THE NEWSLETTER OF THE REAL PROPERTY & FINANCIAL SERVICES SECTION OF THE HAWAII STATE BAR ASSOCIATION

KA NU HOU

FROM THE CHAIR

September 2016

Aloha Section Members:

Welcome to the first issue of this year's Ka Nu Hou. Due to the continuous efforts of our Board members, Section members and other members of the Bar, along with others involved in Hawaii real property and financial services, the Real Property Financial Services Section has been able to continue its series of Brown Bag events and seminars.

On behalf of the Section, I would like to thank **Sarah Morihara, Nathan Fong, Bill Froelich, Brandon Bera**, and **Michael Hamasu** of Colliers International for their presentation "Is this the Peak?" on the real estate outlook for 2016. I would also like to thank **Iris Ikeda**, the Commissioner of the Financial Institutions Division, and **Gordon Ito**, Commissioner of the Hawaii Insurance Division, for their highly informative presentation on their respective divisions. In April we were fortunate to have **Ryan Wilson** of Cades Schutte give the Section a comprehensive overview of FIRPTA and HARPTA withholdings. In May, thanks to the hard work of **Cynthia Ching** and **Sharen Cordeiro** from Kamehameha Schools, and **John Love** from Cades Schutte, the Section hosted the well-attended seminar "Today's Commercial Real Estate Deals." We had a very interesting presentation from **Martin Hsia** from Cades Schutte on the "Top 10 Mistakes Hawaii Real Estate and Financing Attorneys Make." In July, **Andrea Ushijima, Lisa Ayabe** and **Nathan Okubo** from Cades Schutte and **Kimi Ide-Foster** from Chun Kerr, presented the 2016 Legislative Update. Last month the Section had a terrific presentation by **Maria Su** and **Tyler Kimura** from Spire Hawaii on "Building Your Case — How to Leverage Transactional and Litigation Support in Real Estate Deals."

Presentation materials and video links of the Brown Bag presentations can be found on the Section website:
http://hawaiirealpropertysection.com/

If you are interested in making a Brown Bag presentation to the Section, please contact me at RPFSS@HSBA.org with your suggestions.

Our featured author in this issue is **Derek Simon**, a 2016 graduate of the William S. Richardson School of Law.

"Save the Date"

September 23, 2016, 12:00 p.m. to 1:00 p.m., "Recent Developments in the Law of Small Unmanned Aircraft Systems (Drones): A Real Estate Lawyer's Perspective" presented by Imran Naeemullah from Chun Kerr. The presentation will be at the HSBA Conference Room, 1100 Alakea Street, Suite 1000. Attendance is limited to Section members and is free.

October 14, 2016, all day, the 2016 Bar Convention at the Hawaii Convention Center. The Section will be hosting several seminars on Planned Communities and Hawaii's Land Court.

November 18, 2016, 12:00 p.m. to 1:00 p.m., the 2016 Litigation Update with Greg Kugle and Mark M. Murakami, to be held in the HSBA Conference Room, 1100 Alakea Street, Suite 1000. Attendance is limited to Section members and is free. A big MAHALO to Greg and Mark for volunteering to put on this Brown Bag year after year!

December 16, 2016, 12:00 p.m. to 1:30 p.m., Annual Meeting of the RPFSS at the

Plaza Club. Our speaker will be Jesse Souki, Director of Planning, Permitting & Right of Way at the Honolulu Authority for Rapid Transportation.

It's been an exciting year serving as the 2016 Chair. All of the Brown Bags and Seminars put on by the Section would not be possible without the tremendous support of the Board members.

Aloha, Christina "Tina" N. Ohira

Third Time's a Harm?

When racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.
- Justice Potter Stewart

By

Derek Simon*

University of Hawai'i
William S. Richardson School of Law
Class of 2016

Submitted to
Dean Aviam Soifer
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* JD Candidate, 2016. The author would like to thank Dean Aviam Soifer and Professor David Callies for their advice and insight through this paper's drafting.

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Introduction

On January 21, 2015, the United States Supreme Court heard oral arguments in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project*[1] ("*Inclusive Communities Project*"). The question before the Court: the future of one of the most powerful modern civil rights weapons–whether "disparate-impact claims [are] cognizable under the Fair Housing Act ("FHA")."[2] While the FHA expressly prohibits intentional discrimination,[3] whether it prohibits

[1] 135 S. Ct. 46 (2014).

[2] Petition for Writ of Certiorari, *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*, No 13-1371, 2014 WL 1989121, at *I (U.S., filed May 13, 2014).

practices that are otherwise neutral, yet disproportionately affect one or more protected classes, has been the subject of much debate. The ability of plaintiffs to bring disparate impact[4] claims under the FHA has grown in significance as outright discrimination has given way to more subtle forms and as equal protection claims have become more difficult to bring.[5]

Inclusive Communities Project marks the third time since 2011 that the Court has granted certiorari on the question of disparate impact under the FHA; however, the previous two cases settled before the Court heard oral arguments.[6] When provided with similar opportunities prior to 2011, the Court avoided directly ruling upon the question.[7] During that time, however, eleven circuit courts of appeals have recognized disparate impact claims under the FHA,[8] although there is a split on the appropriate standard for the burden of proof for establishing liability.[9] Recently, the United States Department of Housing and Urban Development ("HUD"), to which Congress granted authority to administer and enforce the FHA, has promulgated regulations that expressly authorize disparate impact

[3] *See, e.g.*, 42 U.S.C. § 3604(a) (1988) (prohibiting refusal "to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."); *and* 42 U.S.C. § 3604(b) (prohibiting discrimination "against any person in the . . . sale or rental of a dwelling . . . because of race, color, religion, sex, familial status, or national origin.").

[4] Courts, administrative agencies, and scholars use "disparate impact" and "discriminatory effect" interchangeably. Consequently, both terms are occasionally used interchangeably throughout this paper.

[5] *See, e.g.*, *Washington v. Davis*, 426 U.S. 229, 250-52 (1976) (requiring plaintiffs bringing claims under the Equal Protection Clause to prove that the allegedly proscribed conduct was motivated by a discriminatory purpose).

[6] *See Magner v. Gallagher*, 132 S. Ct. 548 (2011), cert. dismissed, 132 S. Ct. 1306 (2012); Township of *Mount Holly, New Jersey v. Mount Holly Gardens Citizens in Action, Inc.*, 133 S. Ct. 2824 (2013), cert. dismissed 143 S. Ct. 636 (2013).

[7] *See, e.g., Town of Huntington, N.Y. v. Huntington Branch, NAACP*, 488 U.S. 15, 18 (1988) (avoiding the issue); *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188, 199-200 (2003) (same).

[8] *See Langlois v. Abington Housing Authority*, 207 F.3d 43, 49 (1st Cir. 2000); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934-35 (2nd Cir. 1988); *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 146-48 (3rd Cir. 1977); *Betsey v. Turtle Creek Associates*, 736 F.2d 983, 986 (4th Cir. 1984); *Hanson v. Veterans Administration*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Arthur v. Toledo, Ohio*, 782 F.2d 565, 574-75 (6th Cir. 1986); *Metropolitan Housing Development Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977); *United State v. City of Black Jack*, 508 F.2d 1179, 1184-85 (8th Cir. 1974); *Pfaff v. HUD*, 88 F.3d 739, 745-46 (9th Cir. 1988); *Mountain Side Mobile Estates Partnership v. HUD*, 56 F.3d 1243, 1250-51 (10th Cir. 1995); *Jackson v. Okaloosa County*, 21 F.3d 1531, 1543 (11th Cir. 2006).

[9] *See infra* Parts IV(a)(1)-(3).

claims and set a uniform standard for establishing liability.[10] Indeed, in the nearly 45 years since the FHA was enacted, courts and federal agencies have been virtually unanimous in recognizing that disparate impact claims are cognizable under the FHA. The Supreme Court will soon have the final say.

A holding that disparate impact claims are cognizable under the FHA is, however, only half the battle. Although the Court declined to take up the second question in Texas Department of Housing and Community Affairs's ("TDHCA") petition, "[i]f disparate-impact claims are cognizable . . . what are the standards and burdens of proof that should apply,"[11] it will almost certainly settle the circuit split over the matter–should it reach that question. If the Court were to uphold disparate impact claims as cognizable yet formulate a test so demanding upon plaintiffs that it guts the doctrine of its functional significance, the result would be at best a pyrrhic victory.

Many commentators and civil rights proponents fear the Roberts Court will end the nearly forty-year life of disparate impact claims under the FHA.[12] Two recent Supreme Court decisions underscore such fears. The first case, *Smith v. Jackson,*[13] has been read by some as an explicit rejection of the interpretive basis upon which disparate impact was founded.[14] Further, in his concurrence in *Ricci v. Destefano,*[15] Justice Scalia stated–in no uncertain terms–his belief that race-conscious remedies to disparate impact raise significant equal protection issues.[16] Thus, the Court's decision in *Inclusive Communities Project* may necessarily be forced to reconcile Scalia's equal protection concerns with the

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[10] *See* 24 C.F.R. 100.500 (2013).

[11] Petition for Writ of Certiorari, *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*, No 13-1371, 2014 WL 1989121, at *I (U.S., filed May 13, 2014).

[12] *See, e.g.*, Joshua Thompson & Ralph Kasarda, *Symposium: Just Give the Court a Chance*, SCOTUSBLOG (Jan. 5, 2015, 2:52 PM) http://www.scotusblog.com/2015/01/symposium-just-give-the-court-a-chance/ (noting that "[n]obody really believes that the Supreme Court would accept an identical issue three times in four years only to affirm what is a consensus among the government and the courts of appeals.").

[13] 544 U.S. 240 (2005)

[14] *See id.* at 236 (where the Court employed strict textual analysis of ADEA to uphold disparate impact).

[15] 129 S. Ct. 2658, 2672-73 (2009).

[16] *See id*. at 2672-73 (where the Court employed strict textual analysis of Title VII to uphold disparate impact).

Court's constitutional avoidance canon.[17] Consistent with the growing fears over the fate of disparate impact, a District Court for the District of Columbia recently invalidated HUD's disparate impact codifying regulations.[18] There can be no doubt: the stakes are high and there are significant reasons to be concerned about the outcome of *Inclusive Communities Project*.

Part I of this paper begins with an overview of *Inclusive Communities Project*. Next, it provides a brief history of housing segregation in the United States and the mechanisms that have perpetuated such segregation. Lastly, Part I concludes with an overview of the FHA and its substantive provisions.

Part II offers a history of disparate impact. First, it traces disparate impact to its origins under Title VII and then it details the emergence of the doctrine under the FHA.

Part III argues that the Supreme Court should hold that disparate impact claims are cognizable under the FHA. Specifically, it maintains that the statutory text, legislative history and purpose, subsequent amendments, and agency interpretations of the FHA combine to provide more than sufficient grounds for the Court to uphold disparate impact. Part III also addresses recent Supreme Court cases– and the two cases that settled after the Court granted certiorari–that might have an impact on the Court's decision in *Inclusive Communities Project*.

Finally, Part IV addresses the issue of what standard courts should apply in disparate impact cases brought under the FHA. It begins with an overview of the current circuit split and then provides several examples of why a uniform standard is needed. Part IV concludes by arguing that the Court should settle the current circuit split by formally adopting the standard codified in HUD's regulations.

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[17] See *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.").

[18] *See American Ins. Ass'n v. United States Dept. of Housing and Urban Development*, No. 13-00966, 2014 WL 5802283, at *44 (D.D.C. Nov. 3, 2014) [hereinafter *AIA*].

