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Statistically Speaking: Restrictive Changes to Fair Housing Act Disparate Impact Liability

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STATISTICALLY SPEAKING: RESTRICTIVE CHANGES TO FAIR HOUSING ACT DISPARATE IMPACT LIABILITY

Abstract: Disparate impact liability, a theory for pleading discrimination allegations, has been an important tool in the battle for housing equity. Disparate impact claims, however, have undergone drastic changes since their inception in 1971. Most recently, the Department of Housing and Urban Development issued a final rule amending the pleading requirements for litigants alleging disparate impact housing claims. The new rule threatens to undermine the development of disparate impact claims under the Fair Housing Act (FHA) of 1968, which gives plaintiffs access to relief, specifically in cases of lending discrimination. This Note analyzes the rule in light of a seminal 2015 U.S. Supreme Court decision, *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, which recognized disparate impact claims under the FHA. Ultimately, an FHA disparate impact rule should balance the need for plaintiffs to reach the discovery phase of litigation to uncover discriminatory animus versus defendants' ability to justify policies with legitimate purposes.

INTRODUCTION

In the 1950s, Ford Motor Company opened a new manufacturing plant in the town of Milpitas, California.[1] The company transferred 1,400 employees, including 250 Black employees, to meet the staffing demands in Milpitas.[2] To address the incoming wave of employee housing needs, the Federal Housing Administration approved and insured subdivision plans on single-family homes for development.[3] Simultaneously, the Veterans Administration guaranteed the buyers' mortgages on the homes.[4] Even though Black employees were similarly situated to white home buyers, Milpitas excluded Black individuals

[1] RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 9 (2017).

[2] *Id.*

[3] *Id.* Congress created the Federal Housing Administration in 1934 to revitalize the lending market by insuring approved-lender mortgages. *The Federal Housing Administration (FHA)*, HUD.GOV, https://www.hud.gov/program_offices/housing/fhahistory [https://perma.cc/BSB5-VW5V]; *see also* David Reiss, *Underwriting Sustainable Homeownership: The Federal Housing Administration and the Low Down Payment Loan*, 50 GA. L. REV. 1019, 1034–35 (2016) (summarizing the purpose of the Federal Housing Administration as an insurance guarantor for private mortgages).

[4] ROTHSTEIN, *supra* note 1, at 9 n.*. Under the Servicemen's Readjustment Act of 1944, the Veterans Administration (VA) issued low interest rate loans to veterans. April Johnson, Comment, *Fair Housing Issues: A Call for Mandated Housing Integration*, 50 U. TOL. L. REV. 107, 115–16 (2018). These loans required no down payments, but the VA discriminated by redlining in a way similar to the Federal Housing Administration's practices. *Id.*

from owning homes and the city's zoning laws forbade the construction of apartments.[5] Without the ability to own a home or rent an apartment, Black individuals like Frank Stevenson, an educated Ford utility worker, had no choice but to commute over one hour in each direction to the plant.[6] Stevenson was never able to move closer to the plant and made this same trip for twenty years until he retired.[7] Only one of the eight Black individuals with whom Stevenson carpooled was able to move closer to the plant throughout his employment.[8]

Stevenson's story demonstrates an aspect of the long, ugly, and under scrutinized history of housing discrimination in the United States.[9] In 1933, following the Great Depression, Congress passed the Home Owners' Loan Corporation Act to create the Home Owners' Loan Corporation (HOLC).[10] The HOLC was President Franklin D. Roosevelt's New Deal effort to revitalize lending in the housing market.[11] Congress intended for the HOLC to both refinance metropolitan mortgages on the brink of foreclosure and finance favorable loans of those who defaulted on their mortgages.[12] The HOLC's four-category rating system was used to evaluate lending risk, however, it signifi-

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[5] ROTHSTEIN, *supra* note 1, at 9–10. Generally, the phrase "similarly situated" connotes fundamental ideas of equal protection by assessing the relationship between the reasonableness of classifying an individual and the purpose of a particular law. *See* Giovanna Shay, *Similarly Situated*, 18 GEO. MASON L. REV. 581, 612–15 (2011) (explaining that the term "similarly situated" has a complicated legal history). Originally, the phrase meant that legislation could not help or hinder a particular class. *See id.* at 601 (discussing interpretations of "similarly situated" in the 1885 U.S. Supreme Court decision *Barbier v. Connolly*). Later, courts used the term to connect the classification and the legislative intent. *Id.* at 612. Some lower courts used "similarly situated" as a minimum bar for equal protection claims. *Id.* at 615. The preferred understanding of the term, however, focuses on the relationship between a protected class and the purpose of a law. *Id.* This allows a court to frame the law in a way that resonates with the equal protection issues and better guides the legislature. *Id.*

[6] ROTHSTEIN, *supra* note 1, at 10.

[7] *Id.*

[8] *Id.*

[9] *See id.* at xii (stating that housing discrimination was a national, federally-sponsored, and targeted project). For example, the Federal Housing Administration implemented one policy that would undervalue racially mixed urban areas making them unsuitable for mortgage refinancing. *See* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 51–54 (1993) (explaining that starting in the 1930s, the federal government administered sets of policies to promote lending and housing discrimination in minority neighborhoods). The Federal Housing Administration dubbed another policy "inharmonious racial or nationality groups" in its Underwriting Manual. *Id.* at 54. The manual stated that "[i]f a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same social and racial classes." *Id.* (quoting U.S. FED. HOUS. ADMIN., UNDERWRITING MANUAL: UNDERWRITING AND VALUATION PROCEDURE UNDER TITLE II OF THE NATIONAL HOUSING ACT pt. 2, § 9, ¶ 937 (1938) https://www.huduser.gov/portal/sites/default/files/pdf/Federal-Housing-Administration-Underwriting-Manual.pdf [https://perma.cc/96U3-GWCB]). To achieve this goal, the agency encouraged racially restrictive covenants. *Id.*; *see also, e.g.*, *infra* notes 10–15 and accompanying text (outlining other instances of federal discrimination policies).

[10] MASSEY & DENTON, *supra* note 9, at 51.

[11] *Id.*

[12] *Id.*

cantly devalued diverse urban neighborhoods.[13] These practices made the HOLC one of the first instances of the federal institutionalization of redlining and other discriminatory lending practices.[14] In addition to other government-sponsored actions, federal policies that followed the HOLC made it nearly impossible for minority individuals to obtain federally-sponsored and insured loans between the 1930s and 1970s.[15]

Legislators recognized the need to take decisive action to solve the omnipresent discriminatory housing issues.[16] In 1968, Congress passed Title VIII of

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[13] *Id.* Although the Home Owners' Loan Corporation (HOLC) did not invent the four-category loan risk standards, which were widely used in the 1920s, it was the first to implement the standards on a mass scale. *Id.* at 52. The HOLC identified four categories of neighborhoods: (1) Green, (2) Blue, (3) Yellow, and (4) Red. Joyce A. Baugh, *School Desegregation in Metropolitan Detroit: Struggling for Justice in a Divided and Troubled Community*, *in* THE PURSUIT OF RACIAL AND ETHNIC EQUALITY IN AMERICAN PUBLIC SCHOOLS: *MENDEZ*, *BROWN*, AND BEYOND 177, 180 (Kristi L. Bowman ed., 2015). The HOLC marked neighborhoods with Black residents as Red. *Id.* The HOLC issued the most loans to Green and Blue—the contemporary, monocultural, and alluring neighborhoods—and it issued very few to Yellow and Red regions—the blue-collar, Black, or Black-adjacent neighborhoods. *Id.* This practice denotes the beginning of redlining. *Id.*; *see also* Assocs. Home Equity Servs., Inc. v. Troup, 778 A.2d 529, 537 (N.J. Super. Ct. App. Div. 2001) (defining redlining as geographically denying credit for discriminatory reasons).

[14] *See* MASSEY & DENTON, *supra* note 9, at 51. The practices of the HOLC influenced the formation and operation of the Federal Housing Administration and the VA, which eliminated private bank risk by guaranteeing the value of homes. *Id*. at 52–53. Although these federal agencies made home ownership achievable for the masses by minimizing bank risk, they also encouraged "the selective out-migration of middle-class whites to the suburbs," and favored single-family homes over multi-family units. *Id.* at 53. Not only did the organizations promote lending discrimination in the public sector by using maps to track the migration patterns of Black and other non-white minority families for the suitability of loans, but they also encouraged private discrimination by promoting racially restrictive covenants. *Id.* at 53–54; *see also* Baugh, *supra* note 13, at 179 (defining restrictive covenants as court-enforced "private contractual agreements among property owners, specifying that the buyer and seller may not sell or lease property to [B]lacks and sometimes other groups, such as Jews or Catholics, for a designated period of time"). The HOLC mapping practices constitute a form of redlining, or denying credit to a geographic location for discriminatory purposes. *See Assocs. Home Equity Servs., Inc.*, 778 A.2d at 537 (highlighting that the term redlining originated from organizations physically marking red lines on maps to identify areas unworthy of credit). Additionally, reverse redlining is similarly designating those areas for unfavorable credit terms. *Id.*; *see also infra* notes 166–177 and accompanying text (explaining the types of unfavorable credit terms).

[15] *See* MASSEY & DENTON, *supra* note 9, at 53–54 (emphasizing that suburban homeownership only became widely available to white individuals between 1934 and 1969). In addition, other public forms of housing discrimination emerged through exclusionary zoning. Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 773–79 (1993) (explaining that municipalities have subjected communities of color to zoning and land use discrimination). In some places, such as the Township of Mount Laurel, municipalities enacted general zoning ordinances, which effectively prevented low- and middle-income persons from acquiring affordable homes. *See, e.g.*, S. Burlington Cnty. NAACP v. Twp. of Mount Laurel, 336 A.2d 713, 717, 723 (N.J. 1975) (opining that the issue of towns enacting zoning ordinances to engage in economic discrimination is not unique to this area).

[16] *See supra* notes 1–15 and accompanying text (describing the problematic federal and private discriminatory policies and practices requiring resolution); *see also* 42 U.S.C. § 3601 (outlining the Fair Housing Act's (FHA) goal to achieve housing equity).

the Civil Rights Act, commonly known as the Fair Housing Act (FHA), which makes it illegal to discriminate on the basis of a protected class in the housing market.[17] Nevertheless, following the market collapse in 2008, it became clear that discrimination was still an issue affecting racial and ethnic minorities in the housing market on a large scale.[18] The collapse exposed financial institutions' practice of lending to similarly situated people of color on egregious terms.[19]

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[17] *See* 42 U.S.C. § 3604 (prohibiting discrimination in various aspects of the housing market). Protected classes under the FHA are race, color, religion, national origin, sex, physical and mental handicaps, and familial status. *Id.*; *see also infra* note 37 and accompanying text (defining protected classes under the FHA).

[18] *See* KATHLEEN C. ENGEL & PATRICIA A. MCCOY, THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE, AND NEXT STEPS 21–22 (2011) (analyzing, retroactively, the causes of the global housing market collapse throughout the 2000s). The housing market collapse in 2008 led to a global financial crisis. Charles W. Murdoch, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: What Caused the Financial Crisis and Will Dodd-Frank Prevent Future Crises?*, 64 SMU L. REV. 1243, 1244 (2011). During the financial crisis, housing prices plummeted and homeowners who lost their jobs also defaulted on their mortgages, the effects of which led to the downfall of multi-billion-dollar institutions, such as Lehman Brothers. *Id.* at 1244–46, 1295, 1314–17. The crisis is generally characterized by a lack of governmental housing policy, which allowed banks to issue millions of high-risk mortgages. *Id.* at 1249. These high-risk mortgages constituted half of the entire U.S. mortgage market. *Id.* at 1248. Furthermore, the crisis involved several key players. *Id.* at 1255. First, ambitious borrowers sought to purchase homes they could not afford. *Id* at 1255–56. Second, the misaligned interests of mortgage brokers led them to convince borrowers to purchase high-risk loans by using fraudulent tactics. *See id.* at 1258–61 (noting that a broker may have an agency relationship with qualified borrowers, but still push them towards subprime mortgages). Third, mortgage lenders, the unregulated non-bank institutions funded by investment and commercial banks, ignored the ability of borrowers to repay their mortgages. *Id.* at 1261–62, 1266. The transition from manually confirming a borrower's creditworthiness to using complex algorithms made this process easier. *See* ENGEL & MCCOY, *supra*, at 16–17 (describing the transition to automated underwriting); CATHY O'NEIL, WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY 141–42 (2016) (same). At this point, once the broker and lender sold a loan, they collected their fees up front, and they no longer cared whether the borrower would repay. Murdoch, *supra*, at 1266, 1271. The lenders would then sell the loans to two types of entities for securitization, government-sponsored enterprises (GSEs) and investment banks. *Id.* at 1271. Fourth, GSEs, such as Fannie Mae and Freddie Mac, bundled the loans to create and sell mortgage-backed securities (MBSs), which are bonds supported by mortgages as collateral. *Id.* at 1272; *see* ENGEL & MCCOY, *supra*, at 44 (defining MBSs). Fifth, investment banks similarly created private-label securities (PLSs), similar to MBSs but securitized by non-GSEs. Murdoch, *supra*, at 1272; *see* ENGEL & MCCOY, *supra*, at 18 (defining PLSs). Sixth, credit rating agencies gave MBSs and PLSs favorable ratings even though they were high-risk. *Id.* at 1301–03. GSEs and investment banks structured the securities into collateralized debt obligations (CDOs), consisting of both stable and unstable loans. *Id.* at 1249 n.27. When the investors purchased the CDOs, they would also purchase credit default swaps (CDSs) from the seventh key player—issuers of derivatives—who essentially transferred the risk of default to the issuer of the CDOs. *Id.* at 1312 & n.423, 1313. Because of a lack of regulation, these key players were able to create the perfect storm for a financial crisis when the housing market collapsed. *Id.* at 1249.

[19] Robert G. Schwemm & Jeffrey L. Taren, *Discretionary Pricing, Mortgage Discrimination, and the Fair Housing Act,* 45 HARV. C.R.-C.L. L. REV. 375, 398 (2010). Originally, lending discrimination focused solely on denying credit for discriminatory reasons. John Yinger, *Discrimination in Mortgage Lending: A Literature Review*, *in* MORTGAGE LENDING, RACIAL DISCRIMINATION, AND FEDERAL POLICY 29, 30 (John Goering & Ron Wienk eds., 1996) (stating that a denial of loan ap-

To remedy these types of situations, plaintiffs can bring discrimination claims in two ways under the FHA.[20] First, plaintiffs can assert intentional discrimination.[21] Second, plaintiffs can assert disparate impact claims as allegations of facially neutral policies or practices that result in discriminatory effects, regardless of intent.[22] In 2020, the Department of Housing and Urban Development (HUD) finalized a rule to alter the way disparate impact claims are pleaded and reviewed.[23] This new rule replaced the prior three-part burden-shifting framework with a complex and onerous pleading requirement, thus allowing for sweeping affirmative defenses.[24]

Part I of this Note provides an overview of liability under the FHA and discusses how plaintiffs can bring housing discrimination claims under the statute.[25] This Part also considers how the U.S. Supreme Court's 2015 decision in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.* influenced the HUD and its proposed implementation of the FHA's disparate impact standard.[26] Part II then discusses the implications of trends in FHA disparate impact claims and, in particular, the applicability of FHA disparate impact on lending discrimination.[27] Finally, Part III analyzes some of the potential effects the proposed disparate impact rule might have on these types of housing discrimination claims and suggests an alternative ap-

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proval is the most serious and obvious type of lending discrimination). During the financial crisis, discrimination occurred through these egregious terms, typically characterized by high interest rates and high fees. Schwemm & Taren, *supra*, at 398.

[20] DAVID H. CARPENTER, CONG. RSCH. SERV., 95-710, THE FAIR HOUSING ACT: A LEGAL OVERVIEW 5 (2016), https://crsreports.congress.gov/product/pdf/RL/95-710/23 [https://perma.cc/SW7A-46YA].

[21] *Id.* Disparate treatment claims use evidence to prove that some impermissible discriminatory purpose motivated a defendant's action. *Id.*; *see infra* notes 42–53 and accompanying text (articulating the differences between disparate treatment claims based on direct evidence and disparate treatment claims based on circumstantial evidence).

[22] CARPENTER, *supra* note 20, at 5. Disparate impact claims do not allege that a defendant was impermissibly motivated by a discriminatory purpose. *Id.*; *see infra* notes 54–79 and accompanying text (explaining that disparate impact claims arise from facially neutral policies). Instead, disparate impact theories allege that a policy created discriminatory effects, irrespective of motivation. *See* CARPENTER, *supra* note 20, at 7–8; *infra* notes 54–79 and accompanying text.

[23] *See* 24 C.F.R § 100.500 (2021) (providing a complex burden-shifting framework to replace the 2013 rule). The rule requires a plaintiff to meet a five-part pleading requirement, and it gives defendants two opportunities to rebut this prima facie case. *Id.*

[24] *Compare id.* (stating that (1) the plaintiff must meet an ambiguous five-part pleading requirement to allege that a policy caused discriminatory effects, (2) the defendant can argue three affirmative defenses, (3) the plaintiff must prove all the elements of the pleading, and (4) the defendant has an opportunity to allege more affirmative defenses, with no evidentiary requirements), *with* 24 C.F.R. § 100.500 (2013) (implementing a three-part burden-shifting test consisting of (1) the plaintiff alleging a practice caused discriminatory effects, (2) the defendant proving that the practice is necessary, and (3) the plaintiff proving that the defendant's interest could be achieved in a less restrictive way).

[25] *See infra* notes 29–80 and accompanying text.

[26] *See infra* notes 81–149 and accompanying text.

[27] *See infra* notes 150–191 and accompanying text.

proach.[28] This Note ultimately argues that the new rule makes it more difficult—if not impracticable—to bring allegations of disparate impact liability as compared to previous standards, and that the change is unsupported by both precedent, policy, and empirical data.[29]

I. Overview of the FHA and Disparate Impact Liability

The FHA grants legal recourse for discrimination in many segments of the housing market.[30] Although housing discrimination cases are commonly brought under both the Equal Credit Opportunity Act (ECOA) and the FHA, the Supreme Court has only established disparate impact liability for housing discrimination under the FHA.[31] Section A of this Part discusses the language of Title VIII of the Civil Rights Act of 1968 and the differences between the two claims a plaintiff can advance.[32] Section B analyzes a 2015 U.S. Supreme Court decision, *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, a monumental case for FHA disparate impact liability.[33] Section C then reviews how the Supreme Court's holding influenced the HUD's decision to revise the standards for pleading an FHA disparate impact case.[34]

A. Disparate Impact Liability in the Context of the FHA

Before exploring the new rule, it is important to understand where the HUD bases its statutory authority to regulate disparate impact housing complaints: the FHA.[35] The FHA explains that the United States seeks to provide

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[28] *See infra* notes 192–242 and accompanying text.

[29] *See infra* notes 195–224 and accompanying text; *see also infra* notes 154–163 and accompanying text (supporting the idea that the restrictive changes in the regulation are unsupported by empirical data regarding the frequency of disparate impact claims).

