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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Southwest Fair Housing Council  
10 Incorporated, et al.,

11 Plaintiffs,

12 v.

13 Maricopa Domestic Water Improvement  
District, et al.,

14 Defendants.  
15

No. CV-17-01743-PHX-DWL

**ORDER**

16 Pending before the Court is Defendant Maricopa Domestic Water Improvement  
17 District’s (the “District”) motion for summary judgment. (Doc. 101.) Plaintiffs Tavita  
18 Peña, Jennifer Peters, and Southwest Fair Housing Council, Inc. (“SWFC”) (collectively,  
19 “Plaintiffs”) have asserted a single claim against the District—that the District’s practice  
20 of requiring water customers living in public housing to pay a larger security deposit than  
21 the rest of the District’s water customers has a discriminatory impact on members of certain  
22 protected groups and therefore violates the Fair Housing Act (“FHA”), 42 U.S.C. § 3601  
23 *et seq.* (Doc. 40 ¶¶ 51-52.) The District argues that Plaintiffs have failed to demonstrate a  
24 prima facie case of disparate impact and forfeited the opportunity to pursue a disparate-  
25 treatment claim. (Doc. 101.) For the following reasons, the Court will grant the motion.<sup>1</sup>  
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28 <sup>1</sup> The District requested oral argument. That request is denied because the issues have  
been fully briefed and oral argument will not aid the Court’s decision. *See* Fed. R. Civ. P.  
78(b) (court may decide motions without oral hearings); LRCiv. 7.2(f) (same).

1 **BACKGROUND**

2 I. Factual Background

3 The District is a non-profit special district created by Pinal County in 1986. (Doc.  
4 1 ¶ 9; Doc. 101 at 2.) The District provides water to the town of Maricopa, as well as to  
5 some property owned by Pinal County that falls entirely within the town of Maricopa’s city  
6 limits. (Doc. 101 at 2.)

7 Since at least 2000, the District has maintained a policy that all property owners are  
8 responsible for the costs of water services provided to their property. (*Id.*; Doc. 101-1 at  
9 58-59.) Thus, if an owner rents a property, and the tenant leaves without paying the water  
10 bill, the property owner becomes responsible for the bill. (*Id.*) If the bill goes unpaid, the  
11 District obtains a lien against the offending property. (*Id.*)

12 In 2000, the District also expressed concern that “county housing has been a  
13 problem” regarding delinquent water bills. (Doc. 101-1 at 59.) “County housing” refers  
14 to public housing owned and operated by Pinal County. (Doc. 40 at 8-9.) Such housing is  
15 available “only to persons of low income and at rentals within the financial reach of such  
16 persons.” (*Id.* at 9, quoting A.R.S. § 36-1409(A)(1).)

17 In April 2000, the District sent a letter stating that property owners would be held  
18 financially responsible for renters’ delinquent water bills. (Doc. 101-1 at 60.) Because  
19 Pinal County owned the public housing serviced by the District, Pinal County was also  
20 subject to this policy. (*Id.* at 61 [letter from Pinal County acknowledging “our  
21 responsibility for delinquent water bills, incurred by our residents in Maricopa”].)

22 In 2002, after this change failed to alleviate the District’s concerns, the District  
23 revisited the issue. (*Id.* at 62.) At that point, the District decided the best solution was to  
24 raise the security deposit charged to renters moving into public housing units. (*Id.*) The  
25 District communicated this change to Pinal County. (*Id.* at 63.)

26 Despite Pinal County stating that it understood its obligations, delinquency  
27 problems continued. (Doc. 101-1 at 3.) In September 2013, the District attempted to  
28 impose a policy of not starting new water service at a particular location until the previous

1 bill was paid, but Pinal County asked the District to continue providing water to public  
2 housing tenants and promised to “iron out the delinquency issue later.” (*Id.* at 67.)

3 That proved difficult. In September 2013, in response to the District’s suggestion  
4 that it would pursue its standard enforcement mechanism (*i.e.*, a lien on the property in  
5 question), Pinal County bluntly stated “[i]t is unlawful in Arizona to lien public property.”  
6 (*Id.* at 45.) Pinal County also informed the District that “[c]ounties are political  
7 subdivisions of the State [of Arizona]” and, as such, the “anti-gift clause of the AZ  
8 constitution” prohibited Pinal County from paying the delinquent bills of its public housing  
9 residents. (*Id.* at 53.)

