University of Cincinnati Law Review

Volume 88 | Issue 4 Article 5

May 2020

# Zoning for All! Disparate Impact Liability Amidst the Affordable Housing Crisis

Quinn Marker
*University of Cincinnati*, markerjs@mail.uc.edu

# ZONING FOR ALL! DISPARATE IMPACT LIABILITY AMIDST THE AFFORDABLE HOUSING CRISIS

*Quinn Marker*

## I. INTRODUCTION

The United States has a housing problem. At its most basic and unforgiving level, the housing crisis threatens to displace millions of Americans each year.[1] Millions more teeter on the edge of eviction on a near constant basis, plagued by dwindling emergency funds,[2] low wages,[3] and rising rents.[4] The number of households impacted by this set of challenges has risen drastically, with the percentage of cost-burdened renters doubling from just under 24% in the 1960s to over 47% in 2016.[5] Times have been particularly challenging for renters, experiencing a 60% increase in inflation-adjusted median rent between 1960 and 2016, while inflation-adjusted income has grown by merely 5% through the same period.[6] This culminated in a total of 2.3 million filed evictions in 2016 alone.[7] At the same time, the purchase price of homes has risen faster than wages in 80% of U.S. markets, putting home ownership out of reach for most Americans.[8] While the crisis is most often realized in the form of

1. In 2016, 2.3 million evictions were filed, resulting in about 900,000 evicted households. *National Estimates: Eviction in America*, EVICTION LAB, PRINCETON UNIV. (May 11, 2018), https://evictionlab.org/national-estimates/ [https://perma.cc/ZP85-ZZFP]; *see also* Terry Gross, *First-Ever Evictions Database Shows: 'We're In the Middle Of A Housing Crisis',* NPR (Apr. 12, 2019, 1:07 PM), https://www.npr.org/2018/04/12/601783346/first-ever-evictions-database-shows-were-in-the-middle-of-a-housing-crisis [https://perma.cc/K355-ELMV].

2. Only 61% of U.S. Adults could cover an unexpected $400 expense without going into debt. FED. RESERVE, REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2018, 21 (2019), https://www.federalreserve.gov/publications/files/2018-report-economic-well-being-us-households-201905.pdf [https://perma.cc/M7CC-DXMP].

3. "The real value of the federal minimum wage has dropped 17% since 2009 and 31% since 1968." DAVID COOPER ET AL., ECON. POLICY INST., LOW-WAGE WORKERS ARE SUFFERING FROM A DECLINE IN THE REAL VALUE OF THE FEDERAL MINIMUM WAGE 2 (2019), https://www.epi.org/publication/labor-day-2019-minimum-wage/ [https://perma.cc/J3GQ-FLSE].

4. JOINT CTR. FOR HOUS. STUDIES OF HARV. UNIV., THE STATE OF THE NATION'S HOUSING 2018, 1 (2018), http://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_State_of_the_Nations_Housing_2018.pdf [https://perma.cc/PM9E-MEE7].

5. *Id.* at 5. A cost-burdened household spends 30% or more of their income on housing costs. *id.*; *see id.* at 40 for a table illustrating cost-burdened households among renters and homeowners from 2001-2016.

6. *Id*. at 5.

7. Gross, *supra* note 1.

8. Alcynna Lloyd, *Home prices are rising faster than wages in 80% of U.S. markets,* HOUSINGWIRE (Jan. 10, 2019), https://www.housingwire.com/articles/47878-home-prices-are-rising-faster-than-wages-in-80-of-us-markets [https://perma.cc/P8KQ-J9YQ].

these and other financial conflicts, imposing questions about race, class, and health[9] are all brought to bear when confronting the crisis head-on.

The Fair Housing Act's[10] ("FHA" or the "Act") disparate impact liability, formally recognized in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.,*[11] can play a leading role in solving the issue, particularly in eliminating restrictive land use policies across the country. Recent interpretations of *Inclusive Communities* by federal courts have stripped the Act of much of its power and threaten to perpetuate the housing crisis. This comment examines the state of disparate impact liability under the Fair Housing Act and assesses its long-term utility as a tool to combat the housing crisis. Part II first examines the impacts of restrictive land use policy before providing a brief history of disparate impact liability under the Fair Housing Act. Part II concludes with an overview of notable disparate impact litigation, including the landmark case: *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc*. Finally, Part III argues the weakened disparate impact liability currently being applied throughout several circuit courts, is not in accord with the Fair Housing Act. Part III concludes with a proposed burden shifting framework that protects the interests of both parties, while fulfilling the stated purpose of the Fair Housing Act: "to provide … for fair housing throughout the United States."[12]

## II. BACKGROUND

Land use policy controls the way people move throughout their cities. It dictates where they work, live, and gather. To be sure, thoughtful zoning schemes can, and often do, have merit, but they can also present challenges—including economic and racial segregation. This Part first, in Section A, presents the impacts of exclusionary zoning and the Supreme Court's treatment of such schemes. Then, Section B presents the Fair Housing Act and the origins of disparate impact liability. Next, Section C examines the Supreme Court's interpretation of disparate impact liability in the seminal case, *Texas Department of Housing & Community Affairs v. Inclusive Communities Project Inc.* Lastly, Section D examines the various approaches taken by circuit courts in their application of

9. Individuals threatened with eviction are more likely to suffer from physical and mental health issues, including high blood pressure and depression. *See* Hugo Vásquez-Vera et al., *The threat of home eviction and its effects on health through the equity lens: A systematic review,* 175 SOC. SCI & MED. 199, 205 (2017).

10. 42 U.S.C. §§ 3601-3631 (LEXIS through Pub. L. No. 116-91); *see also* Discriminatory Conduct Under the Fair Housing Act, 24 C.F.R. § 100.5 (LEXIS 2019).

11. 135 S. Ct. 2507 (2015).

12. 42 U.S.C. § 3601 (LEXIS through Pub. L. No. 116-91).

*Inclusive Communities.*

### *A. The far-reaching impacts of restrictive land use policy*

While local land use policy often goes unnoticed in daily life, increasingly restrictive land use policies, such as single-family zoning, minimum lot sizes, and other density restrictions, have far-reaching negative implications on the housing market for renters, low-income individuals, and minorities.[13] These policies, particularly single-family zoning, contribute to decreased density and lead to "fewer housing opportunities for low income and minority residents than those [cities] that have embraced a new paradigm for regulating growth and development."[14]

Although experts measure the impacts of restrictive land use policy differently, most research suggests that density restrictions lead to income and racial segregation.[15] At a basic level, economists argue density restrictions, like minimum lot sizes and single-family zoning, increase housing costs by making construction more expensive and constraining total supply.[16] These restrictions have increased in recent years and can be measured by tracking land costs over time.[17] Between 2013 and 2016 the cost of buying land, typically reflected in a comparison between home prices and construction costs, increased by nearly 25% compared to the average span in the 1990s.[18] Likewise, despite only making up 13% of the total United States population, African-Americans live, on average, in communities that are 46% African-American.[19] At the same time, white

13. *See* ROLF PENDALL, ROBERT PUENTES, & JONATHAN MARTIN, BROOKINGS INST., FROM TRADITIONAL TO REFORMED: A REVIEW OF THE LAND USE REGULATIONS IN THE NATION'S 50 LARGEST METROPOLITAN AREAS 5 (2006), https://www.brookings.edu/wp-content/uploads/2016/06/20060802_Pendall.pdf [https://perma.cc/CKW7-QJ62].