[30] *See* 42 U.S.C. §§ 3601–3607, 3617 (noting it is illegal to discriminate in the context of, amongst other things, housing, financing, and brokering, subject to some exemptions).

[31] *Cf.* Winnie F. Taylor, *The ECOA and Disparate Impact Theory: A Historical Perspective*, 26 J.L. & Pol'y 575, 581 (2018) (arguing that disparate impact liability should be extended to Equal Credit Opportunity Act (ECOA) claims). In 2018, Congress passed a resolution barring the Consumer Financial Protection Bureau (CFPB) from establishing disparate impact liability grounded in the ECOA against auto lenders. *Id.* at 580. Nevertheless, there is debate whether the U.S. Supreme Court's 2015 analysis in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, allowing for disparate impact liability where a statute includes broad language, permits disparate impact liability under the ECOA. 135 S. Ct. 2507, 2517–18 (2015) (holding that anti-discrimination statutes, which focus on the effects of an action instead of the motivation, should allow for disparate impact claims), *remand to* 975 F.3d 509 (5th Cir. 2015), *remand to* C.A. No. 08-CV-00546, 2016 WL 4494322 (N.D. Tex. Aug. 26, 2016); Taylor, *supra*, at 581 (explaining the potential for disparate impact theory in ECOA claims); *see also infra* notes 101–104 and accompanying text (explaining the textual analysis in *Inclusive Communities*).

[32] *See infra* notes 35–79 and accompanying text.

[33] *See infra* notes 81–121 and accompanying text.

[34] *See infra* notes 122–149 and accompanying text.

[35] *See* 42 U.S.C. § 3601; *infra* notes 36–41 and accompanying text.

fair housing throughout the nation.[36] To achieve this goal, the statute makes it unlawful to discriminate in the sale or rental of housing, financing of housing, or brokerage services based on a protected class.[37] Although the FHA is a powerful tool for ensuring fair housing, courts generally defer to the HUD's interpretation of the statute.[38]

Accordingly, the HUD's regulations also provide a supplementary list of discriminatory conduct prohibited under the FHA.[39] These prohibitions include (1) refusing the sale or rental of housing, (2) discriminating with the services relating to the sale or rental of housing, (3) limiting the actual availability of housing, (4) indicating preference or discrimination through advertising practices, (5) misrepresenting the availability of housing, (6) blockbusting, and (7) denying access to business services related to the sale or rental of housing.[40] The FHA, however, exempts five housing categories from these prohibitions: (1) owner-sold or rented single-family homes, (2) owner-occupied dwellings

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[36] 42 U.S.C. § 3601.

[37] *Id.* §§ 3601–3619. Protected classes include race, color, religion, national origin, sex, physical and mental handicaps, and familial status. *Id.*; CARPENTER, *supra* note 20, at 1. The first iteration of the FHA in 1968 prohibited housing discrimination based on race, color, religion, and national origin. CARPENTER, *supra* note 20, at 1. In 1974, Congress included sex discrimination, and in 1988, it added physical and mental handicap and familial status to its list of protected classes covered by the FHA. *Id.* Congress also explained that residential real estate financing includes real estate-backed loans, selling, brokering, and property appraisal. 42 U.S.C. § 3605. Subsequently, the Department of Housing and Urban Development (HUD) elaborated that residential real estate financing includes the secondary mortgage market. CARPENTER, *supra* note 20, at 1–2.; *see also* 24 C.F.R. § 100.125 (2021) (expanding the scope of coverage to the lending market).

[38] *See* Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91, 107 (1979) (deferring to the HUD's interpretation of the FHA). President Lyndon B. Johnson created HUD in 1965. *See Questions and Answers About HUD*, HUD.GOV, https://www.hud.gov/about/qaintro [https://perma.cc/EN9G-TC5K] (explaining that the HUD is a cabinet level department created as part of the War on Poverty). The HUD's stated mission is to provide equal housing opportunities by facilitating a stable housing market, supplying affordable housing, and eliminating discrimination. *See Mission*, HUD.GOV, https://www.hud.gov/about/mission [https://perma.cc/TY6D-YV6L] (declaring the department's mission statement). To achieve these goals, the HUD implements programs such as insuring mortgages and loans, issuing various grants, facilitating low-income rentals and housing, helping the homeless, and, importantly, sanctioning discrimination in housing. *See Questions and Answers About HUD*, *supra* (listing the HUD's major programs).

[39] 24 C.F.R. § 100.50.

[40] *Id.* Blockbusting is convincing homeowners to sell their homes at discounted prices for fear of minorities moving in and devaluing their homes. *Blockbusting (Block-Busting)*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY DESK EDITION (2012). For example, some real estate companies hired Black individuals to drive around areas with loud music and scare white families. ROTHSTEIN, *supra* note 1, at 95–96. Typically, after purchasing the properties at discounted prices, the companies would sell the homes at premium prices to minority families. *Id.* at 96. In other instances, private agreements either restrict availability of housing or completely refuse sales. *E.g.*, *id.* at 77–78 (describing restrictive covenants present in deeds). For example, some deeds in Brookline, Massachusetts excluded the sale of properties to Black or Irish home buyers. *Id.*

with less than four independent family living quarters, (3) religious organizations, (4) private clubs, and (5) elderly housing.[41]

1. Differences Between Disparate Treatment and Disparate Impact

Title VIII FHA discrimination claims are typically pleaded under one of two theories.[42] The first theory—disparate treatment—encompasses allegations of intentional discrimination based on either direct or circumstantial or indirect evidence.[43] Disparate impact claims, on the other hand, stem from "facially neutral decision[s]" that have discriminatory effects on a protected class, regardless of motivation.[44] Each, however, involves different legal hurdles for a plaintiff to overcome before successfully pleading an FHA violation.[45]

a. Disparate Treatment: Direct Evidence Versus Indirect and Circumstantial Evidence

Disparate treatment is intentional discrimination based on either direct or circumstantial evidence.[46] For FHA disparate treatment claims based on direct evidence, the plaintiff must present evidence that specifically shows an adverse decision against a protected class motivated by discriminatory animus where there was no legitimate purpose for such a decision.[47] If the plaintiff presents enough direct evidence to support the claim, the burden shifts to the defendant

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[41] *See* 42 U.S.C. § 3603(b) (excluding FHA liability from the sale or rental of single-family homes by a private owner without advertising, as well as owner-occupied dwellings with less than four units); *id.* § 3607(a)–(b) (excluding certain actions from FHA liability by religious groups, private clubs, and housing for the elderly).

[42] CARPENTER, *supra* note 20, at 5. The disparate treatment and disparate impact theories are often misunderstood or mistaken for one another. *See* Joseph A. Seiner, *Disentangling Disparate Impact and Disparate Treatment: Adapting the Canadian Approach*, 25 YALE L. & POL'Y REV. 95, 97 (2006) (explaining that the commonly confusing distinctions between disparate impact and disparate treatment require clarification).

[43] CARPENTER, *supra* note 20, at 5.

[44] *Id*. at 7–8 (alteration in original) (quoting Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977)).

[45] *See id*. at 5 (explaining different claims for each allegation). Disparate treatment claims focus on the intent of the actor. *Id.* Disparate impact claims, however, focus on the effects of an actor's facially neutral determination. *Id.*

[46] *Id.*

[47] *See* Gallagher v. Magner, 619 F.3d 823, 831 (8th Cir. 2010) (explaining how direct evidence sufficiently demonstrates that a discriminatory intent is connected to an adverse action). For example, in 1995, in *Kormoczy v. Secretary, U.S. Department of Housing & Urban Development ex rel. Briggs*, an administrative law judge (ALJ) evaluated two days of testimony to determine the credibility of the evidence. 53 F.3d 821, 822–24 (7th Cir. 1995). The lawsuit alleged that the defendants, landlords, refused to rent a unit to two parents and their daughter based on their familial status. *Id.* The ALJ determined that the evidence demonstrated that both a resident and an apartment owner in the building stated they did not want kids in the apartment. *Id.* The U.S. Court of Appeals for the Seventh Circuit upheld the ALJ's determination and concluded that the statements were direct evidence sufficient to establish disparate treatment under the FHA. *Id.* at 825.

to prove, by a preponderance of the evidence, that the defendant would have made the same decision regardless of the discriminatory motivation.[48] The plaintiff will only succeed if the defendant fails to prove that the decision stemmed from something other than discriminatory intent.[49]

Disparate treatment claims based on circumstantial or indirect evidence, where intentional discrimination can be inferred, follow a similar pattern of burden-shifting as those based on direct evidence.[50] Plaintiffs can establish

[48] CARPENTER, *supra* note 20, at 6; *see also Kormoczy*, 53 F.3d at 824 (clarifying that after a plaintiff satisfies the burden of showing direct disparate treatment, the defendant's burden is to show, by a preponderance of the evidence, that the defendant would have made the same decision in the absence of the illegitimate motivation). Preponderance of the evidence is an evidentiary standard for a party to prove that a fact is more likely than not. *Preponderance of Evidence*, BLACK'S LAW DICTIONARY (11th ed. 2019). Examples of direct evidence in discriminatory employment contexts include managers stating that they do not want white employees associating with non-white employees, a boss denying a promotion at a garage because "women are not mechanically inclined," or implementing an avoidance policy towards an employee and then firing that employee for fear of racial discrimination allegations. 1 LEX K. LARSON, LARSON ON EMPLOYMENT DISCRIMINATION § 8.07 (2d ed. 2021).

[49] *See* CARPENTER, *supra* note 20, at 6 (explaining that defendants can prove they made their decisions to avoid liability under the FHA). For example, in the employment context, in 1994, in *Troupe v. May Department Stores Co.*, the defendant, Lord & Taylor, fired a woman because she was late for work on multiple occasions due to morning sickness from pregnancy. 20 F.3d 734, 738–39 (7th Cir. 1994). The U.S. Court of Appeals for the Seventh Circuit concluded that this did not constitute discrimination based on pregnancy because the defendant would have fired a male employee had the male employee similarly been late to work. *Id.* The court compared this to racial discrimination. *Id.* The court noted that absent evidence that a company would treat a white employee differently, a company would not be guilty of racial discrimination if it fired a Black employee who was leaving for a three-month medical procedure. *Id.* Therefore, because the defendant would have made the decision despite the purported animus, it was not liable. *See id.*

[50] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 804 (1973) (outlining the burden-shifting test for a disparate treatment claim). In 1973, in *McDonnell Douglas Corp. v. Green*, the U.S. Supreme Court enumerated a disparate treatment test in the context of an employee who was allegedly fired based on his race. *Id.* at 792, 802, 804. *McDonnell Douglas* was an employment case, but courts have applied the same test to FHA claims. *Id.*; *see, e.g.*, 2922 Sherman Ave. Tenants' Ass'n v. District of Columbia, 444 F.3d 673, 682 (D.C. Cir. 2006) (applying the *McDonnell Douglas* test to a case involving discriminatory enforcement of housing code violations); Sanghvi v. City of Claremont, 328 F.3d 532, 538–41 (9th Cir. 2003) (applying the *McDonnell Douglas* test to a building closure case); Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown, 294 F.3d 35, 48–52 (2d Cir. 2002) (applying the *McDonnell Douglas* test to a planning board special permit case), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, *as recognized in* Jackson v. N.Y.C. Dep't of Educ., 768 F. App'x 16 (2d Cir. 2019). For example, in 2006, in *Sherman Avenue Tenants' Ass'n v. District of Columbia*, the defendants, Washington, D.C. officials, started an initiative to intensively enforce housing codes for the district's buildings that violated the largest number of housing codes. 444 F.3d at 677. Ultimately, the final list of properties the officials designated for enforcement were in neighborhoods with significantly higher concentrations of Hispanic residents. *Id.* at 682. The plaintiffs, the tenants of one of the listed properties, sued under the FHA and produced circumstantial evidence of disparate treatment. *See id.* at 683–84. First, the tenants demonstrated that the defendants did not use their usual tactic of avoiding building closure. *Id.* at 683. The plaintiffs also brought forward evidence that the defendants treated their building differently than non-Hispanic buildings in violation of similar codes. *Id.* at 683–84. The U.S. Court of Appeals for the D.C. Circuit held that this was enough indirect evidence for a jury to reasonably conclude that the defendants engaged in discriminatory activity. *Id.* at 684.

prima facie cases by showing that: (1) they are members of a protected class; (2) they qualified for covered housing-related services or activities, such as obtaining a mortgage; (3) defendants nevertheless denied an application for or revoked the use of the plaintiffs' housing benefits; and (4) the relevant housing-related services or activities remained available after it was revoked or denied.[51] Defendants can overcome a prima facie case by proving that the revocation or denial furthered a legitimate and nondiscriminatory purpose.[52] Finally, if the defendants meet their burden, plaintiffs can still show, by a preponderance of the evidence, that the stated purpose was merely a pretext for discrimination.[53]

b. Disparate Impact: Facially Neutral Decisions Resulting in Discriminatory Effects

Disparate impact claims, the subject of the HUD rule, typically reflect facially neutral decisions in two different circumstances.[54] In the first circumstance, a decision impacts one group more than another.[55] For example, failing to build public housing in a predominantly white Philadelphia neighborhood impacted people of color more because almost all of the people on the waiting list for public housing were minorities.[56] In the second circumstance, a deci-

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[51] *McDonnell Douglas Corp.*, 411 U.S. at 802.

[52] *Id.* The Supreme Court has further explained that there is a level of sufficiency required to justify a judgment for the defendant, which requires actual evidence, and not simply an argument. Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 255–56, 255 n.9 (1981).

[53] *McDonnell Douglas Corp.*, 411 U.S. at 804. A pretext is when a defendant lies about a justification for taking a particular action to hide the true discriminatory purpose. *Pretext (Pretextual)*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY DESK EDITION, *supra* note 40; *see also* Forrester v. Rauland-Borg Corp., 453 F.3d 416, 419 (7th Cir. 2006) (holding that a pretext is a "deliberate falsehood").

[54] Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977); HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42,854, 42,862–42,863 (Aug. 19, 2019) (codified as amended at 24 C.F.R. pt. 100). Facially neutral decisions can cause discriminatory effects by either unfavorably affecting minorities or by continuing segregative practices. *Vill. of Arlington Heights*, 558 F.2d at 1290.

[55] *Vill. of Arlington Heights*, 558 F.2d at 1290.

[56] Resident Advisory Bd. v. Rizzo, 425 F. Supp. 987, 1018 (E.D. Pa. 1976), *aff'd in part, vacated in part*, 564 F.2d 126 (3d Cir. 1977), *modified*, 503 F. Supp. 383 (E.D. Pa. 1980). In 1976, in *Resident Advisory Board v. Rizzo*, the plaintiffs, persons and a residential organization, demonstrated that the defendants, government officials in Philadelphia, cancelled a public housing project in a white neighborhood. *Id.* The U.S. District Court for the Eastern District of Pennsylvania explained this had discriminatory effects because 95% of those on the waitlist were racial minorities and generally living in the city's poorer neighborhoods. *Id.* This housing project was an opportunity for those individuals to move into an integrated area. *Id.* Cancelling the project took away an opportunity for integration. *Id.* When the burden shifted to the city to justify its actions, the city claimed that it eliminated the project to prevent violence. *Id.* at 1023. The district court was unpersuaded because threats of violence alone do not usurp constitutional rights. *Id.* Furthermore, the city's police department testified that it was well-equipped to handle disturbances arising from the project. *Id.* at 1023–24. Because the defendant could not justify its actions, the court held that the plaintiffs successfully established a claim for disparate impact under the FHA. *Id.* at 1024.

sion perpetuates segregation in a particular community.[57] For example, a zoning ordinance that restricted the development of multi-family homes in a predominantly white area effectively precluded desegregation.[58]

Even before the Supreme Court addressed the issue in 2015, there was also near-unanimous consent among the courts that disparate impact claims are cognizable, or recognized, under the FHA.[59] Courts reasoned that the justiciability of disparate impact claims was increasingly important because requiring a plaintiff to prove discriminatory intent was too difficult in cases where there was no evidence of "overt bigotry."[60]

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[57] *E.g.*, *Vill. of Arlington Heights*, 558 F.2d at 1290 (describing the types of facially neutral determinations that can create disparate impacts). Richard Rothstein summarizes residential segregation: "We like to think of American history as a continuous march of progress toward greater freedom, greater equality, and greater justice. But sometimes we move backward, dramatically so. Residential integration declined steadily from 1880 to the mid-twentieth century, and it has mostly stalled since then." ROTHSTEIN, *supra* note 1, at 39. In 1917, in *Buchanan v. Warley*, the U.S. Supreme Court held that a Louisville, Kentucky zoning ordinance that prevented a Black individual from purchasing a home from a white individual violated the Fourteenth Amendment of the U.S. Constitution. 245 U.S. 60, 82 (1917). Following that case, zoning officials could no longer enact outright segregative ordinances. *See* ROTHSTEIN, *supra* note 1, at 48 (explaining that after *Buchanan*, zoning officials attempted to prevent Black individuals from purchasing homes in middle-class, white residential areas). For example, in 1911, St. Louis's planning engineer, Harland Bartholomew, stated that the purpose of the city's zoning laws was to prevent migration into "finer residential districts . . . by colored people." *Id.* at 49. To avoid *Buchanan*, the 1919 St. Louis zoning ordinance did not refer to race. *Id.* Still, the ordinance designated industrial development only on land that was next to areas with a significant number of Black residents. *Id.* Subsequently, the planning engineer encouraged zoning officials to deny variances so that Black individuals could not afford homes in white neighborhoods. *Id.*

[58] *See* United States v. City of Black Jack, 508 F.2d 1179, 1186–88 (8th Cir. 1974) (holding that a zoning ordinance restricting multi-family developments violates the FHA).

[59] *See* DAVID H. CARPENTER, CONG. RSCH. SERV., R44203, DISPARATE IMPACT CLAIMS UNDER THE FAIR HOUSING ACT 2 (2015), https://crsreports.com/download?hash=104b6c7a1d9fd91df4386ebaab5fd706cd4c9176912213f9034af337690fae3d [https://perma.cc/DP2U-9VTD] (noting the near-unanimity of circuit courts' recognition of the cognoscibility of disparate impact claims). Cognizable refers to a court's recognition of the legal significance of an action or issue, and in this example, means that courts recognize disparate impact as an action or issue that courts can remedy. *Id.*; *Cognizable (Cognisable)*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY DESK EDITION, *supra* note 40.