10 These developments frustrated the District, which in October 2013 sought a meeting  
11 with Pinal County to “open a dialog[ue]. . . . regarding Land owner responsibility of  
12 delinquent balances and to come to an understanding and resolution that will satisfy both  
13 parties.” (*Id.* at 96.) This request went unanswered. (*Id.* at 21.)

14 Eventually, in April 2014, the District sent Pinal County an email detailing its  
15 grievances with how Pinal County was handling the water bills for public housing units.  
16 (*Id.* at 21-22.) The email expressed skepticism toward Pinal County’s legal arguments and  
17 again sought a “resolution that will benefit our entities and . . . the potential tenants at Pinal  
18 County Housing apartments.” (*Id.* at 22.)

19 This email did the trick, and officials from Pinal County met with District officials.  
20 (*Id.* at 27.) As a result of that meeting, “both parties concluded the [District’s] Service  
21 Deposit amount for [Pinal County housing] tenants should be increased.” (*Id.*) The  
22 change, effective January 1, 2015, increased to \$180 the total security deposit required of  
23 public housing tenants. (*Id.* at 98.) Combined with the \$20 service fee, this meant that any  
24 new resident in public housing had to pay \$200 to the District upfront. (*Id.*) In contrast,  
25 non-public housing customers of the District had an upfront cost of \$75—the same  
26 nonrefundable \$20 service fee and a security deposit of \$55. (Doc. 40 at 3.)

27 Through this lawsuit, Plaintiffs seek to challenge that fee increase.<sup>2</sup> (*Id.*) One

28 <sup>2</sup> The Court notes that, in Plaintiffs’ response, Plaintiffs argue that three other District  
“rules” are also at issue in this case. (Doc. 106 at 3-4.) Given the Court’s resolution of

1 Plaintiff, Ms. Peña, has lived in West Edwards Circle, one of Pinal County’s public housing  
2 buildings, since 2001. In November 2016, Ms. Peña was approved to change units within  
3 West Edwards Circle. (*Id.* ¶¶ 23-24.) Like any other resident moving into a Pinal County  
4 housing unit, Ms. Peña was required to prove she had “paid for the gas, electricity, and  
5 water to be turned on in her unit.” (*Id.* ¶ 23.) When Ms. Peña first moved into West  
6 Edwards Circle in 2001, the District charged her a total of \$65. (*Id.*) Pursuant to the  
7 District’s 2015 policy, however, Ms. Peña was charged \$200. (*Id.*) This presented a  
8 “serious hardship”—Ms. Peña’s rent already doubled, and now she was asked to produce  
9 a much larger security deposit than she had in the past. (*Id.* ¶¶ 24-25.) Although Ms. Peña  
10 was able to cover the moving costs, including the District’s security deposit, by depleting  
11 her daughter’s savings, the experience caused Ms. Peña to suffer “severe headaches and  
12 stomachaches and [she] could not sleep” and to fear becoming homeless. (*Id.*)

13 The other individual Plaintiff, Ms. Peters, alleges similar harms. (*Id.* ¶¶ 27-29.) Ms.  
14 Peters moved into her West Edwards Circle unit in June 2016. (*Id.* ¶ 27.) As with all  
15 tenants, she was required to prove that she had paid for all utility hookups, including water  
16 through the District. (*Id.*) This presented a problem because Ms. Peters had a limited,  
17 fixed income of \$800 a month—the District’s \$200 fee would take a quarter of her monthly  
18 income. (*Id.*) Like Ms. Peña, Ms. Peters suffered from lost sleep, headaches,  
19 stomachaches, and a fear of becoming homeless. (*Id.*) Eventually, Ms. Peters was able to  
20 meet her financial obligations through other public assistance programs. (*Id.* ¶ 28.)

21 In September 2016, a case worker at Pinal County Public Housing contacted  
22 SWFHC to “express concern about [the District’s] discriminatory service deposit and its  
23 effect on Pinal County’s public housing residents.” (*Id.* ¶ 30.) In response, SWFHC  
24 directed its “limited resources” to provide outreach and education to West Edwards Circle  
25 tenants explaining fair housing laws and discrimination. (*Id.*)

26 ...

27 \_\_\_\_\_  
28 this case, it need not determine whether those rules are still in play. Plaintiffs’ evidence—  
their statistical study—is the same for each rule.

1     II.     Procedural History

2             On June 5, 2017, Plaintiffs initiated this action.<sup>3</sup> (Doc. 1.) They alleged the factual  
3 background outlined above and brought two claims—violations of federal and state fair  
4 housing laws—against the District. (*Id.*) Plaintiffs claimed that the District violated these  
5 laws by “discriminating on the basis of race, color, national origin, sex, familial status and  
6 disability.” (*Id.* ¶¶ 34, 36.) The District filed an answer denying these allegations. (Doc.  
7 16.)

