SEGREGATIVE-EFFECT CLAIMS UNDER THE FAIR HOUSING ACT

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INTRODUCTION

Two types of discriminatory-effect claims have been recognized under the federal Fair Housing Act (FHA)[1]: (1) disparate impact; and (2) segregative effect. Neither requires a showing of illegal intent, and both, according to a 2013 regulation promulgated by the U.S. Department of Housing and Urban Development (HUD),[2] are subject to the same three-step burden-shifting proof scheme, which assigns the plaintiff the initial burden of proving that the defendant's challenged practice causes a discriminatory effect.[3] Both the disparate-impact and segregative-effect theories date back to appellate decisions from the 1970s,[4] although the Supreme Court's endorsement of the former in 2015 in *Texas Department of Housing & Community Affairs v. Inclu-*

1. Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (1968). The FHA, as amended, is codified at 42 U.S.C. §§ 3601–3619 (2015).

2. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,482 (Feb. 15, 2013) (promulgating 24 C.F.R. § 100.500). As the agency primarily responsible for administering the FHA, *see* 42 U.S.C. § 3608(a), HUD's regulations interpreting the FHA are entitled to substantial deference, *see* Meyers v. Holley, 537 U.S. 280, 287–88 (2003).

3. *See* 24 C.F.R. § 100.500(c) (2017). For a description of this three-step process, see *infra* Section I.A.

4. *See* Metro. Hous. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1288–94 (7th Cir. 1977); United States v. City of Black Jack, 508 F.2d 1179, 1184–85 (8th Cir. 1974). The *Arlington Heights* and *Black Jack* cases are discussed in detail *infra* Section I.C.1.

sive Communities Project, Inc.[5] means that disparate impact has received more attention lately.

Last year, in an article co-authored with Calvin Bradford,[6] I addressed disparate-impact claims. This Article examines the FHA's segregative-effect theory, which is far more elusive, in part because it, unlike the disparate-impact theory, has no clear analog in Title VII claims challenging employment discrimination.[7] The goal of this Article is to provide guidance for evaluating segregative-effect claims, particularly in the crucial first step or "prima facie case" stage.[8]

Part I of this Article reviews the law governing segregative-effect claims as set forth in HUD's 2013 regulation—and in cases decided both before and after that regulation—noting how the elements of such a claim differ from that of disparate-impact claims. Part II explores situations in which the segregative-effect theory may make a unique contribution, apart from impact claims, in the FHA's coverage. These include the classic example—exclusionary zoning, which *Inclusive Communities* labeled "heartland" cases—and other likely scenarios, including those based on prohibited forms of discrimination other than race and national origin. The Article concludes that the segregative-effect theory holds great promise for advancing the FHA's goal of reducing arbitrary barriers to minorities' housing choices, but it needs more refinement before that promise can be fulfilled.

5. 135 S. Ct. 2507 (2015).

6. *See* Robert G. Schwemm & Calvin Bradford, *Proving Disparate Impact in Fair Housing Cases After* Inclusive Communities, 19 N.Y.U. J. LEG. & PUB. POL'Y 685 (2016).

7. *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2522–24 (2015) (tying the proper analysis of disparate-impact claims under the FHA to their counterpart under the federal employment discrimination law, Title VII of the 1964 Civil Rights Act). Title VII is codified at 42 U.S.C. § 2000e (2015).

8. *See Inclusive Cmtys.*, 135 S. Ct. at 2523. The *Inclusive Communities* opinion directed courts to "examine with care" FHA plaintiffs' proof of discriminatory effect, with an eye toward facilitating the "prompt resolution" (i.e., early dismissal) of non-meritorious claims. *Id.* Heeding this directive, a number of lower courts after *Inclusive Communities* have issued pre-trial rulings against FHA-effect claims. *See, e.g.*, Schwemm & Bradford, *supra* note 6, at 689 n.10 (collecting cases); *see also infra* note 273 and accompanying text.

I.
PRINCIPLES FOR PROVING SEGREGATIVE EFFECT IN FHA CASES

A. Basic Framework of a FHA Segregative-Effect Claim: The Three Steps

HUD's 2013 regulation establishes the standards that govern discriminatory-effect claims under the FHA.[9] This regulation sets forth the basic three-step burden-shifting framework applicable to all such claims, regardless of whether they are based on the disparate-impact or segregative-effect theory.[10]

Under the 2013 regulation, all discriminatory-effect cases are to be analyzed in three steps.[11] In "Step One," the plaintiff has the initial burden of establishing a prima facie case by proving that "a challenged practice caused or predictably will cause a discriminatory effect."[12] In "Step Two," if the plaintiff proves a prima facie case, the burden shifts to the defendant to prove that its "challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests."[13] If the defendant satisfies this burden, the plaintiff may still prevail in "Step Three" by proving that the defendant's interest in "the challenged practice could be served by another practice that has a less discriminatory effect."[14]

This Article focuses on Step One in proving segregative-effect claims.[15] This requires three elements: (1) identifying a particular practice of the defendant to challenge; (2) showing through statistical evidence that this practice exacerbates segregation in the relevant

9. *See supra* notes 2–3 and accompanying text.

10. *See* 24 C.F.R. § 100.500(c) (2017). For disparate-impact claims, the standards set forth in the HUD regulation are virtually identical to those adopted by the Supreme Court in the *Inclusive Communities* decision. *Compare* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,470 (Feb. 15, 2013) (HUD), *with Inclusive Cmtys.*, 135 S. Ct. at 2522–23. Because *Inclusive Communities* dealt only with disparate-impact claims, segregative-effect claims are governed solely by the HUD regulation.

11. *See* 24 C.F.R. § 100.500(c).

12. *Id.* § 100.500(c)(1); *cf. Inclusive Cmtys.*, 135 S. Ct. at 2523 (adopting the same view for disparate-impact claims).

13. 24 C.F.R. § 100.500(c)(2); *cf. Inclusive Cmtys.*, 135 S. Ct. at 2523 (adopting similar language—"necessary to achieve a valid interest"—to describe this second step in disparate-impact claims).

14. 24 C.F.R. § 100.500(c)(3); *cf. Inclusive Cmtys.*, 135 S. Ct. at 2515 (adopting the same view for disparate-impact claims); *see also* Mhany Mgmt., Inc. v. County of Nassau, 819 F.3d 581, 617–19 (2d Cir. 2016) (holding that prior Second Circuit precedent putting the burden of proof in this step on the defendant must be abrogated in light of the HUD regulation's determination to put this burden on the plaintiff).

15. For more on Steps Two and Three, see *infra* Section II.B.6.

community to a sufficiently large degree; and (3) proving that the defendant's challenged practice actually caused this segregative effect.[16] The principles underlying the segregative-effect theory as established in case law before and after the HUD regulation are explored in the rest of Part I. Part II deals with the application of these principles to a variety of situations.

B. Distinguishing Disparate-Impact from Segregative-Effect Claims

HUD's regulation endorsing discriminatory-effect claims under the FHA recognizes that a challenged practice may have an illegal effect in either of two ways: "(1) harm to a particular group of persons by a disparate impact; and (2) harm to the community generally by creating, increasing, reinforcing, or perpetuating segregated housing patterns."[17] These two theories had been recognized by numerous courts,[18] which, along with HUD, agreed that a FHA plaintiff may present evidence supporting both types of discriminatory-effect claims in a single case.[19]

Most segregative-effect claims have been made against municipalities accused of using their land-use powers to block integrated housing developments in predominantly white areas.[20] Unlike disparate-impact claims, segregative-effect claims may challenge a particular action or decision of the defendant as well as an across-the-board policy.[21] Moreover, segregative-effect claims focus on the harm done to the local community, whereas disparate-impact claims focus on the harm done to a racial minority or other FHA-protected class.[22] Statisti-

16. *See infra* Section II.A.2.a; *see also* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,468–69 (Feb. 15, 2013) (HUD regulation); *Inclusive Cmtys.*, 135 S. Ct. at 2523–24.

17. Effects Standard, 78 Fed. Reg. at 11,469 (describing 24 C.F.R. § 100.500(a)). This regulation provides 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." 24 C.F.R. § 100.500(a).

18. *See* ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 10:7 n.1 (2017) (collecting cases).

19. *See, e.g.*, *id.* at § 10:5 n.3, para. 1 (collecting cases); *infra* note 27 (discussing additional cases).

20. *See infra* Section I.C.1–.2; *see also* Effects Standard, 78 Fed. Reg. at 11,469 (noting that "the perpetuation of segregation theory of liability has been utilized by private developers and others to challenge practices that frustrated affordable housing development in nearly all-white communities and thus has aided attempts to promote integration [citing cases]").

21. *See infra* Section II.A.1.

22. *See* Effects Standard, 78 Fed. Reg. at 11,469.

cal evidence is the key to proving both types of claims, but the focus of this evidence differs: disparate-impact claims require a comparison of how a challenged policy affects different groups, while segregative-effect claims focus on how a challenged action affects residential segregation in the area.[23]

The Supreme Court's 2015 decision in *Inclusive Communities* endorsed FHA disparate-impact claims, but did not deal with—indeed, barely mentioned—the segregative-effect theory.[24] Furthermore, unlike disparate-impact, the segregative-effect theory has no clear analog in Title VII law.[25] This is not to say that segregative-effect claims are on shaky ground. To the contrary, based on the HUD regulation and *Inclusive Communities'* recognition that the FHA is designed to foster integration,[26] such claims have a strong foundation.[27] This Article focuses on how the FHA's segregative-effect theory might apply in various situations and what proof would be required in such cases.[28]

23. *See infra* Section II.A.2.a; *see also* SCHWEMM, *supra* note 18, at § 10:5 n.3, para. 1 (collecting cases).

24. *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2516–25 (2015) (dealing only with the question of whether disparate-impact claims are cognizable under the FHA); *id.* at 2522 (noting that while the FHA does not "force housing authorities to reorder their priorities," it does aim "to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation"); *id.* at 2525 (noting that some "communities [ ] have long suffered the harsh consequences of segregated housing patterns" and that "local housing authorities may choose to foster diversity and combat racial isolation with race-neutral tools"). For more on *Inclusive Communities* and the segregative-effect theory, see *infra* Section I.C.3.a.

25. *See Inclusive Cmtys.*, 135 S. Ct. at 2516–18 (describing Title VII's effect standard only in terms of disparate-impact claims); *see also* Rebecca Hanner White, *Affirmative Action in the Workplace: The Significance of* Grutter*?*, 92 KY. L.J. 263, 273–78 (2004) (describing the undeveloped state of Title VII law regarding hiring programs designed to create a diverse work force).

26. *See* 135 S. Ct. at 2521–22, 2525–26 (recognizing the FHA's goal of integration); *see also id.* at 2519, 2522 (citing with approval a prominent segregative-effect precedent, *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 937–38 (2d Cir.), *aff'd*, 488 U.S. 15 (1988) (per curiam)).

27. For an appellate decision after *Inclusive Communities* that recognized a segregative-effect claim along with a disparate-impact claim in a FHA-based challenge to a municipality's blocking of a proposed integrated housing development, see *Anderson Grp., LLC v. City of Saratoga Springs*, 805 F.3d. 34, 49–50 (2d Cir. 2015), which is discussed *infra* Section I.C.3.b. *See also* Boykin v. Fenty, 650 F. App'x 42 (D.C. Cir. 2016) (discussed *infra* Section I.C.3.b).

28. *See infra* Part II.

C. *Segregative-Effect Cases Before and After HUD's 2013 Regulation*

The factual setting in most segregative-effect cases has basically been the same: A zoning decision or other governmental action is challenged for preventing the development of a housing project that would help integrate a predominantly white area.

1. *Foundation Cases:* Black Jack, Arlington Heights, *and* Huntington

The FHA was passed in 1968, and early Supreme Court and lower-court decisions quickly declared that the statute should be interpreted broadly to achieve its goal of racial integration.[29] At the same time, developers of subsidized housing projects blocked by suburban municipalities brought a number of suits alleging racial discrimination in violation of the FHA, the Fourteenth Amendment, and other laws.[30] These exclusionary zoning cases eventually produced three major appellate decisions that endorsed the segregative-effect theory of liability under the FHA.

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29. *See, e.g.*, Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972) (quoting Senator Mondale, the FHA's principal sponsor, as saying that the law was designed to replace the ghettos "by truly integrated and balanced living patterns"); Otero v. N.Y.C. Hous. Auth., 484 F.2d 1122, 1134 (2d Cir. 1973) (holding that the FHA's principal purpose was to promote "open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat"); Shannon v. U.S. Dep't of Hous. & Urban Dev., 436 F.2d 809, 821–22 (2d Cir. 1970) ("Increase or maintenance of racial concentration is prima facie likely to lead to urban blight and is thus prima facie at variance with the national housing policy [as expressed in the FHA]. . . . [D]esegregation of housing is [a] goal of the national housing policy."). For more on these cases, see *infra* notes 188–192 and accompanying text (*Trafficante*), notes 319–323 and accompanying text (*Otero*), and note 188 (*Shannon*).

30. Besides the three cases discussed in this section, several other cases involving similar fact patterns were decided in the early 1970s, but they did not rely on the FHA's segregative–effect theory. *See* United Farmworkers of Fla. Hous. Project, Inc. v. City of Delray Beach, 493 F.2d 799, 809–11 (5th Cir. 1974) (ruling that the defendant-city engaged in racial discrimination in violation of the Equal Protection Clause in refusing to allow a proposed subsidized housing project in a white area to tie into its water and sewer systems); Crow v. Brown, 457 F.2d 788 (5th Cir. 1972) (affirming district court's ruling that the defendant-county engaged in racial discrimination in violation of the Equal Protection Clause by blocking subsidized housing projects in white areas surrounding Atlanta); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970) (affirming ruling against defendant-city that blocked a subsidized housing project in a white area based on proof of defendants' racial motivation in violation of the Fourteenth Amendment and the FHA); Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970) (same, based only on the Fourteenth Amendment).

The first was *United States v. City of Black Jack*,[31] where the Eighth Circuit in 1974 held that the defendant-city, a suburb of St. Louis, violated the FHA by enacting an ordinance barring new multi-family construction, which blocked a proposed 108-townhouse development known as Park View Heights that was intended for low- and moderate-income households.[32] Black Jack was virtually all white, whereas St. Louis's population was 40.9% black, and the city's minority residents disproportionately lived in segregated neighborhoods and often in overcrowded or substandard housing.[33] The Eighth Circuit concluded that the FHA curbs the "discretion of local zoning officials . . . where 'the clear result of such discretion is the segregation of low-income Blacks from all White neighborhoods.'"[34]

The *Black Jack* opinion began its analysis by holding that the FHA, like Title VII, does not require a showing of racial purpose.[35] Rather, because "[e]ffect, and not motivation, is the touchstone," a FHA plaintiff need only prove that the defendant's conduct "actually or predictably results in racial discrimination; in other words, that it has a discriminatory effect."[36] Further, such an effect was not limited

31. 508 F.2d 1179 (8th Cir. 1974).

32. *Id.* at 1182–83. Park View Heights had received HUD approval in 1970 for federal funding under § 236 of the National Housing Act, 12 U.S.C. § 1715z-1 (1968), after which Black Jack incorporated the area and passed the ordinance barring further multi-family development. *Black Jack*, 508 F.2d at 1182–83. The developer and others brought a separate suit, alleging that the city's action had the purpose and effect of illegal discrimination in violation of the FHA and other federal laws. *See* Park View Heights Corp. v. City of Black Jack, 467 F.2d 1208 (8th Cir. 1972) (reversing dismissal of this case on standing and ripeness grounds); *see also* Park View Heights Corp. v. City of Black Jack, 605 F.2d 1033 (8th Cir. 1979) (ordering additional remedial relief).

33. *Black Jack*, 508 F.2d at 1183.

34. *Id.* at 1184 (quoting Banks v. Perk, 341 F. Supp. 1175, 1180 (N.D. Ohio 1972), *aff'd in part & rev'd in part*, 473 F.2d 910 (6th Cir. 1973) (unpublished table decision)).

35. *Id.* at 1184–85 (applying the Supreme Court's interpretation of Title VII three years earlier in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)). This view of the FHA was later endorsed by many other appellate courts and eventually by the Supreme Court in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015). *See supra* notes 4–5 and accompanying text.

In *Black Jack*, the United States as plaintiff also contended that the challenged ordinance "was enacted for the purpose of excluding blacks," pointing out that local citizens' opposition to the proposed development "was repeatedly expressed in racial terms." 508 F.2d at 1185 n.3. The Eighth Circuit, though noting that race did seem to play a significant role in the opposition, chose not to "base our conclusion that the Black Jack ordinance violates [the FHA] on a finding that there was an improper purpose." *Id.*

36. *Black Jack*, 508 F.2d at 1184–85.

to actions that harmed blacks more than whites.[37] According to *Black Jack*, the alleged discriminatory effect must be assessed in light of the segregated housing patterns in the relevant metropolitan area:

> Black Jack's action is but one more factor confining blacks to low-income housing in the center city, confirming the inexorable process whereby the St. Louis metropolitan area becomes one that "has the racial shape of a donut, with the Negroes in the hole and with mostly Whites occupying the ring." . . . Park View Heights was particularly designed to contribute to the prevention of this prospect so antithetical to the Fair Housing Act. . . . There was ample proof that many blacks would live in the development, and that the exclusion of the townhouses would contribute to the perpetuation of segregation in a community which was 99 percent white.[38]

Having determined that Black Jack's ordinance had this type of discriminatory effect, the Eighth Circuit ruled that, because the defendant's justifications for it were inadequate,[39] the ordinance violated the FHA and should be enjoined.[40]

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37. The district court concluded that Black Jack's ordinance had no measurably greater impact on blacks than whites, because the class of people for whom the proposed development was designed (i.e., families in a specified income range) included thirty-two percent of the blacks and twenty-nine percent of whites in the metropolitan area. This conclusion was error, the Eighth Circuit ruled, because it did not take into account "the 'ultimate effect' or the 'historical context' of the City's action." *Id.* at 1186.

38. *Id.* at 1186 (quoting Mahaley v. Cuyahoga Metro. Hous. Auth., 355 F. Supp. 1257, 1260 (N.D. Ohio 1973), *rev'd*, 500 F.2d 1087 (6th Cir. 1974)).

39. *Id.* at 1186–88. Black Jack's failed justifications included traffic problems, school overcrowding, the devaluation of adjoining single-family homes, and "[t]he assertion that there was no 'market' or 'need' for Park View Heights in the Black Jack area." *Id.* at 1188. The Eighth Circuit held that the defendant's burden of justification was to prove that its ordinance furthered "a compelling governmental interest," *id.* at 1186, a standard derived from equal protection cases, *see, e.g.*, Palmore v. Sidoti, 466 U.S. 429, 432–33 (1984), and one since replaced for FHA purposes by HUD's 2013 discriminatory-effect regulation and the Supreme Court's *Inclusive Communities* decision, *see supra* note 13 and accompanying text.