[60] *See, e.g.*, *Vill. of Arlington Heights*, 558 F.2d at 1290. A justiciable controversy is one that a court has authority to review. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240–41 (1937) (defining justiciable controversy as a concrete issue in which a court decision could grant relief). Furthermore, in 1977, in *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, the U.S. Court of Appeals for the Seventh Circuit proceeded by warning that interpreting the statute otherwise would run counter to congressional intent by allowing discrete systemic discrimination. 558 F.2d at 1290. Nevertheless, courts, like the Seventh Circuit, also understood that disparate impact claims could not go unfettered. *See, e.g.*, 558 F.2d at 1290 (holding that a bright-line rule establishing liability for discriminatory intent alone would not comport with congressional intent). Statistical disparity, courts agreed, is not enough to justify a prima facie case for discriminatory effect without a showing that a practice caused the disparity. CARPENTER, *supra* note 59, at 3. For example, the Seventh Circuit in *Village of Arlington Heights* explained that a rule punishing every instance of discriminatory effects would go beyond congressional intent and could lead to unintended consequences. 558 F.2d at 1290. The court cited to a 1970s law review article by Professor Paul Brest. *Id.* (citing Paul Brest, *The Su-*

Although eleven U.S. circuit courts recognized FHA disparate impact claims by 2013, the courts initially failed to adopt a uniform standard of review.[61] Typically, the U.S. Courts of Appeals for the First, Second, Third, Fifth, Eighth, and Ninth Circuits implemented a three-step burden-shifting test, but even among these courts, there was no uniform application of the three-step test.[62] In general, the circuit courts require the plaintiff to first make a prima facie showing of disparate impact.[63] If the plaintiff succeeds, the de-

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preme Court 1975 Term—Foreword: In Defense of the Antidiscrimination Principle, 90 HARV. L. REV. 1, 28–29 (1976)). In Professor Brest's article, he supported the contention that punishing every instance of discriminatory effects is a bad policy decision with the example of school segregation. Brest, *supra*, at 29. Schools, Professor Brest reasoned, should have the ability to rebut a presumption of intended segregation because there are countless determinations that go into the level of segregation at a school. *See id.* (giving examples of the types of decisions, such as locale, capacity, or reasonable student neighborhood policies). Professor Brest noted that the school knows the real reason for the segregation, not a plaintiff. *Id.* Additionally, he also argued that school boards should have the ability to reflect parents' desires that their children not attend schools with a high proportion of minority children. *Id.* at 29–30. Professor Brest advanced his argument by stating that in the employment context, per se discriminatory effects enforcement creates racial quotas that might not accurately reflect the talent pool. *Id.* at 30. This is the only support the Seventh Circuit in *Village of Arlington Heights* provided for the contention that a per se discriminatory effects rule is inadvisable. 558 F.2d at 1290.

[61] CARPENTER, *supra* note 59, at 4. The D.C. Circuit assumed that disparate impact claims are cognizable, but it never ruled on the issue. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,460 (Feb. 15, 2013) (previously codified at 24 C.F.R. pt. 100).

[62] *See* Affordable Hous. Dev. Corp. v. City of Fresno, 433 F.3d 1182, 1194–95 (9th Cir. 2006) (applying a burden-shifting test similar to those applied in Title VII of the Civil Rights Act of 1964 disparate impact cases); Charleston Hous. Auth. v. U.S. Dep't of Agric., 419 F.3d 729, 740–41 (8th Cir. 2005) (stating that plaintiffs must demonstrate that a defendants' actions actually or predictably resulted in discriminatory effects, and then noting that the defendants must show that the proposed action was necessary and related to the legitimate non-discriminatory policy objectives); Langlois v. Abington Hous. Auth., 207 F.3d 43, 49–50 (1st Cir. 2000) (following other circuit courts in holding that discriminatory effects create a prima facie case to which a defendant must respond with a valid justification); Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 934, 938–39 (2d Cir. 1988) (stating that plaintiffs can establish a discriminatory effect by showing a disproportionate burden on minorities through proportional statistics, which defendants can rebut with a justification that the policy was legitimate and the least restrictive means), *aff'd in part per curiam*, 488 U.S. 15 (1988); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 148–50 (3d Cir. 1977) (explaining that discriminatory effect alone can establish a prima facie case under a burden-shifting test and that the defendant's rebuttal must be adjudicated on a case-by-case basis), *modified*, 503 F. Supp. 383 (E.D. Pa. 1980); *see also* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11,462 (describing the points of departure amongst the majority of the circuit courts); *cf.* Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affs., 747 F.3d 275, 281–82 (5th Cir. 2014) (following the HUD's 2013 burden-shifting test where the Fifth Circuit had not previously settled on an appropriate standard of review), *stay granted pending cert.*, C.A. No. 08-CV-00546, 2014 WL 2815683 (N.D. Tex. June 23, 2014), *aff'd*, 135 S. Ct. 2507 (2015), *remand to* 795 F.3d 509 (5th Cir. 2015), *remand to* C.A. No. 08-CV-00546, 2016 WL 4494322 (N.D. Tex. Aug. 26, 2016). Major points of departure include whether the plaintiff or defendant bears the final burden of proof. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11,462.

[63] *Id*. A plaintiff can either show disparate impact or a segregative effect. *Id.*; *see also supra* notes 54–58 and accompanying text.

fendant then has to provide some justification for the discriminatory decision.[64] Courts differ on who bears the third burden.[65] Most shift the burden back to the plaintiff who must show that there is a less restrictive method of achieving the defendant's stated policy.[66] The Second Circuit, on the other hand, requires the defendant to prove that the decision is the least restrictive method for achieving the stated justification.[67]

The U.S. Court of Appeals for the Seventh Circuit implemented a four-step balancing test, holistically weighing different factors.[68] The U.S Courts of Appeals for the Sixth and Tenth Circuits applied hybrid approaches to the burden-shifting framework and the balancing test.[69] The U.S. Court of Appeals for the Fourth Circuit applied a burden-shifting test depending on whether the parties were public or private in nature.[70] Finally, the U.S. Court of Appeals for the Eleventh Circuit applied a discriminatory effects plus causation test.[71]

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[64] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11,462. The general requirement is proof that there is not another less restrictive, or less discriminatory, method than the practice or policy the plaintiff is challenging. *Id.*

[65] *Id.*; *see, e.g.*, *Huntington Branch, NAACP*, 844 F.2d at 939 (placing the burden on the defendant to prove that the act was the least discriminatory means).

[66] *See, e.g.*, Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375, 382 (3d Cir. 2011) (shifting the burden to the plaintiff to prove a less discriminatory alternative).

[67] *Id.* In fact, the Second Circuit is the only court that places the third burden on the defendant. *Compare, e.g.*, *Mt. Holly Gardens Citizens in Action, Inc.*, 658 F.3d at 382 (requiring the plaintiff to prove there is a less discriminatory method to achieving the policy interests for a low-income community redevelopment), *and* Gallagher v. Magner, 619 F.3d 823, 834 (8th Cir. 2010) (shifting the burden to the plaintiff to show "a viable alternative means" (quoting Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth., 417 F.3d 898, 903 (8th Cir. 2005))), *and* Graoch Assocs. # 33, L.P. v. Louisville/Jefferson Cnty. Metro Hum. Rels. Comm'n, 508 F.3d 366, 374 (6th Cir. 2007) (shifting the final burden to the plaintiff), *and* Mountain Side Mobile Ests. P'ship v. Sec'y, U.S. Dep't of Hous. & Urban Dev. *ex rel.* VanLoozenoord, 56 F.3d 1243, 1254 (10th Cir. 1994) (affirming the relevant part of the judicial hearing before an independent ALJ that the third burden rests with the plaintiff), *with Huntington Branch, NAACP*, 844 F.2d at 939 (placing the burden on the defendant to prove that the act was the least discriminatory means).

[68] *See* Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977) (presenting four balancing factors critical to demonstrating liability under an FHA disparate impact claim). The four-factor balancing test includes: (1) the strength of discriminatory effect, (2) the extent of evidence supporting the defendant's bad intent, (3) the defendant's interest in the practice, and (4) the type of relief sought by the plaintiff. *Id.* For the fourth factor, the court asks whether the plaintiff wants the defendant to affirmatively provide housing or to simply stop restricting other people's ability to convey property. *Id.*

[69] *See Graoch Assocs. # 33, L.P.*, 508 F.3d at 374 (applying a burden-shifting test and weighing the statistical disparities with the defendant's proffered interest); Reinhart v. Lincoln Cnty., 482 F.3d 1225, 1229 (10th Cir. 2007) (adopting a hybrid approach by incorporating a three-factor balancing test along with the second step of the burden-shifting framework).

[70] *See* CARPENTER, *supra* note 59, at 6 (stating that the Fourth Circuit will apply a burden-shifting test for private defendants, and a four-factor balancing test for public defendants). *Compare* Betsey v. Turtle Creek Assocs., 736 F.2d 983, 987, 988 n.5 (4th Cir. 1984) (using a burden-shifting test for claims against a private entity), *with* Smith v. Town of Clarkton, 682 F.2d 1055, 1065 (4th Cir. 1972) (following the balancing test articulated in *Village of Arlington Heights*). In 1984, *Betsey v. Turtle Creek Associates* was a case filed against a private entity. 736 F.2d at 988 n.5. In 1972, *Smith v. Town*

In 2013, to remedy the inconsistencies among the circuit courts and avoid subjecting parties to uncertainty regarding how the courts might evaluate conduct, the HUD adopted regulations that uniformly applied to all disparate impact cases.[72] The 2013 rule stated that disparate impact claims were cognizable even in cases where there was no discriminatory intent.[73] Similar to prior tests, however, the practice would still be lawful if a defendant could sufficiently justify the targeted actions.[74] The HUD elaborated it would judge a legitimate interest on a case-by-case basis against objective criteria to determine whether the explanation was a pretext for discrimination.[75]

The HUD modeled the 2013 rule after the three-step burden-shifting test already implemented by a majority of the circuit courts.[76] First, a plaintiff needed to show "that a challenged practice caused or . . . will cause a discriminatory effect."[77] The defendant would then have the opportunity to prove that a policy is required for a nondiscriminatory, legitimate purpose.[78] If the defendant met this burden, the plaintiff could still succeed by showing that there was a less discriminatory method to achieve the defendant's interest.[79] In 2015, the

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of Clarkton was a case filed against a public body. *See id.*; *see also Smith*, 682 F.2d at 1058–59. In *Betsey*, the U.S. Court of Appeals for the Fourth Circuit reasoned that a burden-shifting test would have been inappropriate in *Clarkton* because the business necessity element would not apply to public bodies. *Betsey*, 736 F.2d at 988 n.5. The court noted that the *Clarkton* balancing test (i.e., the *Village of Arlington Heights* balancing test) is inapplicable because the burden-shifting framework is more straightforward when a private entity is the defendant. *Id.* Thus, the *Betsey* court required plaintiffs to show that a policy disproportionately affected the minorities in a total group, and to overcome this showing, the burden shifted to defendants to prove a business necessity. *Id.* In contrast, in *Clarkton*, the U.S. Court of Appeals for the Fourth Circuit balanced the following *Village of Arlington Heights* factors: (1) strength of impact, (2) bad intent, (3) the defendant's interest, and (4) the type of relief sought. *Id.*; *see also Smith*, 682 F.2d at 1065.

[71] *See* Hallmark Devs., Inc. v. Fulton Cnty., 466 F.3d 1276, 1286 (11th Cir. 2006) (explaining that a plaintiff can establish disparate impact by statistical evidence demonstrating a relationship between the negative effects of a policy or decision on a group).

[72] *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,460 (Feb. 15, 2013) (previously codified at 24 C.F.R. pt. 100) (justifying the 2013 rule adoption to address, in part, the inconsistency in the application methodology for discriminatory effects, which left parties uncertain about how to comply with the law).

[73] 24 C.F.R. § 100.500 (2013).

[74] *Id*. Disparate impact arises when a policy "actually or predictably results in . . . discriminatory" effects towards a protected class. *Id.* § 100.500(a). Further, a defendant can justify a policy or practice when it is the least restrictive way to achieve a valid interest. *Id.* § 100.500(b).

[75] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11,471. The HUD declined to list examples of interests that would always be deemed per se legitimate. *Id.*

[76] *See* 24 C.F.R. § 100.500(c) (implementing a three-step burden-shifting test).

[77] *Id.* § 100.500(c)(1).

[78] *Id.* § 100.500(c)(2).

[79] *Id.* § 100.500(c)(3). As support that the rule was a reasonable articulation for disparate impact claims, the HUD 2013 rule modeled the burden-shifting approaches for bringing disparate impact claims off of approaches used in the employment context. *See* 42 U.S.C. § 2000e-2(k) (implementing a burden-shifting approach for disparate impact based on Title VII employment discrimination); 29

U.S. Supreme Court in *Inclusive Communities* questioned the validity of this rule when it opined on potential limitations to disparate impact pleading.[80]

B. Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*'s Effect on Disparate Impact Cases*

In 2019, the HUD proposed a new rule to replace the 2013 disparate impact regulation, citing the Supreme Court's 2015 decision in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.* as its primary justification.[81] In *Inclusive Communities*, the Court held that the Inclusive Communities Project (ICP), the plaintiff, must rely on something more than a statistical disparity to establish discriminatory effects as a prima facie showing of disparate impact under the FHA.[82] Congress provides guidelines for state housing agencies, such as the Texas Department of Housing and Community Affairs (TDHCA), the defendant in this case, through a Qualified Allocation Plan (QAP).[83] Through these plans, Low Income Housing Tax Credits (LIHTCs) are allocated to developers building low-income housing projects.[84] Pursuant to the guidelines, the TDHCA developed a methodology to

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C.F.R. § 1625.7 (2020) (implementing a burden-shifting approach for disparate impact based on the age discrimination in employment).

[80] 135 S. Ct. 2507, 2522 (2015) (articulating claim limitations on FHA disparate impact cases), *remand to* 795 F.3d 509 (5th Cir. 2015), *remand to* C.A. No. 08-CV-00546, 2016 WL 4494322 (N.D. Tex. Aug. 26, 2016).

[81] *See* HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42,854, 42,854 (Aug. 19, 2019) (codified as amended at 24 C.F.R. pt. 100) (proposing a new rule to replace the 2013 disparate impact rule); *see also Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2522 (discussing the limitations on FHA disparate impact claims).

[82] 135 S. Ct. at 2522.

[83] *See* I.R.C. § 42(m)(1)(B) (West 2020) (codified at Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 201(a) 134 Stat. 1182, 3056 (2020)) (deferring to states with regards to the implementation of a Qualified Allocation Plan (QAP)).

[84] *See id.* (defining a QAP); TEX. GOV'T CODE ANN. § 2306.6701 (West 2001) (allocating oversight of Low Income Housing Tax Credits (LIHTCs) to the Texas Department of Housing and Community Affairs (TDHCA)). A qualified low-income housing project is either a property with at least 20% affordable units whose occupants have income less than or equal to 50% of the area's median gross income (AMGI), or it is property with at least 40% affordable units whose occupants have income less than or equal to 60% of the AMGI. I.R.C. § 42(g)(1). Congress originally adopted LIHTCs as part of the Tax Reform Act of 1986 and replaced prior incentives to invest in low-income housing by including more incentives for supporting lower-income households. CONG. BUDGET OFF., CBO STAFF MEMORANDUM: THE COST EFFECTIVENESS OF THE LOW-INCOME HOUSING TAX CREDIT COMPARED WITH HOUSING VOUCHERS 1 (1992), https://www.cbo.gov/sites/default/files/102nd-congress-1991-1992/reports/doc09b.pdf [https://perma.cc/984X-FY8F]. The purpose of LIHTCs is to address the lowered quality and quantity of affordable housing for impoverished individuals. *Id.* at 2. The Internal Revenue Code sets forth a QAP that outlines principles that a housing credit agency must use when determining housing priorities, including giving preference to projects that are long-term and located in qualified census tracts. I.R.C. § 42(m)(1)(B).

assign a value and rank to applications it received.[85] The TDHCA readily admitted that it allocated discretionary points to criteria outside the relevant QAP statute.[86] The ICP alleged that the TDHCA used race and ethnicity as factors to allocate LIHTCs that subjected minority tenants "to severe conditions of slum and blight" conditions.[87] Following disagreements with the lower courts and

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[85] TEX. GOV'T CODE ANN. § 2306.6710(b)(1). The ranking system, in order, prioritizes ten criteria: (1) the affordability of the development, (2) the community support on a resolution for the development, (3) the tenant income bases, (4) the dimensions and caliber of the units, (5) the rent rates of the units, (6) the cost of the development, (7) the amenities, (8) the development's location, (9) the level of neighborhood support, and (10) the level of support from the district representative. *Id.*

[86] *See* Op. Tex. Att'y Gen. No. GA-0208, at 1, 8 (2004) (citing to a TDHCA brief that allocates points outside the scope of the Texas QAP). The Texas Attorney General, Greg Abbott, concluded that the TDHCA acted outside its authority by allocating higher points to factors outside the ten criteria in the QAP. *Id.* at 10. The Attorney General reasoned that the TDHCA's discretionary allocation was inconsistent with the express language of the Tax Reform Act and the QAP because it gave criteria outside the statute higher weight than the ten factors in the QAP. *Id.* at 16.