14. *Id.* at 2.

15. Michael C. Lens & Paavo Monkkonen, *Do Strict Land Use Regulations Make Metropolitan Areas More Segregated by Income?*, 82 J. AM. PLAN. ASS'N 6, 9 (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5800413/ [https://perma.cc/2H9D-NEBH] ("We can conclude that density restrictions lead to increased income and racial segregation, but it is less clear how other forms of land use regulation affect income segregation.").

16. JOSEPH GYOURKO & RAVEN MOLLOY, HANDBOOK OF REGIONAL AND URBAN ECONOMICS 1316 (2015), https://faculty.wharton.upenn.edu/wp-content/uploads/2017/05/Regulation-and-Housing-Supply-1.pdf [https://perma.cc/9N9X-6VJG] ("regulation increases the marginal cost of construction, both directly through the fees and time costs and indirectly by requiring construction to follow certain forms . . . . [S]ome types of regulation such as growth controls effectively make the marginal cost of housing infinite by constraining the total number of housing units allowed.").

17. Jason Furman, Opinion, *Reform land use, promote shared growth of new housing*, S.F. CHRON. (Sept. 25, 2016), https://www.sfchronicle.com/opinion/openforum/article/Reform-land-use-promote-shared-growth-of-new-9283703.php [https://perma.cc/BN3B-75GP].

18. *Id.*

19. William H. Frey, *Op-Ed, Census Data: Blacks and Hispanics Take Different Segregation Paths*, BROOKINGS INST. (Dec. 16, 2010), https://www.brookings.edu/opinions/census-data-blacks-and-

Americans make up 64% of the population and live in communities that are 79% white.[20] Even when controlling for socioeconomic factors, housing patterns remain largely segregated by race.[21]

In response, land use reform has gained traction in recent years. In 2016, the Obama administration published a toolkit urging local governments to adopt modern land use best practices, such as allowing accessory dwellings, eliminating parking requirements, and instituting multi-family zoning.[22] Cities and states across the country, most notably Minneapolis and the state of Oregon, answered the call and eliminated exclusionary zoning.[23] Many others are poised to follow suit, sparking impassioned cries of the Yes In My Backyard ("YIMBY") movement to counteract the anti-reform Not In My Backyard ("NIMBY") movement.[24]

The Supreme Court is no stranger to exclusionary zoning either. In 1917, the Court deemed race-based zoning unconstitutional under the 14th Amendment in *Buchannan v. Warley*.[25] Many cities, particularly in the South, defiantly ignored the prohibition and enacted new race based zoning codes anyway.[26] Following the prohibition of race-based zoning, many cities began to employ other forms of facially-neutral exclusionary zoning, such as single family zoning, to control where people lived. From a YIMBY's perspective, single-family zoning keeps lower-income

---

hispanics-take-different-segregation-paths/ [https://perma.cc/X5YR-KJDZ].

20. *Id.*

21. Douglas S. Massey, *American Apartheid: Segregation and the Making of the Underclass*, 96 *AM. J. SOC. 329, 352 (1990)* https://www.jstor.org/stable/pdf/2781105.pdf?refreqid=excelsior%3Ad8e47ca6a85d1cface5880ab5c341430 [https://perma.cc/WF5N-AXPP].

22. THE WHITE HOUSE, HOUSING DEVELOPMENT TOOLKIT 3 (2016), https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Housing_Development_Toolkit%20f.2.pdf [https://perma.cc/K4UV-3KYR].

23. *See* Sarah Mervosh, *Minneapolis, Tackling Housing Crisis and Inequity, Votes to End Single-Family Zoning*, N.Y. TIMES (Dec. 13, 2018), https://www.nytimes.com/2018/12/13/us/minneapolis-single-family-zoning.html [https://perma.cc/VH9U-R79Q]; Elliot Njus, *Bill to eliminate single-family zoning in Oregon neighborhoods passes final legislative hurdle*, THE OREGONIAN (June 30, 2019), https://www.oregonlive.com/politics/2019/06/bill-to-eliminate-single-family-zoning-in-oregon-neighborhoods-passes-final-legislative-hurdle.html [https://perma.cc/4ATZ-9EMN].

24. *See, e.g.*, Alexei Koseff, *California housing: New laws aim to make it easier to build*, S.F. CHRON (Oct. 9, 2019),

https://www.sfchronicle.com/politics/article/California-housing-New-laws-aim-to-make-it14504985.php [https://perma.cc/BQ5U-G9JZ] (new legislation includes a five-year moratorium on exclusionary zoning and series of bill streamlining the process for accessory dwellings); *see also* Alana Semuels, *From 'Not in My Backyard' to 'Yes in My Backyard'*, THE ATLANTIC (Jul. 5, 2017), https://www.theatlantic.com/business/archive/2017/07/yimby-groups-pro-development/532437/ [https://perma.cc/J34V-DHMS].

25. 245 U.S. 60 (1917).

26. *See* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 46-48 (2017). Rothstein describes the post-*Buchannan* race-based zoning codes in Atlanta, Indianapolis, Richmond (VA), Birmingham, West Palm Beach, Austin, Kansas City, and Norfolk. Some continued into the late 1980s.

families from moving into a more affluent area by blocking more affordable multi-family development. From a NIMBY's perspective, single-family zoning is valuable tool to preserve property values and neighborhood character. The Supreme Court took the side of the NIMBY's and held single-family zoning constitutional in *Village of Euclid v. Ambler Realty,* noting that zoning regulations should be upheld as long as there is some connection to public welfare.[27] In so holding, the Court characterized multi-family buildings as a "mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district."[28] One year prior to *Buchannan*, in 1916, just eight cities in the United States had zoning codes.[29] In 1936, in the wake of *Buchannan* and *Euclid*, 1,246 cities had restrictive zoning codes in place.[30] The FHA aimed to confront this and other types of discrimination directly.

Two years after the passage of the Act, exclusionary zoning was again recognized as a major problem facing the country when Housing and Urban Development ("HUD") Secretary George Romney introduced his Open Communities Plan.[31] Romney intended to eliminate exclusionary zoning by withholding federal HUD funds from communities whose zoning codes did not allow for subsidized multi-family buildings for African-American families.[32] The pushback was swift and President Nixon removed Secretary Romney and his Open Communities Plan shortly thereafter.[33] In the years following the passage of the Act, with discrimination taking on new, covert forms, many courts construed the Act broadly in order to implement the Act's stated purpose: "to provide … for fair housing throughout the United States."[34]

27. Village of Euclid v. Ambler Realty, 272 U.S. 365, 387-89 (1926).

28. *Id.* at 394.

29. Elizabeth Winkler, '*Snob zoning' is racial housing segregation by another name,* WASH. POST (SEPT. 25, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/09/25/snob-zoning-is-racial-housing-segregation-by-another-name/ [https://perma.cc/BE2Y-69YR].

30. *Id.*

31. ROTHSTEIN, *supra* note 26 at 201.

32. *Id.*

33. *Id.*

34. 42 U.S.C. § 3601 (LEXIS through Pub. L. No. 116-91); *see generally* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209-10 (1972) (noting the "broad and inclusive language" of the FHA allows parties injured by the "loss of important benefits from interracial associations" to bring a claim); Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 95 (1977) (recognizing "that Congress has made a strong national commitment to promote integrated housing.").

