UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 24-3395

ALBERT PICKETT, JR., KEYONNA JOHNSON, JAROME MONTGOMERY, ODESSA PARKS, and TINIYA SHEPHERD (f/k/a TINIYA HALL), on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

CITY OF CLEVELAND, OH

Defendant-Appellant.

On Petition for Permission to Appeal Class Certification Order of the United States District Court for the Northern District of Ohio
Case No. 1:19-cv-02911-SO

BRIEF OF AMICI CURIAE COMMUNITY LEGAL SERVICES, INC. OF PHILADELPHIA, NATURAL RESOURCES DEFENSE COUNCIL, and NATIONAL CONSUMER LAW CENTER IN SUPPORT OF PLAINTIFFS-APPELLEES

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DISCLOSURE STATEMENT OF
CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Fed. R. App. Proc. 26.1 and 6 Cir. R. 26.1, Amici Curiae Community Legal Services, Inc., Natural Resources Defense Council, and National Consumer Law Center make the following disclosures:

1. Are any of said parties a subsidiary or affiliate of a publicly owned corporation?

   NO.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

   NO.

Date: October 11, 2024

/s/ Robert W. Ballenger
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STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae Community Legal Services, Inc. of Philadelphia, Natural Resources Defense Council, and National Consumer Law Center are continuously engaged in local, state and national discussions concerning access to affordable, life-essential water and sanitation services for low-income households. Amici bring their strong and shared understanding of the challenges facing utilities when customers cannot afford to repay utility debt. Importantly, amici advance the shared interests of customers and utilities in engaging actively in alternative means of collection that assist customers in managing accumulated arrears, and avoiding the accumulation of future arrears, through affordable rate programs, rather than through shut offs or lien enforcement.

As set forth herein, amici respond to statements by Defendant-appellant City of Cleveland and some of Cleveland's amici, which downplay the significant risks water liens pose to housing security for low-income consumers and families. Amici discuss alternative approaches available for water utilities to maintain their operating revenue and their low-income customers' access to affordable water service. Amici submit that water utilities are better served by implementing water rate affordability programs that respond to low-income households' inability to afford water and wastewater bills, rather than pursuing collection against their homes by imposing water liens.

Community Legal Services, Inc. (CLS) of Philadelphia is a nationally renowned organization that is recognized as a model legal services program. CLS's mission is to fight poverty, challenge systems that perpetuate injustice, and change lives through cutting-edge advocacy and exceptional legal representation. CLS provides a broad range of civil legal services across multiple practice groups and has maintained a legal practice dedicated to ensuring access to affordable residential utility service for more than 40 years. CLS attorneys are recognized as national experts on the policies and programs that affect the daily lives of people living in poverty.

Natural Resources Defense Council (NRDC) is an international non-profit environmental and public health membership organization with over 3 million members and online activists. Across the United States, including in the Midwest, NRDC advocates for laws and policies to ensure access to safe, sufficient, affordable water for everyone, regardless of ability to pay. Along with co-amicus National Consumer Law Center, and in consultation with other advocates and community-based organizations around the country, NRDC published in 2022 the Water Affordability Advocacy Toolkit, a comprehensive guide to challenges and solutions to water affordability for low-income households.

Since 1969, the nonprofit National Consumer Law Center (NCLC) has worked for consumer justice and economic security for low-income and other disadvantaged people in the U.S. through its expertise in policy analysis and advocacy, publications and training. NCLC publishes Access to Utility Service (7th edition). NCLC and co-amicus Natural Resources Defense Council co-authored the Water Affordability Advocacy Toolkit.

No party's counsel has authored this brief, in whole or in part, nor has any party or party's counsel contributed money that was intended to fund preparing or submitting this brief. Finally, no person other than amici, their members and counsel, have contributed money that was intended to fund preparing or submitting this brief. All parties have consented to amici's filing of this brief. Accordingly, it is submitted pursuant to Fed. R. App. P. 29(a)(2).