[87] Complaint at 5, 10, Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affs., C.A. No. 08-cv-00546, 2008 WL 5191935 (N.D. Tex. Dec. 11, 2008). The Inclusive Communities Project (ICP), the plaintiff, is a non-profit organization that works with low-income families to obtain housing in non-minority areas of Dallas, Texas. *Id.* at 3. The ICP works closely with Black families to participate in the Dallas Housing Authority's Section 8 Housing Choice Voucher Program. *Id.* The HUD issues funds to local public housing authorities (PHAs) to administer housing choice vouchers to low-income families. *Housing Choice Vouchers Fact Sheet*, HUD.GOV, https://www.hud.gov/topics/housing_choice_voucher_program_section_8 [https://perma. cc/zh6g-A7AR]. Eligible families can then find owners who accept the housing vouchers. *Id.* In turn, the PHAs subsidize a certain amount of the rent, and the families pay the remaining rent owed. *Id.* In 2010, in *Inclusive Communities*, the U.S. District Court for the Northern District of Texas considered cross motions for summary judgment on the ICP's allegations that the TDHCA, the defendant, discriminatorily allocated its LIHTCs. Inclusive Cmtys. Project, Inc., 749 F. Supp. 2d 486, 490 (N.D. Tex. 2010), *ordered findings of fact and conclusion law, ordered remedial efforts*, 860 F. Supp. 2d 312 (N.D. Tex. 2012), *and motion for attorney's fees and costs granted*, C.A. No. 08-CV-00546, 2013 WL 598390 (N.D. Tex. Feb. 15, 2013), *rev'd*, *remanded by* 747 F.3d 275 (5th Cir. 2014), *stay granted pending cert.*, C.A. No. 08-CV-00546, 2014 WL 2815683 (N.D. Tex. June 23, 2014), *aff'd*, 135 S. Ct. 2507 (2015), *remand to* 795 F.3d 509 (5th Cir. 2015), *remand to* C.A. No. 08-CV-00546, 2016 WL 4494322 (N.D. Tex. Aug. 26, 2016). The lower court ruled in favor of the ICP and recognized its disparate impact claims. *Id.* at 500. The ICP made two alternative substantive claims: (1) the TDHCA intentionally discriminated based on race in violation of the Equal Protection Clause of the Fourteenth Amendment and Civil Rights Act; and (2) the TDHCA's LIHTCs allocation had discriminatory effects in violation of the FHA. Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affs., 860 F. Supp. 2d 312, 313–14 (N.D. Tex. 2012), *motion for attorney's fees and costs granted*, C.A. No. 08-CV-00546, 2013 WL 598390 (N.D. Tex. Feb. 15, 2013), *rev'd*, *remanded by* 747 F.3d 275 (5th Cir. 2014), *stay granted pending cert.*, C.A. No. 08-CV-00546, 2014 WL 2815683 (N.D. Tex. June 23, 2014), *aff'd*, 135 S. Ct. 2507 (2015), *remand to* 795 F.3d 509 (5th Cir. 2015), *remand to* C.A. No. 08-CV-00546, 2016 WL 4494322 (N.D. Tex. Aug. 26, 2016). Moreover, the ICP stated that TDHCA disproportionately approved tax credits for non-elderly units in areas with minimal representation. *See Inclusive Cmtys. Project, Inc.*, 749 F. Supp. 2d at 499. Specifically, the ICP argued that "from 1999–2008, [the] TDHCA approved tax credits for 49.7% of proposed non-elderly units in 0% to 9.9% Caucasian areas, . . . only approved 37.4% of proposed non-elderly units in 90% to 100% Caucasian areas, . . . [and] . . . 92.29% of LIHTC units in the city of Dallas were located in census tracts with less than 50% Caucasian residents." *Id.* (footnotes omitted); *see also Inclusive Cmtys. Project, Inc.*, 860 F. Supp. 2d at 331. As a remedy, the district court required the TDHCA to propose new selection criteria for tax credits that

the promulgation of the 2013 FHA disparate impact rule, the Supreme Court granted certiorari.[88]

comply with the FHA. *Inclusive Cmtys. Project, Inc.*, 860 F. Supp. 2d at 332. The court also encouraged the ICP and the TDHCA to collaborate to reduce the possibility of future complaints. *Id.* Finally, the court awarded the ICP attorney's fees and costs of $1,893,969. Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affs., C.A. No. 08-CV-00546, 2013 WL 598390, at *1, *7 (N.D. Tex. Feb. 15, 2013), *rev'd*, *remanded by* 747 F.3d 275 (5th Cir. 2014), *stay granted pending cert.*, C.A. No. 08-CV-00546, 2014 WL 2815683 (N.D. Tex. June 23, 2014), *aff'd*, 135 S. Ct. 2507 (2015), *remand to* 795 F.3d 509 (5th Cir. 2015), *remand to* C.A. No. 08-CV-00546, 2016 WL 4494322 (N.D. Tex. Aug. 26, 2016). In 2010, the Texas district court granted partial summary judgment in favor of the ICP's prima facie case for a disparate impact claim. *See Inclusive Cmtys. Project, Inc.*, 749 F. Supp. 2d at 499–500. The court relied heavily on statistical disparities to support the prima facie case. *Id.* In 2012, after a four-day bench trial and written closing arguments, the district court ruled that TDHCA failed to meet its burden of proving that there was no alternative to the LIHTCs allocation system that would address the department's interests in a less discriminatory manner. *Inclusive Cmtys. Project, Inc.*, 860 F. Supp. 2d at 331; Petition for Writ of Certiorari at 8, *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507 (No. 13-1371). The court concluded with respect to the disparate treatment claim, however, that the ICP failed to prove by a preponderance of the evidence that the TDHCA intentionally violated the Equal Protection Clause and the Civil Rights Act. *Inclusive Cmtys. Project, Inc.*, 860 F. Supp. 2d at 319–21, 319 n.10. The ICP alleged disparate treatment based on indirect evidence that the TDHCA's justifications were pretextual. *Id.* at 319. First, the court found that TDHCA did not intentionally discriminate in LIHTCs allocation because the department produced evidence that the QAP complied with applicable laws and that the staff ranked the applications according to the QAP. *Id.* The TDHCA also offered witness testimony supporting no intentional discrimination. *Id.* Second, the ICP could not prove that the TDHCA used its discretion discriminatorily because the TDHCA was able to credibly justify its discretionary approvals and rejections. *Id.* In one instance, for example, the TDHCA rejected an application because the project was for three-bedroom units only, and the TDHCA preferred projects to have units of different sizes. *Id.* Third, the ICP could not prove that the TDHCA intentionally tried to create discriminatory effects because the TDHCA produced evidence that it affirmatively tried to do the opposite. *Id.* at 320. Fourth, the ICP could not prove the TDHCA's underwriting practices were discriminatory because the TDHCA had an interest in the financial feasibility of a project. *Id.* at 320–21. Lastly, the court pointed to examples demonstrating that the TDHCA's justifications were not pretextual. *Id.* The court reiterated that the TDHCA had a legitimate interest in the financial feasibility of projects and in approving projects with less turnover, even if that meant approving elderly projects that typically have fewer minority residents. *Id.* at 320–21. Thus, the Texas court concluded that the ICP was not able to show disparate treatment. *Id.*

[88] *See* Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affs., C.A. No. 08-CV-00546, 2014 WL 2815683, at *1 (N.D. Tex. June 23, 2014) (reviewing the TDHCA's motion to stay pending the results of the petition to the Supreme Court), *aff'd*, 135 S. Ct. 2507 (2015), *remand to* 795 F.3d 509 (5th Cir. 2015), *remand to* C.A. No. 08-CV-00546, 2016 WL 4494322 (N.D. Tex. Aug. 26, 2016). After the district court ruled in favor of the ICP, the TDHCA appealed to the Fifth Circuit. Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affs, 747 F.3d 275, 280 (5th Cir. 2014), *stay granted pending cert.*, C.A. No. 08-CV-00546, 2014 WL 2815683 (N.D. Tex. June 23, 2014), *aff'd*, 135 S. Ct. 2507 (2015), *remand to* 795 F.3d 509 (5th Cir. 2015), *remand to* C.A. No. 08-CV-00546, 2016 WL 4494322 (N.D. Tex. Aug. 26, 2016). The U.S. Court of Appeals for the Fifth Circuit only addressed whether the Texas district court ruled correctly in finding for the ICP on its FHA disparate impact allegations. *Id.* During the appeal, the HUD proposed the 2013 regulations to standardize burdens of proof in disparate impact cases. *See* 24 C.F.R. § 100.500 (2013) (codifying the proposed 2013 regulation). The Fifth Circuit reiterated that disparate impact claims are cognizable, but it remanded the proceedings to the Northern District Court of Texas to implement the standards outlined in the 2013 HUD proposed regulations. *Inclusive Cmtys. Project, Inc.*, 747 F.3d at 280–83. The TDHCA, the defendants, in turn, petitioned the U.S. Supreme Court for certiorari. *Inclusive*

The Court's opinion in *Inclusive Communities* was the dominant influence for the 2019 FHA disparate impact rule proposed by the HUD.[89] The Court grounded its decision in two prior cases, both analyzing two allegations of employment discrimination under two similar statutes: Title VII of the Civil Rights Act of 1964 and the Age Discrimination Employment Act (ADEA).[90]

To begin, the Court looked to *Griggs v. Duke Power Co.*, and its interpretation of Title VII.[91] In 1971, in *Griggs*, the Supreme Court analyzed the discriminatory effect of a general education test and a high school diploma requirement as prerequisites for employment in the defendant's, Duke Power Company, labor and operations departments.[92] Undeniably, white employees fared better under those requirements than did Black employees.[93] Nevertheless, the Court did not view either requirement as substantially related to the skills required to perform the relevant job.[94] The Court held that, even though there was no discriminatory purpose, Title VII must allow for disparate impact claims in fulfillment of the statute's purpose—removing "artificial, arbitrary, and unnecessary" restrictions on employment when those restrictions result in discrimination on a protected class.[95]

Cmtys. Project, Inc., 2014 WL 2815683, at *1. They asked the Supreme Court to address two issues: (1) the cognoscibility of the FHA disparate impact claims, and (2) the applicable standards. *Id.* at *2. On October 2, 2014 the Supreme Court granted certiorari, heard oral arguments on January 21, 2015, and issued its ruling on June 25, 2015. *See generally* Court Docket, *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507 (No. 13-1371). The Court granted certiorari to answer only the question of "whether disparate-impact claims are cognizable under the Fair Housing Act." *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2515.

[89] *See* HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42,854, 42,854 (Aug. 19, 2019) (codified as amended at 24 C.F.R. pt. 100) (relying on *Inclusive Communities* as justification for proposing the new rule).

[90] *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2516–19; *see also* Smith v. City of Jackson, 544 U.S. 228, 240 (2005) (plurality opinion) (expanding disparate impact liability to Section 4(a) of the Age Discrimination in Employment Act (ADEA) of 1967); Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971) (expanding disparate impact liability to § 703(a) of Title VII of the Civil Rights Act of 1964). Title VII makes it unlawful for an employer to discriminate based on race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a). The statute prohibits employers from discriminatorily firing, refusing to hire, or compensating, or otherwise discriminating in employment terms. *Id.* The statute also prohibits segregating employees in a way that restricts opportunities. *Id.* Similarly, the ADEA prohibits employment discrimination based on age. 29 U.S.C. § 623(a). The statute includes restrictions similar to those found in Title VII, but it instead refers to discrimination based on the employee's age. *See id.* The ADEA includes a provision that prohibits employers from reducing compensation to comply with the law. *Id.*

[91] *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2516; *see Griggs*, 401 U.S. at 436 (expanding disparate impact claims to employment discrimination cases).

[92] 401 U.S. at 425–27.

[93] *Id.* at 430. North Carolina census information showed that white individuals were nearly three times more likely than Black individuals to obtain high school diplomas. *Id.* at 430 n.6.

[94] *Id.* at 431.

[95] *Id.* at 431–32, 436 (allowing disparate impact claims for Title VII employment discrimination unless the defendant can prove the hiring criteria had some "business necessity" with a "manifest relationship" to job performance). *Griggs v. Duke Power Co.* was a landmark 1971 U.S. Supreme

Next, the Court looked to its 2005 decision in *Smith v. City of Jackson*, and its interpretation of the ADEA.[96] In *Smith*, the Court used the reasoning of *Griggs* in the context of employment discrimination based on age.[97] The defendant, the City of Jackson, had a policy that gave younger police officers more generous raises.[98] This disproportionately affected officers over the age of forty.[99] Although the Court held that disparate impact cases are cognizable under the ADEA in certain circumstances, the Court concluded that the defendants proffered a reasonable business necessity—competitive salaries to reduce turnover—for their policy.[100]

In *Inclusive Communities*, the Court emphasized the comprehensive language in both Title VII and the ADEA that allowed for disparate impact claims.[101] Instead of concentrating on the employer's motivations, the Court concluded that the "*otherwise adversely affect[s* an employee's] status" language required the Court to focus on the effects of an employer's actions.[102] By viewing *Smith* and *Griggs* in tandem, the Court reasoned that anti-discrimination laws containing language focusing on the adverse consequences of a given action should be construed to allow for disparate impact claims.[103] Thus, because the FHA makes it unlawful to discriminate in housing "or *otherwise make unavailable*" housing for discriminatory purposes, the Court held that disparate impact claims are cognizable under the FHA.[104]

Court case, and in the years that followed, it provoked scrutiny of employers potentially over screening employees. Mark S. Brodin, *Reflections on the Supreme Court's 1988 Term: The Employment Discrimination Decisions and the Abandonment of the Second Reconstruction*, 31 B.C. L. REV. 1, 5–6 (1989). Federal courts examined facially neutral policies, such as requirements for height and weight, examination scores, experience, and familial relationships. *Id.* The courts concluded that although some of these requirements might have appeared to be useful, many were not actually helpful in determining the applicant's ability to perform the job. *Id.*

[96] *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2517; *see* Smith v. City of Jackson, 544 U.S. 228, 240 (2005) (plurality opinion) (expanding disparate impact liability to age discrimination claims).

[97] *See Smith*, 544 U.S. at 235–36 (drawing parallels with *Griggs* as "prohibit[ing] such actions that 'deprive any individual of employment opportunities or *otherwise adversely affect* [their] status as an employee, because of such individual's' race or age" (quoting 42 U.S.C. § 2000e-2(a)(2) (2000)).

[98] *Id.* at 231.

[99] *Id.*

[100] *Id.* at 243. In 2005, in *Smith v. City of Jackson*, the U.S. Supreme Court held that the defendant's, the City of Jackson, decision to increase low-ranking employee raises was reasonable because it was consistent with the legitimate interest of adjusting to reflect peer police force salaries to reduce employee turnover. *Id.* at 242.

[101] 29 U.S.C. § 623(a)(2); 42 U.S.C. § 2000e-2(a)(2); *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2517–18.

[102] *See Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2518 (quoting *Smith*, 544 U.S. at 235) (highlighting the "otherwise" language in Title VII and the ADEA, which focuses on effects, not motivations).

[103] *Id.*

[104] 42 U.S.C. § 3604(a) (emphasis added); *see Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2518 (highlighting the effects language in the FHA). The focus is on the use of "otherwise make unavailable," which like Title VII and the ADEA, creates a result-oriented focus rather than one that considers

The holding in *Inclusive Communities* came with caveats expressed in dicta.[105] The primary purpose of disparate impact liability is to eliminate the "artificial, arbitrary, and unnecessary barriers," without hindering legitimate interests.[106] According to the Court, to achieve this purpose, disparate impact liability should, first, be limited to allow some leeway for valid interests served by the policy in question.[107] Second, disparate impact claims should also permit defendants to consider relevant market factors.[108] Finally, absent "robust causality" with a specific policy, statistical disparities alone will not support a claim for disparate impact under the FHA.[109]

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motivation. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2518–19 (quoting 42 U.S.C. § 3604(a) (2012)). In 2015, in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.* the U.S. Supreme Court provided three other grounds to support its holding. *Id.* at 2520–22. First, according to the Court, the 1988 amendments to the statute would be superfluous if they assumed liability was constrained to disparate treatment. *Id.* at 2520–21. Second, similar to the ADEA's reasonable-factor-other-than-age (RFOA) provision precluding liability for reasonable non-age distinctions (which the *Smith* Court reasoned would be useless if liability was limited to disparate treatment), the FHA provides for an appraisal exemption in § 3605(a), which can consider factors other than those protected. *Id.* at 2521; *see Smith*, 544 U.S. at 239 (stating that the RFOA has the function of "precluding liability if the adverse impact was attributable to a non-age factor that was 'reasonable'"). Third, the stated purpose of the FHA, to eliminate discrimination in the housing market, generally supports disparate impact liability. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2521–22.

[105] *See Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2522 (stating that disparate impact has been limited to avoid interplay with constitutional dilemmas). For example, the Court explained, allowing disparate impact liability through statistical analysis alone would run counter to the U.S. Constitution. *Id.* Liability under this type of regime, the Court noted, might hinder legitimate government interests. *Id.*

[106] *Id.* (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)). The Court noted that the purpose of the FHA is to promote legitimate interests but not at the expense of creating discriminatory effects or reinforcing segregation. *Id.*

[107] *Id.* The Court compared the defendants', the TDHCA and its officers, latitude for legitimate interests with employment discrimination cases that allowed for similar necessity defenses. *Id.* In the employment context, courts could only impose liability where a discriminatory policy was not unrelated to employment skills and unnecessary for the company. *Id.*

[108] *Id.* In the present case, the Court gave the example that organizations, like the TDHCA, are trying to help the housing market, and these organizations should not bear the burden of high-cost alternative priorities. *Id.* Additionally, the Court signaled that zoning officials also must take other pecuniary and community factors into consideration, such as traffic or historical preservation. *Id.* The FHA, the Court explained, does not impose its own vision of housing development. *Id.*

[109] *Id.* The Court loosely suggested that a plaintiff can meet the "robust causality requirement" by showing that a policy or procedure caused a disparity. *See id.* (holding statistical disparities, without more, do not establish prima facie cases for disparate treatment). The purpose of this requirement, the Court stated, is to not hold defendants accountable for discriminatory effects they did not perpetuate. *Id.* In addition, the Court feared that disparate impact claims could lead organizations to use "numerical quotas," which would bring a host of constitutional issues. *Id.* (quoting Wards Cove Packing Co. v. Atonio, 493 U.S. 642, 653 (1989), *superseded by statute*, 42 U.S.C. § 2000e-2(k), *as recognized in* Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507 (2015)).

1. Remaining Questions After *Inclusive Communities*

Although the Supreme Court in *Inclusive Communities* was clear that disparate impact claims are cognizable under the FHA, it left open several ambiguities for lower courts to interpret.[110] First, it was unclear whether the 2013 HUD disparate impact rule would survive given the new claim limitations.[111] Second, the Court heightened a plaintiff's burdens with the claim limitations, without expressly defining terminology such as "robust causality" or whether "arbitrary, artificial, and unnecessary" is an element of the pleading.[112]

On remand from the Supreme Court, the U.S. District Court for the Northern District of Texas applied a framework in line with the Court's decision and attempted to answer a number of the looming questions.[113] Ultimately, the district court dismissed ICP's disparate impact claims for failure to allege a prima facie case.[114] Importantly, though, the court applied the 2013 HUD burden-shifting regime, which it determined remained intact after the Supreme Court decision, but modified its approach by implementing its interpretation of the Court's limitations.[115]

In its articulation of the modified disparate impact framework, the Northern District of Texas stated that a plaintiff must highlight specific policies

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[110] *Id.* (leaving questions for lower courts to decide). The Supreme Court in *Inclusive Communities* left open the following issues for the lowers court to answer: (1) the type of defendant justifications that *Inclusive Communities* allows, (2) the Court's constitutional interpretative effect on other disparate impact regulations, (3) lower courts' interpretation of the robust causality standard, and (4) the qualifications to subject a policy to scrutiny. *See* Samuel R. Bagenstos, *Disparate Impact and the Role of Classification and Motivation in Equal Protection Law After* Inclusive Communities, 101 CORNELL L. REV. 1115, 1131–32, 1140 (2016); Claire Williams, Note, Inclusive Communities *and Robust Causality: The Constant Struggle to Balance Access to the Courts with Protection for Defendants*, 102 MINN. L. REV. 969, 989 (2017).

[111] *See Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2522 (articulating potential variances from the 2013 HUD rule). Claim limitations potentially include identifying "artificial, arbitrary, and unnecessary" barriers, allowing leeway for legitimate interests, consideration of market factors, and the requirement to prove a "robust causality" between the policy and the disparity. *See supra* notes 105–109 and accompanying text (describing the Supreme Court's caveats to recognizing disparate impact liability under the FHA).

[112] *See Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2522 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)) (remaining silent on potential new requirements).

[113] *See* Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affs., C.A. No. 08-CV-00546, 2016 WL 4494322, at *4–6 (N.D. Tex. Aug. 26, 2016) (applying the Supreme Court's holding to the TDHCA's allocation of LIHTCs).

[114] *Id.* at *13.