### *B. The Fair Housing Act aimed to remedy a century of discrimination and racism*

#### 1. Historical Background of the Fair Housing Act

The roots of housing discrimination run deep. After the Civil War, the Civil Rights Act of 1866 purported to outlaw housing discrimination, but the Supreme Court did not officially recognize the prohibition until 1968.[35] In February of the same year the Kerner Commission, in a report commissioned by President Lyndon B. Johnson, warned the country was "moving toward two societies, one black, one white—separate and unequal."[36] Just seven days after Martin Luther King Jr. was assassinated, and with National Guard troops on call in the basement of the Capitol,[37] Congress passed the FHA as part of the Civil Rights Act of 1968.[38] Senator Walter Mondale, one of the bill's lead sponsors and co-authors, characterized it as a means to promote "truly integrated and balanced living patterns."[39] The Act's stated purpose is closely aligned with Senator Mondale's sentiment: "to provide, within constitutional limitations, for fair housing throughout the United States."[40] In its current form, the Act prohibits discrimination on the basis of race, color, religion, national origin, sex, familial status, and disability.[41]

#### 2. Types of Discrimination Covered Under the Act

There are two types of discrimination protected under the Act: disparate treatment and disparate impact. Disparate treatment requires the plaintiff to prove the defendant "had a discriminatory intent or motive."[42]

---

35. Jones v. Mayer, 392 U.S. 409, 436 (1968) ("In light of the concerns that led Congress to adopt [the Civil Rights Act of 1866] and the contents of the debates that preceded its passage, it is clear that the Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein–*including the right to purchase or lease property*.") (emphasis added).

36. KERNER COMM'N, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968) https://www.ncjrs.gov/pdffiles1/Digitization/8073NCJRS.pdf [https://perma.cc/53UQ-D7VL].

37. Douglas S. Massey, *The Legacy of the 1968 Fair Housing Act*, 30 SOC. F. 571, 575 (2015) https://onlinelibrary.wiley.com/doi/epdf/10.1111/socf.12178 [https://perma.cc/2XSN-723S].

38. Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601-3631 (2012)).

39. 114 CONG. REC. 3422 (daily ed. Feb. 20, 1968) (statement of Sen. Mondale) Mondale further added that, "segregated housing is the simple rejection of one human being by another without any justification but superior power; we have closed our hearts to our fellow human beings to the extent that we have closed our neighborhoods to them." *Id.*

40. 42 U.S.C. § 3601 (LEXIS through Pub. L. No. 116-91).

41. 42 U.S.C. § 3604 (LEXIS through Pub. L. No. 116-91).

42. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, 135 S. Ct. 2507, 2513 (2015).

Disparate treatment discrimination broadly covers discrimination in the "sale, rental, or advertising of dwellings, in the provision of brokerage services, or in the availability of residential real estate-related transactions."[43] HUD regulations identify additional activities considered to be disparate treatment discrimination including "blockbusting,"[44] steering,[45] and denying membership or participation in any organization related to real estate services, such as a real estate brokers association.[46] Alternatively, disparate impact discrimination provides protection for those harmed by a facially neutral policy or practice that has a discriminatory effect.[47] There are two instances typically suited for disparate impact liability: (1) where a decision has a "greater adverse impact on one racial group than on another"[48] and (2) where a decision "perpetuates segregation and thereby prevents interracial association."[49]

Unlike disparate treatment, disparate impact liability has not always been universally recognized. However, by 2013, twelve federal circuit courts recognized disparate impact liability, but differed in their analysis of the issue.[50] HUD formalized disparate impact liability with a 2013 rule, in line with their "long-held interpretation" of the theory.[51] Not only did the new regulation formally acknowledge the availability of disparate impact liability, but it also set forth a uniform standard for evaluating disparate impact claims.[52] The rule sets forth a three step burden shifting framework, requiring the following: (1) claimant must make their prima facie case by "proving that a challenged practice caused or predictably

43. Discriminatory Conduct Under the Fair Housing Act, 24 C.F.R. § 100.5(a) (LEXIS through Sep. 16, 2019).

44. 24 C.F.R. § 100.85(c) (LEXIS 2019) (Such prohibited actions include engaging in profit-motivated conduct which: "… conveys to a person that a neighborhood is undergoing or is about to undergo a change [regarding a protected class] in order to encourage the person to offer a dwelling for sale or rental [or] (2) [e]ncouraging, for profit, any person to sell or rent a dwelling through assertions that the entry or prospective entry of persons of [a protected class], can or will result in undesirable consequences for the project, neighborhood or community.").

45. 24 C.F.R. § 100.70 (LEXIS 2019) (defined as, "to restrict or attempt to restrict the choices of a person by word or conduct in connection with seeking, negotiating for, buying or renting a dwelling so as to perpetuate, or tend to perpetuate, segregated housing patterns, or to discourage or obstruct choices in a community, neighborhood or development.").

46. 24 C.F.R. § 100.90 (LEXIS 2019).

47. 24 C.F.R. § 100.500 (LEXIS 2019).

48. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977).

49. *Id.*; *see also* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209-12 (1972) (recognizing "the loss of important benefits from interracial associations" impacting "the whole community," not just excluded tenants, as a cognizable injury under the Act).

50. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460 (Feb. 15, 2013).

51. *Id.*

52. *Id.*

will cause a discriminatory effect,"[53] (2) if claimant satisfies its burden, respondent must prove "the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests,"[54] (3) if satisfied, claimant can still prevail if able to "prov[e] that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect."[55] The framework specifically noted that any of the defendant's justifications must "be supported by evidence and may not be hypothetical or speculative."[56] While the regulation went a long way towards the standardization of disparate impact liability, the Supreme Court, just 23 months later in *Inclusive Communities,* neglected to expressly adopt the framework and in so doing, limited its bite.[57]

### *C. Texas Department of Housing & Community Affairs v. Inclusive Communities Project*

#### 1. Structural Disagreement in the Lower Courts

While HUD's recognition of disparate impact liability was a positive step forward for those suffering at the hands of discriminatory housing practices, the Supreme Court's decision in *Inclusive Communities* limited its reach.[58] This case considered whether the Texas Department of Housing & Community Affairs ("Department") violated the FHA when it disproportionately allocated low-income housing tax credits ("LIHTC") to predominantly low-income, African-American neighborhoods. The plaintiff in the case, the Inclusive Communities Project ("ICP"), alleged that the state's LIHTC allocation "has caused continued segregated housing patterns" and demanded the Department change its selection criteria[59] in order to promote low-income housing in more affluent suburban areas.[60] ICP was armed with compelling data to illustrate the

53. 24 C.F.R. § 100.500(c)(1) (LEXIS 2019).

54. 24 C.F.R. § 100.500(c)(2) (LEXIS 2019).

55. 24 C.F.R. § 100.500(c)(3) (LEXIS 2019). *But see* Am. Ins. Assoc. v. Dept of Hous. and Urban Dev., 74 F. Supp. 3d 30, 47 (Dist. D.C. 2014) (holding HUD overstepped its authority to promulgate disparate impact regulation and declaring 24 C.F.R. § 100.500 "vacated"), *vacated per curiam*, No. 14-5321, 2015 U.S. App. LEXIS 16894 (D.C. Cir. Sep. 23, 2015).