I. Background

a. The Case: *Inclusive Communities Project, Inc. v. Texas Department of Housing and Community Affairs*

i. The District Court's Decision

In March 2008, Inclusive Communities Project, Inc. ("ICP") filed suit against TDHCA, alleging, among other things, discrimination under the FHA.[19] ICP is a non-profit organization dedicated to achieving racial and socioeconomic integration in the Dallas metropolitan area.[20] In pursuit of these lofty goals, ICP helps low-income, predominately African-American families who are eligible for Dallas's subsidized voucher program to find affordable housing in predominately Caucasian, suburban neighborhoods.[21] TDHCA is the agency vested with the responsibility of administering the federal government's Low Income Housing Tax Credits ("LIHTC") program in Texas.[22] Under the LIHTC program, the federal government provides tax credits to developers of low-income housing, which the developers can then sell to finance construction of the low-income projects. [23]

In its complaint, ICP alleged that TDHCA had been exercising unauthorized discretion in making its decisions regarding the allocation of the tax credits.[24] According to ICP, TDHCA was allocating the credits in a manner that had a discriminatory effect on African-American residents.[25] Specifically, ICP asserted that TDHCA had been disproportionately approving tax credit units for

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[19] *Inclusive Communities Project, Inc. v. Texas Dep't of Hous. & Cmty. Affairs*, 860 F. Supp.2d 312, 313-14 (N.D.Tex.2012) [hereinafter *Inclusive Communities Project I*].

[20] According to its website, ICP "works for the creation and maintenance of thriving racially and economically inclusive communities, expansion of fair and affordable housing opportunities for low income families, and redress for policies and practices that perpetuate the harmful effects of discrimination and segregation." http://www.inclusivecommunities.net/ (last visited Feb. 19, 2015).

[21] *See Inclusive Communities Project I*, 860 F. Supp. 2d at 314.

[22] *See* Tex. Gov't Code § 2306.053(b)(10) ("The department may ... administer federal housing, community affairs, or community development programs, including the low income housing tax credit program.").

[23] *See* 26 U.S.C. § 42(c) (2013) ("The number of credits TDHCA may award for a low-income housing project is determined by calculating the project's "qualified basis," which is a fraction representing the percentage of the project occupied by low-income residents multiplied by eligible costs.").

[24] *See Inclusive Communities Project I*, 860 F. Supp. 2d at 317.

[25] *See id*. at 322.

developments in predominantly minority neighborhoods and disproportionately disapproving tax credit units for developments in predominantly Caucasian neighborhoods.[26] The consequence, according to ICP, was the continued concentration of affordable units in minority neighborhoods, a lack of such units in Caucasian neighborhoods; and, therefore, a perpetuation of the housing segregation that the FHA seeks to end.[27]

In March 2014, the United States District Court for the Northern District of Texas found that ICP had succeeded in proving its disparate impact claim under the FHA though it failed on its claims of intentional discrimination.[28] The district court, having previously granted ICP's motion for partial summary judgment establishing a *prima facie* case of disparate impact,[29] applied the burdens of proof test articulated by the Second Circuit in in *Huntington Branch, NAACP v. Town of Huntington*.[30] Under the *Huntington* test, TDHCA was required to: (1) "prove that [its] interest[s] [were] bona fide and legitimate;" and (2) that "there are no less discriminatory alternatives, meaning that 'no alternative course of action could be adopted that would enable [its] interest[s] to be served with less discriminatory impact.'"[31] Although the court assumed TDCHA's proffered interests were bona fide and legitimate, thereby satisfying the first prong, it concluded that TDCHA had failed to present a single argument that

[26] *See Inclusive Communities Project, Inc. v. Texas Dep't of Hous. & Cmty. Affairs*, 747 F.3d 275, 278 (5th Cir. 2014) [hereinafter *Inclusive Communities Project II*] *cert. granted in part*, 135 S. Ct. 46, 189 (2014).

[27] *Id*.

[28] *See Inclusive Communities Project I*, 860 F. Supp. 2d at 319-20.

[29] The court heavily relied upon evidence presented by ICP that, "from 1999-2008, TDHCA approved tax credits for 49.7% of proposed non-elderly units in 0% to 9.9% Caucasian areas, but only approved 37.4% of proposed non-elderly units in 90% to 100% Caucasian areas." *Inclusive Communities Project II*, 747 F.3d at 279.

[30] *Huntington*, 844 F.2d at 926 ("Once a plaintiff has made a *prima facie* showing of discriminatory effect, a defendant must present bona fide and legitimate justifications for its action with no less discriminatory alternatives available." (*citing Residential Advisory Board v. Rizzo*, 563 F.2d 126, 149 (3rd Cir. 1977)).

[31] *Inclusive Communities Project I*, 860 F. Supp. 2d at 322-23.

there were no less discriminatory alternatives available.[32] TDHCA subsequently appealed the district court's decision to the Fifth Circuit.

ii. The Fifth Circuit's Decision

On appeal, the Fifth Circuit's review was limited to a single issue: "[W]hether the district court correctly found that ICP proved a claim of violation of the [FHA] . . . based on disparate impact."[33] To decide whether ICP had in fact proved a disparate impact claim, the Fifth Circuit had to determine the appropriate standard for establishing liability. Subsequent to the district court's decision, however, HUD had issued its regulations, codifying disparate impact under the FHA.

HUD's regulations are significant for two main reasons. First, the new regulations clarify that a "practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin."[34] Thus, for the first time, HUD's regulations expressly authorize claims for disparate impact under the FHA.

Second, the HUD's regulations provide the following standard for establishing liability:

> (1) The [plaintiff] . . . has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect; (2) [o]nce the . . . plaintiff satisfies [its] burden of proof . . . [the] defendant has the burden of proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests . . . ; [and] (3) [i]f the respondent or defendant satisfies [their] burden of proof . . . the plaintiff may still prevail upon proving that the . . . interests . . . could be served by another practice that has a less discriminatory effect.[35]

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[32] *Id*. at 326.
[33] *Inclusive Communities Project II*, 747 F.3d at 280.

[34] 24 C.F.R. § 100.500(a).
[35] 34 C.F.R. § 100.500(c).

Adopting HUD's burden-shifting approach, the Fifth Circuit reversed the district court and remanded the case for application "given its demonstrated expertise with [the] facts." Therefore, upon remand, ICP (not TDHCA) would have been required to prove that TDHCA's legitimate interests "could be served by another practice that has a less discriminatory effect."[36] However, on October 2, 2014, the Supreme Court granted TDHCA's petition for writ of certiorari.[37]

b. Housing Segregation in the United States

Scholars studying the causes of housing segregation largely agree on three fundamental propositions: (1) residential segregation separating blacks and whites[38] is not "natural;" (2) it is not generally the result of black preference; and (3) it is not primarily the product of economic differences between blacks and whites.[39] Yet segregation in housing still persists over 45 years after the enactment of the FHA. The following sections, which are intended to be illustrative rather than exhaustive, endeavor to provide a general overview of the historical development of housing segregation in the United States and the mechanisms that have perpetuated such segregation.

i. A Brief History of Housing Segregation

Segregation in housing is deeply rooted in the history of the United States. One notable attempt to quantify this history is a 1999 study published by Harvard economists David Cutler, Edward Glaeser, and Jacob L. Vigdor, which breaks down segregation in the United States from 1890 to 1990 based on

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[36] *Inclusive Communities Project II*, 747 F.3d at 282.

[37] *See Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 46 (2014).

[38] Scholars frequently use terms black(s) and African American(s) interchangeably. As a result, the terms are similarly used interchangeably throughout this paper. Additionally, the term white(s) is used as a general reference to Caucasians.

[39] *See* Florence Wagman Roisman, *The Lessons of American Apartheid: The Necessity and Means of Promoting Residential Racial Integration*, 81 IOWA L. REV. 479, 487-88 (1995).

an empirical analysis of census data. [40] Their study identified three distinct periods in the history of housing segregation and corresponding causes.[41]

The first period, known as the "Great Migration," occurred from 1890 to 1940.[42] Beginning in 1890, millions of blacks left the rural South for the industrialized cities of the North[43] and, as a result, America witnessed the "birth of the Ghetto."[44] During this period, the Harvard study found that while only one city contained a "ghetto" in 1890, by 1940 that number had risen to fifty-five.[45] Segregation during this period can partially be attributed to the preferences and actions of both whites and blacks. While whites favored segregation because of racial animus towards blacks, for blacks, and other minorities, clustering together facilitated the transition to the new environment of the urban North.[46] According to the Harvard study, during this period the average urban-dwelling African American went from living in a neighborhood comprised of 27% African Americans in 1890 to 43% African Americans in 1940.[47]

The second period extended from 1940 to 1970.[48] This period was characterized by the consolidation and expansion of ghettos, and an increase in racial tensions. [49] A significant contributing factor to segregation during this time was the post-war expansion of suburban housing, which facilitated

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[40] *See generally* David M. Cutler, et al., *The Rise and Decline of the American Ghetto*, 107 J. Pol. Econ. 455 (1999); *see also* Abraham Bell & Gideon Parchomovsky, *The Integration Game*, 100 Colum. L. Rev. 1965, 1975-80 (2000) [hereinafter Bell & Parchomovsky] (providing detailed discussion of the Harvard study).

[41] *See* Cutler, et al., *supra* note 40, at 462-72.

[42] *See id*. at 456.

[43] From 1910 to 1920, 300,000 African Americans migrated North; from 1920 to 1930, 1.3 million; from 1930 to 1940, 1.5 million; and from 1940 to 1950, 2.5 million. LERONE BENNETT, JR., BEFORE THE MAYFLOWER: A HISTORY OF BLACK AMERICANS 344 (6th ed. 1992).

[44] *See* Cutler, et al., *supra* note 40, at 456.

[45] *See id*.

[46] *See* Bell & Parchomovsky, *supra* note 38, at 1976.

[47] *See id*.

[48] *See* Cutler, et al., *supra* note 40, at 456.

[49] *See* Bell & Parchomovsky, *supra* note 40, at 1976.

segregation by providing whites with increased opportunities to relocate to the suburbs.[50] Such opportunities fostered a "general cycle of racial turnov50er in urban communities . . . [that] can be characterized as the transition from 'all white [to] invasion [to] succession [to] consolidation or all black.'"[51] Thus, frequently, as African Americans sought life amongst whites, whites just as quickly fled to the suburbs. As a result, segregation peaked in 1970, with the average urban-dwelling African American living in a neighborhood comprised of 68% African Americans.[52]

The Final period, from 1970 to 1990, marked a slight reduction in segregation.[53] According to the Harvard study, by 1990 the average urban-dwelling African American lived in a neighborhood that was 56% African Americans (as compared with 68% in 1970).[54] Notwithstanding this reduction, however, segregation remained more pervasive in 1990 than it was in 1940.[55]

In a different 1988 study, one scholar concluded that "[e]very major metropolitan area in the United States still ha[d] a large ghetto; in many cities, over eighty percent of the black population live[d] in virtually all-black neighborhoods."[56] It has been suggested that looking at segregation at the national level obscures a fundamental reality: "[t]he relative segregation of different cities is very stable over time."[57] Such a reality is evidenced by the fact that "[of] the five most segregated cities in the United

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[50] *See* Roisman, *supra* note 36, at 495; *see also* Natasha M. Trifun, *Residential Segregation After the Fair Housing Act*, 36 HUM. RTS. 14, 15 (Fall 2009).

[51] Trifun, *supra* note 50, at 15 (*citing* Douglas S. Massey and Nancy A. Denton, American Apartheid: Segregation and the Making of the Under Class 46 (1993)).

[52] *See* Cutler, et al., *supra* note 40, at 456.

[53] The actual level of reduction is unclear. *Compare* Douglas S. Massey & Nancy A. Denton, American Apartheid: Segregation and the Making of the Underclass 9 (1993) (placing the level of reduction at 7.5%), *with* Cutler, et al., *supra* note 40, at 471 (placing the level of reduction 16.7%; noting, however, that the difference between the its study's 16.7%).