BACKGROUND AND SUMMARY OF ARGUMENT

The cost to consumers of essential water and wastewater services[1] in their homes is increasing dramatically, raising concerns for families, communities, and lawmakers. In many communities, monthly costs for water service now rival, and in some cases, exceed, the costs of home energy services. A survey of 50 of the largest U.S. metropolitan areas revealed that, on average, household costs of water service have increased by more than 4% per year from 2012 to 2023.[2] Some water utilities are responding to the challenges that unaffordable water presents by following the lessons learned from the energy sector and adopting programs that provide discounted bills to promote water affordability coupled with a payment incentive to eliminate accumulated water debt.

Amici share the interests of water utility operators in maintaining and upgrading facilities to meet life-essential needs for safe drinking water and fulfilling their roles in protecting clean water resources. We advocate, alongside the water utility sector, for more federal investment in water infrastructure and creation of a federal low-income water payment assistance program. Nonetheless, it is vital

[1] Amici use the term "water" to include services provided by both water and wastewater (i.e., sewer) utilities.
[2] U.S. Municipal Water & Sewer: Annual Utility Rate Index, 2023, available at: https://www.bluefieldresearch.com/research/u-s-municipal-water-sewer-annual-utility-rate-index-2023/.

for water utilities to employ best practices to manage collections in a manner that recognizes, and affirmatively adapts to, customers' ability to afford service.

As discussed herein, imposing water liens, a property-centric collection method, is not responsive to the affordability challenges of low-income consumers. Water liens can lead directly to loss of housing through foreclosure. Even when they do not, they may bear high rates of interest and penalties and create opportunities for private purchasers of liens to impose additional financial hardship thereby unnecessarily increasing the debt imposed on a household already struggling with unaffordable monthly bills. Imposition of water liens may trigger default on a mortgage or impede access to other resources, such as refinancing, to assist homeowners in avoiding foreclosure based on home mortgage debt. In these respects, water lien policies exacerbate poverty and jeopardize housing.

In contrast, adopting people-centric approaches to water debt creates opportunities for improved collection patterns and relief from accumulated debt. These approaches promote revenue stability for the water utility and housing security for the low-income consumer. Water lien alternatives, such as the adoption of low-income rate affordability programs, are widely recognized as beneficial practices to consumers and utilities. As a consequence, the concerns expressed by Cleveland and its supporting amici regarding the financial implications to utilities of applying the Fair Housing Act to discriminatory water lien practices are overstated. As to low-income customers, who are the customers likely to fall behind on their bills, water liens are simply inefficient and harmful collection tools. In contrast, rate affordability programs are increasingly recognized—including by leading national water utility associations—as effective means to address unaffordable water bills and associated collection challenges.

ARGUMENT

I. Water Liens Exacerbate Poverty and Place Housing in Jeopardy.

Liens imposed on residential property to secure water indebtedness jeopardize housing, resulting in foreclosure, lien sale or other adverse housing impact. Frequently, liens are filed based upon fixed criteria, such as a pre-determined amount of water debt, without regard to the period of time over which such debt was incurred, or the financial means of the applicable household to repay the debt. Indeed, imposing a lien for unpaid water service encumbers the property served without regard to the financial circumstances facing the household. In other words, the lien, as amici supporting Cleveland acknowledge, is a means of "getting in line" to secure payment *from the property served*.[3] As a consequence, the lien is an ineffective means to address the foundational concern of unaffordable water service that creates the debt in the first instance. Furthermore, amici supporting

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[3] Brief of Amicus Curiae National Association of Clean Water Agencies (NACWA) in Support of Defendant-Appellant City of Cleveland at 3.