56. 24 C.F.R. § 100.500(b)(ii)(2) (LEXIS 16, 2019).

57. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, 135 S. Ct. 2507, 2513 (2015).

58. *Id.*

59. Applications for LIHTC credits were scored on a point system, including statutory metrics such as financial feasibility and income level of tenants, in addition to criteria such as the quality of the surrounding schools. *Id.*

60. *Id.* at 2514.

disparity, satisfying their burden for a prima facie case according to the district court and ultimately prevailing when the Department failed to prove "that there [we]re no less discriminatory alternatives" to meet their stated objective.[61] On appeal, the Fifth Circuit reversed. Although the Fifth Circuit agreed with the consensus that disparate impact claims should be recognized, it took issue with the district court's burden shifting framework and the absence of any causation analysis beyond the ICP's "bare statistical evidence."[62]

### 2. The Supreme Court's Recognition (and Limitation) of Disparate Impact

The Supreme Court, in a narrow 5-4 decision, affirmed the decision of the Fifth Circuit in regards to the availability of disparate impact claims, holding them to be "consistent with the Act's central purpose." The Court specifically pointed to discriminatory land use practices as a prime example of disparate impact discrimination, but remanded the case[63] to be considered in light of several limitations outlined in the majority opinion.[64] The Court argued that the Act has "always been properly limited in key respects that avoid the serious constitutional questions that might arise under the [Act]."[65] First, a claimant's prima facie case must be subjected to a "robust causality requirement," pointing to the specific policy or policies at issue creating the disparity.[66] These limitations serve to protect developers and housing authorities from being "held liable for racial disparities they did not create."[67] The Court buttressed this limitation by pointing to its fear that organizations would resort to the use of numerical quotas to ensure racial balance[68] and cautioned courts that a broad disparate impact liability could "inject racial considerations into

61. *Id.* (Over 90% of LIHTC units in Dallas were in areas with less than 50% white residents. ICP also argued from 1999-2008 the Department approved LIHTC applications for almost half (49.7%) of units proposed in areas comprised of less than 10% white residents, while only approving 37.4% in areas with over 90% white residents.).

62. *Id.* at 2515.

63. On remand, the district court held that ICP "failed to prove a prima facie case of discrimination." Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, No. 3:08-CV-0546-D, 2016 U.S. Dist. LEXIS 114562, at *42-43 (N.D. Tex. 2016).

64. Tex Dep't of Hous. & Cmty, Affairs v. Inclusive Cmtys. Project, 135 S. Ct. 2507, 2522-523 (2015).

65. *Id.* at 2522.

66. The Court noted that a "one-time decision may not be a policy at all." *id.* at 2523; *but see* Mhany Mgmt. v. Cnty. of Nassau, 819 F.3d 581, 619 (2nd Cir. 2016) (holding a zoning decision for a single parcel of land constituted a "general policy").

67. *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2523.

68. *Id.*

every housing decision."[69]

Second, defendants must be given "leeway"[70] to prove the practice is "necessary to achieve a valid interest."[71] In support of this limit, the Court argued that it would be inconsistent with the goal of the Act to "impose onerous costs" on well-intentioned developers.[72] The Court offered further reassurance to developers, noting the Act does not put them "in a double bind of liability" based on where they choose to develop.[73] The Court also noted the complex, and often subjective, decisions that zoning officials must make when confronting issues such as historic preservation.[74] Third, the Court instructed courts that all remedial measures in disparate impact cases should be strictly race-neutral.[75]

### *D. Inclusive Communities: Varied Application, Varied Results*

It did not take long for courts across the country to apply their version of the *Inclusive Communities* approach to disparate impact claims. This section highlights the varied applications of *Inclusive Communities* which has led to mixed results and relative confusion. First, Sections 1, 2, and 3 present three divergent applications of the "robust causality" requirement. Next, Section 4 examines the application of the final step of the burden shifting framework—the plaintiff's showing of a less discriminatory alternative. Then, Section 5 covers the hostility towards single-family zoning that has remained in disparate impact liability. Finally, Section 6 highlights HUD's proposed framework changes published in August 2019.

#### 1. A prima facie case *plus* proximate cause

The Eleventh Circuit interpreted robust causality as a general limiting factor on disparate impact claims, aiming to guard developers and cities from becoming "overburden[ed]."[76] In *Oviedo Town Center v. City of Oviedo*, the court held that increases in utility rates in low-income rental housing did not "establish a disparate impact, let alone any causal

69. *Id.* at 2524; The Court's cautious majority opinion goes on to say that a broad disparate impact liability would, not only undermine the Act, but would undermine the "free-market system." *Id.*

70. *Id.* at 2522.

71. *Id.* at 2523.

72. *Id.*

73. *Id.* Meaning developers would be "subject to suit whether they choose to rejuvenate a city core or to promote new low-income housing in suburban communities." *Id.*

74. *Id.*

75. *Id.* at 2524.

76. Oviedo Town Ctr. II, L.L.L.P. v. City of Oviedo, 759 F. App'x 828, 834 (11th Cir. 2018).

connection between the [rate increases] and the disparate impact."[77] The court rejected the plaintiff's offer of statistical evidence as, "nothing more than a showing that a policy impacted more members of a protected class than non-members of protected classes."[78] This is generally aligned with the guidance in *Inclusive Communities* that courts should "avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision."[79] However, this requirement operates much more strictly in practice when an additional showing of proximate cause is required.[80]

2. Robust causality as proven by statistical evidence

The Fourth Circuit focused on the presence of statistical evidence that led to a direct and cognizable consequence. In *de Reyes v. Waples Mobile Home Park,* a mobile home park began enforcing a policy requiring all residents to provide citizenship documentation—a policy that previously went unenforced and only applied to individuals named on the lease.[81] The enforcement of the policy was shown to adversely impact Latinx residents in the mobile home park, such that they were ten times more likely to be negatively impacted.[82] The court suggested that while it is imperative for the plaintiff to prove the disparity "is the result of one or more of the [] practices that they are attacking," evident statistical disparities can ease the causation burden.[83]

3. Arbitrary and Unnecessary Requirement

The Eighth Circuit added an additional requirement to the already burdensome prima facie case standard: requiring the plaintiff to allege

77. *Id.* at 835.

78. *Id.* at 834; *see also* de Reyes v. Waples Mobile Home Park L.P., 903 F.3d 415, 434 (4th Cir. 2018) (Keenan, C.J., dissenting) (arguing that "geographical happenstance cannot give rise to liability against an entity not responsible for the geographical distribution.").

79. *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2524; *See also* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 653 (1989) (arguing that disparate impact claims in workplace supported by only bare statistical evidence of racial disparities would lead to troubling use of quota system in the workplace).

80. *Oviedo Town Ctr.,* 759 F. App'x at 836 (noting that *even if a* prime facie case had been presented "we would then proceed to consider the causal relation.") (emphasis added).

81. *de Reyes*, 903 F.3d at 419.