[115] *Id.* at *4–6. Because the Supreme Court in *Inclusive Communities* did not expressly reject the burden-shifting approach that the Fifth Circuit adopted, in 2016 on remand, the U.S. District Court for the Northern District of Texas interpreted this as leaving the 2013 regulation intact. *See id.* (applying the three-part burden-shifting approach alongside limitations the Supreme Court identified). Under the Fifth Circuit's decision adopting the HUD regulations, the plaintiff must first show that a policy causes discriminatory effects. *Id.* If the plaintiff is successful, the defendant must proffer a legitimate nondiscriminatory interest. *Id.* Finally, if the court deems the defendant's interest legitimate, a plaintiff can still show that there is a less restrictive way of achieving that interest. *Id.*

causing statistical disparities to meet the requisite burden of proof.[116] Policies, the court elaborated, are not one-time decisions, and "robust causality" requires more than just statistical disparity between the policy and disparate impact.[117] Additionally, as the Supreme Court noted, robust causality may be too difficult to prove because multiple factors go into complex decisions, including LIHTCs.[118] In summation, the Texas district court understood that an inquiry into a disparate impact allegations requires careful analysis.[119] The court held that the ICP did not successfully plead a prima facie case because it did not identify and plausibly demonstrate that a facially neutral policy or procedure caused statistically significant disparate effects.[120] Other lower courts, however, have interpreted the *Inclusive Communities* decision less restrictively while still complying with its spirit.[121]

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[116] *Id.* at *4–5. The Texas district court stated that it is not enough for the plaintiff to simply argue that a "generalized policy" causes discriminatory effects. *Id.* at *6. The requirement that a plaintiff point to a specific policy, the court elaborated, is necessary because it helps the court determine whether the specific policy actually caused the discriminatory effects. *Id.* The court concluded that the TDHCA's policy of discretionarily apportioning LIHTCs was a generalized policy, and not a specific one. *Id.*

[117] *Id.* at *4–5 (quoting *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2523). The court noted that the ICP failed to prove that the discretionary allocation caused the discriminatory effects. *Id.* at *8–9. First, the ICP did not prove what the allocation would be if the TDHCA did not use discretionary authority. *Id.* Second, the ICP did not consider other confounding variables as causes for the disparities. *Id.* Other factors such as "zoning rules, community preferences, or developers' choices," the court noted, may have caused the discriminatory effects. *Id.* at *9. Moreover, the ICP was misguided by attempting to link cumulative statistics to individual cases. *Id.*

[118] *Id.* at *4–5.

[119] *Id.*

[120] *Id.* at *7–8. With respect to the 9% LIHTCs, the court further reasoned that the ICP was, in fact, arguing for disparate treatment and not disparate impact when it pointed to discretion as the cause for racial disparity. *Id.* at *8. Even if this argument was for disparate impact, the court concluded that the ICP still failed to plausibly demonstrate that the discretion caused a statistically significant disparity. *Id.* For similar reasons, the court also concluded that the ICP failed to satisfy the "robust causality" requirement with respect to 4% LIHTCs. *Id.* at *12–13.

[121] *See, e.g.*, Cnty. of Cook v. Wells Fargo & Co., 314 F. Supp. 3d 975, 999 (N.D. Ill. 2018) (denying the defendants' motion to dismiss in part and allowing the plaintiff to move forward with its FHA claims). In 2018, in *County of Cook v. Wells Fargo & Co.*, the U.S. District Court for the Northern District of Illinois held that the plaintiff, County of Cook, plausibly alleged a claim for disparate impact under the FHA and denied the defendants', Wells Fargo & Co. and related organizations, motion to dismiss for failure to state a claim. *Id.* at 993–94, 999. First, the plaintiff identified statistical disparities. *Id.* at 992. Second, the plaintiff pointed to a specific policy that it claimed attributed to the statistical disparity. *Id.* at 992–93. The plaintiff used a percentage analysis to show that the defendants issued a disproportionate amount of subprime loans to minority borrowers. *Id.* Specifically, the plaintiff alleged that the defendants relied primarily on employee discretion that resulted in equity stripping practices. *Id.* Third, the plaintiff claimed that the required causal relationship between the practice and discriminatory effects existed. *Id.* at 994. The court concluded that the plaintiff "satisfied the robust causation requirement" simply by alleging that the denial of loan modifications pushed borrowers into foreclosure. *Id.* This interpretation was consistent with the interpretations of the Eight, Ninth, and D.C. Circuits. *Id.* at 991–93 (first citing Ellis v. City of Minneapolis, 860 F.3d 1106, 1107–08 (8th Cir. 2017); then citing City of Los Angeles v. Wells Fargo & Co., 691 F. App'x 453, 454 (9th Cir.

C. The HUD's Implementation of the FHA's Disparate Impact Standard as Influenced by Inclusive Communities

In a purported second effort to clarify ambiguities from the Supreme Court's 2015 decision in *Inclusive Communities*, on August 19, 2019, the HUD proposed a rule for implementation of the FHA's disparate impact standard.[122] It justified the disparate impact rule changes, in part, as an incorporation of *Inclusive Communities*.[123] In response to comments received on June 20, 2018,

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2017); then citing City of Los Angeles v. Bank of Am. Corp., 691 F. App'x 464, 465 (9th Cir. 2017); and then citing Boykin v. Fenty, 650 F. App'x 42, 42–43 (D.C. Cir. 2016) (per curiam)). None of the cases resulted in positive outcomes for the plaintiffs, showing the dangers of interpreting the precedent too strictly. *See infra* Appendix. Moreover, the Illinois district court used lenient interpretations of the standards when assessing facts supporting plausible allegations and the meaning of "robust causation." *See Cnty. of Cook*, 314 F. Supp. 3d at 993–94 (discussing the narrative of the plaintiff's complaint). The court also largely ignored the "artificial, arbitrary, and unnecessary" element as a concession by the defendants. *Id.* at 992–93 (quoting *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2524). Although the elements may still seem stringent, the *County of Cook* court balanced the interest of allowing a plaintiff to proceed with discovery and the dangers of undermining valid business interests. *See id.* at 998–99 (allowing a plaintiff to move beyond the pleading stage).

[122] HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42,854, 42,864 (Aug. 19, 2019) (codified as amended at 24 C.F.R. pt. 100).

[123] HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. at 42,857; *see Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2522 (articulating claim limitations on FHA disparate impact cases). On May 15, 2017, the HUD issued a Federal Register notice seeking public input to identify any ineffective regulations. Reducing Regulatory Burden: Enforcing the Regulatory Reform Agenda Under Executive Order 13777, 82 Fed. Reg. 22,344, 22,345 (May 15, 2017). The Administrative Procedure Act (APA) guides the rulemaking process. 5 U.S.C. §§ 551–559; MAEVE P. CAREY, CONG. RSCH. SERV., IF10003, AN OVERVIEW OF FEDERAL REGULATIONS AND THE RULEMAKING PROCESS 1 (2019), https://crsreports.congress.gov/product/pdf/IF/IF10003 [https://web.archive.org/web/20210206211616/https://crsreports.congress.gov/product/pdf/IF/IF10003]. The APA requires that an agency notify the public of a proposed rule, and then it must accept comments from the public. CAREY, *supra*, at 1–2. After the comment period ends, typically thirty days, the agency must then review and respond to comments. *Id.* Before finalizing the rule, the agency must submit the proposed rule to the Office of Management and Budget's Office of Information and Regulatory Affairs for economic and policy review. *Id.* Finally, the agency may promulgate the rule, briefly stating the purpose for the regulation. *Id.* Because Congress delegated to the agency rulemaking powers, the legislature can still exercise control over regulations in three ways. *Id.* First, Congress can overturn rules by passing legislation or using the Congressional Review Act to issue a joint resolution. *Id.* Second, Congress can use its power of oversight to realign agency objectives. *Id.* Third, Congress can use the power of the purse to control the effectiveness of regulations. *Id.* Courts can also overturn an agency rule if the agency acted arbitrarily and capriciously, exceeded statutory authority, violated the Constitution, or did not follow required procedures for enacting a regulation, including those mentioned. *Id.* For all intents and purposes, however, regulations carry the same weight as statutes because agencies have broad discretion. *See* Nat'l Latino Media Coal. v. FCC, 816 F.2d 785, 788 (D.C. Cir. 1987) (contrasting legislative rules with interpretive rules, and holding that legislative rules carry the full force of law). After the HUD issued notice in 2016, on October 26, 2017, the Secretary of the Treasury suggested that the agency reconsider the disparate impact rule's impact insurance provision. STEVEN T. MNUCHIN & CRAIG S. PHILLIPS, U.S. DEP'T OF TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES: ASSET MANAGEMENT AND INSURANCE 110 (2017), https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-That-Creates-Economic-Opportunities-Asset_Management-Insurance.pdf [https://web.archive.org/web/20210301070405/

the HUD published an advance notice of proposed rulemaking (ANPR) to solicit suggestions on the disparate impact rule.[124]

According to the HUD, commenters on the ANPR generally fell into two categories concerning the federal standard.[125] One group believed that *Inclusive Communities* was consistent with the current rule—citing courts' use of both the 2013 HUD rule and Supreme Court guidance as evidence that the two can coexist.[126] Others thought that the current rule was inconsistent with the *Inclusive Communities* precedent and criticized the proof, causality, statistical disparities, and least restrictive practice standards.[127] In light of this feedback, the HUD proposed a new rule to replace the discriminatory effects standard along with several minor amendments to align with the *Inclusive Communities* decision.[128]

Just as in the original rule, the proposed rule maintains the notion that discriminatory effects against a protected class are sufficient for liability under the FHA.[129] The first paragraph provides new guidelines to establish a prima facie case for discriminatory effects.[130] Under the proposed rule, plaintiffs would have to plead facts that plausibly allege that a specific policy or practice has discriminatory effects by asserting that: (1) the policy or practice is "arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective"; (2) there is a "robust causal link" between the policy or practice and disparate impact that shows the policy or practice "direct[ly] cause[d] . . . the discriminatory effect"; (3) the disparity has an adverse effect on a protected class; (4) the disparity is significant; and (5) there is a direct link between the disparate impact and the plaintiff's injury.[131]

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https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-That-Creates-Economic-Opportunities-Asset_Management-Insurance.pdf]. This Note does not analyze the insurance provision of the proposed regulation, but the Secretary of the Treasury requested that the HUD consider whether the rule complies with existing law, whether the rule might have adverse effects on the homeowner insurance market, and whether the rule is consistent with insurance principles. *See id.* (requesting review of the insurance provisions).

[124] Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 83 Fed. Reg. 28,560, 28,560 (June 20, 2018). The HUD received 1,923 comments. HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. at 42,856.

[125] *See* HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. at 42,856 (summarizing the comments on the advance notice of proposed rulemaking).

[126] *Id.*

[127] *Id.* Other categories of criticisms included the economic burdens of the standard and preferences for state law or federal law. *Id.* at 42,856–42,857.

[128] *Id.* at 42,854.

[129] *Id.* at 42,862.

[130] *Id.* The HUD states that plaintiffs must point to a specific policy, which does not include a "program as a whole" or a one-time housing decision. *Id.* at 42,858.

[131] *Id.* at 42,858, 42,862 (emphasis omitted).

If the plaintiff satisfies this prima facie burden, a defendant can rebut the allegations with three arguments.[132] First, a defendant can argue that its "discretion is materially limited by a third party," such as an applicable law or a binding court or administrative ruling.[133] Second, a defendant can attack assumptions underlying a plaintiff's allegations regarding models or algorithms that cause discriminatory effects.[134] Finally, a defendant can show that the plaintiff failed to present enough facts to sustain a prima facie case.[135] If the defendant fails to discredit a plaintiff's prima facie case of discriminatory effect, the case will move beyond the pleading stage.[136]

Once the allegations move past the pleading stage, the plaintiff must then prove, by a preponderance of the evidence, four of the prima facie elements—robust causality, adverse effects, significant disparity, and a direct link to injury—showing that a policy or practice has discriminatory effects.[137] The defendant has one last opportunity to either prove any of the previously mentioned affirmative defenses—limited discretion, incorrect assumptions, and insufficient facts—by showing that the plaintiff did not satisfy the burden, or showing that the plaintiff's proposed less restrictive policy did not capture a valid interest.[138] If the defendant cannot meet this burden, the plaintiff has successfully pleaded a disparate impact claim.[139]

The proposed rule was met with widespread criticism, including from the institutions that would benefit most from the rule change.[140] Finally, on Octo-

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[132] *Id.* at 42,859.

[133] *Id.* Examples of a third party materially limiting the defendant's discretion include laws (e.g., federal, state, and local) and binding requirements (e.g., court, arbitral, regulatory, or administrative requirements and orders). *Id.* If the government actor who imposed the limitations is the defendant, the HUD explains that the party cannot claim material limitation as a defense. *Id.*

[134] *Id.* at 42,862. A defendant can provide inputs in models that prove that the defendant does not rely on factors that are proxies for a protected class. *Id.* Alternatively, a defendant can prove that the model is distributed by a recognized third party who determines industry standards. *Id.* Finally, a defendant can show that the model is reviewed and validated to ensure that the factors are not proxies for a protected class. *Id.*

[135] *Id.* at 42,862–42,863. The HUD does not elaborate on this defense; rather, it simply states that a defendant can claim that the plaintiff did not meet the initial burden. *Id.* at 42,860.

[136] *Id.* at 42,862–42,863.

[137] *Id.* A plaintiff must prove by a preponderance of the evidence that (1) there is a "robust causal link" between the policy or practice and disparate impact that shows the policy or practice "direct[ly] caus[ed] the discriminatory effect"; (2) the disparity has an adverse effect on a protected class; (3) the disparity is significant; and (4) there is a direct link between the disparate impact and the plaintiff's injury. *Id.*

[138] *Id.* at 42,863. The proposed regulation provides defenses for material limitations in discretion and an attack on a plaintiff's assumptions about models and algorithms. *Id.* at 42,862.

[139] *See id.* at 42,862–42,863.

[140] Emily Flitter, *Big Banks' 'Revolutionary' Request: Please Don't Weaken This Rule*, N.Y. TIMES (July 16, 2020), https://www.nytimes.com/2020/07/16/business/banks-housing-racial-discrimination.html?campaign_id=4&emc=edit_dk_20200717&instance_id=20395&nl=dealbook&regi_id=95781578&segment_id=33642&te=1&user_id=cb0871435994afd0efd517593254549d [https://perma.cc/FA5L-BJSR]. Corporate officers from Bank of America, Citigroup, JP Morgan Chase, and Wells

ber 26, 2020, the HUD made a modified version of the proposed rule effective.[141] First, at the pleading stage, instead of requiring plausible allegations of the five elements, plaintiffs must *sufficiently* plead facts that support the similar five elements.[142] The final rule also eliminates the incorrect assumptions defense in the proposed rule but maintains the third party limited discretion defense both during and after the pleading stage.[143] Moreover, the final rule provides defendants with a new defense.[144] Now, a defendant may claim that the implemented policy was to forecast an event, so long as it does not discriminatorily affect the plaintiffs more than non-protected individuals.[145] Notably, the forecasted event must not discriminatorily affect the plaintiffs more than similarly situated non-protected individuals.[146] Finally, the HUD effectively limited remedies to non-monetary equitable reforms.[147] The HUD will

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Fargo vehemently objected to the proposed rule. *Id.* Some called this objection "unprecedented" and "revolutionary." The HUD was seemingly unphased. *See id.* (failing to respond to a JP Morgan Chase letter, and responding apathetically to the Bank of America letter). In response, the HUD's deputy secretary simply stated that Bank of America missed the public comment period, and the agency suggested that the bank increase its own efforts. *Id.*

[141] *Rulemaking Docket: FR-6111-P-02 HUD's Implementation of the Fair Housing Act's Disparate Impact Standard: Unified Agenda*, REGULATIONS.GOV, https://beta.regulations.gov/docket/HUD-2019-0067/unified-agenda [https://perma.cc/4CP3-RWUS]. The HUD issued the initial final action on September 24, 2020. *Id.* The final rule is published in Title 24 of the Code of Federal Regulations as of April 2021. 24 C.F.R. § 100.500 (2021).

[142] *Compare* 24 C.F.R. § 100.500(b) (requiring the plaintiff to "sufficiently plead facts" alleging the five required elements of disparate impact), *with* HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. at 42,862 (stating that the plaintiff "must state facts plausibly alleging" the five required elements of disparate impact). The first element mandates that the plaintiff plausibly plead facts that a policy does not advance a legitimate interest. 24 C.F.R. § 100.500(b). Next, the plaintiff must state how the statistical disparities, if any, show that the policy is the appropriate cause of such disparity. *Id.* Third, the plaintiff must establish that the policy harms a protected class, not just an individual member of the protected class. *Id.* Fourth, the plaintiff must plead that the discriminatory effects are significant. *Id.* Finally, the plaintiff must demonstrate proximate cause. *See id.* (requiring a "direct relation between the injury asserted and the injurious conduct alleged"). Proximate cause is commonly defined as the legal cause, or a "sufficient" cause among other causes to impose liability. *Proximate Cause (Direct Cause or Efficient Cause or Jural Cause or Legal Cause)*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY DESK EDITION, *supra* note 40.

[143] *Compare* 24 C.F.R. § 100.500(d) (allowing for the third party material limitation defense both at and after the pleading stage), *with* HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. at 42,862 (allowing for the defendant to challenge the plaintiff's assumptions about models or algorithms).

[144] 24 C.F.R. § 100.500(d)(2)(i).

[145] *Id.* Specifically, this new defense states that defendants can show:

> [The] policy or practice is intended to predict an occurrence of an outcome, the prediction represents a valid interest, and the outcome predicted by the policy or practice does not or would not have a disparate impact on protected classes compared to similarly situated individuals not part of the protected class.

Id.

[146] *Id.*

[147] *Id.* § 100.500(f).

only enforce monetary penalties in cases where a defendant has previously violated the FHA.[148] Following the change in administration, on January 27, 2021, President Joe Biden directed the HUD to once again revisit the final rule with the goal to improve housing equality.[149]

II. Discrimination and the Application of FHA Disparate Impact

To understand the goals of the HUD's new rule, it would be prudent to look at the trends of nearly fifty years of FHA disparate impact liability.[150] This Part explores how courts have dealt with FHA disparate impact claims since their inception in 1974.[151] Section A provides a statistical overview of appellate decisions that have had positive outcomes.[152] Section B considers the positive outcomes in the context of FHA disparate impact claims for lending discrimination.[153]

A. FHA Disparate Impact Claims

Between 1974—when the U.S. Supreme Court first recognized disparate impact liability—and the 2013 HUD rule, ninety-two FHA disparate impact claims reached an appellate court, where the court made a substantive decision on the disparate impact claim (Viable Appellate Cases).[154] Of the Viable Appellate Cases, almost twenty percent resulted in positive outcomes for the plaintiffs.[155]

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[148] *Id.* The HUD also suggested that courts should only focus on the equitable reforms as well. *Id.* Further, HUD restricted administrative hearings to non-monetary damages. *Id.*

[149] *See Biden Calls for Review of HUD's 2020 Disparate Impact Rule*, ABA Banking J. (Jan. 27, 2021), https://bankingjournal.aba.com/2021/01/biden-calls-for-review-of-huds-2020-disparate-impact-rule/ [https://perma.cc/E28X-4LPA] (advising the HUD to "take any necessary steps, as appropriate and consistent with applicable law, to implement the Fair Housing Act's requirements that HUD administer its programs in a manner that affirmatively furthers fair housing and HUD's overall duty to administer the Act . . . including by preventing practices with an unjustified discriminatory effect" (statement of President Joe Biden)).