8             On May 14, 2018, Plaintiffs filed an amended complaint. (Doc. 40.) In addition to  
9 the facts alleged above, the amended complaint contained a host of allegations detailing  
10 Pinal County’s failure to meet its obligations under federal and state fair housing laws. (*Id.*  
11 ¶¶ 31-45.) The amended complaint realleged Plaintiffs’ fair housing claims, adding Pinal  
12 County as a defendant in addition to the District, and added two new claims specifically  
13 against Pinal County—violations of 42 U.S.C. §§ 1983 and 1986. (*Id.* ¶¶ 51-58.) Pinal  
14 County filed an answer, denying Plaintiffs’ claims and raising a variety of affirmative  
15 defenses. (Doc. 48.) The District filed an amended answer, again denying Plaintiffs’  
16 claims and raising affirmative defenses. (Doc. 50.) In its amended answer, the District  
17 also raised an indemnification cross-claim against Pinal County. (*Id.* at 10-13.) The  
18 District claimed that, if it were found liable on any of Plaintiffs’ claims, such “liability  
19 would be caused solely or primarily by the advice and guidance that the District received  
20 from Pinal County.” (*Id.* at 13.)

21             On August 12, 2018, Plaintiffs sought to withdraw their sole state-law claim. (Doc.  
22 51.) The Court granted the request. (Doc. 54.)

23             In October 2018, the District and Pinal County filed a stipulated motion to dismiss,  
24 without prejudice, the District’s cross-claim against Pinal County. (Doc. 57.) The Court  
25 also granted this motion. (Doc. 58.)

26 \_\_\_\_\_  
27 <sup>3</sup> This case was originally assigned to a magistrate judge. (Doc. 9.) After a request  
28 was made for reassignment to a district judge, the case was randomly assigned to Judge  
Tuchi. (Doc. 14.) It was reassigned to the undersigned judge on October 31, 2018. (Doc.  
60.)

1 On February 15, 2019, Plaintiffs informed the Court they had reached a settlement  
2 with Pinal County. (Doc. 79.) Plaintiffs were instructed to file a notice of settlement. (*Id.*).  
3 They have yet to do so.

4 Discovery closed on June 28, 2019. (Doc. 88 at 2.) Afterward, the District moved  
5 for summary judgment. (Doc. 101.) Its motion seeks summary judgment on Plaintiffs’  
6 FHA claim, which is Plaintiffs’ only remaining claim. (*Id.*; Doc. 40 ¶¶ 51-58.)

### 7 LEGAL STANDARD

8 A party moving for summary judgment “bears the initial responsibility of informing  
9 the district court of the basis for its motion, and identifying those portions of ‘the pleadings,  
10 depositions, answers to interrogatories, and admissions on file, together with the affidavits,  
11 if any,’ which it believes demonstrate the absence of a genuine issue of material fact.”  
12 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). “In order to carry its burden of  
13 production, the moving party must either produce evidence negating an essential element  
14 of the nonmoving party’s claim or defense or show that the nonmoving party does not have  
15 enough evidence of an essential element to carry its ultimate burden of persuasion at trial.”  
16 *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). “If . . .  
17 [the] moving party carries its burden of production, the nonmoving party must produce  
18 evidence to support its claim or defense.” *Id.* at 1103.

19 “Summary judgment is appropriate when ‘there is no genuine dispute as to any  
20 material fact and the movant is entitled to judgment as a matter of law.’” *Rookaird v. BNSF*  
21 *Ry. Co.*, 908 F.3d 451, 459 (9th Cir. 2018) (quoting Fed. R. Civ. P. 56(a)). “A genuine  
22 dispute of material fact exists if ‘there is sufficient evidence favoring the nonmoving party  
23 for a jury to return a verdict for that party.’” *United States v. JP Morgan Chase Bank*  
24 *Account No. Ending 8215 in Name of Ladislao V. Samaniego*, VL: \$ 446,377.36, 835 F.3d  
25 1159, 1162 (9th Cir. 2016) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-  
26 50 (1986)). The court “must view the evidence in the light most favorable to the  
27 nonmoving party and draw all reasonable inference in the nonmoving party’s favor.”  
28 *Rookaird*, 908 F.3d at 459. Summary judgment is also appropriate against a party who

1 “fails to make a showing sufficient to establish the existence of an element essential to that  
2 party’s case, and on which that party will bear the burden of proof at trial.” *Celotex*, 477  
3 U.S. at 322.