40. *Black Jack*, 508 F.2d at 1188. In a later case that involved similar allegations against another St. Louis suburb that had blocked a proposed subsidized apartment complex, the Eighth Circuit affirmed a trial court's decision that rejected both disparate-impact and segregative-effect claims. *In re* Malone, 592 F. Supp. 1135 (E.D. Mo. 1984), *aff'd sub nom.* Malone v. City of Fenton, 794 F.2d 680 (8th Cir. 1986) (unpublished table decision). In this case, the defendant-suburb (Fenton) had an all-white population of 2400, and the plaintiffs' fifteen units of subsidized housing would likely include ten to fifteen black persons. *Id.* at 1147, 1152, 1167. The segregative-effect claim failed, according to the district court, because the evidence did not establish that "a significant number of blacks would move into [plaintiffs' complex] if it were built." *Id.* at 1167. Thus, the impact this project "might have on segregated housing patterns is insignificant and such a *de minimus* [sic] impact is not sufficient to establish a *prima facie* violation of the Fair Housing." *Id.* Fenton's exclusion of this pro-

Three years later in 1977, the Seventh Circuit produced the second major appellate decision involving the FHA's segregative-effect theory in *Metropolitan Housing Development Corp. v. Village of Arlington Heights*,[41] a case with many similarities to *Black Jack*. The proposed development in *Arlington Heights*, known as Lincoln Green, would have created 190 townhouse apartments in a white suburb of Chicago.[42] Lincoln Green was to be subsidized under the same federal program used in *Black Jack*,[43] which meant that its residents would have limited incomes and thus comprised a group in the metropolitan area that was forty percent minority.[44] The land chosen for Lincoln Green was zoned for single-family dwellings, which the Village refused to change. The developer and three prospective residents sued, alleging racial discrimination in violation of the FHA and the Equal Protection Clause. Focusing on the latter claim, the district court ruled for the defendant, but the Seventh Circuit reversed, holding that the discriminatory effect of the Village's decision could violate the Constitution.[45] The Supreme Court disagreed, ruling that discriminatory purpose was required for an Equal Protection violation[46] and that the plaintiffs, while perhaps having proved a discriminatory effect, had failed to show the necessary unlawful purpose.[47] On remand, the Sev-

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ject, therefore, "would not contribute to the perpetuation of segregated housing in the St. Louis area, in southwestern St. Louis County or in the City of Fenton." *Id.*

41. 558 F.2d 1283 (7th Cir. 1977).

42. *Id.* at 1286. In 1970, Arlington Heights had a population of 64,884 people, of whom twenty-seven were black. *Id.* at 1286–87. The Village claimed that the black population had grown to two hundred by 1976, but the Seventh Circuit still determined that "Arlington Heights would be approximately ninety-nine percent white. We find these numbers to be evidence of 'overwhelming' racial segregation." *Id.* at 1291 n.9.

43. *Id.* at 1286 (referring to the § 236 subsidy program); *see supra* note 32 (describing *Black Jack*).

44. 558 F.2d at 1291.

45. Metro. Hous. Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409 (7th Cir. 1975), *rev'g* 373 F. Supp. 208 (N.D. Ill. 1974).

46. Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977) (following, with respect to the need to prove purposeful discrimination for a constitutional violation, the Court's decision one year earlier in *Washington v. Davis*, 426 U.S. 229 (1976)).

47. *Id.* at 269–71. The Court acknowledged that "[t]he impact of the Village's decision does arguably bear more heavily on racial minorities [because minorities] constitute 18% of the Chicago area population, and 40% of the income groups said to be eligible for Lincoln Green," *id.* at 269, but the other factors identified by the Court as potential indicators of discriminatory intent favored the Village, *id.* at 269–70.

The Court's identification of impact evidence as an element of proof of intent has been of enduring importance, regularly followed by courts seeking to determine if an illegal purpose motivated a defendant's action. *See, e.g.*, SCHWEMM, *supra* note 18, at § 13:12 n.17 (collecting cases). This makes proof of disparate impact relevant in intent as well as impact cases. Would the same be true for proof that a defendant's

enth Circuit ruled that the defendant's action did violate the FHA based on a discriminatory-effect theory, at least if no other site in the Village was available for the proposed development.[48]

According to the Seventh Circuit in its second *Arlington Heights* decision, the FHA could be violated by either of two types of discriminatory effect: (1) an action that "had a greater impact on black people than on white people"; or (2) an action that "had the effect of perpetuating segregation in Arlington Heights."[49] The Seventh Circuit viewed the plaintiffs' showing of disparate impact to be "relatively weak," because the class of people eligible for the proposed development—and thus harmed by the Village's action—was sixty percent white.[50] The perpetuation-of-segregation effect, however, was seen as strong, because "[t]he Village remains overwhelmingly white at the present time, and the construction of Lincoln Green would be a significant step toward integrating the community."[51] This was sufficient for the plaintiffs to prevail, according to the Seventh Circuit, even though other factors might favor the Village, because "we must decide close cases in favor of integrated housing."[52] However, the segregative ef-

action has a segregative effect? No clear answer exists: Only a few decisions have opined on this issue, and they have reached different conclusions. *Compare* Winfield v. City of New York, No. 15CV5236-LTS-DCF, 2016 WL 6208564, at *7 (S.D.N.Y. Oct. 24, 2016) (upholding intent claim based in part on allegations that defendant's policies preserved racial and ethnic segregation), *with* Bonasera v. City of Norcross, 342 F. App'x 581, 585–86 (11th Cir. 2009) (implying the contrary by considering only impact evidence as a factor relevant to proving intent in an opinion recognizing that the FHA can be violated by either segregative effect or disparate impact); *In re* Malone, 592 F. Supp. 1135, 1160, 1166 (E.D. Mo. 1984), *aff'd sub nom.* Malone v. City of Fenton, 794 F.2d 680 (8th Cir. 1986) (unpublished table decision) (same).

48. 558 F.2d at 1290. Shortly after this decision, the Third Circuit relied on it in holding that effect alone could establish a prima facie case under the FHA and that the plaintiffs' evidence showed that the defendants' actions had both a disparate impact on blacks and resulted in segregating a Philadelphia neighborhood. *See* Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 147–49 (3d Cir. 1977).

49. *Arlington Heights*, 558 F.2d at 1288.

50. *Id.* at 1291.

51. *Id.* (footnote omitted); *see also id.* at 1288 (making the same point); Metro. Hous. Dev. Corp. v. Village of Arlington Heights, 517 F.2d, 409, 414 (7th Cir. 1975) (noting, in determining that Arlington Heights's "rejection of Lincoln Green has the effect of perpetuating . . . residential segregation," that "[t]hough the building of this project might have only minimal effects in terms of alleviating the segregative housing problem for the entire Chicago area, it might well result in increasing Arlington Heights' minority population over one thousand percent").

52. *Arlington Heights*, 558 F.2d at 1294. The multi-factor approach to FHA discriminatory-effect cases adopted by the Seventh Circuit here, *see id.* at 1290–93, was somewhat at odds with the approach of other circuits and has since been replaced by the three-step approach set forth in HUD's 2013 discriminatory-effect regulation and the Supreme Court's *Inclusive Communities* decision, *see supra* text accompanying notes 10–14.

fect would be ameliorated if Lincoln Green could be built elsewhere in the Village, and the Seventh Circuit remanded the case to determine this fact.[53]

The third key appellate decision was issued by the Second Circuit in 1988 in *Huntington Branch, NAACP v. Town of Huntington*.[54] Huntington was a highly segregated New York suburb with 200,000 residents, ninety-five percent of whom were white, and the Town's minority population was concentrated in two areas.[55] The Town's zoning plan confined all new private multifamily construction to a largely minority urban renewal area.[56] A developer in 1980 proposed to build a 162-unit subsidized project in a different area that was ninety-eight percent white.[57] When the Town refused to approve the necessary zoning changes, the developer, the local branch of the NAACP, and two residents of Huntington sued, alleging, inter alia, that the Town violated the FHA by barring multifamily developments outside of the

53. *Arlington Heights*, 558 F.2d at 1294–95. On remand, the parties reached a settlement based on building Lincoln Green on another parcel, which was approved by the district court. *See* Metro. Hous. Dev. Corp. v. Village of Arlington Heights, 469 F. Supp. 836 (N.D. Ill. 1979), *aff'd*, 616 F.2d 1006 (7th Cir. 1980).

54. 844 F.2d 926, 937–41 (2d Cir.), *aff'd*, 488 U.S. 15 (1988). While *Huntington* was being litigated, two other cases that included similar claims were decided against the plaintiffs. One involved a different New York suburb and was dealt with in the state court system. *See* Suffolk Hous. Servs. v. Town of Brookhaven, 109 A.D.2d 323, 334–39 (N.Y. App. Div. 1985), *aff'd*, 511 N.E.2d 67 (N.Y. 1987) (adopting the Seventh Circuit's *Arlington Heights* analysis of FHA-effect claims, but ruling against the plaintiffs' claim that the defendant-town had "perpetuated intratown segregation by restricting subsidized family housing to the predominately 'black' areas . . . [because] there were also significant numbers of blacks in other areas of the town"). The other was *Arthur v. City of Toledo*, 782 F.2d 565 (6th Cir. 1986), in which the Sixth Circuit, while recognizing the segregative-effect theory, *id.* at 575, rejected a FHA-based challenge to a city's referendums that blocked two proposed public housing projects. Noting "the strong policy considerations underlying referendums," *id.*, the *Arthur* opinion ruled against the plaintiffs' disparate-impact and segregative-effect claims, concluding that the evidence supporting the former was "relatively weak," *id.* at 576, and that the latter failed because the individuals eligible for the two blocked projects were offered comparable housing elsewhere and "eventually did receive . . . public housing in predominantly white neighborhoods," *id.* at 577.

55. 844 F.2d at 929, 931.

56. *Id.* at 929–31. Minorities made up fifty-two percent of the residents in the urban renewal area. *Id.* at 930.

57. *Id.* at 930–31. The project was to receive assistance under Section 8, "a federal program that provides subsidies for newly-constructed and substantially-rehabilitated housing." *Id.* at 928 n.2. The developer sought to foster racial integration with this project, which had a goal of twenty-five percent minority occupants. *Id.* at 930–31. Because "a disproportionately large number of minorities are on the waiting list for subsidized housing and existing Section 8 certificates," the Second Circuit concluded that a "significant percentage of the tenants [at the project] would belong to minority groups." *Id.* at 937.

urban renewal area and by refusing to rezone the specific site for the proposed project.[58]

The Second Circuit ruled in favor of both claims. In reversing the trial court, the appellate court focused only on what plaintiffs had to prove for a discriminatory-effect violation of the FHA.[59] As in *Black Jack* and *Arlington Heights*, the Second Circuit noted that discriminatory effect could be established in either of two ways: (1) by showing that the defendant's action had a disparate impact on minorities; or (2) by showing that that action perpetuated segregation in the community.[60] The court of appeals held that disparate impact had been shown.[61] More importantly for present purposes, the *Huntington* opinion criticized the district court for failing even to consider the plaintiffs' segregative-effect theory,[62] noting that "recognizing this second form of effect advances the principal purpose of [the FHA] to promote, 'open integrated residential housing patterns.'"[63] The Second Circuit then held that Huntington's restriction of low-income multifamily housing to a minority area and its refusal to allow the proposed project in a white area significantly perpetuated segregation.[64]

The Second Circuit then ruled that, because the Town failed to provide adequate justifications, it violated the FHA.[65] For relief, the

58. The plaintiffs also claimed violations of the Equal Protection Clause, other federal civil rights statutes, and certain state laws, but they ultimately abandoned all but the FHA claims. *See id.* at 928 n.1. The trial court originally dismissed the case for lack of standing, but the Second Circuit reversed that decision in 1982. *See* Huntington Branch, NAACP v. Town of Huntington, 689 F.2d 391 (2d Cir. 1982).

59. *Huntington*, 844 F.2d at 937 n.7 (declining to review the trial court's findings on intentional discrimination on the ground that such a showing is not necessary in FHA cases).

60. *Id.* at 937.

61. *Id.* at 937–38. The district court had ruled against this claim because more whites than blacks would qualify for the proposed project, but the appellate court noted that this use of absolute numbers, as opposed to comparative percentages, was inconsistent with traditional disparate-impact analysis. *Id.* at 938.

62. *Id.* at 937, 938 n.9.

63. *Id.* at 937 (quoting Otero v. N.Y.C. Hous. Auth., 484 F.2d 1122, 1134 (2d Cir. 1973)).

64. *Id.* at 937–38.

65. *Id.* at 939–42. The Second Circuit ruled that the defendant's burden in a FHA-effect case was to present "bona fide and legitimate justifications for its action with no less discriminatory alternative available." *Id.* at 939. This standard differed somewhat from that imposed by other appellate courts in such cases, *see id.* at 939–41, and has since been replaced by HUD's 2013 discriminatory-effect regulation, *see supra* notes 13–14 and accompanying text. *See also* Mhany Mgmt., Inc. v. County of Nassau, 819 F.3d 581, 617–19 (2d Cir. 2016); *infra* note 127.

In *Huntington*, the Town attempted to justify its ordinance restricting multifamily projects to the urban renewal area on the ground that it would encourage investment in these areas, but the Second Circuit found this rationale to be inadequate. It

court ordered the Town to eliminate its restriction on multifamily housing outside of the urban renewal area and to rezone the project site for the proposed development.[66] The Town appealed. In a limited per curiam order, the Supreme Court affirmed and did not vacate the Second Circuit's decision, thus leaving intact its segregative-effect analysis.[67]

The Second Circuit decided *Huntington* in early 1988, a few months before Congress passed the Fair Housing Amendments Act.[68] This law strengthened the FHA's enforcement mechanisms in various ways and added disability and families with children to the groups protected against discrimination.[69] However, Congress did not change the statute's key prohibitory language, a fact that the Supreme Court would later consider important in deciding to uphold FHA disparate-impact claims. According to the Court's opinion in *Inclusive Communities*, Congress "accepted and ratified the unanimous holdings" of the courts of appeals in *Huntington*, *Arlington Heights*, *Black Jack*, and cases from six other circuits that had endorsed the disparate-impact theory of liability.[70] Although *Inclusive Communities* focused on dis-

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held that this restriction was more likely to cause developers to invest in other towns rather than in Huntington's urban renewal area and that tax incentives would have been a more effective and less discriminatory means to the desired end. 844 F.2d at 939. With respect to its opposition to the particular site of the proposed project, the Town offered a variety of justifications, including increased traffic and sewage problems, but the Second Circuit found that none of these was adequately supported by evidence. *Id.* at 939–40.

66. 844 F.2d at 941–42.

67. Town of Huntington v. Huntington Branch, NAACP, 488 U.S. 15 (1988) (per curiam). The Court reviewed only that portion of the case dealing with the Town's restriction of multifamily housing to the urban renewal area and did not consider the issue of the particular project site. *Id.* at 18. Also, because the Town conceded the applicability of the disparate-impact test under the FHA for evaluating its zoning ordinance, the Court did not reach the question of whether that test was the appropriate one. *Id.* Having narrowed the case to a single issue, the Court simply stated: "Without endorsing the precise analysis of the Court of Appeals, we are satisfied on this record that disparate impact was shown, and that the sole justification proffered to rebut the prima facie case was inadequate." *Id.* The Court therefore affirmed the judgment below. *Id.*

68. Pub. L. No. 100-430, 102 Stat. 1619 (1988).

69. *See* SCHWEMM, *supra* note 18, at § 5:3.

70. *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2519–20 (2015); *see also id.* at 2520 (noting that the 1988 Congress "rejected a proposed amendment that would have eliminated disparate-impact liability for certain zoning decisions" and citing to H.R. REP. NO. 100-711 89–93 (1988), which had discussed the *Huntington* decision).

The appellate decisions cited in this part of *Inclusive Communities* included *Arthur v. City of Toledo*, 782 F.2d 565 (6th Cir. 1986) (discussed *supra* note 54); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065–67 (4th Cir. 1982) (recognizing the segregative-effect theory in the course of affirming plaintiff's judgment based on both in-

parate impact, its view that the 1988 Congress's acceptance of prior consistent appellate decisions is helpful in interpreting the FHA suggests that the three cases discussed in this section are entitled to added weight.

2. *Other Cases Before the HUD Regulation*

In addition to the appellate decisions in *Huntington*, *Arlington Heights*, and *Black Jack*, HUD's commentary on its 2013 discriminatory-effect regulation cited two district court decisions that had supported the segregative-effect theory of liability.[71] The first was the 1997 decision in *Summerchase Limited Partnership I v. City of Gonzales*,[72] which again involved a challenge to a municipality's refusal to allow the development of an apartment complex designed for low-income residents. The developers brought both intent and effect claims under the FHA and other laws.[73] The district court granted summary judgment for the defendants on a number of the plaintiffs' claims including their FHA disparate-impact claim,[74] but upheld their FHA claims based on intentional discrimination against minorities and segregative effect.[75] Thus, *Summerchase* provided another example of a situation in which a segregative-effect claim might prevail in the

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tent and disparate impact); and *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3d. Cir. 1977) (discussed *supra* note 48). *See Inclusive Cmtys.*, 135 S. Ct. at 2519; *see also* Betsey v. Turtle Creek Assocs., 736 F.2d 983, 987 n.3 (4th Cir. 1984) (recognizing, in another pre-*Inclusive Communities* appellate decision, the FHA's segregative-effect theory in the course of holding that plaintiffs had made out a prima facie case of disparate impact).

71. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,469 n.103 (Feb. 15, 2013). For a description of other cases that dealt with the FHA's segregative-effect theory during the period between the *Huntington* decision in 1988 and HUD's 2013 discriminatory-effect regulation, see *infra* notes 85–86 and accompanying text and *infra* note 276. *See also* Davis v. N.Y.C. Hous. Auth., 166 F.3d 432 (2d Cir. 1999) (vacating, based on inadequate findings below, an injunction barring defendant from amending its tenant-selection criteria to favor working families, which the district court had found likely to violate the FHA by perpetuating segregation at some of defendant's projects).

72. 970 F. Supp. 522 (M.D. La. 1997).

73. *Id.* at 526.

74. *Id.* at 527–28 (granting summary judgment against plaintiffs' FHA familial status claims alleging intentional discrimination, disparate impact, and segregative effect); *id.* at 528–30 (granting summary judgment against plaintiffs' FHA disparate-impact claim alleging discrimination against minorities); *id.* at 531–40 (discussing summary judgment rulings on plaintiffs' non-FHA claims).