[54] *See* Cutler, et al., *supra* note 40, at 456.

[55] *See id*. at 456-57.

[56] Richard H. Sander, *Individual Rights and Demographic Realities: The Problem of Fair Housing*, 82 Nw. U. L. Rev. 874, 875 (1988).

[57] Cutler, et al., *supra* note 40, at 472.

States in 1890, three [remain] in the top five today (Chicago, Cleveland, and Detroit)."[58] Accordingly, these findings suggest that once segregation becomes prevalent in a certain area, banning its continuance by legal means is unlikely to reverse the trend.[59]

Today, housing segregation is largely perpetuated through market forces. Scholars have identified two primary theories to explain why white homeowners prefer segregation and disfavor integration when purchasing or renting a home. The first theory is simple: segregation continues to be promoted by racial animus.[60] The second theory contends that segregation is perpetuated by fears of white homeowners that the entry of minorities into their neighborhoods will reduce property values.[61] According to the second theory, "because whites are willing to pay more than blacks to live in predominantly white neighborhoods, eventually all neighborhoods become completely segregated, even if most people would prefer modest degrees of integration."[62]

Finally, it has also been widely accepted that the government's implementation of public housing, which has become virtually synonymous with the modern-day ghetto, has significantly contributed to the continued prevalence of housing segregation.[63] The "severe problems associated with [public housing] have largely replaced the direct discrimination as the major hurdle African Americans (and other minorities) must overcome to enter the mainstream of American life."[64] For example, public housing has the effect of isolating many African Americans from employment opportunities in the suburbs, perpetuating segregation in schools, and creating an environment where crime, gangs, drug use,

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[58] *Id*. at 457.
[59] *See* Bell & Parchomovsky, *supra* note 40, at 1980.
[60] *See* Cutler, et al., *supra* note 40, 476; *see also* Bell & Parchomovsky, *supra* note 40, at 439-40.
[61] *See* Cutler, et al., *supra* note 40, at 476.
[62] *Id*. at 477.
[63] *See, e.g.*, Stacy E. Seicshnaydre, *How Government Housing Perpetuates Racial Segregation: Lessons from Post-Katrina New Orleans*, 60 CATH. U. L. REV. 661, 664 (2011) ("The idea that public housing in the United States was created pursuant to a policy of *de jure* segregation is not particularly controversial.").
[64] Sander, *supra* note 56, at 876.

and a range of other social problems flourish.[65] Thus, the reality is that, while the courts have liberally interpreted (and thus strengthened) the FHA since it was enacted in 1968,[66] housing segregation continues to plague America. This alarming reality underscores the critical need for the Supreme Court to find disparate impact claims cognizable under the FHA when it decides *Inclusive Communities Project*.

ii. Mechanisms of Segregation

1. State-Sponsored Segregation: Discriminatory Ordinances

Following the Great Migration of African Americans from rural counties to cities at the turn of the century, and fearing their increasing purchasing power, concerned white homeowners turned to their local governments to prevent integration of their neighborhoods.[67] Many local governments responded by enacting residential segregation ordinances.[68] Typically, these ordinances either: "(1) prohibited whites from moving to all-Negro blocks and Negroes from moving to all-white blocks; (2) divided the city into segregated districts and designated a district for each race; or (3) restricted new residences in mixed blocks to the racial group which had established most of the residences on the block."[69]

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[65] *See id*. at 875; *see also* W. Clark Roof, *Residential Segregation of Blacks and Racial Inequality in Southern Cities: Toward a Causal Model*, 19 SOC. PROBS. 393 (1972)

[66] For example, 42 U.S.C. § 3604(e), declares it illegal for real estate brokers to profit by inducing "any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, or national origin." The provision was clearly aimed at "blockbusting," but courts have interpreted it as a broad ban on attempts to "steer" whites away from racially integrated neighborhoods and attempts to steer blacks away from predominantly white areas. Since steering is a major barrier to stable integration, these rulings were an important indication that the courts would extend the FHA to subtle as well as overt forms of discrimination.

[67] *See generally* David E. Bernstein, *Philip Sober Controlling Philip Drunk: Buchanan v. Warley in Historical Perspective*, 51 VAND. L. REV. 797, 835 (1998) (discussing the prevalence of discriminatory ordinances during the migration of African Americans to the North).

[68] *See* Josh Whitehead, *Using Disparate Impact Analysis to Strike Down Exclusionary Zoning Codes*, 33 REAL EST. L.J. 359, 362-63 (2005).

[69] Bernstein, *supra* note 67, at 835.

In 1910, the City of Baltimore became the first municipality to enact such an ordinance, preventing African Americans from moving onto blocks with a white majority and vice versa.[70] The stated purpose of the ordinance was "preserving peace, preventing conflict and ill feeling between the white and colored races in Baltimore, and promoting the general welfare of the city by providing, so far as practicable, for the use of separate blocks by white and colored people for residences, churches and schools."[71] By 1912, Mooresville and Winston-Salem, North Carolina had passed similar ordinances.[72] By 1913, Asheville, North Carolina; Richmond, Norfolk, and Roanoke, Virginia; Atlanta, Georgia; Madisonville, Kentucky; and Greenville, South Carolina had followed suit.[73] And by 1916, the popularity of segregation ordinances had also reached Birmingham, Alabama; Louisville, Kentucky; St. Louis, Missouri; and New Orleans, Louisiana.[74] The prevalence of these ordinances persisted until 1917, when the Supreme Court decided *Buchanan v. Warley* and invalidated this thinly-veiled form of state-sponsored discrimination. [75]

2. Segregation by Contract: Restrictive Covenants

From 1917, when *Buchanan* was decided, until 1948, racially restrictive covenants became the primary legal means for perpetuating segregation.[76] Typically, under these covenants, property owners would warrant not to sell or lease real property to "any person not of the Caucasian race."[77] Racially

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[70] *See* TOM C. CLARK & PHILIP B. PERLMAN, PREJUDICE AND PROPERTY: AN HISTORIC BRIEF AGAINST RACIAL COVENANTS 11 (1948) [hereinafter Clark & Perlman] (originally submitted as amicus brief in *Shelley v. Kraemer*, 334 U.S. 1 (1948)).

[71] Baltimore, Md., Ordinance 692 (May 15, 1911); *see also* Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910-1913*, 42 Md. L. Rev. 289, 289 (1983), for an in-depth discussion on the Baltimore ordinance and other similar ordinances.

[72] *See* Whitehead, *supra* note 68, at 362-63.

[73] *See id*.

[74] *See id*.

[75] *See Buchanan*, 245 U.S. 60, 74-75 (1917).

[76] *See* Clark & Perlman, *supra* note 70, at 11.

[77] *See Constitutional Law - Equal Protection of the Laws - Judicial Enforcement of Racial Restrictive Covenants Is State Action Prohibited by the Fourteenth Amendment*, 61 Harv. L. Rev. 1450, 1450 (1948).

restrictive covenants were exceptionally effective during this time because "Lochner-era[78] courts consistently enforced them, contributing to the dramatic increase in residential segregation during the first half of the twentieth century."[79]

This form of discrimination was not wholly private. As one commentator explains, "[i]t is virtually impossible to overstate the significance of [the federal government's] involvement in creating, sponsoring, and perpetuating the racially segregated dual housing markets that divide America."[80] For example, the Federal Housing Administration actively promoted the use of racially restrictive covenants, frequently refusing to provide its mortgage insurance or guarantees unless the covenants were attached to the deeds.[81] The widespread acceptability of racially restrictive covenants was substantially abdicated in 1948, when the Supreme Court handed down its landmark decision in *Shelley v. Kramer*,[82] holding that judicial enforcement of the covenants violated the Fourteenth Amendment.[83]

iii. The Battles of Today

As the preceding discussion indicates, by 1948 both discriminatory ordinances and racially restrictive covenants had been outlawed by the Supreme Court. The discriminatory intent behind these mechanisms is patently obvious. Present-day housing segregation, however, is perpetuated by more subtle sources. Indeed, since the FHA's enactment in 1968, courts have accepted disparate impact claims challenging a wide range of practices, including zoning ordinances,[84] administration of section 8

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[78] Named after *Lochner v. New York*, 198 U.S. 45 (1905), the "Lochner-era" refers to the period of time between 1897 to 1937 during which the Supreme Court utilized a broad interpretation of due process that protected economic rights, tended to strike down economic regulations of working conditions, wages or hours in favor of laissez-faire economic policy.

[79] Davison M. Douglas, *Contract Rights and Civil Rights*, 100 Mich. L. Rev. 1541, 1561 (2002).

[80] John O. Calmore, *Spatial Equality and the Kerner Commission Report: A Back-to-the Future Essay*, 71 N.C. L. Rev. 1487, 1509 (1993).

[81] *See id*. at 1509-10 (outlining how the discriminatory policies of the Federal Housing Administration and VA significantly transformed the nation's patterns of homeownership along racial lines).

[82] 334 U.S. at 1 (1948)

[83] *See id*. at 1.

[84] *See Huntington*, 844 F.2d at 937-38.

vouchers,[85] lending practices,[86] mortgage insurance policies,[87] landlord and housing provider reference policies,[88] occupancy restrictions,[89] and the demolition of subsidized housing.[90] If the Supreme Court strikes down disparate impact in *Inclusive Communities Project*, plaintiffs' ability to combat these (and numerous other) discriminatory practices would be irreparably harmed.

c. The FHA

In 1968, Congress enacted the FHA "following the urban unrest of the mid-1960s and the chaotic aftermath of the assassination of the Rev. Dr. Martin Luther King, Jr."[91] The FHA's goal: to provide, "within constitutional limitations, fair housing throughout the United States."[92] Congress believed the FHA's proscription of discriminatory housing practices would "remove the walls of discrimination which enclose minority groups"[93] and "replace ghettos with truly integrated and balanced living patterns."[94]

The thrust of the FHA is found within its two primary substantive provisions. First, 42 U.S.C. § 3604(a), makes it unlawful to "refuse to sell or rent after the making of a bona fide offer, or refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status or natural origin."[95] Second, 42 U.S.C. § 3606(b),

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[85] *See Graoch Assocs. #33, L.P. v Louisville/Jefferson Cnty. Metro Human Relations Comm'n*, 508 F.3d 366, 376-77 (6th Cir. 2007).
[86] *See Miller v. Countrywide Bank, N.A.*, 571 F. Supp. 2d 251, 258 (D. Mass. 2008)
[87] *See Nat'l Fair Hous. Alliance, Inc. v. Prudential Ins. Co. Am.*, 208 F. Supp. 2d 46, 63 (D.D.C. 2002).
[88] *See Fair Hous. Alliance, Inc. v. Edgewater Park Owners Coop., Inc.*, No. 10-CV-912 (RPP), 2012 WL 762323, at 10-11 (S.D.N.Y. Mar. 9, 2012).
[89] *See United States v. Tropic Seas, Inc.*, 887 F. Supp. 1347, 1360 (D. Haw. 1995).
[90] *See Charleston Hous. Auth. v. U.S. Dep't of Agric.*, 419 F.3d 729, 749-42 (8th Cir. 2005).
[91] H.R. Rep. No. 711, 100th Cong., 2d Sess. 15 (1988).
[92] 42 U.S.C. § 3601 (1988).
[93] 114 Cong. Rec. 9563 (1968) (statement of Sen. Celler).
[94] 114 Cong. Rec. 3422 (1968) (statement of Sen. Mondale).
[95] 42 U.S.C. § 3604(a).

makes it unlawful to "discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in the connection therewith."[96]

Against the backdrop of nine circuit courts of appeals having already found claims of disparate impact cognizable,[97] Congress revisited the FHA in 1988, adding several significant amendments. First, Congress granted HUD authority to adjudicate housing discrimination claims[98] and to promulgate regulations necessary to effectuate the FHA's goals.[99] Second, Congress created three exceptions to liability, clarifying that the FHA does not prohibit: (1) "conduct against a person because such person has been convicted . . . of the illegal manufacture or distribution of a controlled substance;" [100] (2) "reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling;"[101] or (3) "a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status."[102] These amendments have been widely interpreted as presupposing the existence of disparate impact liability[103] and will likely be central to the outcome of *Inclusive Communities Project*. The amendments are discussed in greater detail in Part III(c).