[150] *See infra* notes 154–191 and accompanying text.

[151] *See infra* notes 154–191 and accompanying text.

[152] *See infra* notes 154–163 and accompanying text.

[153] *See infra* notes 164–191 and accompanying text.

[154] Stacy E. Seicshnaydre, *Is Disparate Impact Having an Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 Am. U. L. Rev. 357, 391–92 (2013). The first appellate case claiming discriminatory effects under the FHA arose in 1974. *See* United States v. City of Black Jack, 508 F.2d 1179, 1185 (8th Cir. 1974) ("Effect, and not motivation, is the touchstone, in part because clever men may easily conceal their motivations, but more importantly, because whatever our law was once, we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.").

[155] Seicshnaydre, *supra* note 154, at 399 fig.6. Only eighteen out of ninety-two, or 19.6%, of the appellate disparate impact claims, where the court made a substantive decision on the disparate impact claim (Viable Appellate Cases), were positive. *Id.* Positive outcomes do not necessarily refer to a final

Since 2013, both judicial precedent and regulatory frameworks have altered the nature of FHA disparate impact analysis.[156] This Note replicates the FHA disparate impact data created by Stacy Seicschnaydre, Associate Dean at Tulane Law School.[157] The empirical process involved using a specific search term on Westlaw, narrowing by appellate cases only, limiting the date range to exclude prior research, and analyzing the 186 resulting cases to filter for Viable Appellate Cases.[158]

Of the twenty-nine ensuing decisions, almost twenty-five percent of cases resulted in positive outcomes for the plaintiff.[159] Still, this means that since the inception of the cognoscibility of disparate impact liability, slightly more than twenty percent of cases have resulted in positive outcomes for plaintiffs.[160] Moreover, between the first appellate disparate impact case in 1974 and the promulgation of the HUD's final rule on the Implementation of the Fair Housing Act's Discriminatory Effects Standard in 2013, there have been approximately two Viable Appellate Cases per year.[161] Over the past seven years, since the promulgation of the 2013 HUD rule, the frequency of Viable Appellate

judgment on the disparate impact claim. *Id.* at 394. Instead, in this context, positive outcomes also refer to affirmations of trial decisions in favor of plaintiffs, reversals of trial decisions against the plaintiff, and reversals of dismissals of the disparate impact claim. *Id.* at 394–95. Out of the eighteen cases, there were five affirmed judgments in favor of the plaintiff, four reversals of judgments against the plaintiff, four reversals of pleading dismissals, one ruling deeming disparate impact cognizable, and four reversals of summary judgment. *Id.*

[156] *See supra* notes 76–149 and accompanying text (comparing the 2013 disparate impact rule, the U.S. Supreme Court disparate impact precedent in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, the 2019 proposed disparate impact rule, and the 2020 final disparate impact rule).

[157] *See* Seicshnaydre, *supra* note 154, at 392 n.216 (outlining the empirical research process); *Stacy Seicshnaydre: Biography*, TUL. L. SCH., https://law.tulane.edu/faculty/full-time/stacy-seicshnaydre [https://perma.cc/ALS3-AN8J].

[158] *See* Seicshnaydre, *supra* note 154, at 392 n.216 (using the following Westlaw search key: disp! discrim! /2 impact! effect! & "fair housing act" FHA 3604, and narrowing the results to cases decided on the disparate impact FHA claim). The search narrowed from July 1, 2013, to February 2, 2020, and resulted in 186 cases. *Id.*

[159] *See infra* Appendix. Seven of the twenty-nine cases, or 24.1%, resulted in positive outcomes for the plaintiffs. *Id.*

[160] Seicshnaydre, *supra* note 154, app. A; *see infra* Appendix. Since inception, 25 out of 121 Viable Appellate Cases, or 20.7%, have resulted in positive outcomes for plaintiffs. *See* Seicshnaydre, *supra* note 154, app. A; *infra* Appendix. Averages are rounded to the nearest whole month. *See infra* Appendix. For example, the time between February 15, 2013, and February 5, 2020, is six years, eleven months, and twenty-two days. *Id.* The calculation for cases per year for this time period is seven years. *Id.*

[161] Seicshnaydre, *supra* note 154, app. A. Specifically, there have been an average of 2.4 Viable Appellate Cases per year between December 27, 1974, the first appellate disparate impact case, and February 15, 2013, the promulgation of the HUD's final rule on the Implementation of the Fair Housing Act's Discriminatory Effects Standard. *Id.*

Cases per year nearly doubled.[162] Notably, only one of the cases since 2013 was a class action suit, and the court did not grant class status.[163]

B. Disparate Impact as Applied to Lending Discrimination

Lending discrimination is a paradigmatic example for analyzing the effects of disparate impact liability because of the emergence of fraudulent practices leading up to the 2008 financial collapse and the intricacy of factors that contribute to credit-issuing decisions.[164] This makes the required intent for disparate treatment extremely difficult to prove.[165] Legal scholars often only focused on lending discrimination that occurred when a lender denied an applicant a loan for discriminatory reasons.[166] Following the housing market col-

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[162] *See* Seicshnaydre*, supra* note 154, app. A; *infra* Appendix. The average annual Viable Appellate Cases has increased from 2.4 cases per year to 4.3 cases per year. *See* Seicshnaydre*, supra* note 154, app. A; *infra* Appendix.

[163] *See* Adkins v. Morgan Stanley, 656 F. App'x 555, 556–57 (2d Cir. 2016) (holding that the plaintiff could not meet the class certification requirements). The Federal Rules of Civil Procedure have four prerequisites to be certified as a class: (1) numerosity, (2) commonality of law or fact, (3) typicality in the representative parties, and (4) fair representation from the representative parties. FED. R. CIV. P. 23(a). Additionally, a court must find that the common questions of law or fact "predominate over any [individual] questions" of law or fact and that class certification is the "superior" method of resolving the case. *Id.* R. 23(b)(3). In 2016, in *Adkins v. Morgan Stanley*, the plaintiffs, a group of Black homeowners, alleged that the defendants, Morgan Stanley and related entities, caused a home lender to make high-cost, high-risk loans. 656 F. App'x at 556. The U.S. District Court for the Southern District of New York did not certify the class for failure to meet the typicality in the representative requirement, as well as the "predominance and superiority requirements." *Id.* The district court concluded that because each plaintiff's loans had different characteristics, each individual required different proof of harm and causation. *Id.* at 556–57. On appeal, the plaintiffs did not challenge this finding, but they compelled the U.S. Court of Appeals for the Second Circuit Court to certify the class nonetheless and proposed a narrower class. *Id.* at 557. The Second Circuit affirmed the district court's rejection of class certification because to do so would essentially change the nature of the case and "unfairly prejudice" defendants. *Id.* In contrast, class action filings are more common in other contexts, such as securities class actions. *See, e.g.*, CORNERSTONE RSCH., SECURITIES CLASS ACTION FILINGS: 2019 YEAR IN REVIEW 5 (2019), https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2019-Year-in-Review [https://perma.cc/s9ku-ubkk] (demonstrating that plaintiffs filed a total of 428 securities class action lawsuits in 2019).

[164] *See supra* note 18 and accompanying text (describing the financial crisis in 2008).

[165] *See supra* note 18 and accompanying text (giving examples of the types of potentially discriminatory decisions that lenders can make behind closed doors, such as complex underwriting algorithms and methods for pushing buyers towards subprime loans).

[166] Yinger*, supra* note 19, at 30 (stating that refusing to approve a loan is the most serious and obvious type of lending discrimination); *see also* ENGEL & MCCOY, *supra* note 18, at 21 (describing the early stages of subprime lending). According to one scholar, discrimination in mortgage lending exists when the probability of rejection is not only a function of the expected rate of return on the loan, including the applicant, property, and loan characteristics, but also considers minority status or neighborhood location not relevant to the rate of return. Yinger*, supra* note 19, at 32. This function of lending discrimination demonstrates that other forms of lending discrimination, such as subprime lending, were merely afterthoughts. *See id.* at 62 ("Discrimination by mortgage lenders exists when lenders deny loans to minorities (or treat them unfavorably in other ways) after controlling for the factors that influence the returns on a loan.").

lapse of 2008, it became clear that predatory lending practices were rampant well before the market collapsed, and the practices involved more—and arguably worse—than plain denial of credit.[167]

First, lenders would extract exorbitant fees from borrowers, such as credit insurance financed as part of the loan (which accumulated interest), discount points, and prepayment penalties.[168] So, where a $300,000 prime loan might generate $5,000 in fees upfront, the same amount on a subprime loan would generate three times that amount in fees.[169] Lenders would also set high interest rates.[170] To conceal the rates, some of these interest rates could be adjustable-rate-mortgages with favorable initial rates that increased over time or resulted in balloon payments that increased on fixed dates.[171] Lenders typically targeted Black and Latinx neighborhoods with subprime loans characterized by high fees and high interest rates, which were effectively unaffordable and destined for default.[172] Opportunities to obtain credit in minority neighborhoods

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[167] *See* ENGEL & MCCOY, *supra* note 18, at 21–22 (arguing that predatory lending began with small-shop lenders before becoming ingrained in large banking institutions). Subprime generally refers to risky alternative mortgages to traditional loans. *Id.* at 34. These can also be described as Alt-A, nonprime, or predatory loans. *Id.* at 42. Dating back to the 1990s and following banking industry deregulation in the 1980s, securitization made subprime lending attractive for large banking institutions. *Id.* at 16–18. In the 1970s, strict government policies on home mortgages hindered the real estate market. *Id.* at 16. These policies led to astronomical interest rates on mortgages, and eventually, home ownership was not an option for most people. *See id.* (noting that in the 1970s, the mean interest rate on a thirty-year fixed loan rose by 6.36% to 13.74%). In the 1980s, Congress stepped in and eliminated interest rate caps, allowed for alternative loans, and preempted laws that were inconsistent with these laws. *Id.* This deregulation, however, is what ultimately gave banks the ability to create subprime loans. *Id.*

[168] *Id.* at 22, 24.

[169] *See id.* at 37 (comparing a standard fixed-rate mortgage with borrower documentation of income to a subprime loan where the borrower only states income without any documented proof). For the sake of speed and no-hassle, lenders would rarely ask for pay stubs or other proof of income. *Id.* Instead, they would steer consumers towards "low-doc" or "no-doc" loans where the lender would reap the benefits of higher up-front fees. *Id.*

[170] *Id.* at 22.

[171] *Id*. at 23. Even more egregious, at closing, lenders would unexpectedly switch the loan terms that they originally described to the borrower from fixed-rate to subprime adjustable-rate-mortgages (ARMs). *Id.* at 24. Borrowers either did not notice, could not comprehend the terms, or by closing time, were too psychologically invested in home ownership to care or realize the ramifications. *See id.* (describing these "[b]ait-and-switch" tactics).

[172] *Id.* at 22. The Federal Deposit Insurance Corporation (FDIC) defines lending discrimination under the FHA by admonishing seven practices that might disparately treat or impact a protected class. *See* FED. DEPOSIT INS. CORP., CONSUMER COMPLIANCE EXAMINATION MANUAL ch. IV, § 1.1–.2 (2019), https://www.fdic.gov/regulations/compliance/manual/ComplianceExaminationManual.pdf [https://perma.cc/6F92-8TQQ] (listing seven prohibited discriminatory lending practices). The FDIC states that a lender cannot: (1) omit or change information or services throughout the lending process; (2) steer borrowers towards different credit products; (3) deny credit or use different standards of reviewing applications; (4) vary terms of loans such as the amount, interest rate, duration, or type; (5) use different methods for collateral appraisal; (6) service a loan differently for certain individuals; and (7) pool loans differently in the secondary market. *Id.*

has historically been rare.[173] Lenders targeted these inexperienced borrowers who particularly needed credit and could more easily be convinced to sign up for a subprime mortgage.[174]

The 2018 case, *City of Philadelphia v. Wells Fargo & Co.*, illustrates these predatory practices. In *City of Philadelphia*, the U.S. District Court for the Eastern District of Pennsylvania explained that the plaintiff, the City of Philadelphia, brought a plausible claim for disparate impact under the FHA, and then it denied the defendants', Wells Fargo & Co. and related organizations, motion to dismiss.[175] The plaintiff claimed that, for at least ten years, seven facially neutral lending policies created an "artificial, arbitrary, and unnecessary" barrier to credit opportunities for minority applicants in Philadelphia.[176] Between 2004 and 2014, Black and Latinx individuals were around twice as likely to receive a subprime loan than similarly situated white borrowers.[177]

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[173] ENGEL & MCCOY, *supra* note 18, at 22.

[174] *Id.*

[175] *See* City of Philadelphia v. Wells Fargo & Co., C.A. No. 17-cv-02203, 2018 WL 424451, at *3–4 (E.D. Pa. Jan. 16, 2018) (explaining that the plaintiff identified specific policies that caused disparate impacts). In 2018, in *City of Philadelphia v. Wells Fargo & Co.*, the plaintiff, the City of Philadelphia, alleged that Black and Latinx borrowers with Fair Isaac Corporation (FICO) scores similar to white borrowers were more than two times as likely to receive a subprime loan. *See id.* at *9 (outlining the plaintiff's disparate impact allegation); *see also* Christopher P. Guzelian et al., *Credit Scores, Lending, and Psychosocial Disability*, 95 B.U. L. REV. 1807, 1811–24 (2015) (explaining FICO scores).

[176] Complaint for Violations of the Federal Fair Housing Act at 5, 17–18, *City of Philadelphia*, 2018 WL 424451 (C.A. No. 17-cv-02203). Practices included: (1) allowing for discretion to issue expensive and riskier loans, even when a borrower qualified for more stable loans; (2) allowing discretion to refrain from explaining actual characteristics of loans; (3) targeting minority areas for high-risk loans; (4) using monetary incentives to encourage officers to sell high-risk loans; (5) issuing prepayment penalties preventing refinancing to type-A (prime) loans; (6) arbitrarily charging fees; and (7) failing to provide loan officers with accurate information about what the defendants, Wells Fargo & Co. and related entities, could actually offer a consumer. *Id.*

[177] *Id.* at 29. Black borrowers were 2.102 times more likely and Latinx borrowers were 1.655 times more likely to receive a subprime loan than a similarly situated white borrowers. *Id.* These numbers are even more concerning when comparing only borrowers with FICO scores above 660. *Id.* In that case, Black borrowers were 2.570 times more likely and Latinx borrowers were 2.073 more likely to receive subprime loans. *Id.* Thus, minority borrowers who otherwise qualified for more affordable and stable loans instead received riskier ones, including rate-spread reportable and high-cost loans, subprime loans, interest-only loans, balloon payment loans, loans with prepayment penalties, negative amortization loans, no documentation loans, higher-cost government loans, and ARMs with teaser rates. *Id.* at 28. The CFPB defined rate-spread reportable loans were defined by comparing the annual percentage rate (APR) of a particular loan with the average prime offer rate (APOR). Home Mortgage Disclosure (Regulation C), 80 Fed. Reg. 66,127, 66,197–66,198 (Oct. 28, 2015) (codified at 12 C.F.R. pt. 1000). To calculate the APOR, the CFPB compiles loan information from representative prime loans. *Id.* at 66,329. At the time of *City of Philadelphia*, if a loan's APR was more than 1.5% or 3.5% of the APOR (depending on the type of loan) the lending institution was required to report the details of that loan to the CFPB. *Id.* at 66,198. Today, lending institutions are required to report the rate-spread for virtually all home mortgages. *See id.* (adopting a proposal to require reporting regardless of threshold). On interest-only loans, borrowers would have a period of time where they paid only interest on their loans. ENGEL & MCCOY, *supra* note 18, at 34. After that period was over, suddenly,

While there were just six Viable Appellate Cases for lending discrimination between 1974 and 2013, there have been eight Viable Appellate Cases since the promulgation of the 2013 rule.[178] The case frequency for lending discrimination has more than quintupled.[179] Notably, there were no positive outcomes for plaintiffs before the 2013 HUD promulgation.[180] Since then, more than a third of cases have resulted in such positive outcomes.[181] Although lending discrimination is just one example of where disparate impact liability is available, other forms of discrimination, including housing barriers, have seen similar patterns.[182]

These patterns indicate that disparate impact claims may see more time in court, but the courts are still reluctant to rule in favor of the plaintiffs.[183] For

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borrowers would have to pay principal on the loan, which many borrowers could not afford. *Id.* Similarly, balloon payments result when a borrower has to pay more than double the average of previous payments. 15 U.S.C. § 1639c(b)(2)(A)(ii).

[178] *See infra* Appendix.

[179] *See infra* Appendix. Frequency for disparate impact cases has increased from an average of 0.2 cases per year to 1.1 cases per year. *See* Seicshnaydre*, supra* note 154, app. A; *infra* Appendix.

[180] *See infra* Appendix.

[181] *See infra* Appendix. Three out of the eight cases have resulted in positive outcomes for plaintiffs, or 37.5%. *See infra* Appendix.