75. *Id.* at 527 (upholding plaintiffs' FHA race-based claim alleging intentional discrimination); *id.* at 530–31 (upholding plaintiffs' FHA race-based claim alleging segregative effect).

absence of a successful disparate-impact claim.[76] However, the *Summerchase* opinion is not useful in terms of identifying the proof necessary to support a segregative-effect claim, because the court provided only a brief summary of the facts.[77]

By contrast, a detailed picture of the racial demographics was provided in *Dews v. Town of Sunnyvale*.[78] Here, the court, after a bench trial, ruled in 2000 that the defendant-town's zoning restrictions were racially motivated in violation of various civil rights laws and also had both a disparate impact and segregative effect that violated the FHA.[79] Sunnyvale, a small white suburb of Dallas, Texas, had banned all apartments and required one-acre lots for other residential developments, which, inter alia, blocked an affordable multifamily proposal that would have included minority residents.[80] In addition to holding that the Town's refusal to allow multifamily housing disproportionately harmed blacks,[81] the court ruled that "Sunnyvale's ban on apartments and stubborn insistence on large lot, low density zoning also perpetuate racial segregation in Dallas County."[82] Sunnyvale's population was overwhelmingly white and:

> Racial segregation can also be seen by a comparison of the population in the areas of Garland and Mesquite immediately adjoining Sunnyvale. These areas are zoned for multifamily and smaller single-family lot sizes. Not surprisingly, several HUD-assisted apartment complexes exist in Mesquite and Garland, near

76. The court cited *Huntington* and *Arlington Heights* for the proposition that discriminatory effect under the FHA "may be proven by either (1) a showing of disparate impact, or (2) a showing of segregative effect." *Id.* at 528.

77. *See id.* at 526 n.1 (noting that the "facts of this case are voluminous" and that only a brief summary would be provided in the opinion). The court did find that the likely racial make-up of the proposed project would be about seventy-eight percent white and twenty-two percent minority, *id.* at 530, but the racial demographics of the community in which the project was to be located were not given. According to the 1990 Census, the City of Gonzales had a population of 7003, of whom approximately seventy-five percent were white, twenty-four percent were black, and two percent were Hispanic. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1990 CP-1-20, 1990 CENSUS OF POPULATION: GENERAL POPULATION CHARACTERISTICS: LOUISIANA (1992), http://www2.census.gov/library/publications/decennial/1990/cp-1/cp-1-20.pdf.

78. 109 F. Supp. 2d 526, 567–68 (N.D. Tex. 2000).

79. *Id.* at 563–73. In assessing the FHA-effect claims, the *Dews* opinion, like *Summerchase*, quoted *Huntington* for the proposition that discriminatory effect "may be proven by showing either (1) 'adverse impact on a particular minority group' or (2) 'harm to the community generally by the perpetuation of segregation.'" *Id.* at 564.

80. *Id.* at 537–59. Sunnydale had a population of 2228 in 1990. *Id.* at 538. "[T]he percentage breakdown of Sunnyvale's households was 97% white and 0.95% black." *Id.* at 539. The court did not identify how many units would be in the proposed development nor the likely proportion of minority residents it would have.

81. *Id.* at 565–67.

82. *Id.* at 567.

> Sunnyvale. . . . Mesquite and Garland have the largest numbers of DHA's [Dallas Housing Authority's] African-American section 8 tenants of all the Dallas County suburbs. Mesquite and Garland both operate their own section 8 programs in addition to providing housing for DHA's section 8 tenants residing in their respective Cities. . . . There is no question that Sunnyvale's planning and zoning practices as well as its preclusion of private construction of multifamily and less costly single-family housing perpetuate segregation in a town that is 97 percent white.[83]

Having determined that the Town's actions had a discriminatory effect, the court went on to rule that its justifications for those actions were inadequate and thus they violated the FHA.[84]

Prior to HUD's issuance of its 2013 discriminatory-effect regulation, a number of FHA appellate decisions recognized the segregative-effect theory, without having to determine whether liability should be based on it.[85] Most of these cases, like *Summerchase* and *Dews*, involved race-based challenges to a municipality's blocking of a proposed affordable housing development. The few decisions that did

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83. *Id.* at 567–68 (footnotes omitted).

> The fact that Sunnyvale's low-density zoning perpetuates racial segregation is further demonstrated by examining census tract 181.04, which includes almost all of the population and occupied housing units in Sunnyvale, as well as a portion of Mesquite. The total occupied units for tract 181.04 are 3.74% black and 5.1% Hispanic. The occupied units for the portion of the tract in Sunnyvale are 0.96% black and 0.55% Hispanic. The occupied units for the portion of tract 181.04 in Mesquite are 8.26% black and 12.5% Hispanic. A comparison with the population in the Garland census tract (181.15) that is next to Sunnyvale shows the same pattern. The total population for that tract is 7.45% black and 6.64% Hispanic. In census tract 181.15, the block groups that are adjacent to Sunnyvale are 4.41%, 9.46%, and 11.32% black.

Id. at 567–68 (footnotes omitted).

84. *Id.* at 568–69. Following *Huntington*, the court held that the Town's burden in a FHA-effect case was to show that it was furthering a legitimate, bona fide interest and had no less discriminatory alternative. *Id.* at 568. As noted above, this standard has since been replaced by HUD's 2013 discriminatory-effect regulation. *See supra* notes 13–14 and accompanying text. In *Dews*, the Town's justifications included protecting the public health from problems with septic tanks and regional obligations regarding environmental and other issues, which the court held were not proven and also capable of being advanced by zoning alternatives that the Town had rejected. 109 F. Supp. 2d at 568–69.

85. *See* Bonasera v. City of Norcross, 342 F. App'x 581, 585 (11th Cir. 2009); Graoch Assocs. #33, L.P. v. Louisville/Jefferson Cty. Metro Human Relations Comm'n, 508 F.3d 366, 378 (6th Cir. 2007); Hallmark Developers, Inc. v. Fulton County, 466 F.3d 1276, 1286 (11th Cir. 2006); Edwards v. Johnston Cty. Health Dep't, 885 F.2d 1215, 1223–24 (4th Cir. 1989). These four decisions affirmed summary judgments against disparate-impact claims. Only the *Bonasera* plaintiff advocated a segregative-effect claim on appeal, but the court did not separately analyze this claim. *See* 342 F. App'x at 585–86.

rule on segregative-effect claims found the facts insufficient to establish a prima facie case, usually because the plaintiff's development, though likely to include a substantial number of minorities, was proposed for an area that was already integrated.[86]

3. *Cases after the HUD Regulation*

a. Inclusive Communities

As noted earlier, the Supreme Court's 2015 decision in *Inclusive Communities* endorsing FHA disparate-impact claims barely mentioned the segregative-effect theory.[87] Still, the Court's opinion did endorse some lower-court decisions upholding segregative-effect claims. The opinion also contained noteworthy comments on the FHA, its integration goals, and the limits of its reach in claims not based on intentional discrimination.

Justice Kennedy pointed out that recognizing disparate-impact claims is "consistent with the FHA's central purpose [which is] to eradicate discriminatory practices within a sector of our Nation's economy."[88] With respect to challenging governmental practices, the FHA's impact theory "mandates the 'removal of artificial, arbitrary, and unnecessary barriers,' [as] the FHA aims to ensure that [valid governmental policies and priorities] can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation."[89] Thus, the practices made unlawful by the FHA "include zoning laws and other housing restrictions that function unfairly to exclude minori-

86. *See* Artisan/Am. Corp. v. City of Alvin, 588 F.3d 291, 299 n.20 (5th Cir. 2009); Hallmark Developers, Inc. v. Fulton County, 386 F. Supp. 2d 1369, 1383 (N.D. Ga. 2005), *aff'd*, 466 F.3d 1276 (11th Cir. 2006); *accord* (from the pre-*Huntington* period) Arthur v. City of Toledo, 782 F.2d 565, 575 (6th Cir. 1986) (discussed *supra* note 54); *In re* Malone, 592 F. Supp. 1135, 1166–68 (E.D. Mo. 1984), *aff'd sub nom.* Malone v. City of Fenton, 794 F.2d 680 (8th Cir. 1986) (unpublished table decision) (discussed *supra* note 40).

In *Hallmark Developers*, the plaintiff unsuccessfully pursued both disparate-impact and segregative-effect theories before the trial court, but only advanced its disparate-impact claim on appeal. *See* 466 F.3d at 1286. In ruling against the segregative-effect claim, the district court noted that, unlike *Black Jack* and other cases where such a claim had succeeded because an integrated development was proposed in an all-white suburb, the plaintiff's blocked development here was to be built in an area that was already integrated and that, regardless of the fate of this development, "likely will remain a racially mixed, predominantly African-American area, just as it was previously." 386 F. Supp. 2d at 1383.

87. *See supra* note 24 and accompanying text.

88. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2521 (2015).

89. *Id.* at 2522 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

ties from certain neighborhoods without any sufficient justification."[90] According to *Inclusive Communities*, "[s]uits targeting such practices reside at the heartland of disparate-impact liability," a proposition for which the Court cited *Huntington* and *Black Jack* as examples.[91] Again citing *Huntington*, the Court noted that the disparate-impact theory has allowed plaintiffs to vindicate the FHA's objectives "by stopping municipalities from enforcing arbitrary and, in practice, discriminatory ordinances barring the construction of certain types of housing units."[92]

Other points made in *Inclusive Communities* are worth noting. First, in its penultimate paragraph, Justice Kennedy's opinion recognized the FHA's role "in our Nation's continuing struggle against racial isolation [and in] striving to achieve our 'historic commitment to creating an integrated society.'"[93] The opinion concluded:

> [S]ince the passage of the Fair Housing Act in 1968 and against the backdrop of disparate-impact liability in nearly every jurisdiction, many cities have become more diverse. The FHA must play an important part in avoiding the Kerner Commission's grim prophecy that "[o]ur Nation is moving toward two societies, one black, one white—separate and unequal." Kerner Commission Report 1. The Court acknowledges the Fair Housing Act's continuing role in moving the Nation toward a more integrated society.[94]

Second, the opinion noted that the disparate-impact theory "plays a role in uncovering discriminatory intent [by permitting] plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment."[95] Third, while the Court's decision endorsing FHA disparate-impact claims did not rely on giving deference to HUD's 2013 regulation, Justice Kennedy did cite this regulation and HUD's commentary on it with apparent approval on a number of occasions.[96] Finally, the Court's opinion, in discounting the

90. *Id.* at 2521–22.

91. *Id.* at 2522.

92. *Id.* (citing Town of Huntington v. Huntington Branch, NAACP, 488 U.S. 15, 18 (1988) (per curiam)). The *Huntington* citation here was to the Court's own decision in that case, but the *Inclusive Communities* opinion elsewhere cited the Second Circuit's decision in *Huntington*, along with the Seventh Circuit's decision in *Arlington Heights* and the Eighth Circuit's decision in *Black Jack*, as being among the appellate decisions that Congress had "accepted and ratified" when it enacted the 1988 amendments to the FHA. *See id.* at 2519–20.

93. 135 S. Ct. at 2525 (quoting Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring in part and concurring in judgment)).

94. *Id.* at 2525–26.

95. *Id.* at 2522.

96. *See id.* at 2514–15, 2522, and 2523.

defendant's fear of the negative consequences that would attend recognition of disparate-impact liability, pointed to that theory's long provenance.[97] All of these points support not only the disparate-impact theory, but the segregative-effect theory as well.

But the *Inclusive Communities* opinion also insisted that certain limits be placed on the FHA's disparate-impact theory in order "to protect potential defendants against abusive disparate-impact claims."[98] Justice Kennedy quoted with approval HUD's view that "disparate-impact liability 'does not mandate that affordable housing be located in neighborhoods with any particular characteristic.'"[99] More generally, an impact claim "that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement ensures that '[r]acial imbalance . . . does not, without more, establish a prima facie case of disparate impact' and thus protects defendants from being held liable for racial disparities they did not create."[100] Impact-based challenges based solely on racial imbalances, according to *Inclusive Communities*, "would almost inexorably lead . . . to . . . numerical quotas," presumably because potential defendants would seek racial balance to avoid liability, a situation that would raise "serious constitutional questions."[101] As with the principles discussed in the previous paragraph, these "cautionary standards" for FHA-impact claims[102] might reflect more broadly the Court's concerns with non-intent claims

97. Specifically, the Court noted:

> In light of the longstanding judicial interpretation of the FHA to encompass disparate-impact claims and congressional reaffirmation of that result, residents and policymakers have come to rely on the availability of disparate-impact claims. . . . Indeed, many of our Nation's largest cities—entities that are potential defendants in disparate-impact suits—have submitted an *amicus* brief in this case supporting disparate-impact liability under the FHA. . . . The existence of disparate-impact liability in the substantial majority of the Courts of Appeals for the last several decades "has not given rise to . . . dire consequences."

Id. at 2525 (quoting Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 196 (2012)).

98. *Id.* at 2524.

99. *Id.* at 2523 (quoting 78 Fed. Reg. 11,476 (Feb. 15, 2013)).

100. *Id.* (quoting Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 653 (1989)). A related point, as discussed *infra* note 146 and accompanying text, was that FHA-impact claims could only challenge general policies and not one-time decisions. *See Inclusive Cmtys.*, 135 S. Ct. at 2523–24.

101. *Id.* at 2523.

102. *See id.* at 2524.

under the FHA and thus apply as well to the segregative-effect theory of liability.[103]

b. Lower-Court Decisions

Since 2013, when HUD promulgated its discriminatory-effect regulation,[104] four appellate decisions involving FHA segregative-effect claims have been reported.[105] In 2015, the Second Circuit in *Anderson Group, LLC v. City of Saratoga Springs*[106] reinstated a jury verdict in favor of the plaintiff, an affordable housing developer, against a municipality accused of racial and familial status discrimination in blocking the plaintiff's proposed project.[107]

In *Anderson*, the plaintiff proposed a 250–300 unit development on the outskirts of the City, with twenty percent of the units to be rented at affordable rates to low-and-moderate income households.[108] The City, a seasonal tourist mecca some forty miles north of Albany, New York, had 26,000 year-round residents and an urgent need for affordable housing, most of which was concentrated in two downtown

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103. In this regard, the Court's discussion of Step Two of an impact claim would seem to apply equally to Step Two in a segregative-effect claim. As to this point, the *Inclusive Communities* opinion noted that, even if a prima facie case of disparate impact is proven, the defendant can still prevail by showing that its policy is justified; thus:

> An important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing [defendants] leeway to state and explain the valid interest served by their policies. . . . Just as an employer may maintain a workplace requirement that causes a disparate impact if that requirement is a "reasonable measure[ment] of job performance," [Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971)], so too must housing authorities and private developers be allowed to maintain a policy if they can prove it is necessary to achieve a valid interest.

Id.

104. *See supra* note 2 and accompanying text.

105. During this period, the Seventh Circuit ruled on a FHA-impact issue in a case that did not present a segregative-effect claim. *See* City of Joliet v. New West, L.P., 825 F.3d 827 (7th Cir. 2016), *cert. denied sub nom.* Mid-City Nat. Bank of Chi. v. City of Joliet, 137 S. Ct. 518 (Nov. 28, 2016) (No. 16-485) (discussed *infra* notes 256–263 and accompanying text). Also during this period, a number of district court decisions dealt with FHA-impact claims, *see, e.g.*, cases referenced *supra* note 8, but most, like *Joliet*, did not also deal with the segregative-effect theory.

106. 805 F.3d 34 (2d Cir. 2015). This decision came a few months after the Supreme Court's decision in *Inclusive Communities* (discussed *supra* Section I.C.3.a).

107. The defendant's blocking of the proposed development allegedly "perpetuated racial discrimination in Saratoga Springs, and had a disproportionate impact on African-Americans and families with children." *Id.* at 41.

108. *Id.* at 40. An "affordable" unit was, according to HUD's definition, "one that costs no more than 30% of the total annual household income." *Id.* at 39 n.1.

neighborhoods.[109] However, the City rezoned the plaintiff's property to prevent construction of the proposed development.[110]

The governing FHA legal framework, based on *Huntington*, allowed the plaintiff to make out a prima facie case of discriminatory effect by showing either disparate impact or perpetuation of segregation, which then required the defendant to prove a bona fide and legitimate justification for its action with no less discriminatory alternative available.[111] The jury ruled in favor of the plaintiff-developer, finding that the City's action had both a disparate impact on blacks and families with children and also perpetuated race-based segregation, but the jury held the City liable only on the impact theory because it found the City's justifications sufficient to excuse the segregative effect.[112] The district court, finding the jury's verdict inconsistent, granted the City's motion for a new trial, at which the City prevailed on all claims.[113]

The developer appealed, and the Second Circuit held that its verdict in the first trial should not have been set aside.[114] According to the *Anderson* opinion, while *Huntington* categorized adverse impact and perpetuation of segregation as subspecies of discriminatory-effect claims, it did not deal with whether:

> [A]n asserted governmental interest justification that was sufficient to defeat liability as to one type of discriminatory effect also sufficed to defeat liability on the other. *Huntington* . . . therefore leaves open the possibility that a rule or policy may be invalidated on the ground that the legitimate governmental interest served can be achieved by alternatives with less discriminatory effect on families with children, even though that same legitimate governmental interest cannot be achieved by alternatives with less segregating effect on the community.[115]

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109. *Id.* at 38–39.

> These neighborhoods were comprised of three Census tracts . . . . Three "block groups" within these Census tracts were largely made up of low-to-moderate income residents. The same three block groups also contained a concentration of the City's minority residents. While these residents comprised only 5.5% of the City's overall population, the populations of the three block groups were, respectively, 31.2%, 51.6%, and 71.8% non-white.

Id. at 39 n.2.

110. *Id.* at 38–40.

111. *See id.* at 49 (citing Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 934–35 (2d Cir. 1988)).

112. *Id.* at 43.

113. *Id.* at 43–44.

114. *Id.* at 46–50.

115. *Id.* at 49–50.

The result was that the developer prevailed on its FHA-effect claim.[116] Further, the original jury's determination that the plaintiff had established a prima facie case of race-based segregative effect remained intact.[117] The case thus provides an example of a plaintiff successfully proving such a prima facie case, albeit one that was shown to be justified by the defendant.

A few months after *Anderson*, the Second Circuit produced another decision on this issue in *Mhany Management, Inc. v. County of Nassau*,[118] which essentially affirmed the plaintiffs' victory in challenging a white city's opposition to a proposed 300-unit mixed-income development whose likely tenants would be eighteen to thirty-two percent minority.[119] The principal defendant in *Mhany* was Garden City, which is located in suburban Nassau County, New York. Blacks and Hispanics, who accounted for fifteen percent of Nassau County's population, but most of its low-income households and eighty-eight percent of its Section 8 waiting list, made up only between two percent and four percent of Garden City's residents.[120] The County asked the City to zone land for the proposed multi-family development, but the City, in response to local opposition, instead designated the site for a single-family development.[121] The developer and others sued the City for intentional discrimination in violation of various civil rights laws and for effect-based discrimination under the FHA.[122]

116. *See id.* at 56. The Second Circuit did approve some reduction in the original jury's $1 million damage award and remanded the case for a new trial solely on the issue of damages. *Id.* at 51–56.

117. Because the City did not appeal the district court's denial of its motion for judgment as a matter of law on sufficiency-of-the-evidence grounds, the Second Circuit did "not consider whether the evidence presented in this case was sufficient to make out a prima facie FHA disparate impact claim" or satisfy the Supreme Court's decision in *Inclusive Communities*. *Id.* at 51 n.8. Nor was this issue presented to the Second Circuit with respect to the initial jury's finding of segregative effect.

118. 819 F.3d 581 (2d Cir. 2016).