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[96] *Id*. § 3606(b) (1988).

[97] *See* Brief for the United States as Amicus Curiae Supporting Respondents, *Texas Department of Housing and Community Affairs v, The Inclusive Communities Project*, No. 13-1371, 2014 WL 7336683, at *23 (U.S., filed Oct. 28, 2013) [U.S. Brief Supporting Respondents ICP] (outlining the controlling disparate impact cases in the eleven circuits).

[98] *See* 42 U.S.C. § 3612 (1988).

[99] *See* 42 U.S.C. 3614(a) (1988).

[100] *Id.* § 3607(b)(4) (1995).

[101] 42 U.S.C. 3607(b)(1).

[102] 42 U.S.C. 3605(c) (1988).

[103] *See, e.g.*, Transcript of Oral Argument at 9-12, *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project*, 135 S. Ct. 46 (2014) (No. 13-1371) (where Justice Scalia asked the Solicitor General of Texas, Scott Keller, why the amendments don't "kill" TDHCA's case; Solicitor Keller did not appear to provide Scalia with a satisfying answer).

II. The History of Disparate Impact

a. The Beginning: Supreme Court Recognizes Disparate Impact Under Title VII

The Supreme Court has recognized, and upheld, disparate impact claims under a number of statutes, including Title VII of the Civil Rights Act ("Title VII"),[104] the Age Discrimination in Employment Act ("ADEA"),[105] and the Americans with Disabilities Act ("ADA").[106] The origins of disparate impact claims can be traced to the Court's decision in *Griggs v. Duke Power Co.*[107] In *Griggs*, an employer implemented new policies requiring prospective employees (or current employees seeking to transfer departments) to have a high school education and to pass two professionally prepared aptitude tests to be eligible for employment.[108] The new policies were facially neutral, but the Court nevertheless found that they violated Title VII because of the long history of African Americans receiving inferior education[109] and because the employer failed to establish that either requirement had a demonstrable relationship to successful job performance.[110]

Of particular significance, the Court primarily based its decision on the overall purpose of Title VII and not on its text. Specifically, the Court noted that, while there was *some* evidence of discriminatory intent in the record, "Congress directed the thrust of [Title VII] to the consequences of employment practices, not simply the motivation."[111] Indeed, the Court's interpretation of Title VII in

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[104] *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).
[105] *See Smith*, 544 U.S. 228, 234 (2005).
[106] *See Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003).
[107] 401 U.S. 424 (1971).
[108] *See id.* at 427 (the new policies, however, did not apply to the company's labor department).
[109] The Court cited its prior decision in *Gaston County v. United States*, 395 U.S. 285, 289 (1969), where it struck a literacy test required for voter registration because of North Carolina's long history of providing inferior education in its segregated schools.
[110] *See Griggs*, 401 U.S. at 431.
[111] *Id*. at 432.

Griggs provided the analytical framework for many of the early disparate impact cases under the FHA.[112]

b. Emergence of Disparate Impact Under the FHA

A year after *Griggs*, the Supreme Court decided *Trafficante v. Metropolitan Insurance Co.*, invoking Title VII jurisprudence to interpret the FHA. [113] In *Trafficante*, two apartment tenants filed suit under the FHA, alleging that their landlord discriminated against nonwhites during the rental screening process[114] and that they had been harmed by the resulting segregation of the complex.[115] The district court dismissed the plaintiffs' action for lack of standing and the Ninth Circuit affirmed, narrowly interpreting the FHA to permit complaints only by persons who are objects of discriminatory housing practices.[116]

The Supreme Court reversed, holding that the FHA's "broad and inclusive" language should be given a "generous construction" and evinced a "congressional intent to define standing as broadly as is permitted by Article III of the Constitution."[117] The Court's decision announced a broad interpretive

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[112] *See, e.g.*, *Huntington*, 844 at 935 ("Thus, just as the Supreme Court held that Title VII is violated by a showing of discriminatory effect, *Griggs* . . . we hold that a Title VIII violation can be established without proof of discriminatory intent.").

[113] *See generally Trafficante*, 409 U.S. 205 (1972).

[114] "The complaint alleged that the owner had discriminated against nonwhite rental applicants in numerous ways, e.g., making it known to them that they would not be welcome at Parkmerced, manipulating the waiting list for apartments, delaying action on their applications, using discriminatory acceptance standards, and the like." *Trafficante*, 409 U.S. at 207-08.

[115] The plaintiff alleged that they had been injured by the landlord's discriminatory practice because "(1) they had lost the social benefits of living in an integrated community; (2) they had missed business and professional advantages which would have accrued if they had lived with members of minority groups; (3) they had suffered embarrassment and economic damage in social, business, and professional activities from being 'stigmatized' as residents of a 'white ghetto.'" *Trafficante*, 409 U.S. at 208 .

[116] *See id*. at 208.

[117] *Id*. (citing *Hackett v. McGuire Bros., Inc*., 445 F.2d 442, 446 (3rd Cir. 2011)).

approach to the FHA, and embraced its significant analogy to Title VII. Indeed, *Trafficante* marked a major stepping-stone in the development of disparate impact liability under the FHA.

The Eighth Circuit's 1974 decision in *United States v. City of Black Jack*[118] *Missouri* signaled the emergence of disparate impact claims under the FHA. In *Black Jack,* the court considered whether a zoning ordinance that prohibited the construction of new multi-family dwellings violated the FHA.[119] The Eighth Circuit reversed the district court's determination that the ordinance did not have a discriminatory effect, holding that the court failed to take into account "either the 'ultimate effect' or the 'historical context' of the City's actions."[120] Having found that the plaintiffs established a *prima facie* case of disparate impact,[121] the Eighth Circuit shifted the burden to the City to demonstrate that its conduct was necessary to promote a compelling governmental interest.[122] The court ultimately invalidated the ordinance, finding there was no factual basis to support the City's assertion that its proffered interests were furthered by the ordinance.[123] Thus, *Black Jack* announced the arrival of a new weapon to combat discrimination under the FHA, a weapon that hangs in the balance of the Court's decision in *Inclusive Communities Project.*

III. Upholding Disparate Impact Under the FHA

The following sections argue that the Supreme Court should find disparate impact claims cognizable under the FHA in *Inclusive Communities Project*. Historically, the Supreme Court considers the following four factors in determining whether claims of disparate impact are cognizable under a civil

[118] 508 F.2d 1179 (8th Cir. 1974).
[119] *See id.*
[120] *Id.*
[121] *See id.* (the court found the plaintiff's *prima facie* case was satisfied upon showing that exclusion of multi-family dwelling would "contribute to the perpetuation of segregation in [the city].").
[122] *See id.* at 1185.
[123] *See id.* at 1187.

rights statute: (1) statutory text; (2) legislative history and purpose; (3) subsequent Congressional action; and (4) administrative construction.[124] Each factor will be discussed individually in Parts III(a)-(d).

a. The FHA's Text Supports Upholding Disparate Impact

The text of the FHA supports–and certainly does not preclude–the finding that disparate impact claims are cognizable under the FHA. Although the FHA does not specifically address the issue of disparate impact or discriminatory effects, it is also largely silent on the requirement of discriminatory intent. This was similarly the case with Title VII, which the Court interpreted in *Griggs* to include claims of disparate impact.[125] In fact, the key substantive provisions of the FHA do not include the words intent, purpose, or motive.[126] Arguably, the Court must therefore either read into the FHA a requirement of intent or permit claims to be brought without a showing of intent. Given that the FHA's "broad and inclusive" language[127] is to be interpreted to further the policy of "provid[ing], within constitutional limitations, for fair housing throughout the United States,"[128] the later interpretation should be adopted. Further, the later interpretation is consistent with the decisions by the eleven circuit courts of appeals that have already recognized that the FHA supports disparate impact claims.

b. Legislative History and Congressional Intent Support Upholding Disparate Impact

The FHA's legislative history and congressional intent also support upholding disparate impact under the FHA. Indeed, Congress's intent for enacting the FHA is not difficult to discern. Rather, the FHA's legislative history is chock-full of explicit references to Congress's intent to undo the *effects* of

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[124] *See* ROBERT G. SCHWEMM, SARA K. PRATT & NAT'L FAIR HOUSING ALLIANCE, DISPARATE IMPACT UNDER THE FAIR HOUSING ACT: A PROPOSED APPROACH 8 (2009), available at http://www.nationalfairhousing.org/Portals/33/DISPARATE%20IMPACT%20ANALYSIS%20FINAL.pdf (last visited February 21, 2015) [hereinafter Schwemm & Pratt]; *see also Griggs v. Duke Power Co.*, 401 U.S. 424, 429-36; *Smith v. City of Jackson*, 544 U.S. 228, 233-40 (2005).

[125] *See Griggs*, 401 U.S. at 432.

[126] *See* 42 U.S.C. §§ 3604(a), 3605(a)&(b).

[127] *Trafficante*, 93 S.Ct. at 367.

[128] 42 U.S.C. §§ 3601.

discriminatory practices. For example, Democratic Senator Walter Mondale, the FHA's principle sponsor, explained that after the Supreme Court had proscribed explicitly racial zoning laws in 1917,[129] "[l]ocal ordinances with the same *effect*, although operating more deviously in an attempt to avoid the Court's prohibition, were still being enacted."[130] Senator Mondale further stated that it "seems only fair, and is constitutional, that Congress should now pass a fair housing act to undo the *effects*" of past discriminatory governmental actions.[131]

Furthermore, Republican Senator Edward Brooke, one of the FHA's leading supporters, commented that African Americans were still not free to move to better neighborhoods because they were "surrounded by a pattern of discrimination based on individual prejudice, often *institutionalized* by business and industry, and by *Government practices*."[132] Lastly, the legislative history surrounding the FHA also demonstrates that Congress was keenly aware of the inherent difficulty of proving discriminatory intent. For example, Republican Senator Howard Baker introduced a floor amendment (the "Baker Amendment") that would have granted immunity to homeowners who did not intentionally discriminate.[133] The proponents of the FHA rejected the Baker Amendment because it would have undermined the FHA by limiting its reach only to cases of obvious discrimination.[134]

c. Subsequent Congressional Action Supports Upholding Disparate Impact

In 1988, Congress passed the Fair Housing Amendments Act[135] against the backdrop of nine circuit courts of appeal having already held that the FHA prohibited actions that produced

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[129] *See Buchanan*, 245 U.S. at 74-75 (1917).
[130] 114 Cong. Rec. 2526, 2669 (1968) (emphasis added).
[131] *See Id*. (emphasis added).
[132] *Id*. (emphasis added).
[133] *See* 114 Cong. Rec. 5214 (1968) (the amendment provided exemption to homeowners who engaged a real estate agent "without indicating any preference, limitation or discrimination based on race . . . or an intention to make any such preference, limitation or discrimination.").
[134] *See* Schwemm and Prat, *supra* note 124, at 11.
[135] Pub. L. 100-430, 102 Stat. 1619 (1988) [hereinafter FHAA].

discriminatory effects, without the need to prove discriminatory intent.[136] When drafting the amendments, Congress specifically addressed whether the FHA requires a showing of discriminatory intent. For example, the House Committee on the Judiciary rejected an amendment that would have provided that "a zoning decision is not a violation of the [FHA] unless the decision was made with the intent to discriminate."[137] Thus, at least in the zoning context, Congress refrained from adding an express requirement of discriminatory intent when amending the FHA. Arguably, the proposed amendment was also predicated on the assumption that disparate impact liability already existed under the FHA.