[182] *See* Seicshnaydre*, supra* note 154, at 402 (stating that 44.4% of positive outcome FHA disparate impact appellate cases between 1974 and 2013 were housing barrier cases). Housing barrier claims are arguably the most successful and most common FHA disparate impact claims. *Id.* Housing barriers are the result of municipal organizations, and are responsible for housing decisions including zoning, planning and adjustments, promulgating or enforcing rules, and regulations that cause discriminatory effects. *See id.* at 361, 399–400 (explaining that housing barriers can discriminate by limiting availability of housing for minority groups, segregating minority groups to certain areas, or denying housing and freedom of movement). This subset does not include disability accommodations because of their unique requirements under the FHA. *See id.* at 400 n.233. In fact, the first FHA disparate impact case to reach an appellate court reviewed a challenged housing barrier. *See* United States v. City of Black Jack, 508 F.2d 1179, 1179 (8th Cir. 1974) (reviewing a challenge to a restrictive multi-family home ordinance). In 1974, in *United States v. City of Black Jack*, as in typical housing barrier actions, the defendant, the City of Black Jack Zoning Commission, enacted an ordinance that prevented the development of multi-family homes and made the prior multi-family homes nonconforming uses. *Id.* at 1183; *see In re* Coleman Highlands, 777 S.W.2d 621, 624 (Mo. Ct. App. 1989) (defining nonconforming uses as uses that were legal before the zoning ordinance and that continue to be legal after the ordinance). Although the composition of the city was 99% white, the areas surrounding the city were racially and ethnically mixed. *City of Black Jack*, 508 F.2d at 1183. For example, two miles outside the defendant's school district, 100% of the students in the Kinloch School District were Black. *Id.* The percentage of Black people in the City of St. Louis was 40.9% in 1970, just thirteen miles from the defendant. *Id.*; Driving Directions from Black Jack, MO to St. Louis, MO, GOOGLE MAPS, https://www.google.com/maps/dir/Black+Jack,+MO/St.+Louis,+MO/@38.7100442 [https://perma.cc/ZH9U-8E7A]. The U.S. Court of Appeals for the Eighth Circuit held that the plaintiff, the United States suing on behalf of citizens denied housing based on their race, successfully alleged disparate impact because the defendant failed to proffer a reasonable justification for the zoning ordinance. *City of Black Jack*, 508 F.2d at 1188. As a result, the court issued a permanent injunction. *Id.*

[183] *See* Seicshnaydre*, supra* note 154, app. A. For example, the most recent positive outcome for housing barriers was almost forty-two years after *City of Black Jack*. *See* Ave. 6E Invs., LLC v. City of Yuma, 818 F.3d 493, 513 (9th Cir. 2016) (holding in favor of the plaintiff on a denied re-zoning request). In response to the outcry of neighbors in opposition to a proposed affordable Hispanic-targeted neighborhood development, the plaintiffs in *Avenue 6E Investments, LLC v. City of Yuma*,

instance, in 2017, in *City of Los Angeles v. Wells Fargo & Co.*, on nearly identical facts to *City of Philadelphia v. Wells Fargo & Co.*, the U.S. Court of Appeals for the Ninth Circuit affirmed the lower court's decision granting summary judgment for the defendants, Wells Fargo & Co. and affiliated entities, holding that the plaintiff, the City of Los Angeles, failed to prove discriminatory lending on a theory of disparate impact.[184] In its original complaint, the plaintiff alleged that five policies caused discriminatory effects against minority borrowers.[185] The plaintiff used statistical analyses to show that Black indi-

real estate developers, alleged that the defendant, the Yuma City Council, wrongfully denied the rezoning request required for construction. *Id.* at 508. Residents of the abutting neighborhood used "not-in-my-backyard" (commonly referred to as "NIMBY") arguments to oppose the development. *Id.* at 498, 508. In 2016, the U.S. Court of Appeals for the Ninth Circuit held that the plaintiffs could bring a disparate impact claim and reversed and remanded the issue to the U.S. District Court for the District of Arizona. *Id.* at 513. Thus, including these cases, there have been a total of twenty-nine Viable Appellate Cases for housing barriers, ten of which have been successful, approximately 34.5% of the total number of cases. *See* Seicshnaydre*, supra* note 154, app. B (listing the housing barrier cases by type and denoting those that had positive outcomes); *infra* Appendix. Between December 27, 1974, and February 15, 2013, there were nineteen Viable Appellate Cases, eight of which, or 42.1%, had positive outcomes. *See infra* Appendix. (denoting eight successful cases out of the nineteen Viable Appellate Cases). Thus, during that period, there was an average of 0.5 housing barrier cases per year. *See id.* (listing nineteen cases between 1974 and 2013). Since February 15, 2013, there have been an additional ten housing barrier cases, nearly tripling the number of actions, bringing it to an average of 1.4 cases per year. *See infra* Appendix. (listing ten cases between the aforementioned timeframe). The success rate since the promulgation of the final HUD rule, however, has dropped to 20%, with only two appeals resulting in positive outcomes. *See infra* Appendix (marking only seven successful cases).

[184] *See* City of Los Angeles v. Wells Fargo & Co., 691 F. App'x 453, 454–55 (9th Cir. 2017) (holding that the plaintiff failed to prove disparate impact). In 2017, in *City of Los Angeles v. Wells Fargo & Co.*, the plaintiff, the City of Los Angeles, put forward allegations of both disparate impact and treatment. *Id.* at 454. The U.S. Court of Appels for the Ninth Circuit held that the plaintiff did not demonstrate a robust causal link between the policies and discriminatory effects, and it therefore affirmed the lower court's grant of summary judgement. *Id.* at 455.

[185] *See* Complaint for Violation of the Federal Fair Housing Act at 34–35, 40, City of Los Angeles v. Wells Fargo & Co., C.A. No. 13-cv-09007, 2015 WL 4398858 (C.D. Cal. July 17, 2015), *aff'd*, 691 F. App'x 453 (9th Cir. 2017) (identifying at least five policies or practices). The plaintiff used witness testimony, including company employees, to prove that the discriminatory policies were in place at the time. *Id.* at 40. First, the compensation structure encouraged subprime lending. *Id.* at 34. For example, brokers could receive $1,500 difference in compensation for originating a $300,000 subprime loan rather than a $300,000 prime loan. *Id.* at 20. The defendants, Wells Fargo & Co. and affiliates, communicated the different compensation rates to brokers every day via email and online. *Id.* at 24. This structure was a companywide policy. *Id.* at 39. Second, the defendants marketed subprime loans to minority communities. *See id.* at 35, 40 (referencing the promotional policies in the disparate impact portion of the complaint, and elaborating on the policies in the disparate treatment portion of the complaint). For example, one employee noted that the defendants almost exclusively marketed subprime mortgages to churches with a predominantly Black congregation. *Id.* at 42. Third, the brokers had ample discretion to qualify borrowers for subprime loans when they were eligible for prime loans. *See id.* at 34. In case of any doubt as to the discretion of the loan officers, the defendants ratified all the discretionarily priced loans. *Id.* at 26. For example, one employee noted that some loan officers' structuring decisions were largely arbitrary and merely intended to drive up costs. *See id.* at 43–44 (demonstrating that one employee received up to 50% commission on referrals to a subprime division). Fourth, nothing required these brokers to justify their decisions to qualify borrowers for the Alt-A loans. *Id.* at 34–35. Fifth, the defendants failed to monitor the discriminatory effects these dis-

viduals were more than eight times as likely, and Latinx individuals were more than four times as likely, to receive more expensive loans than similarly situated white individuals.[186] As for causation, the plaintiff alleged that high-ranking officers had concrete knowledge that these policies resulted in discriminatory effects.[187]

The Ninth Circuit only analyzed the robust causation requirement, and it largely ignored the statistical disparities.[188] Consequently, the court only identified three of the policies of interest: (1) compensation incentives for discrimination, (2) minority targeted marketing, and (3) a lack of oversight.[189] Ultimately, the court stated that the plaintiff failed to show robust causation between the policies and the discriminatory effects.[190] Thus, the court affirmed summary judgment in favor of the defendants.[191]

III. Implications of the Statutory Language and the Effect on Typical Disparate Impact Claims

Although the result of the final rule may be speculative, an analysis of the statute will suggest that the housing market, including borrowers, may feel substantial effects.[192] Section A of this Part analyzes how the proposed rule is making it impracticably harder to prove disparate impact, looking towards lending discrimination as an example.[193] Section B suggests an alternative frame-

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cretionary practices had on minority borrowers. *Id.* at 35. Even though monitoring was scarce, there was enough oversight that the defendants should have known about the discriminatory practices. *See id.* at 22 (noting that even with the knowledge of discrimination, the defendants did not remedy the practices).

[186] Plaintiff-Appellant's Opening Brief at 28, *City of Los Angeles*, 691 F. App'x 453 (C.A. No. 15-56157). Ian Ayres, a professor of Yale Law and Business Schools and former mortgage and lending economist with the U.S. Department of Justice, analyzed the discovery data on lending from Wells Fargo. *Id.* at 20, 22. He concluded that the discriminatory practices adversely affected minority-borrowers. *See id.* at 22, 28 (concluding that the minority borrowers were significantly more likely to receive FHA and high-cost loans).

[187] *See* Complaint for Violation of the Federal Fair Housing Act, *supra* note 185, at 38 (identifying at least five policies or practices that were discriminatory in effect). For example, one communication between senior and executive vice presidents discussed the different tactics for originating subprime loans, even when borrowers qualified for prime loans. *Id.* at 35. None of the officers took action to remedy the situation. *Id.*

[188] *City of Los Angeles,* 691 F. App'x at 454–55.

[189] *Id.* The Ninth Circuit did not mention the policies of discretionary pricing or lack of required justification for pricing. *See id.* (listing three policies).

[190] *Id.*

[191] *Id.*

[192] *See* HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42,854, 42,862–42,863 (Aug. 19, 2019) (codified as amended at 24 C.F.R. pt. 100) (proposing the new disparate impact rule).

[193] *See infra* notes 195–224 and accompanying text.

work for pleading, defending, and analyzing Fair Housing Act disparate impact claims that balances the interests of plaintiffs, defendants, and the public alike.[194]

A. Effects of the New Disparate Impact Rule

At a minimum, the new disparate impact rule is not intended to simplify pleading and review of FHA claims.[195] At the first stage—the pleading stage—instead of establishing a prima facie case by pointing to a policy, procedure, or practice that caused a discriminatory effect, a plaintiff instead must state facts that plausibly meet an exacting five-part pleading standard.[196] The first two elements of the pleading may be too rigorous for virtually any plaintiff to meet.[197]

The first pleading element requires the plaintiff to challenge a policy or practice as "arbitrary, artificial, and unnecessary" but framed as a legitimate interest.[198] The HUD readily admits that plaintiffs will not know what interest

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[194] *See infra* notes 225–242 and accompanying text.

[195] *Compare* 24 C.F.R. § 100.500(b) (2021) (demonstrating that the new rule is more exacting, longer, and contains undefined terms), *with* 24 C.F.R. § 100.500 (2013).

[196] 24 C.F.R. § 100.500 (2021). Although the final rule does not state the plausible allegation requirement that the proposed rule did, it is likely that plaintiffs will have to meet this precedential standard. *Compare id.* (requiring plaintiffs to plead facts that *sufficiently* allege the five elements), *with* HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. at 42,862 (requiring plaintiffs to *plausibly* allege facts to plead a claim for disparate impact). In the lending context, the ability for a plaintiff to plausibly allege facts may be difficult prior to discovery. *See* HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. at 42,858 (noting, for example, that at the early stages of litigation, a plaintiff might not even know what policy a defendant might proffer in response to disparate impact allegations). A plaintiff must meet the pleading requirements in the Federal Rules of Civil Procedure (FRCP) to move beyond the pleading stage and overcome a motion to dismiss. FED. R. CIV. P. 8, 12(b)(6). The FRCP states that a plaintiff must plead a case by making a short and plain statement of the claim and remedy. *Id.* Generally, plaintiffs must put forth enough facts to suggest their allegations are plausible, not merely conceivable or speculative. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554–55 (2007). Importantly, a complaint must assert facts and not simply conclusory statements. *Id.* at 555. From these facts, a court should be able to make a reasonable inference of liability. Ashcroft v. Iqbal, 556 U.S. 662, 667 (2009). This deviation from general "notice pleading," only requiring plaintiffs to give defendants notice of litigation, purposefully increased the requirements for plaintiffs to reach discovery. Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 42–43 (2010). Some critics, however, argue that the new pleading requirements unfairly burden plaintiffs. *Id.* at 43. The HUD rule will further exacerbate the requirements a plaintiff must meet to plausibly allege a claim for disparate impact, especially because it may be particularly difficult to plausibly allege a claim where there may be no facts supporting overt bigotry. *Compare* 24 C.F.R. § 100.500 (2021) (outlining a five-part pleading requirement with a higher level of specificity in the factual allegations), *with* 24 C.F.R. § 100.500 (2013) (outlining only three requirements for pleading).

[197] *See infra* notes 198–214 and accompanying text (noting the difficulty in overcoming the "arbitrary, artificial, and unnecessary" and the "robust causal link" standards).

[198] 24 C.F.R. § 100.500 (2021). The HUD recognizes that a plaintiff will virtually be unable to bring a disparate impact claim against a one-time decision unless that decision is equivalent to a policy or practice. HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed.

or objective a defendant might proffer as justification.[199] Thus, the plaintiff will theoretically be unable to plead specific facts satisfying this element.[200] In that situation, the HUD suggests that plaintiffs plausibly allege that the policy or practice simply does not advance even a single legitimate interest or objective.[201] If a plaintiff somehow meets this burden, a defendant can simply rebut this claim by identifying an alternative legitimate interest.[202] In the preamble for the 2013 FHA disparate impact rule, the HUD expressly sought to ensure that neither party was "saddled" with this impossible burden of proving a negative.[203] The 2020 rule expressly places this burden on the plaintiff, and the proposal cited the wrong holding of a case from the U.S. Court of Appeals for the Eighth Circuit as justification for doing so.[204]

Even in the seemingly rare case of an identifiable policy or interest, the HUD does not provide guidance in the new rule as to what would render such a policy as "artificial, arbitrary, and unnecessary."[205] Although the U.S. Supreme Court in 2015 referred to the "arbitrary, artificial, and unnecessary" language in dicta in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, the Court did not define what this standard entails, or even suggest that it is an element for the pleading.[206] Particularly in the

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Reg. at 42,858. The HUD rule provides examples such as a zoning decision or a decision to construct a building, which are out of reach from disparate impact liability. *Id.*

[199] HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. at 42,858.

[200] *See id.* (stating that a plaintiff will not be able to plead facts in a situation where there is no identifiable objective).

[201] *Id.* Otherwise, if there is an identifiable legitimate objective, the plaintiff will have to plausibly allege facts showing that the objective is "arbitrary, artificial, and unnecessary." *Id.*

[202] *Id.* at 42,859–42,860.

[203] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. 70,921, 70,924 (Nov. 16, 2011) (codified at 24 C.F.R. pt. 100) (quoting Hisps. United of DuPage Cnty. v. Vill. of Addison, 988 F. Supp. 1130, 1162 (N.D. Ill. 1997)). For this explicit reason, the 2013 rule places the burden on the defendant to prove the policy's necessary relationship to the stated interest. *Id.*

[204] *See* HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. 60,288, 60,312 (Sept. 24, 2020) (codified at 24 C.F.R. pt. 100); HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. at 42,862 (placing the burden on the plaintiff to plausibly allege facts that a policy is "artificial, arbitrary, and unnecessary"). The HUD cites *Ellis v. City of Minneapolis* as a justification. HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. at 60,312 (citing Ellis v. City of Minneapolis, 860 F.3d 1106, 1112–14 (8th Cir. 2017)). In 2017, in *Ellis v. City of Minneapolis*, the U.S. Court of Appeals for the Eighth Circuit suggested that a plaintiff must allege facts regarding the arbitrary nature of a policy. 860 F.32d at 1112. Still, the court ultimately concluded that the bare minimum requirement under *Inclusive Communities* is for a plaintiff to simply "point" to an arbitrary policy. *Id.* at 1114.

[205] *See* HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. at 42,862 (neglecting to elaborate on what this pleading requirement entails).

[206] *See* 135 S. Ct. 2507, 2522 (2015) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)) (stating that disparate impact has been limited to avoid interplay with constitutional dilemmas). In 1971, in *Griggs v. Duke Power Co.*, the U.S. Supreme Court made it clear that the cornerstone of an "artificial, arbitrary, and unnecessary" practice is job performance. 401 U.S. at 431. In

lending context, it is not difficult to imagine that a claim will fall short with regards to the first element because, as the Court conceded, there are "multiple factors that go into investment decisions," which are often made behind the scenes and not explicitly expressed.[207] This makes it fairly easy for a defendant to rebut the plaintiff's allegation prior to discovery.[208]

For similar reasons, the third element—causal link—is likely an insurmountable standard for a plaintiff.[209] The HUD expects a plaintiff to allege a "robust causal link," showing that the policy or practice was the direct cause of the discriminatory effects.[210] Because this element is required at the pleading stage, a plaintiff will not be able to conduct discovery to determine if there is a causal link, let alone this undefined and ostensibly enhanced standard of "robust."[211] Disparate impact cases commonly use evidence of statistical disparities related to a policy or procedure.[212] Again, given that there are a variety of reasons that could contribute to a lending decision, it may be difficult to discern whether there are confounding variables or a combination of complex

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2015, in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, however, the U.S. Supreme Court did not indicate what the cornerstone would be in the housing context, beyond necessity. *See* 135 S. Ct. at 2523 (failing to articulate a definite standard to identify a practice). Furthermore, the HUD explicitly declined to define or give examples of an "arbitrary, artificial, and unnecessary" practice. HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. at 60,310.

[207] *See Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2523–24 (discussing the complex nature of investment decisions).

[208] *See* 24 C.F.R. § 100.500(b)(3) (2021) (outlining the many ways in which a defendant can rebut a plaintiff's allegations).

[209] *See id.* (requiring a plaintiff to show robust causality, but not explaining what this entails).

[210] *Id.* The only guidance the HUD provides for the causal link element is that plaintiffs must use an appropriate comparison to show that the policy is the actual cause of the disparity. HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. at 42,858, 42,862. In the HUD's explanation, it provides no guidance as to what an appropriate comparison might entail. *See id.* (stating only that statistical disparities are not enough to prove disparate impact).

[211] HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. at 42,858, 42,862 (requiring that a plaintiff allege facts supporting robust causality at the pleading stage); *see also* Miller, *supra* note 196, at 45 (discussing the issue of information asymmetry, where a plaintiff who may have a legitimate claim has to plead with factual sufficiency before conducting any discovery). Heightening pleading standards beyond what plaintiffs could possibly know restricts their access to civil remedies by disincentivizing plaintiffs from bringing lending discrimination claims. *See* Miller, *supra* note 196, at 45 (arguing that heightened pleading standards, like those required by *Bell Atlantic Co. v. Twombly* and *Ashcroft v. Iqbal* can deny access to relief).

[212] *See, e.g.*, City of Philadelphia v. Wells Fargo & Co., C.A. No. 17-cv-02203, 2018 WL 424451, at *1, *4 n.7 (E.D. Pa. Jan. 16, 2018) (discussing the plaintiff's statistical evidence in support of its claim).

variables hiding robust causation.[213] The Supreme Court did not elaborate on the meaning of robust causality as compared to previous standards.[214]

The method by which the HUD allows a defendant to rebut pleadings poses significant issues as well.[215] Under the new rule, defendants can demonstrate that practices predicting outcomes, even if they have a disparate impact, are acceptable so long as the outcome is a legitimate interest.[216] The HUD gives the example of predictive models, including automated underwriting, that accurately calculates risk.[217] The reality of modern lending is that, at least since the 1980s, creditors are no longer manually underwriting loans to determine the creditworthiness of an applicant.[218] Instead, underwriting is generally

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[213] *See* Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2524 (2015) (discussing the complexity of investment decisions), *remand to* 795 F.3d 509 (5th Cir. 2015), *remand to* C.A. No. 08-CV-00546, 2016 WL 4494322 (N.D. Tex. Aug. 26, 2016).

[214] *See id.* (refraining from elaborating on the potential new requirements of a "robust causality requirement"). The HUD slightly explained that the "robust causal link" means the "direct cause," but refused to define it any further. HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. 60,288, 60,312 (Sept. 24, 2020) (codified at 24 C.F.R. pt. 100).

[215] *See, e.g.*, 24 C.F.R. § 100.500(d)(2)(i) (allowing significant leeway for a defendant to rebut at the pleading stage).