119. *Id.* at 587–88, 598. The proposed development would have included affordable and Section 8 apartments and was estimated to contain between 56 and 101 minority households. *Id.* at 598. As in *Anderson*, *see supra* note 108, the Second Circuit in *Mhany* accepted a definition of affordable housing as requiring "no more than 30% of a household's income for households earning 80% or less of the [median income in the area]." 819 F.3d at 588 n.1.

120. *Id.* at 588.

121. *Id.* at 590–98.

122. *Id.* at 598. The plaintiffs also sued the County for discrimination in not pressuring Garden City to accept the development. *Id.* The district court granted summary judgment for the County on these claims, *id.*, which the Second Circuit later partially reversed, but not on grounds involving the FHA's discriminatory-effect theory, *id.* at 620–24.

After a bench trial, the district court ruled against the City on the plaintiffs' intent claims.[123] Based on *Huntington*'s framework for FHA-effect claims, the court also found the City's action had both a disparate impact on minorities and a segregative effect, which violated the FHA because the City, while having a legitimate justification for its action, failed to prove that there was no less discriminatory alternative.[124] On appeal, the Second Circuit upheld liability on the intent claim[125] and affirmed the findings of discriminatory effect and justification,[126] but remanded for further proceedings on the "less discriminatory alternative" issue.[127]

Two days after *Mhany*, the Ninth Circuit decided *Avenue 6E Investments, LLC v. City of Yuma*,[128] which upheld the plaintiffs' intent-based claims challenging the defendant's refusal to rezone land for a moderately priced, predominantly Hispanic development and also ruled that summary judgment, while appropriate against the plaintiffs' FHA segregative-effect claim, should not have been entered against their disparate-impact claim.[129] Yuma's Hispanic population was "concentrated in several areas in the northern, western, and central portions of the City [where] substantially all of the available low- to moderate-income housing was located," while the City's white popu-

123. *Id.* at 599, 617.

124. *Id.*

125. *Id.* at 605–16.

126. *Id.* at 616–20. With respect to the disparate-impact claim, the trial judge concluded that the plaintiffs had established a prima facie case, finding that the City's rejection of the requested multi-family zoning "largely eliminated the potential for the type of housing that minorities were disproportionately likely to need—namely, affordable rental units." *Id.* at 617. With respect to the segregative-effect claim, the district court concluded that the City's zoning restriction "on the development of multi-family housing perpetuates segregation generally because it decreases the availability of housing to minorities in a municipality where minorities constitute approximately only 4.1% of the overall population . . . and only 2.6% of the population living in households." *Id.* at 620.

127. *Id.* at 616–20. *Mhany* held that the HUD regulation's approach on this point, which puts the burden of proof in this third step of a FHA-effect claim on the plaintiff, *see supra* note 14 and accompanying text (describing 24 C.F.R. § 100.500(c)(3)), must now be followed even to the point of abrogating prior Second Circuit precedent like *Huntington* that had put this burden on the defendant, 819 F.3d at 617–19. The *Mhany* opinion did, however, "agree with the district court's assessment that plaintiffs more than established a prima facie case [of discriminatory effect and] also agree[d] that Defendants identified legitimate, bona fide governmental interests, such as increased traffic and strain on public schools." *Id.* at 620. The FHA-effect claim was therefore remanded for consideration of whether the plaintiffs met their burden on the "less discriminatory alternative" issue. *Id.*

128. 818 F.3d 493 (9th Cir. 2016), *cert. denied sub nom.* City of Yuma v. Ave. 6E Invs., LLC, 137 S. Ct. 295 (Oct. 11, 2016) (No. 15-1545).

129. *Id.* at 496–97, 513.

lation lived mainly "in separate areas in the northwest and southeast of Yuma in which they comprised more than 75% of the population."[130] The site chosen for the plaintiffs' development was near a white-majority area in southeast Yuma, and the City denied their rezoning request allegedly "in response to animus by neighbors . . . who wished to prevent the development of a heavily Hispanic neighborhood" in their area.[131]

In reversing the district court's dismissal of the intentional discrimination claims, the Ninth Circuit relied primarily on allegations that the City was influenced by the neighbors' race-based statements of opposition.[132] As for the FHA-effect claims, the Ninth Circuit held that the trial court had erred in rejecting the plaintiffs' disparate-impact claim on the ground that other, similarly priced housing might be available in the area.[133] The appellate court also recognized that the plaintiffs had asserted a separate perpetuation-of-segregation claim, but it agreed "with the district court that they failed to set forth sufficient facts for any such claim."[134]

As for the segregative-effect claim in *City of Yuma*, the Ninth Circuit did not describe the plaintiffs' proof supporting this claim, but the district court, in rejecting it, had ruled:

> Hispanics are not a minority in Yuma; they actually constitute 55% of the population. In 2010, the southeastern area of Yuma had a white population of somewhere between 48% and 65%, down from 75% in 1990. Therefore, at the time of the rezoning in 2008, the numbers show that Hispanics were integrating into the area. Also, assuming that the Plaintiffs' proposed development would have had

130. *Id.* at 498.

131. *Id.*

132. *Id.* at 503–07. According to the *City of Yuma* opinion, the Supreme Court's decision in the *Arlington Heights* case, *see supra* note 47, governed the issue of whether the plaintiffs had plausibly alleged that "in violation of the FHA and the Equal Protection Clause, an 'invidious discriminatory purpose was a motivating factor' behind the City's decision to deny the zoning application," 818 F.3d at 504 (quoting Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977)). One of the *Arlington Heights* factors that suggested intentional discrimination was the disparate impact of the City's decision, which the Ninth Circuit held the plaintiffs had adequately alleged. *Id.* at 508.

133. *City of Yuma*, 818 F.3d at 509–13. On this point, the district court, in granting summary judgment against the plaintiffs, had relied on the Eleventh Circuit's opinion in *Hallmark Developers, Inc. v. Fulton County*, 466 F.3d 1276 (11th Cir. 2006), which the Ninth Circuit specifically rejected. *City of Yuma*, 818 F.3d at 510–12. Having decided that this claim would have to be remanded for further consideration, the Ninth Circuit directed the lower court to determine in the first instance whether the plaintiffs' proof showed "a disparate impact on minorities resulting from denial of the rezoning application." *Id.* at 512.

134. *City of Yuma*, 818 F.3d at 513.

> been about half Hispanic and half white as Plaintiffs claim, the integrative effect of that development in southeastern Yuma, which was somewhere around 48% and 65% white based on the 2010 Census, would not have been significant enough to support a disparate impact claim.[135]

The district court noted that in *Huntington*, the Second Circuit had observed that the "area around the property at issue was 98% white and a disproportionate percentage of people on the waiting list for housing that would have been built on the property were minorities," and the Seventh Circuit in *Arlington Heights* had described the defendant-Village as "almost totally white in a metropolitan area with a significant percentage of black people. Since [the proposed project] would have to be racially integrated in order to qualify for federal subsidization, the Village's action in preventing the project from being built had the effect of perpetuating segregation."[136]

In mid-2016, the D.C. Circuit produced a limited decision involving a FHA segregative-effect claim in *Boykin v. Fenty*,[137] which rejected a challenge to the District of Columbia's closure of an integrated homeless shelter known as "La Casa" in a predominantly white area of the city. The plaintiffs in *Boykin* were "forty-two predominantly black and Hispanic former residents of the La Casa shelter, some of whom are disabled."[138] They brought a variety of civil rights claims, all of which were dismissed at the pleading stage except for their FHA race-impact claim, which failed on summary judgment.[139]

The D.C. Circuit affirmed the district court's decision on all claims.[140] The *Boykin* opinion added a final paragraph disposing of

135. Ave. 6E Invs., LLC v. City of Yuma, No. 2:09-cv-00297 JWS, 2013 WL 2455928, at *7 (D. Ariz. June 5, 2013) (footnotes omitted). The last phrase here might suggest that the court was conflating the disparate-impact and segregative-effect theories, but this seems unlikely, given that its opinion earlier had conducted a separate analysis focusing on the data underlying the plaintiffs' disparate-impact claim. *See id.* at *3–7.

For cases reaching similar conclusions in rejecting segregative-effect claims, see *supra* note 86 and accompanying text.

136. 2013 WL 2455928, at *7 n.70 (D. Ariz. June 5, 2013) (citing *Huntington*, 844 F.2d at 937, and quoting *Arlington Heights*, 558 F.2d at 1288).

137. 650 F. App'x 42, 44–45 (D.C. Cir. 2016).

138. *Id.* at 43.

139. *Id.* at 45.

140. *Id.* at 44–45. With respect to the plaintiffs' FHA-impact claims, *Boykin* held that their disability-based claim was properly dismissed because "[t]he complaint failed to allege facts suggesting that the closure affected a greater proportion of disabled individuals than non-disabled," *id.* at 44, and that summary judgment against their race-based claim was proper because the plaintiffs "failed to establish a causal link between the challenged action—the closing of La Casa as part of the [Permanent

the plaintiffs' FHA segregative-effect claim, primarily on failure-of-proof grounds:

> Appellants contend that the District's closure of La Casa in the northwest quadrant of the city, alongside its [Permanent Supportive Housing (PSH)] placements in predominantly minority areas of the city, had an unlawful segregative effect on housing patterns. Appellants have done little to analyze the data to show that La Casa's closure and the District's PSH placements had any segregative effect, particularly when taking into account the District's plans to develop PSH units in the city's northwest quadrant. But even assuming appellants established a prima facie case of segregative effect, they failed to rebut the legitimacy of the District's criteria for selecting PSH sites . . . or to show that the District could have employed those criteria without contributing to segregative housing patterns.[141]

4. *Summary of Past Cases*

With the exception of the D.C. Circuit's decision in *Boykin*, all of the reported cases involving FHA segregative-effect claims have challenged exclusionary zoning decisions. All have also involved race-based claims, although three have also alleged other illegal bases of discrimination (namely, familial status in *Anderson* and *Summerchase* and disability in *Boykin*). Some claims have challenged defendants' land-use policies, but others have focused on particular zoning decisions;[142] this is significant, because a disparate-impact claim, according to *Inclusive Communities*, may challenge only a defendant's policy, not a one-time decision.[143]

Indeed, the ultimate question is whether the FHA's segregative-effect theory adds anything to the disparate-impact theory as now endorsed by the Supreme Court. In the cases reviewed thus far, the answer has been "not much." The only successful segregative-effect claims have always been accompanied by at least a plausible dispa-

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Supportive Housing] program—and any disparate impact on a protected population," *id.* at 45.

141. *Id.* at 45. The *Boykin* opinion ended this paragraph by concluding that "[t]he district court therefore correctly granted summary judgment in favor of the District on the count of disparate impact based on race." *Id.* The last phrase here might suggest that the D.C. Circuit was conflating the disparate-impact and segregative-effect theories, but this seems unlikely, given that its opinion earlier had conducted a separate analysis focusing on the plaintiffs' race-based disparate-impact claim. *See id.*

142. These include *Arlington Heights*, *see* text accompanying notes 42–45, *Black Jack*, *see* text accompanying note 32, *City of Yuma*, *see* text accompanying notes 128–129, and *Summerchase*, *see* text accompanying notes 72–73.

143. *See infra* note 146; *see also infra* Section II.A.1.

rate-impact or other FHA claim;[144] sometimes an impact claim has succeeded where a segregative-effect claim has failed,[145] but the opposite has never occurred. Thus, the issue of what, if anything, the segregative-effect theory *adds* to potential FHA liability remains open for future litigation and is explored next in Part II.

II.
ISSUES IN FUTURE FHA SEGREGATIVE-EFFECT CASES

A. Unresolved Issues in Segregative-Effect Claims

1. Challenging "One-Time" Versus "Policy" Decisions

The Supreme Court in *Inclusive Communities* made clear that FHA disparate-impact claims, like those under Title VII, may challenge only a defendant's general policies and not its one-time decisions.[146] The FHA's segregative-effect theory, however, is built on appellate decisions involving challenges to individual zoning decisions blocking specific housing proposals. Nothing else was at stake in *Arlington Heights*; and, although *Black Jack* and *Huntington* involved challenges to land-use laws that were applicable throughout the municipality, the basic focus of those cases was the defendant's use of those laws to block a particular development. Important questions after *Inclusive Communities* include whether a disparate-impact claim may challenge a zoning scheme used to block a specific housing proposal as a "policy,"[147] and, if not, whether this situation might still be addressed by a segregative-effect claim. However, the broader issue considered here is whether the segregative-effect theory applies generally in single-decision situations and thereby goes beyond the reach of disparate-impact theory.

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144. In a few cases like *Arlington Heights*, the disparate-impact claim was perceived as weaker than the segregative-effect claim. Metro. Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1291 (7th Cir. 1977) (discussed in text accompanying notes 49–51); *see also* Summerchase Ltd. P'ship I v. City of Gonzales, 970 F. Supp. 522 (M.D. La. 1997) (disparate-impact claim failed while segregative-effect claim survived, but the latter was not uniquely important because discriminatory intent was also shown); notes 72–75 and accompanying text (describing *Summerchase*).

145. Examples include *Anderson*, *see* text accompanying notes 112–117, and *City of Yuma*, *see* text accompanying notes 132–133.

146. *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2523–24 (2015). For more on this requirement, see Schwemm & Bradford, *supra* note 6, at 693.

147. *See, e.g.*, Mhany Mgmt., Inc. v. County of Nassau, 819 F.3d 581, 619 (2d Cir. 2016) (holding that the defendant-city's action in blocking a particular housing development here qualified as a policy, not just a one-time decision, that could be appropriately challenged under the disparate-impact theory). *See also supra* notes 118–126 and accompanying text.

A number of reasons suggest an affirmative answer. The first is that the early decisions endorsing the segregative-effect theory often involved single-decision situations. In addition to these exclusionary zoning cases, another important appellate ruling—the Third Circuit's 1970 decision in *Shannon v. U.S. Department of Housing & Urban Development*[148]—also concluded that the FHA could be violated by a particular housing project's segregative effect, albeit the *Shannon* plaintiffs alleged that this illegal effect was caused by the defendants' supporting, rather than opposing, this project.[149]

Another reason is that HUD's 2013 regulation, which now governs the standards for FHA-effect cases (at least to the extent it is not inconsistent with *Inclusive Communities*),[150] is written in a way that seems to apply to one-decision situations. The pertinent language of this regulation provides for potential liability for "[a] practice . . . where it actually or predictably . . . creates, increases, reinforces, or perpetuates segregated housing patterns."[151] The term "a practice"—which later becomes the antecedent for "it"—suggests a singular act, as opposed to only a set of acts decreed by a generalized policy.[152] This understanding is reinforced by the FHA itself, which defines a "discriminatory housing practice" as "an act that is unlawful under section 804, 805, 806, or 818" of the statute.[153] The referenced sections outlaw a variety of singular acts, such as refusal to rent "a dwelling to any person because of race."[154]

Finally, the goal of the segregative-effect theory and the HUD regulation would best be served by applying it to single-act, as well as

148. 436 F.2d 809 (3d Cir. 1970).

149. *See id.* at 811–12. For a further description of *Shannon*, see *infra* note 187.

150. *See, e.g.*, *Mhany*, 819 F.3d at 617–19 (holding, post-*Inclusive Communities*, that courts must follow the HUD regulation's standards, even to the point of abrogating prior judicial precedent).

151. 24 C.F.R. § 100.500(a) (2017). The full text of this regulation is set forth *supra* note 17.

152. *See also* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,468–69 (Feb. 15, 2013) (noting that "[w]hether *a particular practice* results in a discriminatory effect is a fact-specific inquiry" and that "identifying *the specific practice* that caused the alleged discriminatory effect will depend on the facts of a particular situation and therefore must be determined on a case-by-case basis" (emphasis added)).

153. 42 U.S.C. § 3602(f) (2015) (referring to 42 U.S.C. §§ 3604, 3605, 3606, and 3617).

154. 42 U.S.C. § 3604(a) (2015). Numerous courts have ruled in favor of plaintiffs under this provision for a single refusal to rent. *See, e.g.*, Davis v. Mansards, 597 F. Supp. 334, 342–43 (N.D. Ind. 1984); Williamson v. Hampton Mgmt. Co., 339 F. Supp. 1146 (N.D. Ill. 1972); *see also* Harris v. Itzhaki, 183 F.3d 1043, 1052 (9th Cir. 1999) (holding that discriminatory eviction proceedings directed against individual black tenant established a prima facie case of FHA liability).

policy, decisions—as demonstrated by single-decision cases like *Arlington Heights* and in a variety of other situations described below.

2. *Standards and Statistical Evidence in Segregative-Effect Claims*

a. *Appropriate Statistical Evidence and Elements of the Claim*

The nature of the statistical evidence needed to make out a prima facie case differs in disparate-impact and segregative-effect claims. In impact cases, the focus is how the defendant's challenged policy affects protected versus non-protected classes in the market area for the housing at issue.[155] The geographic focus in segregative-effect cases is often a smaller area—such as the specific towns in *Black Jack* and *Arlington Heights*, and the specific neighborhoods in *Huntington* and *City of Yuma*.[156] Indeed, HUD's articulation of the segregative-effect theory speaks in terms of a "community" being injured, not a protected class as in impact claims.[157] This language implies that the proper focus in a segregative-effect claim is limited by the boundaries of this harmed community.[158] While a variety of data sources may be used in disparate-impact cases,[159] the segregative-effect precedents suggest a fairly straightforward approach that relies almost exclusively on local census data.[160]

HUD's discriminatory-effect regulation requires two elements for a segregative-effect claim: (1) there must be "segregated housing patterns because of race [or other protected characteristic]" in the relevant community; and (2) the defendant's challenged practice must "create[ ], increase[ ], reinforce[ ], or perpetuate[ ]" these segregated

155. *See, e.g.*, *supra* note 47; *see also* Schwemm & Bradford, *supra* note 6, at 701–02.

156. *See supra* text accompanying note 33 (*Black Jack*); note 42 and accompanying text (*Arlington Heights*); text accompanying notes 55–57 (*Huntington*); text accompanying notes 129–130 (*City of Yuma*).

157. *See* Effects Standard, 78 Fed. Reg. at 11,469 (noting that an illegal practice under this theory causes "harm to the community generally by creating, increasing, reinforcing, or perpetuating segregated housing patterns").

158. For more on the proper definition of "community" in segregative-effect cases, see *infra* Section II.A.3.

159. *See* Schwemm & Bradford, *supra* note 6, at 710–18.