Rather than amending the FHA to include an intent requirement, Congress left the operative language intact, electing only to: (1) extend the FHA's prohibitions to disability and family status; and (2) establish several exemptions that presuppose the existence of disparate impact liability.[138] Under the Supreme Court's re-enactment canon, "Congress is presumed to be aware of . . . judicial interpretation[s] of a statute and to adopt th[ose] interpretation[s] when it re-enacts a statute without change."[139] The legislative history from the House and Senate make clear that when Congress amended the FHA, it approved of the existing circuit courts of appeals decisions that had permitted disparate impact claims.[140]

d. HUD's Construction of the FHA Supports Upholding Disparate Impact

The amended FHA grants HUD administrative and enforcement authority, including the authority to conduct formal adjudications of FHA complaints and the power to promulgate regulations to

[136] *See* U.S. Brief Supporting Respondents ICP, *supra* note 97, at *23.
[137] H.R. Rep. No. 100-711, at 89-91 (1988).
[138] *See* FHAA, *supra* note 135.
[139] *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).
[140] *See* Schwemm & Pratt, *supra* not 124, at 8.

further the FHA's purpose.[141] Consistent with this authority, HUD has long interpreted the FHA to proscribe practices that have an unjustifiable discriminatory effect, regardless of intent.[142] Most notably, as discussed *supra*, HUD promulgated regulations in 2013 that codified its belief that disparate impact claims are cognizable under the FHA.[143]

Even prior to HUD's promulgation of its 2013 regulations, and beyond its formal adjudications, the agency has consistently maintained a "long-held interpretation of the availability of 'discriminatory effects' liability" under the FHA."[144] For example, in 1994, HUD joined the Department of Justice and numerous other federal regulatory agencies in publishing an *Interagency Policy Statement on Discrimination in Lending*.[145] The policy statement recognized that claims of lender discrimination could be proved through an FHA disparate impact claim and specified how such claims should be analyzed.[146] Further, in 1995, HUD issued its final rule on *The Secretary of HUD's Regulations of the Federal Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac).*[147] In this rule, HUD concluded that "the disparate impact theory [was] firmly established by [FHA] case law" and declared that it was committed to prohibiting government-sponsored enterprises from discriminating "in a manner that has a discriminatory effect."[148]

Lastly, HUD is not the only federal agency to interpret the FHA to include claims of disparate impact. For example, the Department of Justice, which also has enforcement authority under the

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[141] *See* 42 U.S.C. 3614(a) (1988).
[142] *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,461 (codified at 24 C.F.R. pt. 100) [hereinafter HUD's Final Rule].
[143] *See* 24 C.F.R. §§ 100.1-500.
[144] HUD's Final Rule, *supra* note 142, at 11,460.
[145] *See* Fed. Reg. 18266, 18269-70 (Apr. 15, 1994).
[146] *See Id.*
[147] *See* 60 Fed. Reg. 61846, 61867 (Dec. 1, 1995).
[148] *See* Fed. Reg. 18266, 18269-70 (Apr. 15, 1994); 24 C.F.R. § 81.41 (1996).

FHA,[149] has successfully and repeatedly urged courts to recognize disparate impact.[150] In 1995 the Department of Justice also joined HUD and eight other federal agencies in adopting a joint *Interagency Policy Statement on Discrimination in Lending*, which recognized that claims of disparate impact could be brought under the FHA.[151]

e. Causes For Concern?

Several recent Supreme Court cases, and the two cases that settled after the Court granted certiorari, have hinted of the possible demise of disparate impact under the FHA. This section discusses those cases and their possible implications in *Inclusive Communities Project*.

i. Smith v. City of Jackson

In 2005, the Supreme Court issued a significant disparate impact opinion in *Smith v. City of Jackson*,[152] holding that disparate impact claims could be brought under the ADEA. [153] While the Court's holding once again recognized a disparate impact cause of action, it was the Court's analysis– which constituted a significant departure from *Griggs*–that has caused considerable concern.[154] Rather than focusing on the underlying purpose of the statute, as Chief Justice Burger had done for the Court in *Griggs*, the *Smith* Court instead based its decision on textual similarities between the ADEA and Title VII.[155] Specifically, the Court noted that in both the ADEA and Title VII Congress used the phrase "otherwise adversely affects"[156] and the Court then concluded that "the text focuses on the *effects* of the

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[149] *See* 42 U.S.C. §§ 3610(g)(2)(C), 3614 (1988).
[150] *See Mountain Side Mobile Estates Partnership*, 56 F.3d at 1250-51; *Pfaff*, 88 F.3d at 745-6; *City of Black Jack*, 508 F.2d at 1184-85.
[151] *See* Fed. Reg. 18266, 18269-70 (Apr. 15, 1994).
[152] 544 U.S. 228 (2005).
[153] *See id.* at 240.
[154] *See id*. at 233-40.
[155] *See id*. at 235-36.
[156] The Court employed the rule of statutory interpretation that "where two statutes use similar language we generally take this as 'a strong indication that [they] should be interpreted *pari passu.*" *Northcross v. Board of Ed. of Memphis City Schools*, 412 U.S. 427, 428 (1973).

action on the employee rather than the motivation for the action of the employer."[157] Thus, the Court held, perhaps only because the language in the ADEA and Title VII were the same, that the reasoning in *Griggs* similarly applied to the ADEA.[158]

At least one federal district court has already applied the Court's restrictive textual interpretation of the ADEA in *Smith* to a claim of disparate impact brought under the FHA. In *American Insurance Association v. U.S. Department of Housing and Urban Development* ("AIA"),[159] the United States District Court for the District of Columbia invalidated HUD's disparate impact regulations, noting "a sea change in the approach to the analysis of statutory provisions with respect to disparate impact liability."[160] Specifically, Judge Leon concluded that: (1) the FHA unambiguously prohibits *only* intentional discrimination and therefore HUD's regulations were not entitled to *Chevron* deference;[161] (2) Congress's intent to limit the FHA's reach to only intentional discrimination was "readily discernible;" and (3) courts in the D.C. Circuit, which had not yet decided the matter itself, was not bound by holdings in other circuits–particularly in light of *Smith*.[162] Texas Solicitor General Scott Keller similarly echoed the district court's reasoning during oral arguments in *Inclusive Communities Project*.[163]

If the Supreme Court applies its analysis in *Smith* to the FHA, as Judge Leon did in *AIA*, it could result in the demise of disparate impact under the FHA. As will be discussed below, however, another district court disagrees with Judge Leon's analysis, instead upholding HUD's regulations under

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[157] *Smith*, 544 U.S. at 236 (emphasis in original).
[158] *Id*.
[159] No. 13-00966, 2014 WL 5802283, at *44 (D.D.C. Nov. 3, 2014) [hereinafter *AIA*].
[160] *Id*.
[161] *See infra* notes 252-256 and accompanying text.
[162] *AIA*, at *44-45.
[163] *See generally* Transcript of Oral Argument, *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project*, 135 S. Ct. 46 (2014) (No. 13-1371).

Chevron.[164] Furthermore, at least one commentator has concluded, after closely comparing the texts of the FHA and ADEA, that "[b]ecause the FHA's text reflects a general concern with protecting all people, not just a particular individual as the ADEA's text sometimes does, interpreting the FHA to provide for impact claims is reasonable and consistent with . . . *Smith*."[165]

ii. Ricci v. Destafano

The constitutionality of disparate impact (in the Title VII context) was brought into question in *Ricci v. Destafano*.[166] In *Ricci*, the City of New Haven, Connecticut, refused to certify the results of its fire department's promotional examination out of fear that the City would be exposed to disparate impact liability under Title VII.[167] The cause of the City's fear: despite its substantial efforts to ensure a racially neutral examination,[168] white employees did overwhelming better than minorities on the exams.[169] As a result, 17 white firefighters and one Hispanic firefighter filed suit, alleging that the city's refusal to certify the results violated Title VII and the Equal Protection Clause of the Fourteenth Amendment.[170] Specifically, the plaintiff firefighters "allege[d] that when the [the City] refused to certify the . . . exam results based on the race of the successful candidates, it discriminated against them in violation of Title VII's *disparate-treatment* provision."[171] In response, the City countered "that its decision was permissible because the tests "appear[ed] to violate Title VII's *disparate-impact*

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[164] *See* discussion *infra* Part IV(d)(i).
[165] Schwemm, & Pratt, *supra* note 124, at 10.
[166] *See generally* 557 U.S. 557 (2009).
[167] *See id*. at 562-63.
[168] The City spent one hundred thousand dollars to hire a consulting group specializing in promotional tests administered to public-safety officials to ensure the exam would test the relevant knowledge, skills, and abilities. *See id*. at 564-65.
[169] "Seventy-seven candidates completed the lieutenant examination - 43 whites, 19 blacks, and 15 Hispanics. Of those, 34 candidates passed - 25 whites, 6 blacks, and 3 Hispanics. . . . [T]he top 10 candidates were eligible for an immediate promotion to lieutenant. All 10 were white. . . .Forty-one candidates completed the captain examination - 25 whites, 8 blacks, and 8 Hispanics. Of those, 22 candidates passed - 16 whites, 3 blacks, and 3 Hispanics. . . . [Nine] candidates were eligible for an immediate promotion to captain - 7 whites and 2 Hispanics. *Id*. at 566.
[170] *See id*. at 563.
[171] *Id*. at 578-79 (emphasis added).

provisions."[172] In its efforts to avoid disparate impact liability, the City thus arguably took race-conscious, discriminatory action.

The Court never reached the Equal Protection issue, instead resolving the case solely on Title VII grounds. Justice Kennedy's majority opinion held that "under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding . . . disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action."[173] The Court found the examinations were "job related and consistent with business necessity" and that there was no "equally valid, less-discriminatory alternative that served the City's needs but that the City [had] refused to adopt."[174] As a result, the Court remanded the case for summary judgment in favor of the plaintiffs, thereby avoiding the equal protection question.[175]

While the Court's decision in *Ricci* ultimately turned on Title VII, and never reached the underlying equal protection issue, Justice Scalia's concurrence addressed the issue. As Justice Scalia explained:

> "[I]f the Federal Government is prohibited from discriminating on the basis of race . . . then surely it is also prohibited from enacting laws mandating that third parties—*e.g.*, employers, whether private, State, or municipal—discriminate on the basis of race. . . . As the facts of these cases illustrate, Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decisionmaking [sic] is, as the Court explains, discriminatory."[176]

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[172] *Id*. (emphasis added).
[173] *Id*. at 585.
[174] *Id*. at 587.
[175] *See id*. at 593.
[176] *Id*. at 594.

Furthermore, Justice Scalia is not the only sitting Justice that has voiced these concerns. Both Chief Justice John Roberts[177] and Justice Clarence Thomas[178] have similarly recognized that race-conscious remedies can violate the Equal Protection Clause. TDHCA raised the same equal protection arguments in *Inclusive Communities Project* and there is reason to fear that Justice Scalia's concurrence in *Ricci* provides a framework to end disparate impact under the FHA.

f. Missed Opportunities or Dodged Bullets?