#### 4 DISCUSSION

5 The FHA prohibits discrimination on the basis of race, color, religion, sex, familial  
6 status, or national origin when making certain decisions regarding the sale or rent of a  
7 dwelling. One provision of the FHA makes it unlawful “[t]o refuse to sell or rent after the  
8 making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise  
9 make unavailable or deny, a dwelling” because of a person’s protected status. 42 U.S.C. §  
10 3604(a). A different provision makes it unlawful “[t]o discriminate against any person in  
11 the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of  
12 services or facilities in connection therewith, because of” the person’s protected status. *Id.*  
13 § 3604(b).

14 In general, claims arising under the FHA come in two forms. “First, and most  
15 obvious, [the FHA] prohibits intentional discrimination.” *Ave. 6E Invs., LLC v. City of*  
16 *Yuma*, 818 F.3d 493, 502 (9th Cir. 2016). Such claims are known as disparate-treatment  
17 claims. *Id.* Second, the FHA also forbids “actions by private or governmental bodies that  
18 create a discriminatory effect upon a protected class or perpetuate housing segregation  
19 without any concomitant legitimate reason.” *Id.* at 503. This theory of liability is known  
20 as disparate impact. Here, Plaintiffs have advanced the sort of statistical evidence  
21 traditionally used in disparate-impact claims, and that is the theory to which the parties  
22 dedicate most of their briefing. (Doc. 101 at 1-14; Doc. 106 at 1-15; Doc. 110 at 1-9.)  
23 Accordingly, the Court will begin its analysis with the disparate-impact claim.

#### 24 I. Disparate Impact

25 The Supreme Court’s 2015 decision in *Texas Dept. of Hous. & Cmty. Affairs v.*  
26 *Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015) (“*ICP*”), provides the starting point  
27 for assessing the contours of disparate-impact liability under the FHA. In *ICP*, the  
28 plaintiffs sought to raise, under Section 3604(a) of the FHA, a disparate-impact challenge

1 to a Texas housing agency’s practice of “granting too many [tax] credits for housing in  
2 predominantly black inner-city areas and too few in predominantly white suburban  
3 neighborhoods,” arguing that this practice “caused continued segregated housing patterns.”  
4 *Id.* at 2514. The sole issue the Supreme Court agreed to review was “whether disparate-  
5 impact claims are cognizable under the FHA.” *Id.* at 2515. As part of its analysis, the  
6 Court focused on the statutory text of Section 3604(a), explaining that “the phrase  
7 ‘otherwise make available’ is of central importance to the analysis” because such “results-  
8 oriented language” raises an inference that Congress sought to regulate “the consequences  
9 of an action rather than the actor’s intent.” *Id.* at 2518. The Court also likened Section  
10 3604(a)’s passive language to the passive statutory language (“otherwise adversely affect”)  
11 found in two other statutes, Title VII and the Age Discrimination in Employment Act  
12 (“ADEA”), under which disparate impact is a recognized theory of liability. *Id.* at 2519.  
13 For these and other reasons, the Court concluded “that disparate-impact claims are  
14 cognizable under the Fair Housing Act.” *Id.* at 2525.

15 Here, both parties assume that *ICP* paves the way for Plaintiffs to assert a disparate-  
16 impact claim against the District (Doc. 101 at 5; Doc. 106 at 5)—they simply dispute the  
17 sufficiency of the evidence. However, the claim in *ICP* arose (at least in part) under Section  
18 3604(a) of the FHA, and the Supreme Court focused on the presence of an unusually  
19 passive and “results-oriented” phrase within Section 3604(a)—*i.e.*, a defendant may be  
20 held liable for engaging in conduct that “otherwise make[s] unavailable” a housing unit to  
21 a member of a protected class—when concluding that disparate-impact claims should be  
22 recognized under that provision. But this case doesn’t appear to involve a claim under  
23 Section 3604(a)—as noted, that provision applies only when a defendant engages in  
24 conduct that *prevents* a protected-group member from renting or buying a dwelling, and  
25 both individual plaintiffs in this case acknowledge they were able to pay the increased  
26 deposit (albeit with significant difficulty). Thus, Plaintiffs’ claim appears to arise under  
27 Section 3604(b), and that provision of the FHA doesn’t include the “results-oriented”  
28 language found in Section 3604(a)—liability arises only when the defendant affirmatively



1 “discriminate[s] against any person in the terms, conditions, or privileges of sale or rental  
2 of a dwelling, or in the provision of services or facilities in connection therewith, because  
3 of” the person’s protected status. 42 U.S.C. § 3604(b) (emphasis added). Thus, although  
4 the Ninth Circuit has previously held that disparate-impact claims are cognizable under  
5 Section 3604(b), *see, e.g., Ojo v. Farmers Grp., Inc.*, 600 F.3d 1201, 1203 (9th Cir. 2010),  
6 there is some question as to whether those decisions are affected by *ICP*.