Cleveland are wrong to submit that, as a general principle, water liens have no impact on the household until the owner chooses to sell the property.[4]

As amici NRDC and NCLC explained in a 2022 report that presents a comprehensive survey of water affordability challenges and solutions nationally, "municipal water liens threaten a primary means of wealth building, home ownership, and contribute to the racial wealth gap."[5] Some jurisdictions directly foreclose for nonpayment of water and/or tax liens.[6] For example, in Detroit, foreclosure associated with water debt accounted for as much as 25% of the homes sold at auction in some census tracts.[7] In a water/tax foreclosure, the property is typically sold at auction with the proceeds utilized to repay the municipal liens followed by any other claims asserted against the property. Rarely does the former homeowner receive a significant amount of the auction proceeds.[8]

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[4] Brief of Amicus Curiae American Water Works Association (AWWA) in Support of Defendant-Appellant City of Cleveland, at 7; Brief of NACWA at 11.

[5] Larry Levine et al., Water Affordability Advocacy Toolkit, 32 (describing the lien process and consequences for low-income homeowners), available at: https://www.nrdc.org/sites/default/files/water-affordability-toolkit-full-report.pdf (hereinafter, Water Affordability Toolkit).

[6] Water Affordability Toolkit, 32-34 (discussing foreclosure auctions in Philadelphia and Maine).

[7] Michigan Public, Citizen research links Detroit water shut offs, tax foreclosures, August 12, 2016, available at: https://www.michiganpublic.org/politics-government/2016-08-12/citizen-research-links-detroit-water-shutoffs-tax-foreclosures.

[8] John Rao, The Other Foreclosure Crisis, at 13 (2012) available at: https://www.nclc.org/wp-content/uploads/2022/09/tax-lien-sales-report.pdf.

Widespread media coverage has highlighted the extent to which sales of water liens (as opposed to direct foreclosure) contribute directly to the loss of housing around the country. Often, a very small unpaid water bill becomes the basis for collection action that creates insurmountable costs, driving long-time homeowners into new indebtedness or homelessness while creating opportunities for massive profits for lien purchasers.[9] These examples, and many others, demonstrate that water liens are not, in many cases, simply a financial asset held by the utility until the property is voluntarily sold,[10] but in fact contribute to foreclosure and involuntary loss of housing. In Cleveland, as the city

[9] In 2012, a retired New Jersey plumber and his wife nearly lost their home over a $140 water bill. The debt, which the property owners were unaware of, was sold to an investor who foreclosed on the property. Ultimately, to save the home, the family had to borrow $37,500, secured as a new mortgage on their home, to satisfy the investor's demands. John W. Schoen, How a $140 bill Snowballed into Foreclosure, NBC News, July 24, 2012, available at: https://www.nbcnews.com/business/economy/how-140-bill-snowballed-foreclosure-flna907752. In 2010, a Baltimore caretaker lost her family home, which had been mortgage free since 1984, over an unpaid city water bill of $362. After imposing interest charges, legal fees, and other expenses, a judge ordered her to pay just over $3,600 or forfeit her property. When she was unable to pay, she and her teenage son were forced out of the home. The Center for Public Integrity, The Other Foreclosure Menace, May 18, 2010, available at: https://publicintegrity.org/inequality-poverty-opportunity/the-other-foreclosure-menace/.

[10] Brief of NACWA at 11-12.

acknowledges, water liens are subject to interest and penalty accrual as well as foreclosure and tax lien certificate sale by Cuyahoga County.[11]

Sales of water liens to private purchasers raise heightened risks to low-income homeowners because the private purchaser, unlike the municipal water utility, has a profit motive to recoup its investment. In Cuyahoga County, the average tax lien certificate sale "ranges from 10 to 17 million dollars and contains several thousand parcels."[12] As explained in NRDC's and NCLC's 2022 report, "Lien purchasers, which may be individuals or large investors like banks, manipulate and use the lien sale process to profit from homeowner distress. Worse yet, many states allow these purchasers to add exorbitant fees and interest rates that owners must pay to avoid losing their homes."[13] A low-income homeowner, unable to fully and consistently afford to pay their water bill, is thus thrust further into indebtedness, secured only by their residence, and exposed to loss of housing when water liens are sold to private investors.