82. *Id.* at 428 ("Latinos constitute 64.6% of the total undocumented immigrant population in Virginia, … are ten times more likely than non-Latinos to be adversely affected by the Policy, as undocumented immigrants constitute 36.4% of the Latino population compared with only 3.6% of the non-Latino population."); *see also* Inclusive Cmtys. Project v. Lincoln Prop. Co. 920 F.3d 890, 906 (5th Cir 2019) (focusing on the behavior change in the 4th Circuit's robust causation analysis).

83. *de Reyes*, 903 F.3d at 425, 428 (noting that statistical evidence demonstrating the result of the park's documentation requirement satisfied prima facie standard).

facts demonstrating the policy at issue is "arbitrary or unnecessary."[84] In *Ellis v. City of Minneapolis,* the court rejected a plaintiff's claim that a city housing code aimed to discourage for-profit rental housing.[85] Here, plaintiffs alleged the city's vague housing code and rental license revocations displaced "protected class families" from their rental units.[86] The court rejected the plaintiff's claim, specifically pointing to the lack of "factually supported allegations that [the] provisions are arbitrary or unnecessary to health and safety."[87] The Eighth Circuit's prima facie standard is particularly burdensome in this way; requiring not only robust causality, but a showing that the challenged practice is arbitrary and unnecessary.

### 4. Less Discriminatory Alternatives

The interests of the defendants, typically developers and municipalities, are closely guarded in the third step of the burden shifting framework as well. If defendants carry their burden of proving the challenged practice is necessary to achieve their stated interest, the plaintiff can still prevail if they offer "an available alternative … practice that has less disparate impact and serves the [entity's] legitimate needs."[88] This standard operates as a relatively tough bar for plaintiffs to meet. For instance, in *Inclusive Communities Project v. Lincoln Property Company*, the Fifth Circuit rejected a plaintiff's showing of less discriminatory alternatives to the defendant's practice of refusing to accept tenants paying with Section 8 vouchers.[89] The court noted that the plaintiff failed to demonstrate how the alternative programs would be managed or if the plaintiff could financially support them.[90] However, in *Mhany Management v. County of Nassau*, a plaintiff's showing that an alternative zoning code would serve the city's interests in traffic reduction below current levels, satisfied the burden even though the city's proposed zoning code would have actually reduced traffic more effectively.[91]

84. Ellis v. City of Minneapolis, 860 F.3d 1106, 1112 (8th Cir. 2017).

85. *Id.* at 1112.

86. *Id.* at 1109.

87. *Id.* at 1112.

88. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, 135 S. Ct. 2507, 2518 (2015) (alterations in original); *see also* 24 C.F.R. 100.500(c)(3) (LEXIS through Sep. 16, 2019 issue).

89. Inclusive Cmtys. Project v. Lincoln Property Co., 920 F.3d 890, 906 (5th Cir. 2019).

90. *Id.* ("[I]f ICP's programs were not successfully executed, Lincoln and the Owners 'could experience financial harm.'").

91. Mhany Mgmt. v. Cty. of Nassau, No. 05-cv-2301, 2017 U.S. Dist. LEXIS 153214, at *37 (E.D.N.Y. Sep. 19, 2017).

5. A hostility towards single-family zoning remains prevalent

Despite the warning from *Inclusive Communities* that a decision to build on a single site, as opposed to a citywide scheme, "may not be a policy at all," courts generally accept a single instance of restrictive land use policy as sufficient to form the basis of a prima facie case of disparate impact.[92] For instance, the Second Circuit expressed a strong opposition to restrictive land use policies, like single-family zoning, in *Mhany Management. v. County. of Nassau*, even when the zoning decision only affected a single site.[93] In *Mhany*, after residents of a town with no affordable housing[94] voiced strong opposition to the prospect of multi-family development on the site, the city developed a new zoning code that effectively eliminated the possibility of multi-family development on the parcel.[95] The court pointed to the specific identification of restrictive zoning by *Inclusive Communities* as evidence that even if a single decision rather than a widespread policy was at issue, such restrictions "function unfairly to exclude minorities from certain neighborhoods without any sufficient justification" and are "at the heartland of disparate-impact liability."[96] Other federal circuit courts have also required a higher showing of disparate impact by plaintiffs for "affirmative … obligations on private actors," such as changing a voucher-acceptance policy, while removing barriers like restrictive zoning are treated more favorably for plaintiffs.[97]

6. Recent interpretations by HUD threaten to obliterate disparate impact

In a continued effort to strip down disparate impact liability, the Trump administration, through HUD, proposed regulations in August 2019 that, if adopted, would combine many of the above restrictions into a new, five-

92. *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2523-524.

93. *Mhany Mgmt.,* 819 F.3d at 619.

94. *Id.* at 587. In this case, affordable housing meant "housing which requires no more than 30% of a household's income for households earning 80% or less of the Area Median Income for the Nassau-Suffolk Metropolitan Statistical Area." *Id.* at n.1.

95. *Id.* at 596.

96. *Id.* at 619 (quoting Tex Dep't of Hous. & Cmty, Affairs v. Inclusive Cmtys. Project, 135 S. Ct. 2507, 2522 (2015)); *see also* Huntington v. Huntington Branch, NAACP, 488 U.S. 15, 17 (1988) (holding single-family zoning has a discriminatory impact because it "restricts private construction of low-income housing to the largely minority urban renewal area, which 'significantly perpetuated segregation'"); United States v. City of Black Jack, 508 F.2d 1179, 1186 (8th Cir. 1974) (holding that the "ultimate effect" and the "historical context" of single-family zoning were discriminatory). *But see* Village of Arlington Heights v. Metro. Hou. Dev. Corp., 429 U.S. 252, 270 (1976) (holding that plaintiff failed to prove discriminatory purpose was a motivating factor in request to rezone area for multi-family housing).

97. Inclusive Cmtys. Project v. Lincoln Property Co., 920 F.3d 890, 908 (5th Cir. 2019).

part burden on the plaintiff.[98] Under this approach, a plaintiff would be required to prove: (1) the practice is "*arbitrary*, *artificial*, and *unnecessary* to achieve a valid interest or legitimate objective;" (2) a "*robust causal* link;" (3) "that the challenged policy or practice has an adverse effect on *members of a protected class;*" (4) that the disparity is "*significant*;" (5) that the "complaining *party's alleged injury* is directly caused" by the practice.[99] Notably, the proposed framework eliminates a respondent's burden of identifying a valid interest served by the policy *unless* the plaintiff proves that practice is "arbitrary, artificial, and unnecessary."[100] HUD then offers several possible defenses for respondents including claims of limited discretion,[101] challenges to robust causality,[102] and several types of challenges to the plaintiff's statistical models.[103]

## III. DISCUSSION

It is wrong to limit disparate impact liability under the FHA. Moreover, federal courts are largely setting standards that are too onerous to meet outside of very specific scenarios with clear causation—a situation inconsistent with disparate impact liability as a whole. Section A of this Part argues that the Supreme Court's opinion in *Inclusive Communities* places too many limits on an already restrictive theory. Section B analyzes the flawed application of the standard in federal courts across the country, focusing on the Ninth and Eleventh Circuits. Section C then analyzes the common-sense workability of the Fourth and Second Circuit's application of the standard. Finally, Section D proposes an alternative framework that stays true to the stated purpose of the Act, while also accounting for the Supreme Court's safeguards identified in *Inclusive Communities.*

98. HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42, 854 (proposed Aug, 9, 2019) (to be codified at 24 C.F.R 100). https://s3.amazonaws.com/public-inspection.federalregister.gov/2019-17542.pdf [https://perma.cc/94GK-UNCX]; *see also* Lola Fadula, *Trump Proposal Would Raise Bar for Proving Housing Discrimination*, N.Y. TIMES (Aug. 2, 2019), https://www.nytimes.com/2019/08/02/us/politics/trump-housing-discrimination.html [https://perma.cc/9KGF-EAW6].

99. HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42, 854, 15-17.

100. *Id.* at 16 ("If a plaintiff adequately alleges facts to support the assertion that the practice or policy is arbitrary, artificial, and unnecessary, only then does the defendant have the burden to identify a valid interest or interests that the challenged policy or practice serves.").

101. *Id*. at 18 ("Paragraph (c)(1) provides that the defendant may show its discretion is materially limited by a third party.").

102. *Id.*

103. *Id.* at 19.

### *A. The Supreme Court overly constrained disparate impact liability in Inclusive Communities*

The Supreme Court's reasoning in *Inclusive Communities* is overly restrictive and has directly caused the atrophy of disparate impact liability[104] in courts across the country in the following ways: (1) the robust causality requirement of a plaintiff's prima facie case is too demanding in a typical disparate impact situation and (2) the defendant's burden of proof is far too minimal to have any real bite.

First, robust causality provides too much focus on proximate cause when the entire aim of disparate impact is to provide an avenue for relief when intent cannot be proved by an injured party.[105] HUD's 2013 regulations admittedly do not provide much guidance in this regard, but *Inclusive Communities* goes too far in its application and requirement of "robust causality." While the HUD regulations require proof of a discriminatory effect, plaintiffs are able to prove that a practice "*caused or predictably will cause*" the effect.[106] Though it is necessary to identify the practice at issue, imposing an onerous causation requirement as the Court did in *Inclusive Communities* undercuts the purpose of disparate impact—finding relief from discrimination when overt intent is difficult to prove.[107]

Next, the defendant's burden of proof is far too low to apply without dismantling disparate impact altogether. HUD's 2013 regulations formalized the second step of the burden shifting framework and required the defendant to prove that "the challenged practice is necessary to achieve one or more *substantial*, *legitimate*, *nondiscriminatory* interests."[108] The *Inclusive Communities* decision, on the other hand, allows a policy to stand if the defendant can prove, with so-called "leeway," the policy "is necessary to achieve a *valid* interest."[109] The Court makes a comparison to workplace requirements, noting that a

104. Disparate impact liability was already extremely limited in practice, having been successful for plaintiffs merely 18 times between 1974-2013 (19.6% of cases). Stacy E. Seichnaydre, *Is Disparate Impact Having an Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 Am. U. L. Rev. 357, 399 (2013).

105. "Liability may be established under the Fair Housing Act based on a practice's discriminatory effect, as defined in paragraph (a) of this section, even if the practice was not motivated by a discriminatory intent." 24 C.F.R. § 100. 500 (LEXIS 2019).

106. 24 C.F.R. § 100.500(c)(1) (LEXIS 2019) (emphasis added).

107. 24 C.F.R. § 100.500 (LEXIS 2019) ("Liability may be established under the Fair Housing Act based on a practice's discriminatory effect … even if the practice was not motivated by a discriminatory intent.").

108. 24 C.F.R. § 100.500(c)(2) (LEXIS 2019) (emphasis added).

109. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, 135 S. Ct. 2507, 2522-23 (2015) (emphasis added); *id.* at 2524 (noting without these "safeguards … *valid* governmental and private priorities" might be displaced) (emphasis added).

policy causing a disparate impact can stand if it is a "reasonable measure[ment] of job performance," before concluding that although not an exact fit, "the comparison suffices."[110] This culminates in a drastic reduction of the defendant's burden—not only a far cry from the aims of the Act,[111] but entirely inconsistent with HUD's regulations just two years prior.[112] Moreover, the Court notes concerns facing municipalities when making complex zoning decisions and the purported "double bind of liability" that arises when making a decision that impacts a "community's quality of life," while entirely failing to consider the quality of life issues faced by the injured parties in these cases.[113]

The Court remains silent on the final step of HUD's framework regarding the plaintiff's proof of nondiscriminatory alternative practices. However, the defendant's standard is so minimal that virtually any justification allows policies having a disparate impact to stand. Given the lack of limitations placed on this final step, some lower courts have taken advantage to allow some disparate impact claims to survive.[114]

The Court's opinion is also internally inconsistent, applying these restrictive standards just pages after formally recognizing disparate impact claims as part of the Act and noting that "zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods … *reside at the heartland* of disparate-impact liability."[115] The Court mentions developers and tenants alike have found, and should continue to find, relief under the disparate impact theory, but quickly "limit[s] [the Act] in key respects."[116]

### *B. The inequitable application of a flawed standard in federal circuit courts*

Circuit courts have taken the guidance provided in *Inclusive Communities* as credence to promote further inequity. First, Section 1 argues that the Eleventh Circuit's addition of proximate cause to the prima face case is unworkable. Next, Section 2 argues the burden of proving the necessity of a practice should fall on the defendant.

110. *Id.* at 2523.

111. *See supra* Section II.B.1.

112. *See supra* Section II.B.2.

113. *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2523.

114. *See supra* Section II.D.4.

115. *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2521-22 (emphasis added).

116. *Id.* at 2522 (emphasis added).

### 1. Robust causality does not include an independent finding of proximate cause

The Eleventh Circuit's focus on proximate caused created an unworkable standard in *Oviedo Town Ctr. II, L.L.L.P. v. City of Oviedo*.[117] Here, a developer claimed a city's utility rate increase disproportionately impacted minority residents.[118] The Eleventh Circuit disagreed, affirming the district court's grant of summary judgment in favor of the city and dismissing the disparate impact claim.[119] The court establishes the proximate cause requirement as a separate step in and of itself, apparently trying to align itself with its interpretation of *Inclusive Communities*.[120] While *Inclusive Communities* mandates a causal connection, the Court is clear in its acceptance of statistical evidence as demonstrating that connection.[121] Admittedly, the plaintiff's statistical evidence in support of its prima facie case was weak in this case.[122] However, the court notes that even with strong statistical evidence it would then proceed to proximate cause considerations.[123] This additional level of scrutiny on a plaintiff's claim entirely conflates the Court's guidance in *Inclusive Communities* as well as the relevant HUD regulations.[124]

### 2. A prima facie case does not require a showing that the practice was arbitrary and unnecessary

The Eighth Circuit's rejection of a prima facie case based on the plaintiff's failure to prove the practice was "arbitrary and unnecessary" placed an unnecessary burden on the plaintiff— making the standard nearly unreachable.[125] While *Inclusive Communities* heightened the standard for "robust causality," the Court does not demand a plaintiff demonstrate the challenged practice is arbitrary or unnecessary.[126] The *Inclusive Communities* Court does include this language, noting that

117. Oviedo Town Ctr. II, L.L.L.P. v. City of Oviedo, 759 F. App'x 828 (11th Cir. 2018).

118. *Id.* at 830.

119. *Id.* at 839.

120. *Id.* at 836.

121. *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2523 ("[a] plaintiff who fails to allege facts at the pleading stage *or* produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact.") (emphasis added).