7 In any event, because the parties assume Plaintiffs may advance a disparate-impact  
8 claim in this case, the Court will assume so, too. Disparate-impact claims under the FHA  
9 are governed by the same three-step, burden-shifting framework that is used to evaluate  
10 disparate-impact claims in other contexts. *See, e.g., ICP*, 135 S.Ct. at 2514-15 (not  
11 quarreling with the district court’s application of this framework); *Ave 6E*, 818 F.3d at 513  
12 (discussing the “burden-shifting framework for disparate-impact claims under the FHA”)  
13 (citation omitted). However, the Supreme Court in *ICP* also identified several  
14 “safeguards” that must be incorporated into the burden-shifting framework. 135 S.Ct. at  
15 2523. Those safeguards are necessary, the Court explained, because “disparate-impact  
16 liability must be limited so employers and other regulated entities are able to make the  
17 practical business choices and profit-related decisions that sustain a vibrant and dynamic  
18 free-enterprise system.” *Id.* at 2518. *See also id.* at 2522 (noting that “serious  
19 constitutional questions . . . might arise under the FHA . . . if [disparate impact] liability  
20 were imposed based solely on a showing of a statistical disparity”). Thus, the Court held  
21 that “a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff  
22 cannot point to a defendant’s policy or policies causing that disparity.” *Id.* at 2523. The  
23 Court labeled this “[a] *robust causality* requirement” and hinted that some lower courts had  
24 failed to properly apply it in pre-2015 decisions addressing disparate-impact liability under  
25 the FHA. *Id.* at 2523-24 (emphasis added). The Court concluded: “Courts must . . .  
26 examine with care whether a plaintiff has made out a prima facie case of disparate impact  
27 . . . . A plaintiff who fails to . . . produce statistical evidence demonstrating a causal  
28 connection cannot make out a prima facie case of disparate impact.” *Id.* at 2523.

1           In their briefs, the parties disagree about what type of statistical evidence is required  
2 to satisfy this “robust causality” requirement under the first step of the disparate-impact  
3 framework. Plaintiffs contend they are only required to show that the District’s challenged  
4 policy disproportionately affected individuals who are protected by the FHA. (Doc. 106  
5 at 5, 7.) Thus, Plaintiffs contend that the statistical analysis conducted by their expert,  
6 which shows that the households in West Edwards Circle (the public housing building  
7 where Ms. Peña and Ms. Peters both reside) are significantly more likely to be headed by  
8 an African-American, a Native American, or a female with children than the households in  
9 the District’s overall service area, is sufficient. (*Id.* at 6-7, citing Doc. 106-4 at 66-73.)  
10 The District disagrees, arguing that Plaintiffs failed to meet their burden because their  
11 proffered statistics are devoid “of any opinion regarding the cause of any statistical  
12 disparities.” (Doc. 101 at 7.) That is, the District asserts that the complained-of policy  
13 must “cause[] the disparity among protected groups,” rather than simply showing “that a  
14 policy impacted more members of a protected class than nonmembers of a protected class.”  
15 (Doc. 110 at 1, 4.)

16           Since *ICP* was decided in 2015, lower courts have struggled to discern what,  
17 exactly, “robust causality” means in the context of an FHA disparate-impact claim. No  
18 consensus has emerged. *See generally Inclusive Communities Project, Inc. v. Lincoln*  
19 *Property Co.*, 920 F.3d 890, 903-04 (5th Cir. 2019) (“Although the Supreme Court’s  
20 opinion in *ICP* established ‘robust causation’ as a key element of a plaintiff’s prima facie  
21 burden in a disparate impact case, the Court did not clearly delineate its meaning or  
22 requirements. . . . However, decisions from three other circuits—the Fourth, Eighth and  
23 Eleventh—have considered its application, yielding opinions reflecting various views of  
24 the prerequisites.”). Nevertheless, this Court is required to follow Ninth Circuit law, and  
25 the Ninth Circuit’s post-*ICP* decisions support the conclusion that Plaintiffs’ evidence is  
26 insufficient.