Even when a lien for water debt is not sold to an investor, it can contribute to housing loss or instability. Because a lien for water debt may be superior to a

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[11] Brief of Defendant-Appellant City of Cleveland, OH, at 8; <u>see also</u> Certification Order, R. 93, PageID# at 4847.
[12] See, e.g., Tax Lien Certificate Sales, Cuyahoga County Treasurer's Office, available at: <u>https://cuyahogacounty.gov/treasury/delinquency/tax-lien-certificate-sales</u>.
[13] <u>Water Affordability Toolkit</u>, 34.

mortgage lien, even if taken subsequent thereto,[14] the imposition of the lien affects the mortgagee's position and interest and may constitute a default on the loan. Even if it is not superior to an existing mortgage at the time it is filed, a water lien, like other municipal liens, may be an obstacle to refinancing and modifying a mortgage to avoid foreclosure. As a result, a homeowner who may otherwise qualify for a loan modification after falling behind in payment, could nonetheless be incapable of avoiding foreclosure due to the lender's insistence that the homeowner eliminate all water debt associated with the property.[15]

In sum, the imposition of a lien to secure water debt on residential property contributes to loss of housing and housing instability for low-income homeowners who face unaffordable water bills. Due to the significant risk liens create, more effective, available mechanisms that enable the utility to avoid imposing liens should be implemented.

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[14] See, e.g., 53 Pa. C.S. §7106(a)(1); Mich. Comp. Laws Ann. § 123.165; Del. Code Ann. tit. 25, § 4501; United States v. Rahar's Inn, Inc., 243 F. Supp. 459, 461 (D. Mass. 1965); Home Owners' Loan Corp. v. Public Water Works Dist. No. 2, 104 Colo. 466, 92 P.2d 745 (1939); Home Owners' Loan Corp. v. Wood, 170 Misc. 74, 9 N.Y.S.2d 834 (Sup 1938).

[15] See, e.g., Pat Loeb, Pa. agency that helps make homes affordable criticized for rule that forces some owners out, KYW Newsradio, October 3, 2019, available at: https://www.audacy.com/kywnewsradio/articles/news/agency-helps-low-income-folks-afford-homes-criticized.

II. Low-Income Affordability Programs are Effective Alternatives to Traditional Collection Methods and Respond to Customer Ability to Pay.

Rather than relying upon recovery of water debt from the property served, water utilities can engage in active development of policies and programs that provide affordable water bills. In other words, they can shift to "people-centric" approaches, rather than property-centric approaches, to addressing affordability challenges.[16]

Water utilities can and should look to long-standing examples of alternative practices adopted by energy utilities in lieu of subjecting economically vulnerable customers to water shut offs and loss of housing. Amici strongly disagree with the sweeping assertion, made by amici for Cleveland, that the only means available to address customer non-payment and maintain utility revenue are: (1) the certification/lien process; (2) the use of debt collection services; or (3) service termination.[17] As discussed herein, programs to assist utility customers with affordable bill payments and managing accumulated debts are widely-recognized and available alternatives.

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[16] Water Affordability Toolkit, 35.

[17] Amicus Curiae Brief of Northeast Ohio Regional Sewer District, et al. (NEORSD), at 4. There are numerous examples of municipal water utilities implementing alternatives to these traditional collection methods as discussed in Section II. These alternatives are broadly supported by leading water sector organizations as discussed in Section III.

Notably, Ohio was a nationwide leader in establishing an alternative practice that responds to unaffordable energy bills. In 1983, Ohio adopted what has become the country's largest Percentage of Income Payment Plan (PIPP) that consistently delivers affordable monthly energy bills based on household income.[18] Low-income customers participating in Ohio's PIPP receive a discount that limits their monthly bill to a specified percentage of their income, as well as credit toward their accumulated debt with timely payment of their discounted bills.[19] Several states have followed and adopted similar programs or guidelines.[20] Programs like Ohio's PIPP remain in operation in the energy sector in many states.[21]