160. *See, e.g.*, Mhany Mgmt., Inc. v. County of Nassau, 819 F.3d 581, 588 (2d Cir. 2016) (discussed *supra* note 120 and accompanying text); Anderson Grp., LLC v. City of Saratoga Springs, 805 F.3d 34, 38–39 (2d Cir. 2015) (discussed *supra* note 109 and accompanying text); Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 929–31, 937 (2d Cir.), *aff'd*, 488 U.S. 15 (1988) (discussed *supra* notes 55–57 and accompanying text); Metro. Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1286–89, 1291 (7th Cir. 1977) (discussed *supra* note 42 and accompanying text); Dews v. Town of Sunnyvale, 109 F. Supp. 2d 526, 537–59, 565–68 (N.D. Tex. 2000) (discussed *supra* notes 80–83 and accompanying text).

patterns.[161] Both elements require statistical proof, but the limited guidance provided by HUD and prior cases suggests that such evidence need not be sophisticated.[162]

With respect to the first element, early appellate cases simply relied on race-based census figures for the local community. In *Arlington Heights*, for example, the Seventh Circuit found "overwhelming" racial segregation based on census data showing that the Village's population was ninety-nine percent white in a metropolitan area than included many black residents.[163] Other cases reached the same conclusion based on data showing a suburban community or neighborhood was ninety-four to ninety-nine percent white.[164] Courts that found the plaintiffs' proof inadequate noted that the percentage of minorities living in the target community roughly mirrored the overall area's racial demographics.[165] Thus, while sophisticated techniques do exist for measuring segregation in metropolitan areas, courts have not used these methodologies to determine whether the first element has been established.[166]

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161. 24 C.F.R. § 100.500(a).

162. *See supra* note 160 (identifying cases). HUD has specifically cautioned that its discriminatory-effect regulation was not designed "to describe how data and statistics may be used in the application of the [effect] standard" nor did it provide "a codification of how data and statistics may be used in the application of the standard." Effects Standard, 78 Fed. Reg. at 11,468; *see also id.* ("Whether a particular practice results in a discriminatory effect is a fact-specific inquiry. Given the numerous and varied practices and wide variety of private and governmental entities covered by the Act, 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.").

163. 558 F.2d at 1286–87, 1291; *see supra* notes 42–44 and accompanying text.

164. *See Huntington*, 844 F.2d at 928–931, 937 (describing the Town as ninety-five percent white and the relevant community as ninety-eight percent white); *Black Jack*, 508 F.2d at 1183 (describing the relevant community as ninety-nine percent white); *Dews*, 109 F. Supp. 2d at 533–59, 567–68 (describing the relevant community as ninety-four to ninety-seven percent white); *see also supra* notes 55, 57 and accompanying text (*Huntington*); *supra* note 33 and accompanying text (*Black Jack*); *supra* notes 80, 83 and accompanying text (*Dews*).

165. *See supra* note 40 (*In re Malone*); *supra* note 54 (*Suffolk* and *Arthur*); *supra* text accompanying note 135 (*City of Yuma*).

166. The most commonly used method for measuring racial segregation is the dissimilarity index. *See* Schwemm & Bradford, *supra* note 6, at 717 n.137; *see also* Charles M. Lamb et al., *HMDA, Housing Segregation, and Racial Disparities in Mortgage Lending*, 12 STAN. J. C.R. & C.L. 249, 267 (2016) (describing the dissimilarity index). There are other measures as well. *See, e.g.*, Brief for Housing Scholars as Amicus Curiae Supporting Respondent, Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507 (2015) (No. 13-1371), 2014 WL 7405732, at *5–6 (describing the "exposure index" and opining that it is a better measure of black-white segregation than the dissimilarity index); Leah Hendey & Mychal Cohen, USING DATA TO ASSESS FAIR HOUSING AND IMPROVE ACCESS TO OP-

The second element has also been easy for the plaintiffs to satisfy. For example, the Seventh Circuit in *Arlington Heights* concluded that construction of the proposed development "would be a significant step toward integrating the community" and thus the Village's blocking of it would perpetuate segregation.[167] The court reached this conclusion by simply assuming that the development's racial make-up would reflect the income-eligible population in the overall metropolitan area (i.e., forty percent black), which would result in an increase of seventy-six black families (i.e., forty percent of the project's 190 units).[168] This would still leave Arlington Heights's population of 65,000 to 67,000 over ninety-nine percent white, hardly a "significant step" toward integrating the Village. Still, most courts have followed a similar analysis; that is, so long as the plaintiff can show that a proposed housing development is likely to include a sizeable portion of minorities, e.g., because it is subsidized in a racially diverse metropolitan area, a heavily white municipality that blocks such a project is perpetuating segregation.[169]

Another factor mentioned in many of the segregative-effect cases is the need for the type of affordable housing that the defendant-municipality has blocked.[170] Sometimes, the opinions note that the defendant itself has recognized this need in, for example, reports it filed in connection with receiving a HUD grant.[171] It is unclear why such a

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PORTUNITY: A GUIDEBOOK FOR COMMUNITY ORGANIZATIONS 23 (Urban Inst. 2017) (describing dissimilarity, isolation, and other indices of segregation).

167. 558 F.2d at 1291; *see supra* note 51 and accompanying text.

168. *Id.* at 1291; *see supra* note 44 and accompanying text.

169. *See Black Jack*, 508 F.2d at 1183, 1186 (discussed *supra* notes 33, 38 and accompanying text); *Huntington*, 844 F.2d at 937–38 (discussed *supra* note 64 and accompanying text); *Dews*, 109 F. Supp. 2d at 567 (discussed *supra* note 82 and accompanying text). *But see In re* Malone, 592 F. Supp. 1135, 1167 (E.D. Mo. 1984), *aff'd sub nom.* Malone v. City of Fenton, 794 F.2d 680 (8th Cir. 1986) (unpublished table decision) (discussed *supra* note 40).

170. *See* Mhany Mgmt., Inc. v. County of Nassau, 819 F.3d 581, 509 (2d Cir. 2016) (noting that "the lack of affordable housing has long been a problem for Nassau County [and] Garden City contains no affordable housing"); Anderson Grp., LLC v. City of Saratoga Springs, 805 F.3d 34, 39 (2d Cir. 2015) (noting that residents of the defendant-City "have long faced a well-documented shortage of affordable housing"); *Huntington*, 844 F.2d at 929 (noting that the defendant "Town has a shortage of affordable rental housing for low and moderate-income households"); *Arlington Heights*, 517 F.2d at 411 (noting that the plaintiffs' proposed project would be "the only subsidized housing in Arlington Heights despite a great demand for such housing in that area"); *Black Jack*, 508 F.2d at 1188 (noting that the evidence demonstrated "a strong demand for suburban apartments in St. Louis County").

171. *See* Ave. 6E Invs., LLC v. City of Yuma, 818 F.3d 493, 498 (9th Cir. 2016) (citing the defendant-City's analyses conducted as a HUD grantee showing that "the Hispanic population in Yuma was concentrated in [three] portions of the City . . . [and] that substantially all of the available low- to moderate-income housing was lo-

showing of need is relevant to a segregative-effect claim, other than to affirm the plaintiff-developer's confidence that its proposed project will fill up and thus contribute to integration in the area.[172] Of course, this evidence of need might be relevant to other issues in the case, such as undercutting the defendant's attempt to justify its behavior in Step Two of an effect case[173] or to suggest that the defendant's proffered justification was simply a pretext for intentional discrimination.[174] In any event, this type of evidence is now likely to be even more accessible as a result of HUD's recent reformation of its system for requiring all of its municipal grantees to regularly conduct detailed analyses of fair housing issues in their jurisdictions.[175]

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cated in those areas"); *Anderson*, 805 F.3d at 39 (noting that the defendant-City's Consolidated Plan filed with HUD documented "a concentration of low-to-moderate income residents in certain areas of the City, . . . where most of the City's high-density subsidized rental housing opportunities were located"); *Huntington*, 844 F.2d at 929 (noting that the defendant-Town's Housing Assistance Plan, which it "filed with HUD as part of Huntington's application for federal community development funds, reveals that the impact of this [affordable rental housing] shortage is three times greater on blacks than on the overall population").

172. *Cf.* Hallmark Developers, Inc. v. Fulton County, 466 F.3d 1276, 1287 (11th Cir. 2006) (rejecting FHA disparate-impact claim in part because the need for plaintiff-developer's proposed project was belied by "the existence of other housing within the price range proposed by Hallmark" and noting that "[i]f there is a glut in the market of homes in Hallmark's projected price range, the lack of the Hallmark's particular development is not likely to have an impact on anyone, let alone adversely affect one group disproportionately"). The Ninth Circuit has since expressed disagreement with this position. *See supra* note 133 and accompanying text.

173. *See supra* note 13 and accompanying text.

174. *See Mhany*, 819 F.3d at 612–15; *City of Yuma*, 818 F.3d at 507–09.

175. *See* Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272, 42,272–371 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903). These regulations require every HUD-fund recipient to take "meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on [race and other] protected characteristics." 24 C.F.R. § 5.152 (2017) (defining "affirmatively furthering fair housing"). Grantees are required to prepare an assessment of fair housing (AFH), which includes "an analysis of fair housing data, an assessment of fair housing issues and contributing factors, and an identification of fair housing priorities and goals." *Id.* § 5.152. The AFH is viewed as central to a grantee's AFH strategy by requiring it "to assess the elements and factors that cause, increase, contribute to, maintain, or perpetuate segregation, racially or ethnically concentrated areas of poverty, significant disparities in access to opportunity, and disproportionate housing needs." *Id.* § 5.154(a). Local-government grantees are required to include, as part of their periodic AFH planning process, a series of demographic maps. *See* Affirmatively Furthering Fair Housing Assessment Tool: Announcement of Final Approved Document, 80 Fed. Reg. 81,840 (Dec. 31, 2015). For examples of demographic maps covering various jurisdictions, see *Affirmatively Furthering Fair Housing Tool*, U.S. DEP'T OF HOUS. & URBAN DEV., http://egis.hud.gov/affht/ (last visited Nov. 2, 2017).

For a recent example of a municipal-grantee's reports leading to a segregative-effect charge against it, see U.S. Dep't of Hous. & Urban Dev., Letter Finding Non-

b. The "How Much" Issue

Another key issue is *how much* discriminatory effect must be shown to establish a prima facie case. In impact cases, which build on a long history of similar Title VII claims, there is general agreement that a "substantial" disparity must be shown, and courts have come up with some relatively straightforward measures of how much disparity is sufficient.[176] There is no such guidance in segregative-effect cases. A few decisions have suggested that this theory requires that the challenged practice "significantly" perpetuate segregation,[177] but most cases do not mention this requirement, and in some successful claims, the actual effect on a community's segregation seems to be small.[178]

If a segregative-effect claim only requires two elements (i.e., that the defendant-municipality is predominantly white and has rejected an affordable housing proposal), it seems possible that *every* white community that blocks such a proposal would face such a claim.[179] What's

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compliance with Title VI of the Civil Rights Act of 1964, Case No. 06-16-R001-6, at 7–8 (Jan. 11, 2017), http://www.taahp.org/wp-content/uploads/2016/06/HUD-letter-to-Mayor-Sylvester-Turner-find-civil-rights-violations.pdf, which found, in part based on Houston's own fair housing analyses in recent filings with HUD, that Houston's policies regarding the location of subsidized housing projects in the city perpetuated segregation.

176. *See* Schwemm & Bradford, *supra* note 6, at 706–07 (discussing Title VII's 4/5 standard and its equivalent in FHA disparate-impact cases).

177. *See* Davis v. N.Y.C. Hous. Auth., 166 F.3d 432, 438 (2d Cir. 1999) ("The proper standard to be applied on remand is whether the proposed use of the working family preference will *significantly* perpetuate segregation at the relevant NYCHA developments."); Ave. 6E Invs., LLC v. City of Yuma, No. 2:09-cv-00297 JWS, 2013 WL 2455928, at *7 (D. Ariz. June 5, 2013), *rev'd on other grounds*, 818 F.3d 493 (9th Cir.), *cert. denied*, 137 S. Ct. 295 (Oct. 11, 2016) (No. 15-1545) (rejecting segregative-effect claim because racial impact of the blocked development, which was proposed near an integrated area, was not "significant enough" to reduce segregation there); *see also* Metro. Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1291 (7th Cir. 1977) (quoted *supra* text accompanying note 51); *In re* Malone, 592 F. Supp. 1135, 1167 (E.D. Mo. 1984), *aff'd sub nom.* Malone v. City of Fenton, 794 F.2d 680 (8th Cir. 1986) (unpublished table decision) (rejecting segregative-effect claim because plaintiff's blocked development "would have only a *de minimus* [sic] impact" on segregated housing patterns in the area).

178. *See, e.g.*, *Arlington Heights*, 558 F.2d at 1291; *supra* notes 167-169 and accompanying text (discussing *Arlington Heights*).

179. One response to the implied criticism here that proving Step One of a segregative-effect claim would be too easy is to rely on Steps Two and Three of an effect-case analysis, *see supra* notes 13–14 and accompanying text, to ameliorate any unfairness to potential defendants. As the Third Circuit wrote in 2011 in rejecting a defendant's argument that the court's view of the plaintiff's initial burden in a disparate-impact case was too easy:

> The Township may be correct that a disparate impact analysis will often allow plaintiffs to make out a *prima facie* case when a segregated neighborhood is redeveloped in circumstances where there is a shortage of al-

more, the segregative-effect theory goes further. Recall that the HUD regulation authorizes such a claim when a challenged practice not only perpetuates segregated housing patterns, but also when it "increases" or "reinforces" them.[180] This part of the theory has rarely been used,[181] but it could be applied to housing-project approvals (e.g., by a white suburb like Arlington Heights of *any* high-priced development, which would presumably continue the community's all-white character). This situation—where, say, a 99%-white suburb acts in a way that would result in its becoming 99.1% white—suggests that a segregative-effect claim that relies on the "increases"/"reinforces" language might falter on the "significant" requirement, lest the theory apply in even *de minimis* situations.[182] As noted earlier,[183] this "how much" issue has not been well-developed in the segregative-effect cases.

> ternative affordable housing. But this is a feature of the FHA's programming, not a bug. . . . We need not be concerned that this approach is too expansive because the establishment of a *prima facie* case, by itself, is not enough to establish liability under the FHA. It simply results in a more searching inquiry into the defendant's motivations—precisely the sort of inquiry required to ensure that the government does not deprive people of housing "because of race."

Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly, 658 F.3d 375, 384–85 (3d Cir. 2011). Further, according to the *Mount Holly* opinion, because FHA-effect cases may be based on either a disparate-impact or a segregative-effect theory, a defendant "is free to argue that its plan is less discriminatory than all of the available alternatives because it does the best job of integrating the neighborhood. However, those arguments are properly considered in the context of the last steps of the [FHA] analysis, not as a requirement of the *prima facie* case." *Id.* at 385; *see also* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc. 135 S. Ct. 2507, 2522–23 (2015) (noting that an "important and appropriate means of ensuring that disparate-impact liability is properly limited" is the defendant's opportunity in the second step of the analysis to prove that its challenged policy "is necessary to achieve a valid interest"); *cf. id.* at 2523–24 (directing courts to "examine with care whether a plaintiff has made out a prima facie case of disparate impact" in order "to protect potential defendants against abusive disparate-impact claims").

180. *See* 24 C.F.R. § 100.500(a) (2017) (quoted in full *supra* note 17).

181. The principal case is an early challenge to HUD's approval of a heavily minority project in a city's minority neighborhood. *See* Shannon v. U.S. Dep't of Hous. & Urban Dev., 436 F.2d 809 (3d Cir. 1970) (discussed *infra* note 187).

182. *See supra* note 177 and accompanying text.

183. *See supra* notes 167–169 and accompanying text; *see also* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,469 (Feb. 15, 2013) (responding to question about whether liability under the segregative-effect theory "requires an attempt to segregate further, or merely a practice that continues existing patterns of segregation," by generally defending this theory but not providing any specific numerical guidance for determining if a particular practice sufficiently perpetuates segregation to produce liability); *supra* note 162 (describing dearth of HUD guidance).

3. Who/What Is the Community Harmed?

HUD's discriminatory-effect regulation provides that a housing practice may result in FHA liability by causing "harm to the community generally by creating, increasing, reinforcing, or perpetuating segregated housing patterns."[184] Thus, the segregative-effect theory focuses on "harm to the community," a phrase adopted from the Second Circuit's 1988 decision in *Huntington*.[185] As noted above, past segregative-effect decisions have generally dealt with a specific suburban town or, as in *Huntington*, particular parts of the defendant-town.[186] The question is how broadly the geographic area should be defined in gauging whether a challenged practice harms "the community."

In addition to the segregative-effect decisions, early FHA cases involving standing to sue are relevant here, particularly three decided by the Supreme Court.[187] The Court's first FHA decision in 1972,

184. *See* Effects Standard, 78 Fed. Reg. at 11,469 (explaining 24 C.F.R. § 100.500(a) (2017)).

185. *See supra* note 60 and accompanying text.

186. *See supra* note 156 and accompanying text; *see also infra* note 323 (identifying the relevant community in another Second Circuit case involving the FHA's integration mandate as a particular neighborhood in New York City).

187. The three Supreme Court decisions discussed in this section were recently reaffirmed by the Court in *Bank of America Corp. v. City of Miami*, 137 S. Ct. 1296, 1303–04 (2017).

In addition to these decisions, another early FHA standing case that involved alleged harm to a local community was *Shannon v. U.S. Department of Housing & Urban Development*, 436 F.2d 809 (3d Cir. 1970), a decision that the Supreme Court cited with approval in two of its FHA decisions in the 1970s. *See* Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 114 n.28 (1979); Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 208 (1972). In *Shannon*, the Third Circuit upheld the standing of local residents and businesses to challenge HUD's decision to support a particular subsidized housing project in their Philadelphia neighborhood in violation of HUD's duties under the FHA and Title VI of the 1964 Civil Rights Act. 436 F.2d at 815–17. The plaintiffs alleged that locating this project "on the site chosen will have the effect of increasing the already high concentration of low income black residents in the East Poplar Urban Renewal Area." *Id.* at 812. The Third Circuit upheld the plaintiffs' standing based on their desire "to create a more stable and racially balanced environment," *id.*, and their allegation that "the concentration of lower income black residents in [this] project in their neighborhood will adversely affect not only their investments in homes and businesses, but even the very quality of their daily lives," *id.* at 818. According to *Shannon*, the choice of location of a given HUD-subsidized housing project could have the effect of racial discrimination, an effect that "could arise by virtue of the undue concentration of persons of a given race, or socio-economic group, in a given neighborhood." *Id.* at 820. This could "have the same potential for perpetuating racial segregation" as the by-gone de jure system of segregation that once existed in low-rent public housing. *Id.* The Third Circuit concluded that, based on HUD's affirmative duties under the FHA's § 3608, the agency's actions cannot ignore the negative effects of heightened racial concentration on minority neighborhoods,

Trafficante v. Metropolitan Life Insurance Co.,[188] upheld standing for tenants to sue their landlord for discriminating against minority applicants. The defendant, which owned a large apartment complex in San Francisco with about 8200 residents,[189] argued that only those it allegedly discriminated against could sue.[190] The Court disagreed, holding that the plaintiffs' allegations sufficiently set forth "injury in fact . . . ; the alleged injury to existing tenants by exclusion of minority persons from the apartment complex is the loss of important benefits from interracial association."[191] According to the *Trafficante* opinion, "[t]he person on the landlord's blacklist is not the only victim of discriminatory housing practices; it is, as Senator Javits said in supporting the bill, 'the whole community.'"[192]

A few years later in *Gladstone Realtors v. Village of Bellwood*,[193] the Court held that *Trafficante* applied to residents of an area whose racial make-up was allegedly being manipulated by the defendants' illegal steering.[194] The defendant-realtors in *Gladstone* allegedly directed black homeseekers to a particular "target area" in the Village, a Chicago suburb, while directing similarly situated white homeseekers to other towns.[195] The individual plaintiffs in *Gladstone* included four residents of this target area, who alleged that "the transformation of their neighborhood from an integrated to a predominantly Negro community is depriving them of 'the social and professional benefits of living in an integrated society.'"[196]

The question then became "whether an allegation that this particular area is losing its integrated character because of [defendants'] conduct is sufficient to satisfy [Article] III."[197] The defendants argued that there was a critical distinction between the 8200-person complex in *Trafficante* and the targeted 12-by-13-block neighborhood in *Glad-*

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and thus the FHA requires HUD to consider the "relevant racial and socio-economic information" before approving sites for federally subsidized housing. *Id.* at 821.