27           The most analogous (albeit unpublished) decisions are *City of Los Angeles v. Wells*  
28 *Fargo & Co.*, 691 Fed. App’x 453 (9th Cir. 2017), and *City of Los Angeles v. Bank of Am.*

1 *Corp.*, 691 Fed. App’x 464 (9th Cir. 2017). In each case, the plaintiff asserted a disparate-  
2 impact challenge under the FHA to a bank’s practice of “target[ing] low-income  
3 borrowers” with “higher-amount [mortgage] loans” that were likely to result in default.  
4 *Wells Fargo*, 691 Fed. App’x at 454-55; *Bank of America*, 691 Fed. App’x at 465.<sup>4</sup> In  
5 support of these claims, the plaintiff offered statistical evidence from an expert showing  
6 that “[m]inority borrowers were two to three times more likely to receive high cost or Fair  
7 Housing Act/Veteran’s Affairs . . . loans than were similarly situated white borrowers.”  
8 *Bank of America*, 691 Fed. App’x at 465. Nevertheless, the district court granted summary  
9 judgment to both defendants and the Ninth Circuit affirmed, holding that (1) under *ICP*,  
10 “[t]he causal link between the policy and disparity must be ‘robust,’ and (2) the plaintiff’s  
11 statistical evidence was insufficient under this test because it “failed to demonstrate how  
12 the . . . two policies were causally connected in a ‘robust’ way to the racial disparity, as  
13 they would affect borrowers equally regardless of race.” *Wells Fargo*, 691 Fed. App’x at  
14 454-55; *Bank of America*, 691 Fed. App’x at 465.

15 Plaintiffs’ evidence in this case fails for the same reason. The District has adopted  
16 a facially race-neutral policy of requiring water customers who reside in public housing to  
17 pay a higher security deposit than water customers who reside in non-public housing.  
18 Plaintiffs’ statistical evidence merely shows that certain groups that are protected under the  
19 FHA are more likely to reside in public housing than in non-public housing. Although the  
20 inevitable consequence of this housing pattern is that members of protected groups will be  
21 statistically more likely to pay the increased deposit, there is nothing “robust” about this  
22 causal connection. The unfortunate reality is that membership in one of the FHA’s  
23 protected groups is often correlated with low-income status, yet *Wells Fargo* and *Bank of*  
24 *America* both recognize that it is insufficient under *ICP* for a plaintiff asserting a disparate-  
25 impact claim under the FHA to merely show that a race-neutral policy was targeted toward  
26 those with low incomes and therefore ended up affecting a disproportionate share of

27 <sup>4</sup> For further background, see *City of Los Angeles v. Wells Fargo & Co.*, 2015 WL  
28 4398858, \*1 (C.D. Cal. 2015) (“According to the City, Wells Fargo engaged in  
discriminatory and predatory mortgage lending practices that resulted in a disparate  
number of residential home foreclosures for minority borrowers in Los Angeles.”).

1 protected-group members. *Cf. Reinhart v. Lincoln Cty.*, 482 F.3d 1225, 1231 (10th Cir.  
2 2007) (“It is not enough for [plaintiffs] to show that (1) a regulation would increase housing  
3 costs and (2) members of a protected group tend to be less wealthy than others.”).

4 The Fourth Circuit’s decision in *Reyes v. Waples Mobile Home Park Ltd. P’Ship*,  
5 903 F.3d 415 (4th Cir. 2018)— which Plaintiffs incorrectly proffer as a decision supporting  
6 their position (Doc. 106 at 8-9)—further supports this outcome. In *Reyes*, a mobile home  
7 park instituted a policy of requiring all tenants over the age of 18 to provide proof of legal  
8 immigration status. 903 F.3d at 419. A tenant who failed to do so was subject to eviction.  
9 *Id.* at 419-20. In the ensuing FHA lawsuit, the plaintiffs alleged this policy was  
10 “disproportionately ousting Hispanic or Latino . . . families from their homes and denying  
11 them one of the only affordable housing options in [the area].” *Id.* at 421 (internal  
12 quotations omitted). In other words, plaintiffs brought a disparate-impact claim. *Id.* at  
13 420-421. The district court dismissed that claim but the Fourth Circuit reversed. As the  
14 court put it, “[u]nderstanding th[e] robust causality requirement is at the crux of this  
15 appeal.” *Id.* at 425. The court concluded the plaintiffs’ allegations were sufficient to  
16 establish robust causality because they “*did not merely allege that Latinos would face*  
17 *eviction in higher numbers than non-Latinos. Instead, Plaintiffs satisfied the robust*  
18 *causality requirement by asserting that the specific Policy . . . was likely to cause Latino*  
19 *tenants at the Park to be disproportionately subject to eviction compared to non-Latino*  
20 *tenants at the Park.*” *Id.* at 429 (emphasis added).