Low-income affordable rate programs in the energy sector typically include one or both of the following components: ongoing bill discounts and assistance with arrears. Robust "arrearage management plans," used in both the energy and water sectors, enable participating low-income households to qualify for suspension of debt collection practices and ongoing forgiveness of accumulated

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[18] LIHEAP Clearinghouse, Overview of Percentage of Income Payment Plans, January 2014, available at: https://liheapch.acf.hhs.gov/docs/PIPPupdate.pdf.
[19] See Ohio Department of Development, Percentage of Income Payment Plan, at: https://development.ohio.gov/individual/energy-assistance/2-percentage-of-income-payment-plan-plus.
[20] LIHEAP Clearinghouse, Overview of Percentage of Income Payment Plans, January 2014.
[21] See, e.g., Andrea Nishi, et al., The Low Income Home Energy Assistance Program and Other Low-Income Relief Programs in the US, available at: https://www.energypolicy.columbia.edu/wp-content/uploads/2023/11/LIHEAP-CGEP_Infoguide_111523-1.pdf.

debt.[22] However, the ability to successfully manage accumulated arrears still turns on the household's ability to afford ongoing payment demands. Therefore, optimally, bill discounts are provided in connection with arrearage management to ensure that households can consistently pay their bills going forward.[23] Programs including both components are becoming more common among water utilities, as rising bill obligations increasingly exceed the means of economically vulnerable households.[24]

In Philadelphia, Pennsylvania, for example, the city's municipal water utility implemented the "Tiered Assistance Program" after adopting legislation that mirrored affordability and arrearage forgiveness approaches used by the state's energy and natural gas utilities.[25] Like Pennsylvania's electric and natural gas utilities, Philadelphia's water rate affordability program provides low-income households with bills that are capped at a specified percentage of income, coupled with an arrearage forgiveness component that eliminates back water debt over a 24-month payment period.[26] Philadelphia's water rate affordability program was

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[22] Water Affordability Toolkit, 43-44.

[23] Id. at 43.

[24] Amici discuss three such programs herein, however, additional examples are provided in the Water Affordability Toolkit, at 43-44.

[25] See, e.g., 52 Pa. Code §§69.265(2)(i)(A) (affordable bill percentages); 69.265(8)(ix) (arrearage forgiveness).

[26] See, e.g., City of Philadelphia, Wipe out your water bill debt through TAP, available at: https://www.phila.gov/2022-11-14-wipe-out-your-water-bill-debt-through-tap/.

created due to concerns with increasingly unaffordable water bills and the corresponding heavy concentration of water liens in economically-vulnerable neighborhoods.[27]

Similarly, Baltimore adopted its "Water4All" program, which utilizes a formula to determine the maximum amount a participating, low-income household should pay as a percentage of household income and provides discounts designed to produce correspondingly affordable bills.[28] Like Philadelphia's program, participants in Baltimore's Water4All program receive a credit toward their accumulated arrears each time they make an on-time payment of their discounted bills.

The City of Chicago has also adopted a water affordability program, called the "Utility Billing Relief" program, with the specific purpose of addressing water bills for "the most vulnerable, low-income homeowners, especially those with past due debt."[29] Chicago's program suspends collections on past-due amounts to provide an opportunity for participants to eliminate accumulated water debt.

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[27] See, e.g., Philadelphia City Council Finance Committee, Hearing on Bill No. 140607, April 9, 2015, tr. at 17, available at: https://www.transcriptroom.org/tr/CAF/DownloadFile/3158300?docType=30&FileName=fi040915.pdf (Councilmember Sanchez, sponsor of the underlying legislation, commenting that 20% of the water debt was clustered in her district).

[28] See, e.g., City of Baltimore, Water4All Baltimore, available at: https://cityservices.baltimorecity.gov/Water4All.

[29] Mun. Code of Chicago §11-12-545(b).