As discussed *supra*, *Inclusive Communities Project* marks the third time since 2011 that the Supreme Court has granted certiorari to determine whether disparate impact claims are cognizable under the FHA. In both previous instances, the cases were settled prior to oral arguments. As will be discussed below, settlement in at least one of the cases resulted from increased apprehension by the Justice Department and numerous civil rights groups that the Court was poised to seize the opportunity to strike down disparate impact under the FHA.[179]

i. Magner v. Gallagher

In 2011, the Court granted certiorari in *Magner v. Gallagher*,[180] accepting for the first time an invitation to review disparate impact under the FHA. In *Gallagher*, owners of residential rental properties brought suit against the City of St. Paul, Minnesota, alleging that the City's aggressive enforcement of its housing codes violated the FHA because it disproportionately affected racial

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[177] *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 724 (2007) (where Court held that, under the Equal Protection Clause, allegedly compelling interest of diversity in higher education could not justify districts' use of racial classifications in student assignment plans).

[178] *See Grutter v. Bollinger*, 539 U.S. 306, 352 (2003) (Thomas, J., dissenting) ("The contours of 'pressing public necessity' can be further discerned from those interests the Court has rejected as bases for racial discrimination. For example, *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267 (1986), found unconstitutional a collective-bargaining agreement between a school board and a teachers' union that favored certain minority races.").

[179] *See infra* note 185 and accompanying text.

[180] 132 S. Ct. 548 (2011).

minorities.[181] The Eighth Circuit reversed the district court's grant of summary judgment in favor of the City after finding that the plaintiffs had established a *prima facie* case of discriminatory effect.[182] Subsequently, the City petitioned the Supreme Court for a writ of certiorari on two questions: (1) whether "disparate impact claims are cognizable under the [FHA];" and (2) if so, "should they be analyzed under the burden-shifting approach used by three circuits, under the balancing test used by four circuits, under a hybrid approach used by two circuits, or by some other test?"[183]

The Supreme Court granted certiorari on both questions but the parties reached agreement to dismiss the petition.[184] Numerous media outlets have since reported that the settlement was the result of intervention by the federal government. For example, one such outlet reported that:

> After the Supreme Court agreed to hear the Magner case, Thomas Perez, the former attorney general for civil rights at the Justice Department and the current labor secretary, engineered a quid pro quo deal to get it out of the hands of the justices. St. Paul dismissed the pending case in exchange for the Justice Department's agreeing to forgo pursuit of two False Claims Act claims against the City for false certifications in connection with obtaining federal housing grants. Those claims could have recovered as much as $200 million for American taxpayers.[185]

If such media reports are true, the federal government's actions indicate a strong belief that the Supreme Court will strike down disparate impact under the FHA when given the opportunity.

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[181] *See Gallagher v. Magner*, 619 F.3d 823, 833 (8th Cir. 2010).

[182] *See id*. at 835.

[183] Petition for Writ of Certiorari, *Magner v. Gallagher*, No 10-1032, 2011 WL 549171, at *I (U.S., filed Feb. 14, 2011).

[184] *See* Lyle Denniston, *Fair Housing Case Dismissed*, SCOTUSBLOG (Feb. 10, 2012, 2:27 PM), http://www.scotusblog.com/2012/02/fair-housing-case-dismissed/.

[185] Hans A. Von Spakovsky & Michael Flynn, *Last-Minute Settlement Saves 'Disparate Impact' – Again*, NATIONALREVIEW.COM (Nov. 1, 2013, 5:51 PM), http://www.nationalreview.com/corner/362917/last-minute-settlement-saves-disparate-impact-again-hans-von-spakovsky-michael-flynn.

ii. Mount Holly v. Mount Holly Gardens Citizens in Action, Inc.

The Court's next opportunity to decide the fate of disparate impact under the FHA came in 2013, when it granted certiorari in *Township of Mt. Holly v. Mt. Holly Gardens Citizens in Action, Inc*.[186] In *Mt. Holly*, the Township proposed a redevelopment plan that would eliminate the existing homes in its "Gardens" neighborhood, a predominantly African American and Hispanic area plagued by crime,[187] blight, and overcrowding.[188] Under the plan, the Gardens would be replaced almost entirely with market-rate houses, thereby displacing its existing residents.[189] In 2008, an association of concerned residents filed suit in federal district court, alleging, among other things, violations of the FHA.[190] Thereafter, the district court granted the Township's motion for summary judgment, finding that the concerned residents had failed to establish a *prima facie* case of discrimination under the FHA and that, in any event, the plaintiffs had not shown how an alternative course of action would have had a lesser impact.[191]

The Third Circuit reversed, holding that the district court erred in finding the resident's statistical evidence insufficient to establish a *prima facie* case of disparate impact as well as by applying the wrong standard.[192] The district court's decision was remanded for further proceedings to determine whether the Township had carried its burden that there were no less discriminatory alternatives.[193] After the

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[186] *Mt. Holly*, 133 S. Ct. 2824 (2013).

[187] For example "[i]n 1999, 28% of crimes in the Township occurred in the Gardens, even though that neighborhood covers only 1.5% of the Township's land area." *See Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375, 378 (3d Cir. 2011).

[188] *See id*.

[189] *See id*. at 377.

[190] *See id*. at 380.

[191] *See id*. at 381.

[192] *See id*. at 377.

[193] *See id*. at 388.

Township's request for rehearing *en banc* was stayed pending the Supreme Court's resolution of *Gallagher,* and then denied after *Gallagher* settled, the Township petitioned for certiorari.[194]

The Township's petition presented two questions, virtually identical to those raised in *Gallagher*: (1) whether disparate impact claims are cognizable under the Fair Housing Act; and (2) if so, should they be analyzed under the burden-shifting approach used by three circuits, under the balancing test used by four circuits, under a hybrid approach used by two circuits, or by some other test?[195] When the Court granted certiorari in June of 2013, however, it limited its grant to the Township's first question.[196] As with *Gallagher*, the parties settled and the petition was dismissed prior to oral arguments.[197]

IV. Standards For Disparate Impact And The Need For Uniformity

Should the Supreme Court hold that disparate impact claims are cognizable under the FHA, it will almost certainly proceed to set a uniform standard for establishing liability. But what standard should the Court adopt? The following sections first outline the current circuit split and highlights some of the consequences resulting from the lack of a uniform standard. Next, an overview of the standard codified in HUD's regulations is provided. Finally, an argument is put forth for why the Court should formally adopt HUD's burden-shifting standard.

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[194] *See generally* Petition for a Writ of Certiorari, *Mount Holly Citizens in Action v. Twp. of Mount Holly*, 2012 WL 2151511 (No. 11-1507).

[195] *See id.* at *i

[196] *See Twp. of Mount Holly, N.J. v. Mt. Holly Gardens Citizens in Action, Inc.*, 133 S. Ct. 2824 (2013).

[197] In a subsequent interview, the Mayor of St. Paul stated that in the wake of the "Department of Justice's settlement against Countrywide Mortgage, which provided $335 million of relief to homeowners who have been discriminated against, disparate impact recovery is an important tool in fighting predatory lending and economic injustice . . . ." *See City of Saint Paul Seeks to Dismiss United States Supreme Court Case Magner vs. Gallagher*, SAINT PAUL MINNESOTA (Feb. 10, 2012), http://www.stpaul.gov/index.aspx?NID=4874 (last visited Mar. 3, 2015). Although the settlement in *Gallagher* does not appear to be the result of intervention on the part of the federal government, the Mayor's view is indicative of the common belief that the Supreme Court would strike down disparate impact under the FHA if provided the opportunity.

a. Current Circuit Tests

As discussed *supra*, eleven circuit courts of appeals have recognized disparate impact under the FHA.[198] These eleven Circuits all recognize that the first step in the test requires the plaintiff to make a *prima facie* showing of disparate impact.[199] Beyond this initial step, however, the circuits are badly split on the appropriate standard or test for determining liability. According to some commentators, the lack of a uniform standard has produced an "inchoate" and "increasingly incoherent" body of law.[200] As a result, three divergent tests have emerged: the Fourth, Sixth, Seventh, and Tenth Circuits employ a "balance-of-factors" test; the Third, Eighth, and Ninth Circuits employ a "burden-shifting" test; and the First and Second Circuits employ a "hybrid" test.

i. Balance-of-Factors Test

The balance-of-factors test employed by the Fourth, Sixth, Seventh, and Tenth Circuits is largely based on equal protection analysis.[201] The test was first announced by the Seventh Circuit in *Metropolitan Housing Development Corp. v. Village of Arlington Heights*,[202] in which the Court identified "four critical factors" to be examined:

> (1) how strong is the plaintiff's showing of discriminatory effect; (2) is there some evidence of discriminatory intent, though not enough to satisfy the constitutional standard of *Washington v. Davis* ; (3) what is the defendant's interest in taking the action complained of; and (4) does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing.[203]

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[198] *See supra*, note 8 and accompanying text.
[199] *See infra* Parts IV(a)(i)-(iii).
[200] *See* Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 EMORY L.J. 409, 439 (1998); *see also Langlois*, 207 F.3d at 52 (Stahl, J., dissenting) (citing Mahoney).
[201] *See, e.g.*, *Vill. of Arlington Heights v.* 558 F.2d at 1290 (where court borrowed heavily from equal protection case law to develop disparate impact test).
[202] *Vill. of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977).
[203] *Id*. at 1290 (citations omitted).

Both the Sixth and Tenth Circuits have made an important modification to the *Arlington Heights* test, however. In *Arthur v. City of Toledo,*[204] the Sixth Circuit adopted three of the four *Arlington Heights* factors, declining to include the second factor–whether there was "some evidence of discriminatory intent."[205] Similarly, in *Mountain Side Mobile Estates Partnership v. Secretary of Housing and Urban Development,* [206] the Tenth Circuit also elected to adopt the *Arlington Heights* test without the intent factor.[207]

Initially, the Fourth Circuit also adopted the *Arlington Heights* test in *Smith v. Town of Clarkson*. [208] Two years later in *Betsey v. Turtle Creek Associates*,[209] however, the Fourth Circuit found it necessary to differentiate between cases brought against public and private defendants.[210] In *Betsey*, the court held that, because the final factor in the *Arlington Heights* test[211] contemplated a public defendant, it was an inappropriate test to be applied in cases in which the defendant was a private party.[212] As result, the *Betsey* Court articulated the following test for private defendants based upon Title VII precedent:

> The burden confronting defendants faced with a *prima facie* showing of discriminatory impact is different and more difficult than what they face when confronted with a

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[204] 782 F.2d 565 (6th Cir. 1986).

[205] *See id*. at 575 ("Under the second factor, the Seventh Circuit inquired whether plaintiffs introduced some evidence of discriminatory intent. The court, however, concluded that this factor was 'the least important of the four factors.' We agree and additionally decide not to consider this factor in our analysis.").

[206] 56 F.3d 1243 (10th Cir. 1995).

[207] *Id*. at 1252 ("We adopt the Sixth Circuit's analysis of disparate impact. We also decline to adopt the second factor of discriminatory intent from the Seventh Circuit's analysis. Discriminatory intent is the basis of a disparate treatment claim. However, disparate impact claims are premised on policies or practices which are adopted without a discriminatory motive but which are functionally equivalent to intentional discrimination.").

[208] 682 F.2d 1055, 1065 (4th Cir. 1982) ("We agree with . . . with the four critical factors utilized by the Seventh Circuit in [*Arlington*] to determine whether a violation has occurred[.]").

[209] 736 F.2d 983 (4th Cir. 1984).

[210] *See id*. at, 989 n.5.

[211] "[D]oes the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing." *Vill. of Arlington Heights*, 558 F.2d at 1290.

[212] *See Betsey*, 736 F.2d at 988-989.