21 Here, in contrast, Plaintiffs have not shown—or even attempted to show—that the  
22 protected-group members residing at West Edwards Circle would be “disproportionately”  
23 affected by the security-deposit increase “compared” to the other residents of West  
24 Edwards Circle. Nor could they—everybody has to pay the same fee. Rather, Plaintiffs  
25 have merely shown that the District chose to adopt a race-neutral policy at housing facilities  
26 whose population is composed of a higher percentage of protected-group members than  
27 the general population. Under *Reyes*, that is not robust causality. *Id.* (suggesting the  
28 disparate-impact claim would have failed had the plaintiffs “merely allege[d] that Latinos

1 would face eviction in higher numbers than non-Latinos”).

2 Finally, Plaintiffs’ reliance on *Hardie v. National Collegiate Athletic Ass’n*, 876  
3 F.3d 312 (9th Cir. 2017), fails for similar reasons. *Hardie* involved a disparate-impact  
4 challenge to an NCAA rule that excluded anyone with a felony conviction from coaching  
5 at an NCAA-certified youth athletic tournament. *Id.* at 315.<sup>5</sup> In support of this challenge,  
6 the plaintiff offered statistical evidence showing that “46.5% of those approved under the  
7 [rule] were African American, while 80.1% of those denied because of a felony conviction  
8 were African American.” *Id.* at 318. The plaintiff also offered statistical evidence showing  
9 that “African American applicants represented 40.3% of applicants denied because of a  
10 felony conviction, compared to 26.5% of approved applicants, meaning that African  
11 Americans were represented among felony-denied applicants at a rate 1.52 times higher  
12 than among approved applicants.” *Id.* The Ninth Circuit concluded this evidence was  
13 sufficient under the first prong of the disparate-impact test and *ICP* because it “establishes  
14 a ‘causal connection’ between the Participant Approval Policy’s blanket felon ban and the  
15 disproportionate effect on African American coaching applicants.” *Id.* at 321.

16 Plaintiffs’ statistical evidence in this case is nothing like the evidence in *Hardie*.  
17 Here, 100% of protected-group members who reside at West Edwards Circle must pay the  
18 increased security-deposit fee, but 100% of the other residents must pay the fee, too.  
19 Everybody is treated the same, and experiences the same outcome, regardless of  
20 membership in a protected group. To find liability under the FHA in this circumstance  
21 would turn the concept of “robust causality” on its head and ignore *ICP*’s exhortation that  
22 “serious constitutional questions . . . might arise under the FHA . . . if [disparate impact]  
23 liability were imposed based solely on a showing of a statistical disparity.” 135 S.Ct.  
24 2522.<sup>6</sup>

25 \_\_\_\_\_  
26 <sup>5</sup> The disparate-impact challenge in *Hardie* arose under Title II of the Civil Rights  
27 Act of 1964, not under the FHA, but the Ninth Circuit cited *ICP* and applied its “robust  
28 causality” requirement. *Hardie*, 876 F.3d at 319-20.

<sup>6</sup> Plaintiffs also cite cases decided between 1977 and 2005 that address disparate-  
impact liability under the FHA (Doc. 106 at 7-8), but those cases were decided before *ICP*  
and do not incorporate its “safeguards” or its robust causality requirement.

1       II.     Disparate Treatment

2             In their response, Plaintiffs argue that, in addition to their disparate-impact claim,  
3 they have “submitted sufficient evidence to withstand summary judgment on their disparate  
4 treatment claim.” (Doc. 106 at 16.) The District argues, however, that there is no disparate-  
5 treatment claim in this case—Plaintiffs have neither alleged nor pursued such a claim  
6 throughout this litigation. (Doc. 110 at 9.) Even if such a claim exists, the District argues,  
7 Plaintiffs have failed to meet their burden.