Chicago's affordable rate program provides a 50% discount on water bills and forgives one-twelfth of a participant's outstanding debt for each on-time (discounted) monthly payment.[30]

The economic premise underlying the establishment of low-income affordability programs, whether in the energy or water utility sector, is that a utility that delivers an affordable bill to a low-income customer will receive more in payment from that customer than if it delivered an unaffordable bill. Furthermore, funding discounted rates for low-income households has proven to increase a utility's revenue collection. A study funded jointly by energy utilities, low-income advocates, and others, which examined affordable energy rate programs around the country, described them, as "an alternative to a way of doing business that simply wasn't working."[31] As applicable to water liens, the alternative of a water rate affordability program presents an opportunity to improve collections by targeting ratepayer funded assistance to those with the inability to afford full tariff bills, with concomitant higher, more consistent revenues from all customers on an ongoing basis. As discussed in Section III, the economic benefit to the utility of water rate

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[30] Mun. Code of Chicago §§11-12-545(c) (definition of "Reduced Rate"); 11-12-545(d)(3) (forgiveness of debt upon completion of 12 month program participation).

[31] Applied Public Policy Research Institute for Study and Evaluation, et al., Ratepayer Funded Low-Income Energy Programs: Performance and Possibilities Final Report, Pennsylvania Appendix at 18 (2007).

affordability programs in reducing uncollectibles is widely accepted by water utility sector organizations and trade associations.

A recent review of Philadelphia's program has affirmed the economic benefit of low-income rate affordability programs. In setting new base rates in 2023, Philadelphia found that program discounts are a far more efficient means of collecting utility revenues than demanding that economically vulnerable customers pay more than they can afford.[32] As the Philadelphia rate making board found, "The record is clear that increasing the enrollment of eligible TAP participants not only helps those customers maintain essential water and sewer services but also increases…overall collections."[33]

As an alternative to traditional collection methods, water rate affordability programs recognize the need for the utility to maintain high levels of collectibles while also responding to customers' ability to pay. If the utility faces significant challenges in obtaining necessary revenues, those who rely upon the system may face unreliable or unsafe service.[34] Illogically, a utility that fails to consider

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[32] Philadelphia 2023 General Rate Proceeding, Rate Determination, at 24, available at: https://www.phila.gov/media/20230623151204/2023-General-Rate-Proceeding-Rate-Determination-2023-06-22.pdf.

[33] Philadelphia 2023 General Rate Proceeding, Rate Determination, at 47.

[34] See, e.g., Letter from Environmental Financial Advisory Board to EPA Administrator Stephen L. Johnson, February 22, 2006, https://nepis.epa.gov/Exe/ZyPDF.cgi/90060J00.PDF?Dockey=90060J00.PDF ("Significant numbers of household-level affordability problems create a political

adopting a rate affordability program may instead seek increases in its base rates, further exacerbating nonpayment and disconnection for those customers who have already experienced payment difficulty and cannot afford to repay for prior service. In contrast, as amici NRDC and NCLC explained in their 2022 report: "When low-income customers are billed an amount they can afford…they are much more likely to pay those bills, voluntarily and on time, providing a more stable, predictable revenue stream for the utility."[35]

III. Leading Water Utility Sector Organizations Recognize the Risks of Water Liens and Benefits of Water Rate Affordability Programs.

Nationally, leading water utility trade associations and utility-affiliated research organizations have acknowledged the downsides of relying on liens (and other harmful practices like shutoffs) as a collection tool when customers are unable to pay their bill. In fact, these organizations encourage utilities to adopt pro-active water affordability solutions such as those described in Part II above. As reflected in a series of guides, manuals, and other publications they have issued, these organizations appear to recognize—in common with amici—the need to adopt alternative approaches that meaningfully address low-income customers' affordability challenges while improving the utility's financial stability. They have

climate where it is impossible for utilities to achieve or maintain full-cost rates. This, in turn, leads to deferrals of maintenance, upgrading, and replacement, as well as a lower standard of operation.").

[35] Water Affordability Toolkit at 13.

thus implicitly rejected the notion, expressed by some in this proceeding,[36] that liens provide an essential method of collecting delinquent water charges, even from low-income customers unable to afford their water bills.

