Prop. Mgmt. Servs.*, 801 F. Supp. 2d 12, 16 (D. Conn. 2011) (viewing "subjective rationales" for housing policy "skeptically").

Here, Defendants' cursory argument that Florence County's actions are based on a legitimate rationale only serves to highlight that there are material facts in dispute that preclude summary judgment. For example, Defendants assert, with no citation, that their actions surrounding the Ordinance's passage reflect a concern "that owners and developers may attempt to hurriedly seek permits to skirt a forthcoming zoning change." Defs.' Mem. at 16. Then, citing to Florence County Council meeting minutes and deposition testimony of a Defendant Florence County Councilmember, Defendants claim that "the concerns at issue here were traffic, infrastructure, health, and safety." *Id.* Plaintiff has proffered arguments and evidence that Defendants' reasons for passing the Ordinance were pretextual. *See, e.g.*, Compl. ¶¶ 103–12, 132–33. Defendants' assertions about traffic and safety in response are not supported by any "facts or documentation," and essentially amount to a restating of their opinion—which is "speculative" and "subjective." Defendants fail to show that there is no dispute of material fact regarding their alleged legitimate interest in blocking the development of the Jessamine.

V. CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motion for summary judgment on Plaintiff's FHA claims.

Dated: April 2, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2024, I electronically filed the foregoing with the Clerk of Court using the ECF system, which sent notification of such filing to all counsel of record.

/s/ Alisha Jarwala
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