188. 409 U.S. 205 (1972).

189. *Id.* at 206.

190. *Id.* at 208.

191. *Id.* at 209–10.

192. *Id.* at 211 (quoting 114 Cong. Rec. 2706 (1968)).

193. 441 U.S. 91, 111–15 (1979).

194. *Id.* at 111. The individual plaintiffs in *Gladstone* "claimed to be injured as homeowners in the community against which [defendants'] alleged steering has been directed." *Id.*

195. *Id.* at 111–13.

196. *Id.* at 111. According to the Court, the *Gladstone* plaintiffs' allegations of injury to their "society" was "similar to that presented in *Trafficante*" and referred to "the harm done to the residents of the carefully described neighborhood in Bellwood in which four of the individual [plaintiffs'] reside." *Id.* at 111–12.

197. *Id.* at 113.

stone, in part because the "population of Bellwood, of which the target neighborhood is only a part, was estimated at 20,969."[198] The Court rejected this argument, concluding that "for the purpose of standing analysis, we perceive no categorical distinction between injury from racial steering suffered by occupants of a large apartment complex and that imposed upon residents of a relatively compact neighborhood such as Bellwood."[199] Thus, *Gladstone* held that the standing of the local residents here "to protest the intentional segregation of their community [does] not vary simply because that community is defined in terms of city blocks rather than apartment buildings."[200] The Court did, however, issue this caveat:

> A "neighborhood" whose racial composition allegedly is being manipulated may be so extensive in area, so heavily or even so sparsely populated, or so lacking in shared social and commercial intercourse that there would be no actual injury to a particular resident.[201]

Still, according to *Gladstone*, the resolution of such issues was not appropriate at the summary judgment stage, but should be based on "discrete facts presented at trial."[202]

In 1982, the Court decided another FHA standing case involving local residents in *Havens Realty Corp. v. Coleman*.[203] Like *Gladstone*, *Havens* upheld a challenge to defendants' steering practices that allegedly deprived two of the individual plaintiffs of "the benefits that result from living in an integrated community."[204] These plaintiffs alleged *Gladstone*-like injuries as "residents of the City of Richmond or Henrico County."[205] The defendants sought to distinguish *Gladstone* by arguing that the plaintiffs here, "by pleading simply that they were residents of the Richmond metropolitan area, have failed to demonstrate how the asserted steering practices of [defendants] in

198. *Id.* at 113 n.27.

199. *Id.* at 114. The *Gladstone* opinion noted that the difference between the plaintiffs here and *Trafficante*'s apartment residents might actually favor the former: "Apartment dwellers often are more mobile, with less attachment to a community as such, and thus are able to react more quickly to perceived social or economic changes. The homeowner in a suburban neighborhood such as Bellwood may well have deeper community attachments and be less mobile." *Id.* at 113–14.

200. *Id.* at 114.

201. *Id.*

202. *Id.* The Court added a footnote here, noting that the evidence at trial should also cover the extent of the defendants' business in the target area, because such evidence would be "relevant to the establishment of the necessary causal connection between the alleged conduct and the asserted injury." *Id.* at 114 n.29.

203. 455 U.S. 363 (1982).

204. *Id.* at 375.

205. *Id.* at 376.

Henrico County may have affected the *particular* neighborhoods in which the individual [plaintiffs] resided."[206] The Court responded:

> It is indeed implausible to argue that [defendants'] alleged acts of discrimination could have palpable effects throughout the *entire* Richmond metropolitan area. At the time relevant to this action the city of Richmond contained a population of nearly 220,000 persons, dispersed over 37 square miles. Henrico County occupied more than 232 square miles, in which roughly 170,000 people made their homes. Our cases have upheld standing based on the effects of discrimination only within a "relatively compact neighborhood" [quoting *Gladstone*]. We have not suggested that discrimination within a single housing complex might give rise to "distinct and palpable injury," . . . throughout a metropolitan area. . . . [Plaintiffs] have not identified the particular neighborhoods in which they lived, nor established the proximity of their homes to the site of [defendants'] alleged steering practices.[207]

Still, the *Havens* opinion refused to say "as a matter of law that no injury could be proved" nor that "[f]urther pleading and proof might establish that they lived in areas where [defendants'] practices had an appreciable effect."[208] Thus, the Court ordered that the plaintiffs be given an opportunity on remand to amend their complaint to make the necessary allegations to avoid dismissal.[209]

Taken together, *Trafficante*, *Gladstone*, and *Havens* provide guidance on the size and type of area that might be appropriate for segregative-effect claims. Further, the fact that these cases involved standing under the FHA is hardly an objection to their relevance here, because the decisions essentially equated standing with a claim on the merits.[210] Thus, the Court's determination that local residents and various other types of plaintiffs are entitled to challenge FHA-prohibited action that is racially manipulating their neighborhood provides a sense of how such a "community" should be defined for segregative-effect claims.[211]

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206. *Id.* at 377.

207. *Id.* (footnote omitted) (quoting Warth v. Seldin, 422 U.S. 490, 501 (1975)).

208. *Id.*

209. *Id.* at 378.

210. As the *Gladstone* opinion put it, because standing exists "as long as the plaintiff suffers actual injury as a result of the defendant's conduct," anyone may sue who is "genuinely injured by conduct that violates *someone's* rights" under the FHA. 441 U.S. 91, 103 n.9; *see also* Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296, 1303 (2017) (describing plaintiffs in *Trafficante*, *Gladstone*, and *Havens* as "hav[ing] a cause of action under the FHA").

211. In both *Gladstone* and *Havens*, various plaintiffs in addition to the local residents were held to have alleged sufficient injury by the defendants' FHA violations to have standing. *See Gladstone*, 441 U.S. at 109–11 (upholding municipality's stand-

4. Non-Governmental Defendants and Non-Racial Claims

HUD's discriminatory-effect regulation provides for FHA liability for any practice that has a segregative-effect because of race or other prohibited factor and regardless of who engages in that practice.[212] The cases upon which this theory is based, however, have all been brought against municipal defendants and have all involved allegations of race or national origin discrimination.[213] This raises the possibility that segregative-effect claims against private defendants and/or involving non-racial protected classes would be inappropriate or at least subject to some limitations.

As for potential defendants, HUD's view is that "[l]iability for a practice that has an unjustified discriminatory effect may attach to either public or private parties."[214] Further, the Seventh Circuit in *Arlington Heights* opined that segregative-effect claims may be asserted

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ing); *Havens*, 455 U.S. at 373–74, 378–79 (upholding standing of a tester and fair housing organization). There have also been multiple types of plaintiffs in many of the early segregative-effect cases. *See, e.g.*, *supra* notes 31–32 and accompanying text (describing *Black Jack*), text accompanying notes 44–45 (describing *Arlington Heights*), text accompanying note 58 (describing *Huntington*). Because anyone who is genuinely injured by a defendant's FHA violation may sue, *see supra* note 210, the point here is to focus on what conduct might be unlawful under the segregative-effect theory, rather than who might bring such a claim.

212. *See* 24 C.F.R. § 100.500(a) (2017) (providing liability for any practice that enhances segregated housing patterns "because of race, color, religion, sex, handicap, familial status, or national origin").

213. *See supra* Section I.C.

214. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,474 (Feb. 15, 2013); *see also id.* at 11,470–71 ("The standards in [HUD's discriminatory-effect regulation] apply equally to individuals, public entities, and for-profit and nonprofit private entities because . . . neither the text of the [FHA] nor its legislative history support drawing a distinction among them."); *id.* at 11,463 (citing 76 Fed. Reg. 70,942 n.40) (2011)) ("discriminatory effects liability applies to both public and private entities"). Lending support to this view, the Supreme Court in *Inclusive Communities* indicated that its endorsement of FHA-impact claims applied to private as well as public defendants. *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2523 (2015) (noting that the "actors" subject to such claims included "[e]ntrepreneurs" and "private developers" as well as "[z]oning officials" and "housing authorities").

against private defendants, albeit in dicta.[215] However, no such claim has yet succeeded against a private defendant.[216]

Similarly, no case has endorsed the segregative-effect theory in a successful claim of discrimination based on religion, sex, familial status, or disability. As noted above, two appellate decisions recently reviewed segregative-effect claims in cases that included allegations of familial status and disability discrimination along with race and national origin claims.[217] Those courts ultimately ruled against these non-racial claims, but neither opinion suggested that such claims were inappropriate per se.

The next section, which discusses possible future segregative-effect claims, includes consideration of such claims against non-governmental defendants and those involving non-racial discrimination.[218]

B. Future Applications of the Segregative-Effect Theory

1. Location of and Restrictions on Affordable Housing[219]

a. Exclusionary Zoning in White Areas

All successful segregative-effect cases thus far have involved challenges to zoning or other actions by local governments that

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215. Metro. Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1293 (7th Cir. 1977) (citing Smith v. Anchor Bldg. Corp., 536 F.2d 231 (8th Cir. 1976)). The Seventh Circuit's citation to *Smith* for this proposition was dubious. The defendant in *Smith* was liable based solely on discriminatory intent, although the court did opine that effect as well as intent claims are appropriate against private defendants under the FHA. *Smith*, 536 F.2d at 234–36. Other decisions involving private housing providers have recognized, at least in *dicta*, the FHA's segregative-effect theory. *See* Graoch Assocs. #33, L.P. v. Louisville/Jefferson Cty. Metro Human Relations Comm'n., 508 F.3d 366, 378 (6th Cir. 2007); Betsey v. Turtle Creek Assocs., 736 F.2d 983, 987 n.3 (4th Cir. 1984). *But see* Brown v. Artery Org., 654 F. Supp 1106, 1115–16 (D.D.C. 1987) (opining, in the course of upholding FHA-intent claim challenging landlord's conversion from low-rent to high-rent housing, that the FHA's effect theory does not apply to private defendants).

216. *Cf. supra* Section II.A.3 (discussing three Supreme Court cases upholding plaintiffs' standing in claims alleging that private defendants' FHA-based intentional discrimination had segregative effects).

217. *See* Boykin v. Fenty, 650 F. App'x 42 (D.C. Cir. 2016) (discussed *supra* notes 139–140 and accompanying text); Anderson Grp., LLC v. City of Saratoga Springs, 805 F.3d 34 (2d Cir. 2015) (discussed *supra* notes 112–115 and accompanying text); *see also* Summerchase Ltd. P'ship I v. City of Gonzales, 970 F. Supp. 522 (M.D. La. 1997) (district court ruled against segregative-effect claim based on familial status); *supra* note 74 and accompanying text (discussing *Summerchase*).

218. *See infra* Section II.B.3–.5.

219. The term "affordable housing" here is used consistent with HUD's commentary to its discriminatory-effect regulation, which means that it includes government-subsidized housing and unsubsidized housing whose rental rates are modest. *See, e.g.*, Effects Standard, 78 Fed. Reg. at 11,476–77 (noting that "the discriminatory effects

blocked affordable housing developments. These cases are what the Supreme Court in *Inclusive Communities* described as the "heartland" of FHA disparate-impact claims.[220] Given the ease with which plaintiffs have shown segregative effect in exclusionary zoning cases,[221] this type of claim seems likely to succeed at the prima facie case stage and thus require justification by the defendant-municipality in Step Two.[222] This would be true even if a disparate-impact claim failed, e.g., because the development would house a significant number of white residents or the challenged action was a one-time decision rather than a policy.[223] Further, HUD's new regime for enforcing the FHA's affirmative mandate in § 3608 for municipal and other recipients of HUD funds suggests that defendants in exclusionary zoning cases would have an even more difficult time in the future justifying their opposition to affordable housing proposals.[224]

Still, it must be noted that only one modern exclusionary zoning case has ruled in favor of a segregative-effect claim where a disparate-impact claim has failed.[225] Even in early cases, the separate value of the segregative-effect theory was unclear.[226] Further, if the implications of the segregative-effect theory suggested in the previous paragraph become widely accepted, courts may require more proof that the blocked development would substantially help integrate the area.[227]

In addition, the segregative-effect theory's application to exclusionary zoning claims other than those based on race and national origin is untested.[228] One example would be a zoning decision blocking a

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method of proof has been used by plaintiffs seeking to develop such [affordable] housing" and these cases show that "use of the discriminatory effects framework has promoted the development of affordable housing"). For more on HUD's view of the meaning of "affordable housing," see *supra* notes 108 and 119.

220. *See supra* text accompanying note 91.

221. *See supra* notes 163–169 and accompanying text.

222. *See supra* note 13 and accompanying text.

223. *See supra* notes 49–52 and accompanying text (discussing *Arlington Heights*); Section II.A.1 (discussing policies versus one-time decisions).

224. *See supra* note 175 and accompanying text.

225. *See* Summerchase Ltd. P'ship I v. City of Gonzales, 970 F. Supp. 522 (M.D. La. 1997) (discussed *supra* notes 74–75 and accompanying text and note 143); *cf.* Davis v. N.Y.C. Hous. Auth., 166 F.3d 432 (2d Cir. 1999), *vacating* 1997 WL 407250, at *6–15 (S.D.N.Y. 1997) (vacating for inadequate findings an injunction barring housing provider from amending its tenant-selection procedures to favor working families based on district court's determination that this change, though not having a disparate impact on minorities, would cause a segregative effect at some of defendant's projects).

226. *See supra* notes 143–144 and accompanying text.

227. *See supra* notes 167–169 and accompanying text; *see also supra* Section II.A.2.b.

228. *See infra* Section II.B.5.

group home for disabled persons in a traditional single-family neighborhood. Based on the analogy to race in cases such as *Arlington Heights* and *Huntington*, the plaintiff in such a disability case would merely have to prove the chosen area has only a small percentage of disabled people to make out a prima facie case. There has indeed been much FHA litigation involving group homes, but the plaintiffs in these cases, while often succeeding based on other theories, have rarely prevailed in their disparate-impact claims.[229] This might change if plaintiffs articulate their discriminatory-effect claim in terms of segregative effect rather than disparate impact.[230]

b. Municipal Attacks on Affordable Housing

In the years leading up to *Inclusive Communities*, the Supreme Court twice granted certiorari to decide whether the FHA covered disparate-impact claims, but these cases were settled before the Court could resolve the issue.[231] Both cases accused municipalities of attacking affordable housing that was occupied primarily by minorities, and both resulted in appellate decisions upholding disparate-impact claims that did not mention the segregative-effect theory.

The first was *Gallagher v. Magner*,[232] where landlords of low-income properties challenged a city's aggressive housing-code enforcement program that allegedly had both a racially discriminatory purpose and effect. The district court granted summary judgment against all of these claims, which the Eighth Circuit affirmed except for the FHA-impact claim. This claim survived because the evidence showed that the defendants' aggressive code enforcement exacerbated the city's shortage of affordable housing, which was disproportionately occupied by racial minorities.[233] Furthermore, while the defen-

229. *See* SCHWEMM, *supra* note 18, at § 11D:5 nn.20–22 and accompanying text. Examples of failed impact claims by group homes include *Quad Enterprises Co. v. Town of Southold*, 369 F. App'x 202, 205–07 (2d Cir. 2010), *Schwartz v. City of Treasure Island*, 544 F.3d 1201, 1217–18 (11th Cir. 2008), *Lapid-Laurel v. Zoning Board of Adjustment of Township of Scotch Plains*, 284 F.3d 442, 466–68 (3d Cir. 2002), and *Gamble v. City of Escondido*, 104 F.3d 300, 306–07 (9th Cir. 1997).

230. *See infra* notes 335–336 and accompanying text (describing cases challenging spacing requirements that forbid operation of a group home closer than a certain minimum distance from another such facility).

231. *See* Township of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc., 134 S. Ct. 636 (2013) (dismissing prior grant of certiorari of case in which the Court had agreed to decide whether "disparate impact claims [are] cognizable under the Fair Housing Act" after the parties settled); Magner v. Gallagher, 132 S. Ct. 1306 (2012) (same).

232. 619 F.3d 823, 834 (8th Cir. 2010), *cert. granted sub nom* Magner v. Gallagher, 132 S.Ct. 1306 (2012), *and dismissed*, 565 U.S. 1187 (2012).

233. *Id.* at 834–36.

dants' code enforcement was conceded to have "a manifest relationship to legitimate, non-discriminatory objectives" (thereby satisfying their Step Two burden),[234] the plaintiffs had identified an alternative approach that would achieve these objectives "while maintaining a consistent supply of affordable housing."[235] Although this case was ultimately dismissed by the Supreme Court, it was clearly on the minds of the Justices when they decided *Inclusive Communities*. The principal dissent cited *Magner* with obvious contempt for allowing a FHA-impact claim to challenge a municipality's "efforts to combat 'rodent infestation' and other violations of the city's housing code."[236] Even the majority opinion, while endorsing the disparate-impact theory, suggested it might not apply in this situation.[237]

In the second, *Mount Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly*,[238] residents of a poor and deteriorating neighborhood sought to stop the municipality from displacing them by redeveloping the neighborhood with primarily upscale homes. Minorities accounted for eighty percent of the target neighborhood, which thus had "the highest concentration of minority residents within Mount Holly."[239] When the defendant began to acquire and demolish many of the area's homes, the plaintiffs brought claims alleging intentional and disparate-impact discrimination. The district court entered summary judgment against all of these claims.[240] However, the Third Circuit, while affirming the intent ruling,[241] held that the plaintiffs had made out a prima facie case of disparate impact under the FHA.[242] The appellate court rejected the defendant's argument that its redevelopment plan could not violate the FHA unless it increased segregation, holding that disparate impact and segregative effect are alternative ways of establishing a FHA violation.[243] The parties agreed that the defendant's goal of alleviating blight and unsafe conditions was a le-

234. *Id.* at 837.
235. *Id.* at 838.
236. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2532 (2015) (Alito, J., dissenting).
237. *See id.* at 2524 (noting that "*Magner* was decided without the cautionary standards announced in this opinion and, in all events, the case was settled by the parties before an ultimate determination of disparate-impact liability"); *see also id.* at 2523 (opining that it would be "paradoxical to construe the FHA to impose onerous costs on actors who encourage revitalizing dilapidated housing in our Nation's cities merely because some other priority might seem preferable").
238. 658 F.3d 375, 377–81 (3d Cir. 2011).
239. *Id.* at 378.
240. *See id.* at 380–81.
241. *Id.* at 387.
242. *Id.* at 382–85.
243. *Id.* at 385.

gitimate interest sufficient to satisfy its burden in Step Two.[244] Thus, the case on remand would turn on Step Three, i.e., whether the plaintiffs could prove that these conditions "could be remedied in a far less heavy-handed manner that would not entail the wholesale destruction and rebuilding of the neighborhood."[245]

In an article cited in *Inclusive Communities*,[246] Professor Seicshnaydre noted that *Magner* and *Mount Holly* were rare disparate-impact wins among FHA cases that challenged municipal efforts to improve housing through heightened code enforcement or redevelopment.[247] In any event, neither case involved a segregative-effect claim. In fact, the defendants' actions in those cases, by attacking housing that was disproportionately occupied by minorities, might be seen as *reducing* segregation by causing the dispersal of impacted minority families throughout the relevant communities.[248]

In some situations, however, municipal efforts to "improve" minority areas can reinforce segregation. One example from the 1990s is

244. *Id.* For a description of Step Two of a discriminatory-effect case, see *supra* note 13 and accompanying text.