The American Water Works Association (AWWA) identifies as a nonprofit, scientific and educational society with more than 4,300 water system members.[37] AWWA recently published "Thinking Outside the Bill: A New Guide to Affordability and Customer Assistance," which recognizes that water utility bills increasingly present financial burdens that are unaffordable for some residential customers, particularly people living in underserved communities.[38] AWWA's guide is intended to help utilities "proactively develop or enhance" affordability programs by utilizing demographic, social, economic and environmental data.[39] It discusses various forms of bill discounts to help with affordability, including fixed discounts based on income, percentage-of-income-payment options, variable tiered discounts and lifeline rates.[40] Importantly, AWWA's guide also discusses arrearage

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[36] See, e.g., Brief of NEORSD at 9.
[37] Brief of AWWA at 1.
[38] American Water Works Association, Thinking Outside the Bill at 1-2 (3d ed.), available at: https://www.awwa.org/wp-content/uploads/ThinkingOutsidetheBill_ThirdEdition.pdf.
[39] Id. at 3.
[40] Id. at 17-18 (lifeline rates provide a fixed amount of water service at a low rate).

management and forgiveness, noting that those program features provide an "additional incentive for customers to participate and pay their bills on time."[41]

In discussing arrearage management, AWWA's guide explicitly acknowledges the risks imposed by shutting off service or imposing a lien for water debt:

> [W]ater service shutoff and placing a lien on the property have been implemented by some utilities. However, shutting off an essential service can exacerbate a customer's situation while not addressing the root problem, which is likely a financial hardship…. A lien typically comes with a fee imposed by the court the lien was filed with and passed on to the customer. If the lien remains unpaid, the customer's property could be foreclosed upon, resulting in the loss of the property.

It then invites utilities to consider eliminating these practices:

> The COVID-19 pandemic led to the suspension of many of these measures to protect public health and not exacerbate hardships on customers and has led some utilities to consider whether permanent change or suspension in these practices is warranted *given their negative consequences on customers*.[42]

AWWA also publishes the industry-standard manual for water rate-setting. In that manual, AWWA explains how utilities, themselves, reap financial benefits by proactively addressing affordability challenges:

> When customers have trouble paying utility bills, the cost to the utility is manifested in increased arrearages, late payments, disconnection notices, and service terminations. Some of the specific advantages of adopting customer financial assistance programs include…reducing

[41] Id. at 19.
[42] Id. (emphasis added).

> utility collection costs, arrearages, disconnects, and reconnects, which improves the utility's bottom line….[43]

Similarly, AWWA's executive director for government affairs noted in the association's journal that:

> [R]esolving bad debt from customers who cannot afford their rates can be more expensive for a utility than instituting a [customer assistance program] and assisting customers in paying their bills . . . The benefit to the utility of having discounts or lower rates for low-income customers is the increased likelihood of collecting payment from these customers."[44]

The Water Environment Federation (WEF)—the wastewater utility sector's equivalent of AWWA—publishes a standard rate-setting manual for wastewater utilities. Similar to AWWA's rate-setting manual, WEF explains that adopting pro-active water affordability solutions, rather than chasing after unpaid bills that low-income customers cannot afford to pay, can improve a utility's finances:

> If the rates and charges are not affordable for a portion of the customers, a utility may experience…increasing levels of accounts receivables, rising expenses for uncollectable accounts…. [Low-income discounts]…will help ensure that…costs of bill collection and

[43] American Water Works Association (AWWA), M1 Principles of Water Rates, Fees and Charges, Seventh Edition, 2017, pp. 217-18.
[44] G. Tracy Mehan and Ian D. Gansler, Addressing Affordability as a Necessary Element of Full-Cost Pricing, Journal AWWA 109, no. 10 (October 2017): 46-50 (internal citation omitted), http://aquadoc.typepad.com/files/affordability_full-cost_pricing_jawwa20o2017.pdf.