> showing of discriminatory intent. Defendants may overcome a *prima facie* showing of discriminatory intent by articulating some "legitimate non-discriminatory reason for the challenged practice." However, when confronted with a showing of discriminatory impact, defendants must prove a business necessity sufficiently compelling to justify the challenged practice. We have "frequently cited and applied" the business necessity formulation in employment discrimination cases arising under Title VII.[213]

The Fourth Circuit remains the only circuit that applies a different test to public and private defendants.

ii. Burden-Shifting Test

The burden-shifting test employed by the Third, Eighth, and Ninth Circuits is largely based on Title VII analysis.[214] The test was first announced by the Third Circuit in *Resident Advisory Board v. Rizzo*,[215] in which the court articulated the following three-prong test: (1) the plaintiff must make a showing of disparate impact; (2) the defendant must establish justification for its actions; and (3) defendant must then prove that no alternative course of action could be adopted that would enable its interest to be served with less discriminatory effect.[216] While explicitly adapting the burden-shifting framework applied under Title VII claims, the *Rizzo* Court declined to include the "business necessity" test employed in Title VII discrimination cases.[217]

The Eight and Ninth Circuits have both adopted the first two prongs of the burden-shifting test; however, the burden under the third prong rests upon the plaintiff (not the defendant) to demonstrate that

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[213] *Id*. (citations omitted).

[214] *See, e.g.*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (holding that "[t]he complainant in a Title VII trial must carry the initial burden under the statute of establishing a *prima facie* case of racial discrimination. . . . The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection.").

[215] 564 F.2d 126 (3rd Cir. 1977).

[216] *See id*. at 148-49.

[217] *See id*. ("Looking to Title VII for the correct standard for rebuttal of a *prima facie* case, we note that the "business necessity" test employed in Title VII job discrimination cases, is of somewhat uncertain application in Title VIII cases. An employment practice producing a discriminatory effect under Title VII might well be justified by the fact that it is 'substantially related to job performance.' However, it appears to us that the job-related qualities which might legitimately bar a Title VII-protected employee from employment will be much more susceptible to definition and quantification than any attempted justification of discriminatory housing practices under Title VIII. As one commentator has observed, "the consequences of an error in admitting a tenant do not seem nearly as severe as, for example, the consequences of an error in hiring an unqualified airline pilot.").

a viable alternative course of action was available.[218] This notable distinction is also reflected in HUD's regulations and will be further discussed *infra* Part IV.

iii. Hybrid Test

The hybrid test, employed by the First and Second Circuits, is a combination of both the burden-shifting and balancing tests. The controlling case in the Second Circuit is *Huntington Branch, NAACP v. Town of Huntington*,[219] which utilizes the first two prongs of the burden-shifting tests but borrows from the balancing tests for its final step.[220] Under *Huntington*, a plaintiff must first demonstrate a *prima facie* case by submitting evidence that the practice in question "actually or predictably results" in a discriminatory effect.[221] Next, the burden shifts to the defendant to demonstrate "its actions furthered, in theory and practice, a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect."[222] Lastly, the court examines two additional factors: (1) whether there was any evidence of discriminatory intent; and (2) whether the plaintiff is suing to compel a governmental defendant to build housing or only to require a governmental defendant to eliminate some obstacle to housing that the plaintiff itself will build.[223] Only after the court weighs the final two factors will it determine whether the challenged practice is sufficiently justified, thereby avoiding disparate impact liability.

The controlling case in the First Circuit is *Langlois v. Abington Housing Authority*.[224] Under *Langlois*, a plaintiff must first demonstrate a *prima facie* case of disparate impact.[225] Next, the

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[218] *See Oti Kaga v. S.D. Hous. Dev. Auth.*, 342 F.3d 871 (8th Cir. 2003); *Harris v. Itzhaki*, 183 F.3d 1043, 1051 (9th Cir. 1999).
[219] 844 F.2d 926 (2nd Cir. 1988).
[220] *See id.* at 936.
[221] *See id.*
[222] *See id.*
[223] *See id.*
[224] 207 F.3d 43 (1st Cir. 2000).

defendant is only required to establish that the demonstrated disparate impact is justified by a "legitimate and substantial goal."[226] According to the court, the inquiry ends there, noting that it is not the courts' job to "balance objectives, with individual judges deciding which seem to them more worthy."[227] Thus, the First Circuit's approach refrains from imputing too heavy of a burden on the defendant: it does not require the defendant to demonstrate that no alternative with less discriminatory effect existed, nor does it provide the plaintiff with an opportunity to do the same. The First Circuit's approach in *Langlois* is arguably the most defendant-friendly test.

b. Inconsistent Results And The Need For A Uniform Standard

Perhaps the most troubling consequence of the circuit split is the potential for inconsistent results. Although the Supreme Court has recognized that "[its] principal responsibility under current practice . . . is to ensure the integrity and uniformity of federal law,"[228] the integrity of the FHA is currently threatened by the lack of a uniform standard for disparate impact claims. For example, a number of commentators have argued that *Gallagher*[229] would have been decided differently in other circuits.[230]

As discussed *supra*, *Gallagher* involved a claim brought by several landlords who alleged that, by aggressively enforcing its housing codes, the City of St. Paul increased business costs for landlords, thereby reducing "affordable housing" inventory.[231] According to the plaintiffs, the City's policies had a discriminatory effect on African Americans, who comprised roughly 60% to 70% of the affected

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[225] *See id.* at 51.
[226] *Id.*
[227] *Id.*
[228] *Kansas v. Marsh*, 548 U.S. 163, 183 (2006) (Scalia, J., concurring).
[229] *See supra* Part III(f)(i).
[230] *See, e.g.*, Brief for Int'l Mun. Lawyers Ass'n as Amici Curiae Supporting Petition for Certiorari, Gallagher, 619 F.3d 823 (No. 10-1032), 2011 WL 1037535, cert. granted 132 S. Ct. 548, 181 L. Ed. 2d 395 (2011), cert. dimissed, 132 S. Ct. 1306, 181 L. Ed. 2d 1035 (2012) (arguing that although the plaintiff's disparate impact claim was sustained in the Eighth Circuit, it would have failed in the Fourth, Seventh, and Tenth Circuits).
[231] *See* 619 F.3d at 83.

renters.[232] The Eighth Circuit, employing its burden-shifting test, reversed the district court's grant of summary judgment in favor of the City, finding that a *prima facie* case had been presented and that the issue of a viable alternative was a genuine question of fact.[233]

Had *Gallagher* gone before the Tenth Circuit, which employs a balance-of-factors test, the City may have escaped liability. In *Reinhart v. Lincoln County*,[234] the plaintiffs were unable to develop an affordable housing subdivision because of the County's land-use regulations.[235] The Tenth Circuit held that the plaintiffs had not established a *prima facie* case of disparate impact because it was not enough "to show that (1) a regulation would increase housing costs and (2) members of a protected group tend to be less wealthy than others."[236] Cases in both the Fourth[237] and Seventh[238] Circuits similarly suggest that each may have also reached a different result in *Gallagher*. The *Gallagher* Court, however, expressly rejected the Tenth Circuit's conclusion in *Reinhart*, holding instead that "the existence of a significant statistical disparity, even one resulting from inequality, is sufficient to create a *prima facie* case."[239]

The consequence of the circuit split is that there will be inconsistent outcomes in cases with closely analogous facts. This seems unacceptable: the FHA is a federal statute that should protect members of its protected classes equally, regardless of which circuit court of appeals has jurisdiction over their claims. *Inclusive Communities Project* provides the Supreme Court with an opportunity to uphold the integrity of the FHA by setting a uniform that is fair for both plaintiffs and defendants.

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[232] *See id.*
[233] See *id*. at 837.
[234] 482 F.3d 1225 (10th Cir. 2007).
[235] *Id*. at 1226-27.
[236] *Id.* at 1230.
[237] *See Williams v. 5300 Columbia Pike Corp.*, Nos. 95-2964, 95-3091, 1996 WL 690064, at *3 (4th Cir. Dec. 3, 1996).
[238] *See Hemisphere Bldg. Co. v. Vill. of Richton Park*, 171 F.3d 437, 440 (7th Cir. 1999).
[239] *Gallagher*, 619 F.3d at 836.

c. HUD's "Final Rule" – Disparate Impact, Codified

In 2013, HUD promulgated its "Final Rule;"[240] a series of regulations that it claims "formaliz[es] its long-held recognition of discriminatory effects liability under the [FHA] and, for purposes of providing consistency nationwide, formalizes a burden-shifting test for determining whether a given practice has an unjustified discriminatory effect, leading to liability under the [FHA]."[241] In drafting the regulations, HUD relied upon the statutory text and legislative history of the FHA,[242] as well as the principles developed in the extensive case law since 1968.[243] The substantive provisions of HUD's regulations can be broken down into three sections.

First, HUD's regulations expressly authorize disparate impact claims under the FHA. Specifically, the regulations provide that "[l]iability may be established under the [FHA] based on a practice's discriminatory effect . . . even if the practice was not motivated by a discriminatory intent."[244] The regulations further define "discriminatory effect" as "[a] practice . . . [that] actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin."[245]

Second, HUD's regulations provide a uniform standard for establishing disparate impact liability. Under the regulations:

> (1) The [plaintiff] . . . has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect.

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[240] *See* 24 C.F.R. §§ 100.1-.500.
[241] HUD's Final Rule, *supra* note 142, at 11,461 & nn. 12-16.
[242] *See id*. at 11,465-66.
[243] *See* Michael G. Allen, et al., *Assessing HUD's Disparate Impact Rule: A Practitioner's Perspective*, 49 HARV. C.R.-C.L. L. REV. 155, 196 (2014).
[244] 24 C.F.R. § 100.500.
[245] *Id*. at § 100.500(a).

> (2) Once the . . . plaintiff satisfies th[is] burden . . . defendant has the burden of proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant.
>
> (3) If the . . . defendant satisfies [its] burden of proof . . . [the] plaintiff may still prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.[246]

Therefore, HUD's regulations adopt a burden-shifting approach most analogous to the tests employed by the Eighth and Ninth Circuits, which place the final burden of proving that less discriminatory alternatives existed upon the plaintiff.

Third, HUD's regulations provide guidance for determining whether a challenged practice has a legally sufficient justification. Under HUD's regulations, a legally sufficient justification exists when the challenged practice: (1) "[i]s necessary to achieve one or more substantial, legitimate, nondiscriminatory interests" and (2) "[t]hose interests could not be served by another practice that has a less discriminatory effect."[247] The regulations further provide that "[a] legally sufficient justification must be supported by evidence and may not be hypothetical or speculative."[248]

d. Why the Supreme Court Should Adopt HUD's Regulations

i. <u>HUD's Regulations are a Permissible Construction of the FHA and Should Be Afforded *Chevron* Deference</u>

HUD, as the agency Congress charged with enforcing the FHA, has the authority to promulgate regulations for reviewing FHA claims[249] and the regulations should be afforded *Chevron* deference.[250] In fact, TDHCA itself urged the Fifth Circuit to adopt HUD's burden-shifting test, rather than the more

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[246] *Id*. at §§ 100.500(c)(1)-(3).
[247] *Id. at* §§ 100.500(b)(1)(i)&(ii).
[248] *Id*. at § 100.500(b)(2).
[249] *See* 42 U.S.C. 3614(a) ("The Secretary may make rules . . . to carry out this subchapter."); 42 U.S.C. § 3608(a) (vesting "authority and responsibility for administering this Act" in the Secretary of HUD); 42 U.S.C. § 3535(d) (2000) (general rulemaking authority); 42 U.S.C. §§ 3612(g)-(h) (adjudicative authority).
[250] *See infra* notes 252-256 and accompanying text.

plaintiff-friendly test applied by the district court, specifically arguing that *Chevron* deference was owed.[251] Under *Chevron*, a two-step test controls judicial review of an agency's interpretation of a statute. [252] Under the first step, a court must ask "whether Congress has directly spoken to the precise question at issue."[253] If Congress's intent is clear and unambiguous, "that is the end of the matter."[254] If, however, the statute is silent or ambiguous as to the question at issue, the court must proceed to the second step and determine "whether the agency's [interpretation] is based on a permissible construction of the statute."[255] Courts must defer to the agency's interpretation if it is "reasonable," and may not substitute their own interpretation for that of the agency.[256]

Although it has been argued that HUD's regulations are not owed *Chevron* deference,[257] such arguments are not persuasive. Indeed, in *Property Casualty Insurer's Ass'n of American v. Donovan*, [258] a District Court for the Northern District of Illinois recently upheld HUD's regulations as a reasonable, and therefore permissive, interpretation of the FHA under *Chevron*. Judge St. Eve's *Chevron* analysis is informative.[259]

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[251] *See* Brief of Appellants, *Inclusive Communities Project, Inc. v. Texas Department of Housing and Community Affairs*, No. 12-11211, 2013 WL 1802039, at *29 (5th Cir., filed April 22, 2013) ("Congress has given HUD authority to issue regulations interpreting the FHA. . . . Because HUD's regulations were subject to notice and comment, they deserve [*Chevron*] deference unless Congress has clearly spoken on the issue or the regulations are not based on a permissible construction of the. As evidenced by the range of courts of appeals decisions, Congress has not spoken clearly on the burden-of-proof issue in disparate-impact claims under the FHA. HUD's regulations are a reasonable interpretation of the burden of proof and should be applied in this case.").