8             As noted, the FHA allows for both disparate-treatment and disparate-impact claims.  
9 *Ave. 6E Invs.*, 818 F.3d at 502-03. That does not mean, however, that a plaintiff may  
10 proceed under both theories if only one is alleged in the complaint. In *Coleman v. Quaker*  
11 *Oats Co.*, 232 F.3d 1271 (9th Cir. 2000), three plaintiffs brought claims under the ADEA.  
12 *Id.* at 1280. In their complaint, the plaintiffs alleged a disparate-treatment theory but not a  
13 disparate-impact theory. *Id.* When the plaintiffs tried to raise a disparate-impact claim at  
14 summary judgment, the district court dismissed it, relying on the fact that it hadn’t been  
15 raised in the complaint. *Id.* The Ninth Circuit affirmed, reasoning that allowing the  
16 plaintiffs to raise a new theory of liability at summary judgment would prejudice the  
17 defendant. *Id.* at 1292, 1294. The court emphasized that the two theories require “entirely  
18 different defenses,” so a lack of notice as to one theory would “make[] it difficult, if not  
19 impossible, for [a defendant] to know how to defend itself.” *Id.* at 1292. Thus, the court  
20 held that plaintiffs who clearly state one theory of liability in their complaint, but seek to  
21 utilize the other, are “required either (1) to plead the additional [theory] in their complaints,  
22 or (2) to make known during discovery their intention to pursue recovery on the [other  
23 theory] omitted from their complaints.” *Id.* at 1294.

24             Disparate-impact and disparate-treatment claims are generally handled the same  
25 from one statutory context to the next. *Hardie*, 876 at 319 n.8. The Court sees no reason  
26 the rule announced in *Coleman* would not apply here. *Cf. Elliott v. QF Circa 37, LLC*,  
27 2018 WL 29933467, \*13 n.13 (S.D. Cal. 2018) (denying plaintiff the opportunity to pursue  
28 a disparate-treatment claim under the FHA because it was not raised in the complaint);

1 *Keller v. City of Fremont*, 2012 WL 12884555, \*1 (D. Neb. 2012) (denying plaintiff’s  
2 attempt to rely on a disparate-impact theory under the FHA because it was not raised in the  
3 complaint). *See also Ave 6E Invs.*, 818 F.3d at 503-04 (reversing dismissal of disparate-  
4 treatment claims only because “the second amended complaint contains sufficient  
5 allegations that the [defendant’s] decision was driven by animus”). Thus, under *Coleman*,  
6 Plaintiffs are foreclosed from pursuing a disparate-treatment claim at this stage of the  
7 litigation. Plaintiffs’ complaint makes specific mention of a disparate-impact claim.  
8 *Compare* Doc. 40 ¶ 21 (“As a result of the demographics of public housing in [the  
9 District’s] service area and Pinal County, a service deposit fee policy that requires public  
10 housing residents to pay a fee three times higher than the fee paid by non-public housing  
11 residents actually and predictably result in discrimination.”) *with* 24 C.F.R. § 100.500(c)(1)  
12 (in a discriminatory effects case, the plaintiff “has the burden of proving that a challenged  
13 practice caused or predictably will cause a discriminatory effect.”). In contrast, the  
14 complaint is devoid of any allegation that discrimination against a protected class member  
15 was a “motivating factor” behind the District’s challenged policy change, which is an  
16 essential element of a disparate-treatment claim. *Ave. 6E Invs.*, 818 F.3d at 503-504. The  
17 complaint, then, showed an intent to pursue a disparate-impact claim but not a disparate-  
18 treatment claim. Similarly, it does not appear that, in the course of discovery, Plaintiffs  
19 gave any indication that they would pursue a disparate-treatment claim in addition to their  
20 disparate-impact claim.

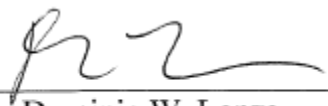
21 Finally, although the Court need not reach the issue, the evidence Plaintiffs cite in  
22 support of their disparate-treatment claim appears insufficient to establish a genuine  
23 dispute of material fact. The strongest evidence Plaintiffs cite is that one of the District’s  
24 board members stated he didn’t “think [Pinal County was] as accountable as they should  
25 have been for their property, for managing the influx of people and tenants and that type  
26 of thing.” (Doc. 106-6 at 122.) Plaintiffs ascribe discriminatory meaning to this statement,  
27 but standing alone, it is not the sort of “code word” that demonstrates discriminatory intent.  
28 *Ave. 6E Invs.*, 818 F.3d at 505-06. Whether a code word demonstrates intent depends on

1 “local custom and historical usage,” evidence that is absent from the record. *Id.* Without  
2 more, it is unlikely Plaintiffs’ disparate-treatment claim would survive summary judgment  
3 on the merits.

4 Accordingly, **IT IS ORDERED** granting the District’s motion for summary  
5 judgment. (Doc. 101.) Because Plaintiffs have indicated they have settled with Pinal  
6 County, there are no remaining claims in this case. Therefore, the Clerk of Court shall  
7 enter judgment accordingly and terminate this action.

8 Dated this 21st day of February, 2020.

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Dominic W. Lanza  
United States District Judge