> bad debts are minimized, and desired revenues can be collected to achieve other goals and objectives of the utility.[45]

Another prominent water-sector organization, the US Water Alliance, is "a national membership organization advancing policies and programs to secure a sustainable [water] future for all."[46] Cleveland is a member.[47] In a recent fact sheet on "Addressing Customer Debt: Guidance for the Water Sector," the Alliance asserted that water utilities "need strategies to ensure that low-income ratepayers can manage their bills and do not fall back into debt."[48] The fact sheet highlighted examples of municipal water utility debt forgiveness programs, including the Philadelphia and Chicago programs discussed in Part II, above.

More than a decade ago, the Water Research Foundation (WRF) published an exhaustive—and oft-cited—"best practices" guide for low-income water

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[45] Water Environment Federation, Financing and Charges of Wastewater Systems, Manual of Practice No. 27, 4th Ed. (2018), Chapter 12.
[46] US Water Alliance, "About Us," https://uswateralliance.org/about-us/ (last visited Oct. 1, 2024).
[47] US Water Alliance, "US Water Alliance Members," https://uswateralliance.org/about-us/us-water-alliance-members/ (last visited Oct. 1, 2024) (Cleveland is listed as "Cleveland Water").
[48] US Water Alliance, Fact Sheet Addressing Customer Debt: Guidance for the Water Sector, 1 (2022), available at: https://uswateralliance.org/wp-content/uploads/2023/09/Addressing-Customer-Debt-Guidance-for-the-Water-Sector.pdf.

assistance and affordability programs.[49] As described in that guide, WRF is a non-profit organization that

> sponsors research to enable water utilities, public health agencies, and other professionals to provide safe and affordable drinking water to consumers…. Funding for research is provided primarily by subscription payments from close to 1,000 water utilities, consulting firms, and manufacturers in North America and abroad.[50]

Today, Cleveland is one of hundreds of "utility subscribers" that support WRF's research.[51]

WRF's best practices guide emphasized that a "proactive approach [to low-income affordability challenges] is ultimately a more effective business strategy than simply waiting for accounts to appear as past due."[52] In fact, WRF explained that "customer assistance programs have been shown to be capable of producing more total revenue for the dollars expended."[53]

The WRF guide presents examples of low-income discounts and rate structures intended to make current bills more affordable, as well as programs designed to help customers affordably manage arrears. A section on "arrearage

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[49] Water Research Foundation, Best Practices in Customer Assistance Programs, xx-xxi (2010), available at https://aquadoc.typepad.com/files/water_affordability_4004.pdf.
[50] Id. at ii.
[51] The Water Research Foundation, "Utility Subscribers" (accessed Oct. 1, 2024), https://www.waterrf.org/utility-subscribers.
[52] Water Research Foundation, Best Practices in Customer Assistance Programs, at xxi-xxii.
[53] Id. at 91.

forgiveness" is based on the premise that "a growing realization exists in the utility industry that circumstances exist under which the best treatment of an arrearage is to write them [sic] off and give the customer an opportunity to become a good paying account on a going forward basis."[54] It explores—and recommends—arrearage forgiveness options based on the "arrearage management plan" approach described in Part II, above, whereby debt is forgiven over time as a customer makes payments on current bills.[55]

CONCLUSION

For all of the foregoing reasons, the application of the Fair Housing Act to discriminatory use of water liens would not undermine municipal water systems' ability to fund their operations. In fact, imposing water liens as a collections tool, without adoption of effective means of delivering assistance to customers struggling with non-payment, is inconsistent with best practices in the water utility sector and jeopardizes housing stability. Instead, wider use of appropriately structured low-income water rate affordability programs would broadly support the shared interests of all stakeholders, stabilizing revenues for water utilities while promoting housing and water security for underserved communities.

[54] Id. at 78.
[55] Id. at 78-80.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,891 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of October 2024, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Notice of this filing will be sent to all parties of record by operation of the Court's ECF system.

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