[216] *Id.* Unlike the proposed rule, the final rule does not explicitly mention algorithms. HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. at 60,290. The HUD notes, however, that the predictive assessment defense is intended to replace the algorithm defense. *Id.* The concern for including an explicit algorithm defense is that it would be too expansive and that technology law is still developing. *Id.* Still, it is difficult to see how replacing "algorithms" with "prediction model[s]" will narrow the defense. *See id.* (noting that the defense will still allow defendants to justify their predictive models).

[217] HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. at 60,290. In the HUD's example, a plaintiff alleged that members of a protected class were rejected for loans more than non-protected individuals. *Id.* A defendant could then use the predictive model to show that protected individuals who are approved for loans default at the same rate as non-protected individuals and avoid liability. *Id.* This hypothetical, though, requires the assumption that to impose liability, the predictive model used to issue loans provides a disproportionately restrictive standard that causes the approved protected members to default at lower rates. *Id.* But the purpose of disparate impact is to cover facially neutral choices that are unrelated to the legitimate interest. CARPENTER, *supra* note 20, at 5. So, for example, it is not difficult to imagine a situation where a lender uses criteria like neighborhood to determine whether to issue a loan. *But cf.* HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. at 60,290 (giving a hypothetical of an overly restrictive predictive model that would cause less defaults among approved members of a protected class). This decision would narrow the pool of eligible loan applicants, but it would not necessarily mean that eligible applicants are less likely to default. *Contra id.* (arguing that if a predictive model is discriminatory, then approved protected individuals should be defaulting at lower rates).

[218] *See* O'NEIL, *supra* note 18, at 141–42 (describing the methods of underwriting prior to automation); *see also* ENGEL & MCCOY, *supra* note 18, at 16–17 (describing the transition from cautionary underwriting to automated underwriting in the 1980s). For manual underwriting, lenders would frequently consider an applicant's church-going habits, familial engagement with the law, employer references, race, and gender. O'NEIL, *supra* note 18, at 141. Additionally, instead of using complicated models, lenders would use risk-averse rules, such as requiring low debt to income ratios, higher down payments, and significant savings. ENGEL & MCCOY, *supra* note 18, at 16. With the advent of mainstream computers, it became easier to use more complicated statistical analyses to determine the risk of lending to individual borrowers through automated underwriting. *Id.* at 16–17.

automated, and consequently, overt discrimination is less easily identifiable.[219] Unfortunately, it can be common for data scientists to insert their inherent biases into the predictive tools, creating a prime situation for disparate impact liability to provide relief for affected borrowers.[220] The immense amount of data that banks have on borrowers are calculated behind closed doors.[221] These closed-door calculations materially affect credit-worthiness.[222] The ability for a defendant to simply argue that a predictive tool is achieving a valid interest might make this claim extremely difficult to overcome.[223] Ultimately, even

[219] ENGEL & MCCOY, *supra* note 18, at 16–17.

[220] O'NEIL, *supra* note 18, at 143, 145 (noting that e-scores, which are unregulated models that predict creditworthiness, tend to be based on stereotypes rather than focused on the individual borrower). As an analog, consider St. George School of Medicine in the United Kingdom. *Id.* at 115–17. Around the same time that banks started using automated underwriting, St. George wanted to use similar technology to cut time and costs when reviewing applicant materials. *Id.* at 115. St. George's computer system replicated prior year's procedures of manual review. *Id.* at 116. Human reviewers typically, however, rejected applicants with grammatical typos, which resulted in higher rejection of foreign applicants. *Id.* at 117. This criterion is seemingly facially neutral. *See id.* (rejecting applications based on writing skills). But, by copying the manual review procedures, the system interpreted the review procedures to simply reject foreign applicants. *Id.* Additionally, manual reviewers rejected female applicants because of their prospect of motherhood. *Id.* The computerized system followed suit. *Id.* Ultimately, in 1988, the U.K. government found the school liable for discrimination. *Id.* at 117.

[221] *Id.* at 143.

[222] *Id.* Cathy O'Neil, professional data scientist, Harvard mathematics PhD, and former professor, describes the gravity of how models and algorithms affect people's daily lives:

> Today we're added up in every conceivable way as statisticians and mathematicians patch together a mishmash of data, from our zip codes and Internet surfing patterns to our recent purchases. Many of their pseudoscientific models attempt to predict our creditworthiness, giving each of us so-called e-scores. These numbers, which we rarely see, open doors for some of us, while slamming them in the face of others.

Id. For example, Capital One can often access internet search history and the location of potential borrowers on its website. *Id.* at 144. A person searching for a high-end car located in an affluent neighborhood is likely to be targeted with a different credit card option than someone searching for a used low-end car in a poorer neighborhood. *Id.* at 143–44.

[223] *See* 24 C.F.R. § 100.500(d)(2)(i) (2021) (allowing defendants to use a predictive model defense); HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42,854, 42,862–42,863 (Aug. 19, 2019) (codified as amended at 24 C.F.R. pt. 100) (proposing that defendants can attack assumptions about models and algorithms). The HUD justified these sweeping defenses of the algorithm by asserting that automated underwriting is a tool for assessing and accessing credit. HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. at 42,859 (stating that businesses have legitimate profit-seeking objectives). Instead of asserting a claim against a lender, the HUD suggests plaintiffs seek remedies from the creator of the model. *See id.* at 42,859–42,860 (conceding that the affirmative defenses allowing for models and algorithms are issues that require more comments and analyses). Even if a plaintiff does somehow successfully plead a disparate impact allegation, the available remedies are likely limited to equitable relief. 24 C.F.R. § 100.500(f).

compared to other disparate impact standards, the proposed standard is drastically unfavorable towards plaintiffs.[224]

B. The HUD Rule Cannot Coincide with the Inclusive Communities *Decision: Factors Necessary for an Alternative Approach*

These are just a few ways that the HUD rule makes it more difficult to prove certain types of discrimination through discriminatory effects, and the heightened standards may halt some of the newfound access to relief for plaintiffs.[225] Typically, with respect to housing discrimination allegations, plaintiffs will argue both disparate treatment and disparate impact in the alternative.[226] In the absence of the ability to point to overt discrimination, disparate impact claims may allow a plaintiff to move forward in litigation, engage in discovery, and uncover concrete evidence of discrimination.[227] Part II of this Note analyzed the statistics from the ninety-two FHA impact claims that reached an appellate court, where the court made a substantive decision on the Viable Appellate Cases.[228] The Viable Appellate Cases, however, do not account for those cases where a plaintiff was allowed to advance theories in litigation and expose evidence of discriminatory animus.[229] Further, it may be the situation that many of the robust disparate impact cases settle at the trial level.[230] It is

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[224] *See* 42 U.S.C. § 2000e-2(k) (articulating disparate impact standards for Title VII employment discrimination); 29 C.F.R. § 1625.7 (2020) (articulating disparate impact standards for employment discrimination under the ADEA). Similar to the 2013 FHA disparate impact rule, Congress deployed a three-part burden-shifting test for Title VII disparate impact claims. *See* 42 U.S.C. § 2000e-2(k). First, the complaining party must show that a practice caused disparate impact based on a protected class. *Id.* Then the defendant must either demonstrate there is no disparate impact or that the practice is related to the job. *Id.* Finally, the plaintiff may show that there is a less restrictive alternative employment practice. *Id.* On the other hand, the Equal Employment Opportunity Commission provides for a much more favorable standard for plaintiffs to prove disparate impact for age discrimination. *See* 29 C.F.R. § 1625.7 (outlining the disparate impact based on age standard). The regulation begins with the presumption that any employment practice that adversely affects older employees is discrimination, but requires a plaintiff to prove that a policy caused the discriminatory effects. *Id.* § 1625.7(c). An employer has the exacting burden to present a "reasonable factor other than age" furthering a legitimate business purpose. *Id.* § 1625.7(d).

[225] *See supra* notes 154–163 and accompanying text (explaining that disparate impact cases are rarely brought and successful at the appellate level, but noting that a slight uptick in some cases has been seen).

[226] *See, e.g.*, Complaint, *supra* note 87, at 5–12 (arguing both theories of disparate treatment and disparate impact). Plaintiffs might also add underdeveloped disparate impact claims as a form of "insurance" in the event they cannot prove disparate treatment. Seicshnaydre*, supra* note 154, at 393.

[227] *See id*. at 393 (arguing that plaintiffs will plead both disparate treatment and disparate impact in the alternative).

[228] *See id.* at 392–93; *see also infra* Appendix (analyzing only disparate impact cases and no other claims).

[229] *See* Seicshnaydre*, supra* note 154, at 393; *see also infra* Appendix.

[230] *See* Seicshnaydre*, supra* note 154, at 390 n.209, 392 (clarifying that settlement data is likely inaccessible and cases that settle may be the strongest).

also important to keep in mind that FHA disparate impact cases are rare, and will seldom—if ever—be granted class action status.[231]

As discussed, the final rule is an unacceptable recitation of the Supreme Court's 2015 decision in *Inclusive Communities*.[232] Still, the 2013 rule can no longer stand in light of the Court's holding.[233] The following proposed regulation balances the elements that must be present in an FHA disparate impact regulation, under both the FHA and *Inclusive Communities*, and several of the guiding housing policies outlined in this Note.[234]

At the pleading stage, instead of sufficiently pleading facts, a plaintiff must point to a specific policy or practice causing discriminatory effects towards a protected class.[235] Requiring a plaintiff to simply point to a policy reduces the burden of proving a negative.[236] Second, instead of an amorphous

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[231] *Compare* Adkins v. Morgan Stanley, 656 F. App'x 555, 557 (2d Cir. 2016), *and infra* Appendix (demonstrating that the only FHA disparate impact class action to make it to the appellate court since promulgation of the 2013 rule failed class certification), *with* CORNERSTONE RSCH., *supra* note 163, at 5 (demonstrating that plaintiffs in total filed 428 securities class action lawsuits in 2019 alone). The U.S. Court of Appeals for the Second Circuit's 2016 holding in *Adkins v. Morgan Stanley* demonstrates why it is nearly impossible for plaintiffs to become certified as a class, at least in the lending context, because of the typicality, predominance, and superiority requirements in the FRCP. *See* FED. R. CIV. P. 23 (requiring typicality, predominance, and superiority for class certification); 656 F. App'x at 556–57 (affirming the district court ruling against predominance because there are too many factors affecting individual loans, which potentially caused different features).

[232] *See supra* notes 195–224 and accompanying text (describing how the proposed rule does not reflect the Supreme Court's analysis in *Inclusive Communities* and creates unnecessary burdens for the plaintiff); *see also* Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2522–24 (2015) (elaborating on FHA disparate impact pleading requirements), *remand to* 795 F.3d 509 (5th Cir. 2015), *remand to* C.A. No. 08-CV-00546, 2016 WL 4494322 (N.D. Tex. Aug. 26, 2016).

[233] *See Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2522–24 (stating limitations on the 2013 rule and indicating some new requirements).

[234] *See* 42 U.S.C § 3604 (using language allowing for disparate impact claims); *see also Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2522–24 (explaining some of the key limitations on disparate impact claims). The primary purpose of disparate impact liability is to eliminate the "artificial, arbitrary, and unnecessary barriers," without ignoring legitimate interests. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2522–24 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)). To achieve this purpose, disparate impact liability should, first, be limited to allow leeway for valid interests served by the policy in question. *Id.* Second, it should also permit defendants to have latitude to consider relevant market factors. *Id.* Finally, statistical disparities absent a specific policy or procedure with "robust causality" to discriminatory effects will not support a claim for disparate impact under the FHA. *Id.*

[235] *See Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2522–24 (stating that a plaintiff must "point" to a policy that causes discriminatory effects). The Court does not, however, require a sufficiency standard for allegations merely pointing to a policy. *See id.* (stating that a "disparate-impact claim relying on statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity").

[236] *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. 70,921, 70,924 (Nov. 16, 2011) (codified at 24 C.F.R. pt. 100) (admonishing a burden that would require a party to prove a negative or facts that the plaintiff could not possibly know). For example, a requirement that a plaintiff prove that a policy does not advance any legitimate interests is proving a

"robust causality," the causation requirement should mandate either alleging particular facts or producing statistics demonstrating a link between the policy and the disparate impact.[237] For example, allowing lenders to discretionarily deny loan modifications, which statistically leads to a higher probability of foreclosure on minority homes, identifies a policy and establishes requisite causation.[238]

If a plaintiff can meet this burden, instead of allowing for sweeping defenses regarding predictive tools, the defendant still has an opportunity to rebut the plaintiff's allegations by identifying a valid interest the policy achieves.[239] A valid interest should be a good-faith, informed, and non-discriminatory interest related to the defendant's particular industry.[240] For example, as the Court suggests in *Inclusive Communities*, a zoning board may have legitimate interests in costs, traffic patterns, and historical value.[241] Finally, as in other disparate impact contexts, a plaintiff should have the last opportunity to prove that the defendant can achieve this valid interest in a less discriminatory manner without imposing material costs on the defendant.[242]

CONCLUSION

Housing discrimination is an all-pervasive leviathan that has manifested in both the public and private sectors. Where there was once a regulatory gap between overt bigotry and facially neutral policies, disparate impact claims have opened a path for plaintiffs to seek redress. The U.S. circuit courts recognized the need for this avenue of relief and, in 2013, the U.S. Department of Housing and Urban Development (HUD) facilitated and standardized the re-

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negative. *See id.* The 2013 rule avoided this by shifting burdens. *Id.* The defendant could identify a valid interest, and the plaintiff could identify the least restrictive method for achieving that interest. *Id.*

[237] *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2522–24.

[238] *See* Cnty. of Cook v. Wells Fargo & Co., 314 F. Supp. 3d 975, 993–94, 999 (N.D. Ill. 2018) (holding that the plaintiff successfully pointed to a policy that led to lenders' issuing disproportionate amounts of subprime loans to minority applicants); *see also supra* note 121 and accompanying text (describing the reduced causality requirement, but noting it still remains consistent with precedent).

[239] *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2522–23. Although the Court does say the purpose of disparate impact claims is to eliminate "artificial, arbitrary, and unnecessary" policies, the Court places the burden of necessity on the defendant. *Id.* (quoting *Griggs*, 401 U.S. at 431).

[240] *See id.* (describing limited examples of valid interests). The HUD declines to elaborate on what a valid interest might be. HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. 60,288, 60,312 (Sept. 24, 2020) (codified at 24 C.F.R. pt. 100). Instead, the HUD states what a valid interest is not. *Id.* A valid interest is not "discriminatory, non-substantial, or otherwise illegitimate." *Id.*

[241] *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2522–23.

[242] *See id.* (comparing the burden-shifting framework in FHA claims to Title VII claims). The Court stated that the valid interest portion of the burden-shifting framework for FHA disparate impact claims should be comparable to the business interest portion of the burden-shifting framework for Title VII disparate impact claims. *Id.* Title VII allows a plaintiff to rebut the business interest with a less restrictive policy. 42 U.S.C. § 2000e-2(k).

quirements for disparate impact liability. Claimants have begun to gain access to this narrow type of recourse. Still, the frequency of disparate impact housing cases is low and success rates even lower.

In 2019, in response to the U.S. Supreme Court's 2015 decision in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc*., the HUD proposed a new rule. This final rule simultaneously heightens the standard required for plaintiffs to bring disparate impact housing allegations, makes it easier for defendants to quickly remove cases from court, and removes monetary consequences for discriminatory practices. Although the HUD grounded its justification in quasi-legal and policy arguments, the new rule is likely unsubstantiated and unnecessary to advance the relevant interests.

Instead, the HUD should adopt a new regulation that balances plaintiffs' need for a legal avenue to discover potential disparate treatment, defendants' latitude to engage with the market, and the HUD's obligation to comport with Supreme Court precedent in *Inclusive Communities.* Such a rule might look like a hybrid of the three-part burden-shifting test, including some of the Supreme Court's concerns but allowing for more leeway to reach discovery.

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APPENDIX

2013–2019 Disparate Impact Viable Appellate Cases (cases marked with an "*" represent positive outcomes for plaintiffs)
Shcaw v. Habitat for Human. of Citrus Cnty., Inc., 938 F.3d 1259 (11th Cir. 2019)
Khan v. City of Minneapolis, 922 F.3d 872 (8th Cir. 2019)
Thomas v. S.F. Hous. Auth., 765 F. App'x 368 (9th Cir. 2019)
Inclusive Cmtys. Project, Inc. v. Lincoln Prop. Co., 920 F.3d 890 (5th Cir. 2019)
Oviedo Town Ctr. v. City of Oviedo, 759 F. App'x 828 (11th Cir. 2018)
* Fair Hous. Ctr. of Wash. v. Breier-Scheetz Props., LLC, 743 F. App'x 116 (9th Cir. 2018)
* Reyes v. Waples Mobile Home Park Ltd. P'ship, 903 F.3d 415 (4th Cir. 2018)
Binns v. City of Marietta, (Hous. Choice Voucher Program), 704 F. App'x 797 (11th Cir. 2017)
Ellis v. City of Minneapolis, 860 F.3d 1106 (8th Cir. 2017)
City of Los Angeles v. Bank of Am. Corp., 691 F. App'x 464 (9th Cir. 2017)
City of Los Angeles v. Wells Fargo & Co., 691 F. App'x 453 (9th Cir. 2017)
* City of Miami v. Bank of Am. Corp., 800 F.3d 1262 (11th Cir. 2017)
Scopellitti v. City of Tampa, 677 F. App'x 503 (11th Cir. 2017)
Edwards v. Gene Salter Props., 671 F. App'x 407 (8th Cir. 2016)
City of Joliet v. New West, L.P., 825 F.3d 827 (7th Cir. 2016)
Boykin v. Fenty, 650 F. App'x 29 (2d Cir. 2016)
Frederick v. Wells Fargo Home Mortg., 649 F. App'x 29 (2d Cir. 2016)
* Avenue 6E Invs., LLC v. City of Yuma, 818 F.3d 493 (9th Cir. 2016)
* Anderson Grp., LLC v. City of Saratoga Springs, 805 F.3d 34 (2d Cir. 2015)
* City of Miami v. Citigroup Inc., 801 F.3d 1268 (11th Cir. 2015)
* City of Miami v. Wells Fargo & Co., 801 F.3d 1258 (11th Cir. 2015)
Shahin v. PNC Bank, 625 F. App'x 68 (3d Cir. 2015)
Anderson v. City of Blue Ash, 798 F.3d 338 (6th Cir. 2015)
McCulloch v. Town of Milan, 559 F. App'x 96 (2d Cir. 2014)
Inclusive Cmtys. Project v. Tex. Dep't of Hous. & Cmty. Affs., 747 F.3d 275 (5th Cir. 2014)
City of Fort Lauderdale v. Scott, 551 F. App'x 972 (11th Cir. 2014)
Whitaker v. N.Y. Univ., 531 F. App'x 89 (2d Cir. 2013)
L&F Homes & Dev., L.L.C. v. City of Gulfport, 538 F. App'x 395 (5th Cir. 2013)