[252] *See Chevron*, 467 U.S. at 842-44.

[253] *Id*. at 842-43.

[254] *See id*. at 843.

[255] *Id*.

[256] *See id*. at 842-44.

[257] *See, e.g.*, Brief for the Petitioners, *Texas Department of Housing and Community Affairs v, The Inclusive Communities Project*, No. 13-1371, 2014 WL 6466935, at *17 (U.S., filed Nov. 17, 2013) (arguing that certain textual objections preclude judicial deference to HUD's disparate-impact regulation under the *Chevron* framework).

[258] *See Prop. Cas. Insurers Ass'n of Am. v. Donovan*, No. 13-C-8564, 2014 WL 4377570, at *24-25 (N.D. Ill. Sept. 3, 2014).

[259] *See id*. at *24-25.

Under the first *Chevron* step, Judge St. Eve found that the FHA is silent on how a plaintiff should prove an FHA claim, therefore necessitating application of the second step.[260] This does not appear to be a contentious point–as discussed *supra*, the primary substantive provisions of the FHA do not expressly require a showing of discriminatory intent. Therefore, application of the second step was warranted.

Under the second step, Judge St. Eve found HUD's regulations to be a reasonable construction of the FHA for three reasons.[261] First, the Judge St. Eve found that HUD's "burden-shifting framework . . . reflects HUD's reasonable accommodation of the competing interests at stake–*i.e.*, the public's interest in eliminating discriminatory housing practices and defendants' . . . interest in avoiding costly or frivolous litigation[.]"[262] Second, Judge St. Eve found that HUD's regulations are consistent with the framework courts have developed for deciding disparate impact claims under the FHA.[263] Lastly, Judge St. Eve observed that HUD's approach is similar to the statutory approach Congress adopted for Title VII disparate impact cases, noting that "[c]ourts have repeatedly turned to Title VII precedent for guidance evaluating disparate impact liability under the FHA (Title VIII) and vice versa."[264]

Judge St. Eve's analysis under the second *Chevron* step is also persuasive.

Perhaps most importantly, HUD's regulations do not create new liabilities. Rather, as Judge St. Eve noted, HUD's regulations simply refined the framework that has been developed by the courts for nearly 45 years. Certainly an interpretation of the FHA that is consistent with 45 years of case law is "reasonable" and, therefore, should be afforded *Chevron* deference. Furthermore, one of HUD's

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[260] *See id*. at *24.
[261] *See id*. at *25.
[262] *Id*.
[263] *See id.*
[264] *Id*. (*citing Kyles v. J.K. Guardian Sec. Servs., Inc.*, 222 F.3d 289, 295 (7th Cir. 2000)).

objectives in promulgating its regulations was to produce a standard that is fair to both plaintiffs and defendants.[265] In recognizing that the regulations embody a "reasonable accommodation of the competing interests at stake," Judge St. Eve acknowledges that objective was achieved. Lastly, as Judge St. Eve also observed, HUD's burden-shifting standard is consistent with the burden shifting-test applied in Title VII cases, which the Supreme Court has upheld.[266] As a result, the Supreme Court should afford HUD's regulations *Chevron* deference.

ii. The Notice-And-Comment Rulemaking Process Enabled HUD to Develop A Superior Standard

HUD's regulations should also be adopted because they were developed through the notice-and-comment rulemaking process pursuant to express statutory authority.[267] Indeed, the Supreme Court has previously recognized that the use of notice-and-comment rulemaking is a "significant" sign *Chevron* deference is owed. [268] As one commentator has noted, "[f]ar from simply adopting the approach of any specific court, HUD thoroughly engaged with the case law and brought its own expertise to bear in adopting some judicial interpretations that the agency found to be true to the letter and spirit of the [FHA] while rejecting others."[269] The result: a standard that reflects the "agency's carefully considered and authoritative interpretation of the scope of the statute it is charged with enforcing, and . . . a practical analytical framework for evaluating disparate impact claims."[270]

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[265] *See* HUD's Final Rule, *supra* note 142, at 11,465.

[266] *See, e.g.*, *McDonnell Douglas Corp.*, 411 U.S. at 802 (holding that "[t]he complainant in a Title VII trial must carry the initial burden under the statute of establishing a *prima facie* case of racial discrimination. . . . The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection.").

[267] *See* 42 U.S.C. 3614(a).

[268] *See Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 714 (2011); *see also United States v. Mead Corp.*, 533 U.S. 218, 230 (2001) (stating that *Chevron* deference applies to "the fruits of notice-and-comment rulemaking or formal adjudication").

[269] Allen, et al., *supra* note 243, at 169.

[270] *Id*. at 169-70.

The notice-and-comment rulemaking process enabled HUD to develop a standard incorporating 45 years of precedential hindsight and its own expertise in enforcing the FHA. As the following section demonstrates, these advantages are reflected in both the individual provisions and overall functioning of HUD's regulations.

iii. HUD's Regulations Will Enable Courts to Combat Segregation Fairly and Effectively

HUD's regulations maintain the pragmatic approach necessary for disparate impact claims to be effective. First, HUD refrained from providing a single standard for demonstrating a *prima facie* case of disparate impact. HUD found that "given the numerous and varied practices and wide variety of private and governmental entities covered by the [FHA], it would be impossible to specify in the rule the showing that would be required to demonstrate a discriminatory effect in each of these contexts."[271] As a result, HUD's regulations preserve the great latitude courts have previously afforded plaintiffs to prove that the challenged practice has a discriminatory effect.

Second, HUD's regulations assign to the plaintiff the burden of proving that the defendant could have achieved its legitimate interests through a less discriminatory alternative.[272] While plaintiffs and fair housing advocates likely oppose this approach, the choice embodies a reasonable compromise by HUD in formulating its regulations. Indeed, some commentators have even suggested that HUD's Final Rule operates as a hybrid between tests that place the burden on plaintiffs and those that place the burden on the defendant.[273] Specifically, the commentators observe that "[w]hile HUD placed the ultimate burden of proving the existence of a less discriminatory alternative on the plaintiff, it

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[271] *See* HUD's Final Rule, *supra* note 142, at 11,468.
[272] *See* 24 C.F.R. § 100.500(c)(3).
[273] *See* Allen, et al., *supra* note 243, at 179.

nonetheless required the defendant to prove that its policy is 'necessary,' in other words that other options were ineffective or unworkable."[274]

Third, HUD's regulations implicitly preserve a role for findings of discriminatory intent. As discussed *supra*, some of the circuits are split over the relevance of discriminatory intent.[275] However, claims of disparate impact and disparate treatment (which requires discriminatory intent) are inextricably linked and plaintiffs frequently plead both, as was the case in *Inclusive Communities Project*.[276] Commentators have identified at least three HUD's regulations permit plaintiffs to develop–and triers of fact to consider–evidence of discriminatory intent: by analyzing the (1) strength of the plaintiff's *prima facie* case; (2) legitimacy of a defendant's attempt to justify a practice with a demonstrated discriminatory effect; and (3) plaintiff's showing of less discriminatory alternatives.[277] While the nature of disparate impact is to permit plaintiffs to redress discrimination without evidence of intent, surely evidence of intent can only further support a claim that a discriminatory effect cannot be legally justified. Therefore, by leaving room for the consideration of evidence of discriminatory intent, HUD's regulations preserve the historic "symbiotic nature" of disparate treatment and disparate impact claims.[278]

Simply stated, if the Supreme Court adopts HUD's burden-shifting standard two primary advantages will result. First, adopting HUD's regulations will immediately resolve the current circuit split and eliminate (or at least reduce) the likelihood of inconsistent results. Second, HUD's regulations provide a superior standard because they were produced through a process that took into account 45

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[274] *Id*.

[275] *Compare Vill. of Arlington Heights*, 558 F.2d at 1290 (where court announced a "balance-of-factors" test that considered evidence of discriminatory intent); *with Arthur*, 782 F.2d at 575 (where court adopted the *Arlington Heights'* "balance-of-factors" but declined to consider evidence of discriminatory intent).

[276] *See Inclusive Communities Project I*, at 313-14.

[277] *See* Allen, et al., *supra* note 243, at 179.

[278] *See id*. at 190.

years of case law and HUD's own expertise in enforcing the FHA. The result: a uniform standard that maintains the pragmatic approach necessary for the FHA to fight the more subtle sources of modern segregation.

Conclusion

There can be no doubt: the stakes are high in *Inclusive Communities Project*. The FHA may not have achieved the fully-integrated society its congressional framers envisioned, but it remains an indispensible weapon in the fight against discrimination in the United States. Central to its effectiveness is the ability for plaintiffs to seek redress against actions or practices that have disproportionately affected them because of their race, regardless of their ability to prove discriminatory intent. At a time when overt, race-based discrimination has been largely replaced by subtle (and sometimes unintentional) mechanisms of segregation, claims of disparate impact are essential to effectuating the purposes of the FHA.

Yet proponents have reasons to be concerned. The Supreme Court's grant of three petitions for certiorari in four years demonstrates that it has an urgent desire to decide the question of whether disparate impact claims are cognizable under the FHA. The question thus becomes: why is the Court so eager to decide upon an issue that it has avoided for so long? Indeed, many commentators and observers believe that claims of disparate impact under the FHA will soon be a relic of the past.

Notwithstanding the Supreme Court's recent interest, all hope should not be lost. Sufficient justification exists for the Court to uphold disparate impact under the FHA. For forty years, the circuit courts of appeals have almost uniformly recognized disparate impact under the FHA. Claims of disparate impact are not foreclosed by the text of the FHA and the FHA's legislative history is clear: Congress understood that the Act had to be capable of fighting the *effects* and *consequences* of

discrimination in the housing context, regardless of the underlying motivation. Indeed, in the nearly 45 years since the first disparate impact claim was brought under the FHA, Congress (and the Supreme Court) has refrained from expressly requiring a showing of discriminatory intent. Furthermore, HUD's regulations provide the Court with an opportunity to resolve the circuit split by adopting a uniform standard capable of being both fair and effective. HUD's notice-and-comment rulemaking process produced a standard that ensures fairness by adequately confronting the competing interests of both plaintiffs and defendants. Finally, HUD's burden-shifting standard permits courts to employ the pragmatic approach necessary for the FHA to address the diverse sources of modern housing segregation.

Ultimately, attempting to predict an outcome in *Inclusive Communities Project* is futile. There are arguments to be made on both sides. Regardless of the how the Court decides, however, the ramifications of its decision are likely to be extraordinary and will shape the future of housing segregation in United States for many years to come.