122. *Oviedo Town Ctr*., 759 F. App'x at 833, 835 (appellants presented only the results of a self-reported survey that only demonstrated that more minority residents lived in complex compared to the rest of the City).

123. *Id.* at 836 (noting "a prima facie case of disparate impact might have been presented, and we would then proceed to consider the causal relation").

124. *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2523.

125. Ellis v. City of Minneapolis, 860 F.3d 1106, 1112 (8th Cir. 2017).

126. *See supra* Section II.C.2.

"policies are not contrary to the disparate-impact requirement unless they are 'artificial, arbitrary, and unnecessary barriers.'"[127] However, this is not a burden intended for the plaintiff. Rather, it is a clear reference to the defendant's required showing that the policy is "necessary to achieve a valid interest."[128] It would be entirely redundant for the Court to have required a necessity showing by both parties. The Eighth Circuit's approach would dictate for the following burden shifting framework: (1) plaintiff makes a prima facie case, demonstrating robust causality *and* that the challenged practice is arbitrary and unnecessary,[129] (2) defendant, with so-called "leeway," explains how the challenged practice *is* necessary to achieve a valid interest, (3) plaintiff demonstrates a less discriminatory alternative that would serve defendant's interest.[130] This is fundamentally at odds with the guidance in *Inclusive Communities* and HUD regulations which clearly shoulder the defendant with the burden to prove the practice is necessary—not the reverse.[131]

### *C. The equitable application of a flawed standard in federal circuit courts*

Despite some federal courts weakening disparate impact liability, others have used *Inclusive Communities* disparate impact theory to promote equity. First, Section 1 argues the Fourth Circuit's use of statistics is true to the aims of the Act. Next, Section 2 argues for a plaintiff-friendly standard for proof of less discriminatory alternatives.

#### 1. Compelling statistical evidence can satisfy robust causality

The Fourth Circuit's acceptance of, and focus on, statistics has allowed disparate impact liability under *Inclusive Communities* to serve its true purpose. Here, the court was confronted with the discriminatory enforcement of a rule at a mobile home park requiring all residents in the park to provide documentation proving their legal status in the U.S.[132] The court accepted the statistical evidence[133] as "self-evident" of a prima

127. *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2524 (quoting Griggs v. Duke Power Co. 401 U.S. 424, 431 (1971)) (emphasis added).

128. *Id.* at 2523.

129. *Ellis*, 860 F.3d at 1112.

130. *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2522.

131. *See* 24 C.F.R. 100.500(c)(2) (LEXIS 2019) ("Once the charging party or plaintiff satisfies the burden of proof set forth in paragraph (c)(1) of this section, the respondent or 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.") (emphasis added).

132. de Reyes v. Waples Mobile Home Park L.P., 903 F.3d 415, 419 (4th Cir. 2018).

133. *See supra* note 82 and accompanying text.

facie disparate impact claim,[134] not requiring a close examination of causation although it was abundantly clear in this case.[135] To be sure, causation is still a necessary component of disparate impact claims. For instance, the Supreme Court in *Inclusive Communities* demands that the claim must fail if "the plaintiff cannot point to [the] defendant's policy or policies causing that disparity."[136] However, the Court also stated that statistical evidence *can* demonstrate that causal connection, noting a plaintiff is required to "allege facts at the pleading stage *or* produce statistical evidence demonstrating a causal connection."[137] The additional step of proximate cause is wholly unnecessary, as demonstrated by *Inclusive Communities*' acceptance of compelling statistics.

2. Less discriminatory alternatives need not be equally effective

The *Mhany* court's common-sense approach to the reasonable alternatives prong of the framework is true to the aim of the Act and to the Court's rationale in *Inclusive Communities*.[138] In *Mhany,* a city's rezoning of a single parcel to eliminate the possibility of affordable housing was held to have a discriminatory effect on minorities.[139] On remand, defendants argued that the plaintiffs must prove that their proposed alternative would be "equally effective" as their rezoning strategy.[140] The Eastern District of New York disagreed and determined that the plaintiff's proposed alternative would only need to "serve[] [the city's] interests."[141] Not only is the court's express rejection of the "equally effective" standard in line with the stated purpose of the Act, but it is directly in line with HUD's interpretation of the burden shifting

134. *de Reyes*, 903 F.3d at 428 (quoting Betsey v. Turtle Creek Associates 736 F.2d 983, 988 (4th Cir. 1984)).

135. The policy had historically had only been enforced against the leaseholder, but in mid-2015, the park began requiring documentation from adult occupant. *Id.* at 419.

136. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, 135 S. Ct. 2507, 2523 (2015).

137. *Id.*

138. Mhany Mgmt. v. Cnty. of Nassau, 819 F.3d 581, 618 (2nd Cir. 2016).

139. *Id.* at 619-20; *remanded to* No. 05-cv-2301, 2017 U.S. Dist. LEXIS 153214, at *38 (E.D.N.Y. Sep. 19, 2017) (holding plaintiff's burden to prove alternative, nondiscriminatory methods of satisfying defendant's interests was satisfied and zoning scheme thus had a disparate impact).

140. *Mhany Mgmt*., No. 05-cv-2301, 2017 U.S. Dist. LEXIS 153214, at *12 (E.D.N.Y. Sep. 19, 2017).

141. *Id.* at *26; *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11473 (February 15, 2013) ("The additional modifier "equally effective," borrowed from the superseded *Wards Cove* case, is even less appropriate in the housing context than in the employment area in light of the wider range and variety of practices covered by the Act that are not readily quantifiable."). *But see* Inclusive Cmtys. Project v. Lincoln Prop. Co. 920 F.3d 890, 906 (5th Cir 2019) (rejecting plaintiff's showing of less discriminatory alternatives due to financial harm that could be suffered by defendants).

framework, noting that it is consistent "with the Joint Policy Statement, with Congress's codification of the disparate impact standard in the employment context, and with judicial interpretations of the Fair Housing Act."[142] Further still, HUD notes that the "equally effective" standard would be difficult to apply in Fair Housing Act cases, given the challenges that come along with quantifying many housing practices.[143]

### *D. A burden-shifting framework to eliminate exclusionary zoning and promote equity*

This proposed burden shifting framework protects the interests of both parties and honors the constitutional concerns raised in *Inclusive Communities*, while fulfilling the stated purpose of the Fair Housing Act. Used effectively, the framework could eliminate single-family zoning—a practice the Supreme Court has identified as "resid[ing] at the heartland of disparate-impact liability"[144] and would promote "integrated and balanced living patterns."[145]

#### 1. A realistic robust causality anchored on statistical evidence

The proposed framework closely follows the current HUD regulations, while respecting the concerns of the Supreme Court in *Inclusive Communities*. First, the plaintiff must present a claim supported by statistical evidence demonstrating a causal connection. At this stage, causation should, more often than not, be "self-evident," assuming the statistical evidence raises an inference of causation. This step leans heavily on the guidance of *Inclusive Communities*, while channeling the Fourth Circuit's interpretation of "robust causality," which allows for reliance on statistical evidence. While the Supreme Court in *Inclusive Communities* was concerned with an overreliance on statistical evidence, this formulation of the step allows plaintiffs with compelling statistics to make a prima facie case. However, a claim supported only by statistics without an inference of causation can and should be rejected.[146]

---

142. "HUD does not believe the rule's language needs to be further revised to state that the less discriminatory alternative must be 'equally effective,' or 'at least as effective,' in serving the respondent's or defendant's interests."

Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11473.

143. *Id.*

144. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, 135 S. Ct. 2507, 2522 (2015).

145. 114 CONG. REC. 3422 (daily ed. Feb. 20, 1968) (statement of Sen. Mondale).

146. "But disparate-impact liability has always been properly limited in key respects to avoid serious constitutional questions that might arise under the FHA, *e.g.,* if such liability were imposed based

### 2. A heightened standard of justification for defendants harkens back to HUD's regulations

Once this burden is satisfied, a respondent must then demonstrate (a) that the challenged practice is "necessary to achieve one or more substantial, legitimate [and] nondiscriminatory interests"[147] and (b) that the challenged practice is *not the primary factor* furthering the alleged disparate impact. This step expressly rejects the Supreme Court's approach and reverts to the prior HUD language, rather than the low standard used in *Inclusive Communities*.[148] The step also requires respondents to demonstrate that the practice is not the primary factor causing the disparate impact. The reason for both of these changes is simple: the Fair Housing Act demands it. To allow for the Supreme Court's low standard for a respondent's justification would permit discrimination if merely "necessary to achieve a valid interest."[149] Surely, an Act that allows discrimination in furtherance of decreased traffic[150] would not "provide, within constitutional limitations, for fair housing throughout the United States."[151] Moreover, the added "primary factor" requirement is also furthering the Act's objectives. If the Act is to strive for "truly integrated and balanced living patterns,"[152] it must also reject a policy, even if achieving a valid interest, if it is a primary cause of furthering the demonstrated discrimination. To do otherwise would be to ignore the nation's "historic commitment to creating an integrated society."[153]

### 3. The final offer of a less discriminatory alternative should be reasonable

Next, if this burden is carried by the defendant, the plaintiff must then show either: (a) the respondent's interest is not "substantial, legitimate, [and] nondiscriminatory" or (b) the plaintiff's stated interest could be achieved by an alternative practice that would have a less discriminatory effect, even if not as effective as the challenged practice. This final step

*solely* on a showing of a statistical disparity." *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2512 (emphasis added).

147. 24 C.F.R. § 100.500(c)(2) (LEXIS 2019).

148. *Id.* (defendant must prove the practice is "necessary to achieve one or more substantial, legitimate, nondiscriminatory interests"). *But see Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2523 (noting that defendants will be allowed to maintain a policy if it is "necessary to achieve a valid interest").

149. *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2523.

150. Mhany Mgmt. v. Cnty. of Nassau, 819 F.3d 581, 620 (2nd Cir. 2016) (accepting defendant's stated interest of traffic control as legitimate governmental interest to restrict multi-family development).

151. 42 U.S.C. § 3601 (LEXIS through Pub. L. No. 116-91).

152. 114 CONG. REC. 3422 (daily ed. Feb. 20, 1968) (statement of Sen. Mondale).

153. *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2525.

combines the guidance of HUD, as applied by the Eastern District of New York, insofar as the alternative practice need not be "equally effective," but must merely meet the interest.[154] While the burden falls on the plaintiff at this point, the responsibility to meet a stated interest in a less discriminatory manner should, in practice, lie with the respondent as they are typically the party with expertise in the given field. For instance, the Fifth Circuit's application of this step rejected the plaintiff's proposed alternatives because the respondents could be financially harmed.[155] While financial viability must be considered, surely it cannot be the lead factor in a rejection of a less discriminatory alternative. Moreover, under this integrated analysis, a reduction in profit would not necessarily render the alternative invalid, as long as the respondent's interest was achieved.

### 4. Exclusionary zoning practices should be reviewed with greater scrutiny

Moreover, courts should examine instances of exclusionary zoning with a greater level of scrutiny. First, courts have historically applied a lower standard of review towards the removal of barriers, such as eliminating single-family zoning, as opposed to commanding action, such as forcing landlords to accept housing vouchers.[156] Next, the United States Congress and the Supreme Court have both acknowledged and taken steps to eliminate similar segregation. The Fair Housing Act was expressly enacted to eliminate segregation as demonstrated by Senator Mondale's plea to replace the ghettos with "truly integrated and balanced living patterns."[157] The Supreme Court in *Inclusive Communities* recognizes the "historic commitment to creating an integrated society."[158] The Court has even recognized the detrimental impacts single-family zoning can have on *everyone*—beyond those who are actually being excluded, noting parties who may not have even been excluded can bring

154. *Mhany Mgmt*., No. 05-cv-2301, 2017 U.S. Dist. LEXIS 153214, at *26 (E.D.N.Y. Sep. 19, 2017).

155. Inclusive Cmtys. Project v. Lincoln Prop. Co., 920 F.3d 890, 906 (5th Cir 2019).

156. *Id.* at 908-909; *see also* Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1293 (7th Cir. 1977) ("The courts ought to be more reluctant to grant relief when the plaintiff seeks to compel the defendant to construct integrated housing or take affirmative steps to ensure that integrated housing is built than when the plaintiff is attempting to build integrated housing on his own land and merely seeks to enjoin the defendant from interfering with that construction"); Huntington Branch, NAACP v. Huntington, 844 F.2d 926, 936 (1988) (noting that in a disparate impact claim seeking compelled action, "a defendant would normally have to establish a somewhat more substantial justification for its adverse action than would be required if the defendant were defending its decision not to build."); *Lincoln Property Co.,* 920 F.3d at 908 (distinguishing between compelled action and removal of arbitrary barriers).

157. 114 CONG. REC. 3422 (daily ed. Feb. 20, 1968) (statement of Sen. Mondale).

158. *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2525.

a disparate impact claim based on a "loss of important benefits from interracial associations."[159]

## IV. CONCLUSION

Disparate impact liability under the Fair Housing Act is a vital protection against covert and systemic racism. While the Supreme Court solidified its existence in *Inclusive Communities,* subsequent courts, including the Eleventh, Eighth, and Fifth Circuits have demonstrated the flawed analysis that can result when applying the *Inclusive Communities* framework, particularly in their understanding of robust causality and less discriminatory alternatives. Others, including the Fourth and Second Circuits, have aligned themselves closer with the true aims of the Act, while still honoring the objectives of *Inclusive Communities*.

Without the full protection for the Fair Housing Act's disparate impact liability, "states and others will be left with fewer critical tools to combat the kinds of systemic discrimination that the Act was intended to address."[160] A full-powered disparate impact liability, as proposed above, can and should be implemented. This approach, while in stark contrast to the recent regulations proposed by HUD,[161] zealously and equitably protects those whom the Act was fundamentally intended to protect: the nation's most vulnerable.

159. *See* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209-210 (1972) (noting the "broad and inclusive" language of the FHA allows parties, injured by the "loss of important benefits from interracial associations" to bring a claim); *see also Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2523 (noting zoning decisions "contribute to a community's quality of life and are legitimate concerns for housing authorities").

160. Brief of Mass., et al. as Amici Curiae in Support of Respondent at 12, *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. 2507 (2015) (No. 13-1371) (noting that it would be a "significant concern to States" to lose disparate impact liability).

161. *See supra* Section II.D.6.