245. 658 F.3d at 386. For a description of Step Three of a discriminatory-effect case, see *supra* note 14 and accompanying text.

The D.C. Circuit had earlier dealt with a situation similar to *Magner* and *Mount Holly* in *2922 Sherman Avenue Tenants' Ass'n v. District of Columbia*, 444 F.3d 673 (D.C. Cir. 2006). There, residents of a poor Hispanic neighborhood accused the local government of violating the FHA by aggressively enforcing its housing code against their apartment buildings in order to shut them down and gentrify the area. The D.C. Circuit found enough evidence to support the plaintiffs' intentional discrimination claim, noting that the defendant, having originally identified seventy-five buildings distributed evenly throughout the city for aggressive code enforcement, ultimately targeted only twenty-seven buildings located in neighborhoods with high Hispanic populations. *Id.* at 682. The disparate-impact claim failed, however, because the plaintiffs showed only that the defendant's code-enforcement policy impacted buildings in predominantly Hispanic areas but did not provide the demographics of the specific buildings harmed by that policy. *Id.* at 681. The opinion did not include any discussion of the FHA's segregative-effect theory.

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

247. *See* Stacy Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM. U. L. REV. 357, 403–08, 432–433 (2013). Examples of appellate decisions ruling against such claims include *Scopellitti v. City of Tampa*, 677 F. App'x 503, 507–08 (11th Cir. 2017) and *2922 Sherman Avenue Tenants' Ass'n*, 444 F.3d at 673 (discussed *supra* note 245).

248. *See supra* note 243 and accompanying text. Professor Seicshnaydre calls these "housing improvement" cases and notes: "A housing improvement plan may have an adverse impact on a community of color in the immediate aftermath of its adoption and implementation, but over time it may have the effect of increasing housing opportunity and reducing segregation." Seicshnaydre, *supra* note 247, at 407.

Hispanics United of DuPage County v. Village of Addison,[249] in which a Chicago suburb allegedly targeted its redevelopment efforts at two heavily Hispanic neighborhoods.[250] Local residents and other plaintiffs, supported by the Justice Department, claimed that the resulting displacements would significantly decrease the number of Hispanics living in the Village, resulting in "the loss of social and professional benefits gained from an integrated community."[251] The consolidated lawsuits, which included claims of intentional discrimination, disparate impact, and segregative effect,[252] were settled just prior to trial.[253] In approving the settlement, the district court found that the Village's redevelopment activities may have had a disparate impact on Hispanics[254] and also that these activities "could have had the secondary consequence of increasing segregation" by displacing a large percentage of the Village's Hispanic population which, given the absence of any relocation assistance, created "a danger of forcing large numbers of Hispanics to relocate outside the Village."[255]

More recently, in *City of Joliet v. New West, L.P.*,[256] the Seventh Circuit, in 2016, ruled against a FHA-impact claim without considering the segregative-effect theory. This case involved Joliet's efforts to condemn a heavily black, low-income housing complex. The complex's owner argued, unsuccessfully, that razing it would violate the FHA because of racial intent or disparate impact. The trial judge ruled against these claims, finding no disparate impact on the facts[257] and noting, with respect to Joliet's intent, that the City had agreed "to create at least 115 new low-income housing units and provide housing vouchers for all remaining [complex] residents."[258] The Seventh Circuit affirmed, but gave different reasons for rejecting the impact claim. The appellate court held that this claim failed because the defendant's tenants would not be injured by having to move to better housing and also because the project's condemnation was a one-time

249. 958 F. Supp. 1320 (N.D. Ill. 1997) and 988 F. Supp. 1130 (N.D. Ill. 1997).
250. *See* 988 F. Supp. at 1136–44 (describing the relevant facts). The Village's population prior to its redevelopment activities was 32,058, 13.4% of whom were Hispanics, and, although Hispanics lived throughout the Village, they were heavily concentrated in the two targeted neighborhoods. *Id.* at 1136–37.
251. 958 F. Supp. at 1328.
252. *See* 988 F. Supp. at 1150.
253. *See id.* at 1136.
254. *Id.* at 1155.
255. *Id.* at 1155 n.16.
256. 825 F.3d 827 (7th Cir. 2016), *cert. denied sub nom.* Mid-City Nat. Bank of Chi. v. City of Joliet, 137 S. Ct. 518 (Nov. 28, 2016) (No. 16-485).
257. *See id.* at 830.
258. *Id.* at 829.

decision by the City and thus could not be challenged as a policy under the disparate-impact theory.[259]

The *Joliet* case, which began years before HUD issued its 2013 discriminatory-effect regulation, seems to be a strong candidate for a segregative-effect claim. The condemned complex was in a white area,[260] and its black residents, even if they were ultimately able to secure other housing in Joliet, seemed likely to end up in heavily black areas.[261] Further, as noted above, one-time acts can be challenged under the segregative-effect theory.[262] But the owners in *Joliet* did not make such a claim, and the Seventh Circuit did not mention this theory.[263]

The cases discussed in this section are reminiscent of those involving "urban renewal" in the 1960s and 1970s.[264] Those cases usu-

259. *Id.* at 828. See *supra* note 146 and accompanying text for a description of this requirement of the disparate-impact theory.

260. *See* Petition for Writ of Certiorari at 3, Mid-City Nat'l Bank v. City of Joliet, 137 S. Ct. 518 (2016) (No. 16-485), 2016 WL 5956657 [hereinafter Joliet Petition] (describing the complex's 800 residents as being ninety percent African-American and Joliet as being racially divided with west of the Des Plaines River (where the complex was located) being sixty-seven percent white and six percent African-American and east of the river being predominantly African-American and Hispanic).

261. *See, e.g.*, Complaint at 12, United States v. City of Joliet, No. 11-cv-5305 (N.D. Ill. Aug. 4, 2011) (alleging that the City's actions would violate the FHA both by having "a disproportionate adverse impact on African-Americans and operat[ing] to perpetuate segregation in Joliet"). This claim by the United States was settled in 2013. *See* Press Release, U.S. Dep't of Justice, Justice Department and HUD Settle Discrimination Claims Against the City of Joliet, Ill. (Nov. 12, 2013), https://www.justice.gov/opa/pr/justice-department-and-hud-settle-discrimination-claims-against-city-joliet-ill.

262. *See supra* Section II.A.1.

263. In a separate action, the United States did allege both segregative-effect and disparate-impact claims, but this action was settled in 2013. *See supra* note 261. As for the private owners' claim that went to trial, the owners did argue that the displaced residents would not be able to find housing elsewhere in Joliet. See Joliet Petition, *supra* note 260, at 4 (noting that the private-owner plaintiffs "presented evidence of the absence of alternative affordable housing in Joliet and . . . contended that the residents of the Property [complex] would find it improbable, if not impossible, to find suitable alternative housing in nearby communities"). However, the Seventh Circuit endorsed the trial judge's contrary finding, noting that "Joliet had a population of 148,000 at the 2010 census, and a city of that size should not have difficulty finding room for the 240 or so [displaced] families with housing vouchers. . . . [T]he population of Joliet Township is about a quarter black. . . . Only a small fraction of the black population is affected by the closure of the [complex], which implies that space elsewhere will be available." 825 F.3d at 829. But the question in a segregative-effect case is not *if*, but *where*, other housing will be available; if the answer is primarily in minority neighborhoods, then the condemnation of a heavily black complex in a white area certainly could be challenged for increasing segregation in the city.

264. *See, e.g.*, Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 131–33 (3d Cir. 1977) (describing how urban renewal took blacks out of an integrated area in Philadelphia

ally involved constitutional claims by displaced minorities that required proof of racial intent, but the modern era has allowed FHA-effect claims as well. The modern cases have generally focused on FHA disparate-impact claims, most of which—other than *Magner* and *Mount Holly*—have failed. As *Hispanics United* and *Joliet* suggest, however, even if a disparate-impact claim fails in such a case, a segregative-effect claim may be viable, at least where the defendant's "housing improvement" activities result in dispersal of minority families without the benefit of a relocation program in the relevant jurisdiction.

c. Locating Affordable Housing in Heavily Minority Areas

The "reverse" of a municipality's exclusion of affordable housing is to approve such housing in a poor area that already has a disproportionate number of minority residents, thus perpetuating segregation.[265] In 1970, the Third Circuit produced a strong condemnation of this type of action in *Shannon v. HUD*.[266] However, few cases in recent times have raised FHA-challenges to housing-project approvals.[267]

The most important case in modern times is *Inclusive Communities*, where a state agency was accused of approving housing proposals under the Low Income Housing Tax Credit (LIHTC) program in a way that resulted in most Dallas-area projects being located in poor inner-city neighborhoods as opposed to white suburban communities.[268] The trial court found against the plaintiff's intent-based claims, but ruled in favor of the FHA disparate-impact claim.[269] The latter

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and turned it into all-white one, as background for finding intentional discrimination here); *see also id.* at 146–50 (affirming plaintiffs' judgment based on both disparate-impact and segregative-effect grounds).

265. A similar result may occur when other subsidized housing opportunities, such as Section 8 vouchers, are used in such areas. For more on the Section 8 program and the FHA's segregative-effect theory of liability, see *infra* Section II.B.4.a.

266. 436 F.2d 809 (3d Cir. 1970) (discussed *supra* note 187).

267. *See* United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1219 (2d Cir. 1987) (commenting that "once a municipality has decided to construct housing, [it may not] lawfully proceed with segregative intent and effect to confine housing for minority occupancy to areas in which minority residence is already concentrated, thereby enhancing and perpetuating racial segregation in residential patterns"); Metz v. Herbert, 243 F. Supp. 3d 929, 937–38 (M.D. Tenn. 2017) (dismissing FHA-based challenge to defendant's approval of affordable housing project that allegedly would perpetuate segregation in plaintiffs' neighborhood); *supra* note 175 (describing HUD charge against Houston, Texas).

268. *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2513–14 (2015).

269. *See* Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, 860 F. Supp. 2d 312, 318–31 (N.D. Tex. 2012). In a prior opinion ruling that the plaintiff had established a prima facie case of disparate impact, the court relied on evidence

ruling was ultimately reviewed by the Supreme Court, which held that disparate-impact claims were cognizable under the FHA, but expressed skepticism about this particular claim.[270]

The Court's opinion noted two difficulties with the plaintiff's claim. First, it suggested that deciding where to locate a particular housing project might be a one-time decision rather than a "policy."[271] The second problem was causation: A plaintiff's challenge to a new development "in one location rather than another will not easily be able to show that this is a policy causing a disparate impact [in part] because of the multiple factors that go into investment decisions about where to construct or renovate housing units."[272] On remand, the trial court took the hint and ruled against the plaintiff's disparate-impact claim, both because the court concluded that no "policy" was involved and because of a lack of causation.[273]

These problems would be far less daunting in a segregative-effect claim. First, segregative-effect claims, unlike those based on disparate impact, can challenge one-time decisions.[274] Second, segregative-effect claims have required much less in the way of proof of a causal connection between the defendant's action and continuing segregation; to date, the cases have only demanded that a segregative-effect plaintiff show that the defendant blocked an integrated housing propo-

showing that, "from 1999–2008, [defendant] 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." *Id.* at 322 (quoting Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs (ICP II), 749 F. Supp. 2d 486, 499 (2010)). The court also found that "92.29% of [LIHTC] units in the city of Dallas were located in census tracts with less than 50% Caucasian residents." *See* 135 S. Ct. at 2514 (quoting *ICP II*, 749 F. Supp. 2d at 499).

270. *See Inclusive Cmtys.*, 135 S. Ct. at 2522–25.

271. *Id.* at 2523 (noting that a "one-time decision may not be a policy at all" for disparate-impact purposes).

272. *Id.* at 2523–24. The *Inclusive Communities* opinion also questioned whether a causal connection could be shown between the defendant's action here and a disparate impact, because, for instance, "federal law substantially limits the [defendant's] discretion." *Id.* at 2524.

273. Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, No. 3:08-CV-0546D, 2016 WL 4494322, at *6–12 (N.D. Tex. Aug. 26, 2016). In a related case decided shortly thereafter, the same judge upheld plaintiff's intent-based claims accusing the federal authorities administering the LIHTC program of also concentrating such projects in the Dallas area in poor and minority areas, but dismissed their FHA-impact claim for failing to identify a proper policy to challenge and lack of causation without separately considering a segregative-effect theory under the FHA. *See* Inclusive Cmtys. Project, Inc. v. U.S. Dep't of Treasury, No. 3:14-CV-3013D, 2016 WL 6397643, at *8–14 (N.D. Tex. Oct. 28, 2016).

274. *See supra* Section II.A.1.

sal in a white area or fostered such a proposal in a minority area.[275] If this remains true, the segregative-effect theory would provide a more robust tool than disparate-impact claims for challenging decisions to locate subsidized housing in poor inner-city areas.

2. *Residency Preferences*

Housing restrictions that discriminate in favor of local residents have long been the target of FHA litigation. In 1980, a housing authority's use of such a preference in an all-white suburb of Mobile, Alabama was struck down based on its racial effect,[276] despite no finding of intentional discrimination.[277] Local preferences imposed by predominantly white communities in racially diverse areas virtually invite FHA-effect claims. Some of these cases have relied on the disparate-impact theory,[278] but the segregative-effect theory seems an even stronger basis for these claims. Obviously, a preference for local residents in an all-white area would have the effect of maintaining segregation.[279]

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275. *See* notes 163–169 and accompanying text; Shannon v. U.S. Dep't of Hous. & Urban Dev., 436 F.2d 809 (3d Cir. 1970) (described *supra* note 1867).

276. United States v. Hous. Auth. of Chickasaw, 504 F. Supp. 716, 729–32 (S.D. Ala. 1980). In reaching this conclusion, the court relied both on the disparate-impact and segregative-effect theories. *See id.* at 730 (finding both that defendant's application of "the residency requirement to applicants seeking housing certainly had a greater adverse impact on Negroes as against Caucasians" and that its decision "to adopt and enforce the residency requirement worked to perpetuate the segregation of the Chickasaw community").

277. *Id.* at 727–29. Intent-based FHA challenges to local residency requirements have been upheld in other cases. *See, e.g.*, Winfield v. City of New York, No. 15CV5236-LTS-DCF, 2016 WL 6208564, at *7 (S.D.N.Y. Oct. 24, 2016); United States v. Town of Oyster Bay, 66 F. Supp. 3d 285 (E.D.N.Y. 2014); Fair Hous. Justice Ctr. v. Edgewater Park Owners Coop., Inc., No. 10 CV 912(RPP), 2012 WL 762323, at *7–9 (S.D.N.Y. Mar. 9, 2012).

278. *See, e.g.*, Langlois v. Abington Hous. Auth., 234 F. Supp. 2d 33, 56–64 (D. Mass. 2002); *cf.* Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Par., 648 F. Supp. 2d 805 (E.D. La. 2009) (holding that defendant's "blood relative" ordinance that limited rentals to landlords' close family members violated FHA-based consent decree both because of its disparate racial impact and its discriminatory intent); Complaint, Fair Hous. Justice Ctr., Inc. v. Town of Bedford, No. 7:17-cv-05664 (S.D.N.Y. July 26, 2017) (alleging that heavily white Town's preferences for local residents and workers for its affordable housing would have an adverse impact on African Americans in violation of the FHA).

279. *See Winfield*, 2016 WL 6208564, at *6 ("There is an obvious causal link between a policy whose very purpose is to maintain the existing racial and ethnic makeup of local communities and the corresponding perpetuation of the racial and ethnic makeup of those communities."); *see also* J. David Goodman, *City to Settle Discrimination Claim in Brooklyn Housing Plan*, N.Y. TIMES (Dec. 4, 2017), https://www.nytimes.com/2017/12/03/nyregion/brooklyn-housing-discrimination.html (reporting on the settlement of a FHA case in which the trial court had issued a prelimi-

Though most of these cases have been brought against municipal defendants, the theory would also apply to private defendants, such as a co-op that requires new buyers to have references from current residents.[280] Landlords and other housing providers that rely exclusively on word-of-mouth to advertise their units might also be targets of such a claim.[281]

Regardless of the type of defendant, a plaintiff's prima facie case would only require proof that, in a housing market with substantial minorities, a local preference is being employed in a predominantly white building or community.[282] Once this is shown, the local preference could survive only if the defendant can provide a legitimate justification for it,[283] and then only if the plaintiff cannot identify a less discriminatory alternative.[284]

3. *Steering*

Racial steering has long been the target of FHA suits,[285] and it remains a major form of housing discrimination and cause of residen-

narily injunction against New York City after finding that its local-resident-preference system in a predominantly white community "will perpetuate segregation" in the area and thus was likely to violate the FHA (quoting Broadway Triangle Cmty. Coalition v. Bloomberg, 941 N.Y.S.2d 831, 839 (N.Y. Sup. Ct. 2011))); *cf. Langlois*, 234 F. Supp. 2d at 62 (noting, in ruling against local preferences by Boston-area suburbs, that there is an "overarching intuitive principle here: where a community has a smaller proportion of minority residents than does the larger geographical area from which it draws applicants, a selection process that favors its residents *cannot but* work a disparate impact on minorities").

280. *See, e.g.*, *Fair Hous. Justice Ctr.*, 2012 WL 762323, at *10–11.

281. *See* Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1040 (2d Cir. 1979) (citing numerous FHA cases for the proposition that a requirement that an applicant be compatible with the current neighbors may be used to mask racial discrimination); *cf.* William M. Wiecek & Judy L. Hamilton, *Beyond the Civil Rights Act of 1964: Confronting Structural Racism in the Workplace*, 74 LA. L. REV. 1095, 1127 (2014) (noting that "[r]ecruiting new workers via word-of-mouth through friends and friends-of-friends has a racial impact . . . [b]ecause whites and blacks live in largely segregated neighborhoods and move in different social circles").

282. *See supra* notes 163–169 and accompanying text.

283. *See, e.g.*, *Langlois*, 234 F. Supp. 2d at 69, 70 n.41 (holding inadequate defendants' proffered justification for their residency preferences and opining that a legitimate justification in such a case would require "a record of local conditions and needs that suggests why the residency preferences are necessary [giving examples]"); *Broadway Triangle Cmty. Coalition*, 941 N.Y.S.2d at 839 ("The Defendants have not demonstrated that their policies and actions are furthered by legitimate interests, which cannot be satisfied by lesser, non-discriminatory alternatives.").

284. *See, e.g.*, *Langlois*, 234 F. Supp. 2d at 70 (suggesting that plaintiffs' proposals for modifying the challenged residency preferences here would satisfy their Step Three burden).

285. *See* SCHWEMM, *supra* note 18, at § 13:5. FHA decisions condemning racial steering date back to the early 1970s. *See* United States v. Pelzer Realty Co., 484 F.2d

tial segregation.[286] In 1982, the Supreme Court described racial steering as a "practice by which real estate brokers and agents preserve and encourage patterns of racial segregation in available housing by steering members of racial and ethnic groups to buildings occupied primarily by members of such racial and ethnic groups and away from buildings and neighborhoods inhabited primarily by members of other races or groups."[287] In addition to realtors, steering claims have been brought against housing developers and large landlords who allegedly directed whites and blacks to different units within their control.[288]

Racially motivated steering makes housing unavailable in violation of the FHA's § 3604(a).[289] However, in an influential 1990 decision by the Seventh Circuit, Judge Posner suggested that the FHA condemns only intent-based steering.[290] Given that both the Supreme Court and HUD have described steering as a practice that perpetuates segregated housing patterns,[291] Judge Posners's theory seems unduly restrictive.

438, 441–42 (5th Cir. 1973); Johnson v. Jerry Pals Real Estate, 485 F.2d 528 (7th Cir. 1973).

286. *See* MARGERY AUSTIN TURNER ET AL., U.S. DEP'T OF HOUS. & URBAN DEV., HOUSING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES 2012, at xi (2013) (finding, based on HUD-sponsored national housing discrimination study covering twenty-eight metropolitan areas, that minority homeseekers are still often "told about and shown fewer homes and apartments than [comparable] whites"); *id.* at xvii ("Whites are significantly more likely than blacks or Asians to be shown . . . neighborhoods with higher percentages of whites"); *id.* at 55 ("[W]hites hear more positive comments about white neighborhoods and more negative comments about minority neighborhoods than do blacks, potentially steering them away from mixed or minority neighborhoods.").

287. Havens Realty Corp. v. Coleman, 455 U.S. 363, 366 n.1 (1982). The *Havens* case is discussed *supra* notes 203–209 and accompanying text.

288. *See, e.g.*, Mitchell v. Cellone, 389 F.3d 86, 88 (3d Cir. 2004); United States v. Mitchell, 580 F.2d 789, 791 (5th Cir. 1978).

289. *See* 42 U.S.C. § 3604(a) (2015); SCHWEMM, *supra* note 18, at § 13:5 n.6 (collecting cases). Steering may also violate other provisions of the FHA. *See id.* at § 14:2 nn. 18–20 and accompanying text (dealing with steering claims under the FHA's § 3604(b)).

290. Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1529–34 (7th Cir. 1990). According to Judge Posner, the question in this case was whether § 3604(a) "forbids *unintentional* racial steering—more aptly, perhaps, whether there is such an animal." *Id.* at 1529. The answer he gave was "no," with the opinion concluding that "we cannot imagine the practice (innocent in intent, discriminatory in impact [citing *Griggs*]), on which a disparate impact theory might be based in this case" and that here "discriminatory effect is not . . . the violation; it is merely evidence of violation." *Id.* at 1533–34.

291. *See supra* text accompanying note 287 (quoting the Supreme Court in *Havens*); *see also* 24 C.F.R. § 100.70(a) (2017) (HUD regulation). This HUD regulation makes it unlawful, on the basis of race or any other prohibited ground,

> 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

For Judge Posner, a realtor would not be liable if he merely acquiesces in his customers' preferences; that is, he shows whites who prefer majority-white areas only houses in those areas and blacks who prefer integrated areas only houses in those areas.[292] But surely this practice—as opposed to showing all prospects both areas—would have the effect of reinforcing/perpetuating racial segregation, regardless of the salesperson's "innocent" intent. Indeed, it was this very behavior that the Supreme Court held in *Gladstone* and *Havens* could be challenged by local residents, because the defendants' practices allegedly had the harmful effect of segregating their communities.[293]

As with any segregative-effect claim, there may be a "how much" issue in a steering claim based on this theory—for example, did the defendant do *enough* steering to have an appreciable effect on segregation in the area?[294] However, the theory itself seems sound for this type of case. Further, HUD's anti-steering regulation reduces concerns about this issue, because it explicitly applies to actions that "tend to perpetuate" segregated housing patterns, not only actions that actually perpetuate such patterns.[295]

4. *Other Race-Based Examples*

a. *Section 8*

The Housing Choice Voucher (HCV or Section 8) program is HUD's largest subsidy program, serving some 2.2 million low-income households.[296] Individuals who meet income-eligibility requirements obtain vouchers from their local public housing agency (PHA) that are used to secure private housing within or even beyond the PHA's juris-

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so as to perpetuate, or tend to perpetuate, segregated housing patterns, or to discourage or obstruct choices in a community, neighborhood or development.

24 C.F.R. § 100.70(a).

292. *See Dwivedi*, 895 F.2d at 1529–34.

293. *See supra* notes 193–209 and accompanying text.

294. *See supra* Section II.A.2.b; *supra* notes 206–08 and accompanying text.

295. 24 C.F.R. § 100.70(a) (quoted *supra* note 291).

296. *See* U.S. DEP'T OF HOUS. & URBAN DEV., HUD'S PROPOSED 2017 BUDGET: FACT SHEET (2017), https://www.hud.gov/sites/documents/PROPOSEDFY17FACTSHEET.PDF.

diction (i.e., vouchers are "portable").[297] Nationwide, voucher users are disproportionately minorities, with almost half being black.[298]

From the program's inception, many landlords have refused to deal with HCV holders. Their "No Section 8" policies have been the target of a number of FHA-based impact challenges,[299] most of which have not succeeded.[300] But a segregative-effect challenge might be more likely to be successful; indeed, it would seem that a segregative-effect prima facie case could be made against any landlord employing such a policy in either a large apartment complex or neighborhood if the complex or neighborhood is predominantly white and the voucher holders in the area include a substantial percentage of minorities.[301]

b. Individual Refusals to Sell or Rent

Assume that a subdivision developer, landlord, or other housing provider rejects a minority applicant, resulting in a FHA intent-based suit accusing the provider of refusing to sell or rent because of the applicant's race. Without direct evidence of the defendant's illegal motive, the plaintiff could succeed only via the prima-facie-case approach, in which the plaintiff has the burden of proving, inter alia, that

297. *See* Hardaway v. D.C. Hous. Auth., 843 F.3d 973, 976 (D.C. Cir. 2016) (first citing 42 U.S.C. § 1437(r)(1), and then citing 24 C.F.R. § 982.353(b)); *Housing Choice Vouchers Fact Sheet*, U.S. DEPT. OF HOUS. & URBAN DEV., https://www.hud.gov/topics/housing_choice_voucher_program_section_8 (last visited Nov. 17, 2017).

298. *See Assisted Housing: National and Local*, U.S. DEPT. OF HOUS. & URBAN DEV., http://www.huduser.gov/portal/datasets/picture/yearlydata.html (using the Query Tool, search "2016 Based on 2010 Census"; "U.S. Total"; "Housing Choice Vouchers"; and "%" of the desired ethnicity) (last visited Oct. 31, 2017) (reporting that in 2016, forty-eight percent of voucher holders were black and seventeen percent were Hispanic). However, the racial/ethnic distribution of voucher holders varies considerably across the country. *See* OFFICE OF POLICY DEV. & RESEARCH, U.S. DEPT. OF HOUS. & URBAN DEV., HOUSING CHOICES VOUCHER LOCATION PATTERNS: IMPLICATIONS FOR PARTICIPANT AND NEIGHBORHOOD WELFARE app. B-1 at 101 (2003) ("Appendix B-1: Age and Race/Ethnicity of the HCV Population in Each of the 50 Largest MSAs").

299. *See, e.g.*, Wadley v. Park at Landmark, L.P., 264 F. App'x 279 (4th Cir. 2008); Graoch Assocs. #33, L.P. v. Louisville/Jefferson Cty. Metro Human Relations Comm'n, 508 F.3d 366, 369 (6th Cir. 2007); *see also* L.C. v. Lefrak Org., 987 F. Supp. 2d 391, 403–05 (S.D.N.Y. 2013) (challenging "No Section 8" policy based on both FHA-impact claim and supplemental claim based on state law banning source-of-income discrimination).

300. *See, e.g.*, *Graoch Assocs. #33*, 508 F.3d at 377–79; Inclusive Cmtys. Project, Inc. v. Lincoln Prop. Co., No. 3:17-CV-206-K, 2017 WL 2984048, at *8–12 (N.D. Tex. July 13, 2017); Burbank Apartments Tenant Ass'n v. Kargman, 48 N.E.3d 394, 412–14 (Mass. 2016).

301. *See supra* notes 163–169 and accompanying text.

the defendant's claimed legitimate reason for its action is false (i.e., is a pretext for discrimination).[302]

Now assume that the defendant's housing is located in a community whose residents are over ninety-five percent white. Would this added fact allow the plaintiff to assert, along with the intent claim, a segregative-effect claim on the theory that the defendant's rejection of the minority homeseeker reinforces or perpetuates segregated housing patterns in this area?[303]

If so, the addition of the segregative-effect claim could be significant. In both claims, once a prima facie case is established, the issue becomes whether the defendant had a legitimate reason for its action. However, the defendant's burden of proof on this issue is greater in the effect claim. In the intent claim, the defendant's burden is simply one of production,[304] whereas it is a full burden of persuasion in the effect claim.[305] In other words, if the fact-finder cannot decide whether to believe the defendant, the defendant will prevail in the intent claim but lose in the effect claim. Further, even if the fact-finder believes the defendant on this point, the plaintiff may still prevail in the effect claim by showing a less discriminatory alternative (e.g., that the minority applicant could be accepted, but with conditions to ameliorate the defendant's legitimate concerns over, say, the applicant's ability to pay).

Could the segregative-effect theory increase the chances of success for intent-based FHA cases in racially segregated communities? The only apparent difficulty at the prima-facie-case stage would be showing that the defendant's action caused a substantial effect on local segregation, i.e., satisfying the "how much" element.[306] True, the foundation cases for this theory—*Black Jack*, *Arlington Heights*, and *Huntington*—involved blocked developments that would have added a group of minority families to all-white communities, but their opinions suggest that virtually *any* number of new black families would suffice to help desegregate the area.[307] In order to deal with the problem posed in this section, courts will have to give more attention to

302. *See* SCHWEMM, *supra* note 18, at § 10:2 (discussing the parties' respective burdens of proof in such a case).

303. The same issue would presumably be presented if the racial situation were reversed, i.e., the defendant rejects a white homeseeker's application in a predominantly black community.

304. *See* SCHWEMM, *supra* note 18, at § 10:2 nn. 16–20 and accompanying text.

305. *See supra* note 13 and accompanying text.

306. *See supra* Section II.A.2.b.

307. *See supra* notes 167–169 and accompanying text.

defining "how much" is required to establish a prima facie case of segregative effect.

5. Cases Involving Other Protected Classes

The FHA outlaws discrimination on the basis of seven factors: race, color, national origin, religion, sex, familial status, and disability.[308] All reported segregative-effect cases thus far have been based on race, color, or national origin, although one has also included a disability claim and two others a familial status claim.[309]

While the segregative-effect theory applies to all protected classes,[310] a prerequisite for a successful claim is that the relevant area is already highly segregated, e.g., in a race claim, the local population is overwhelmingly white.[311] This fact presumably would not be present in most familial status and sex-based claims. On the other hand, disability claims on behalf of group homes seeking to locate in traditional single-family neighborhoods would likely succeed, as the proposed home would add more disabled residents to an area that presumably has only a few. Thus, the segregative-effect theory could add another weapon to the FHA arsenal used by group homes, which, although having often succeeded in intent and reasonable accommodation claims, have rarely prevailed on the disparate-impact theory.[312] By contrast, group homes designed to house needy children or women would face a difficult task of proving this prerequisite for a segregative-effect claim.[313]

Religion-based cases may be possible in some areas. For example, Orthodox Jews have brought a number of FHA intent-based

308. *See* 42 U.S.C. §§ 3604–06 & 3617 (2015).

309. *See* Boykin v. Fenty, 650 F. App'x 42 (D.C. Cir. 2016) (disability); Anderson Grp., LLC v. City of Saratoga Springs, 805 F.3d 34 (2d Cir. 2015) (familial status); Summerchase Ltd. P'ship I v. City of Gonzales, 970 F. Supp. 522 (M.D. La. 1997) (familial status). All three were unsuccessful.

310. *See supra* note 17 (quoting HUD regulation).

311. *See supra* notes 163–165 and accompanying text.

312. *See supra* note 229 and accompanying text.

313. There are several cases in which such group homes have brought FHA-based challenges to adverse municipal actions. *See, e.g.*, Doe v. City of Butler, 892 F.2d 315, 323 (3d Cir. 1989) (holding that defendant's zoning ordinance blocking proposed temporary shelter for abused women was not shown to have a discriminatory impact on women); Children's All. v. City of Bellevue, 950 F. Supp. 1491, 1495–1501 (W.D. Wash. 1997) (striking down defendant's restrictions on group home for troubled youth on both familial status and disability grounds); *cf.* Cmty. House, Inc. v. City of Boise, 490 F.3d 1041, 1048–52 (9th Cir. 2007) (ordering preliminary injunction under the FHA for homeless shelter's women and families-with-children residents who were displaced when defendant adopted a men-only policy for that shelter). None of these cases presented a segregative-effect claim.

claims against New York suburbs challenging actions that allegedly discouraged people with similar religious beliefs from moving into those communities.[314] It is not hard to envision similar claims on behalf of Muslims in various parts of the country.[315] A segregative-effect claim in such a case would allow the plaintiff to prevail without having to prove intentional discrimination, but, as noted in the previous paragraph, the viability of such a claim would require proof that the particular community has a low percentage of residents that observe the targeted religion.[316]

6. *Other Issues*

a. *Can Segregative-Effect Be Used as a Defense?*

Plaintiffs in discriminatory-effect cases must show that the defendant's challenged action has either a disparate impact on a protected class, a segregative effect in the local community, or both. Past cases and HUD's discriminatory-effect regulation view these two theories as complementing each other and providing alternative methods for establishing liability.[317] However, what if the theories conflict in a particular situation? Specifically, could a defendant whose policy is shown to disproportionately harm a protected class prevail in Step Two of an impact case on the ground that this policy reduces segregation?

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314. *See, e.g.*, LeBlanc-Sternberg v. Fletcher, 67 F.3d 412, 419 (2d Cir. 1995); Bloomingburg Jewish Educ. Ctr. v. Village of Bloomingburg, 111 F. Supp. 3d 459, 489–91 (S.D.N.Y. 2015); Congregation Rabbinical Coll. of Tartikov, Inc. v. Village of Pomona, 915 F. Supp. 2d 574, 607–17 (S.D.N.Y. 2013); Yeshiva Chofetz Chaim Radin, Inc. v. Bd. of Trustees *ex rel.* Village of New Hempstead, 98 F. Supp. 2d 347, 354–55 (S.D.N.Y. 2000); *see also* Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 157 n.13 (3d Cir. 2002) (implying, in rejecting on standing grounds FHA claim by local residents that defendant's removal of Jewish religious items from its utility poles "discourage[d] Orthodox Jews from moving into town," that such a claim by outsiders might be upheld); Mosdos Chofetz Chaim, Inc. v. Village of Wesley Hills, 815 F. Supp. 2d 679, 707 (S.D.N.Y. 2011) (dismissing, after upholding various other claims, FHA claims against certain defendants whose opposition to religious center proposed by Orthodox Jews was held to be protected speech).

315. *Cf.* United States v. Bensalem Township, 220 F. Supp. 3d 615, 620–23 (E.D. Pa. 2016) (upholding complaint under the Religious Land Use and Institutionalized Persons Act accusing defendant of religious discrimination in denying zoning approval for mosque).

316. *Cf. Bloomingburg Jewish Educ. Ctr.*, 111 F. Supp. 3d at 466 (noting that the defendant-village has only four hundred residents and that "[o]ver the past several years, Hasidic Jews have been moving into the village in increasing numbers").

317. *See* 24 C.F.R. § 100.500(a) (2017) (HUD regulation); *supra* notes 37–38 and accompanying text (*Black Jack*); *supra* note 49 and accompanying text (*Arlington Heights*); *supra* note 60 and accompanying text (*Huntington*).

Hints of this possibility do exist. For example, the HUD regulation, by explicitly providing that a defendant can show in Step Two that its challenged practice "is supported by a legally sufficient justification . . . [but this] may not be used as a defense against a claim of intentional discrimination,"[318] implies that such a showing might be used to defend other types of FHA claims. Another example is the Second Circuit's 1973 decision in *Otero v. New York City Housing Authority*,[319] which allowed the defendant-Authority to ignore a tenant-placement plan preferring certain displaced former residents for two new projects in favor of a more integrative solution. In *Otero*, the fact that minorities accounted for most of the displaced residents favored by the original plan led the lower court to rule in their favor, but the Second Circuit disagreed. It noted that following that plan would result in the new buildings being eighty percent minority and twenty percent white,[320] which would conflict with the Authority's FHA-imposed duty to integrate its housing.[321] This duty bars public housing officials from making decisions "having the long range effect of increasing or maintaining racially segregated housing patterns merely because minority groups will gain an immediate benefit."[322] According to the Second Circuit, "[t]he purpose of racial integration is to benefit the community as a whole, not just certain of its members."[323]

These hints, however, have not yet resulted in a successful defense to a FHA-impact claim. As noted above, the Third Circuit in 2011 in the *Mount Holly* case rejected a defendant's argument that its redevelopment plan could not run afoul of the disparate-impact theory unless it increased segregation in the community.[324] Decades earlier in *Betsey v. Turtle Creek Associates*,[325] the Fourth Circuit also upheld a FHA-impact claim against a private landlord, rejecting the defendant's

318. 24 C.F.R. § 100.500(d).

319. 484 F.2d 1122, 1136–38 (2d Cir. 1973).

320. *Id.* at 1132.

321. *Id.* at 1132–33. The statutory basis for the Authority's duty to integrate was, according to the Second Circuit, the FHA's § 3608, which requires HUD grantees to affirmatively further fair housing and which thus mandates that "consideration be given to the impact of proposed public housing programs on the racial concentration in the area in which the proposed housing is to be built." *Id.* at 1134 (citing 42 U.S.C. § 3608, which is discussed *supra* note 175 and its accompanying text). According to *Otero*, § 3608 meant that the Authority has "an obligation to act affirmatively to achieve integration in housing." *Id.* at 1133.

322. *Id.* at 1134.

323. *Id.* The relevant "community" in *Otero* was assumed to be "the area delineated as the Lower East Side" of Manhattan. *Id.* at 1132 n.13.

324. *See supra* note 243 and accompanying text.

325. 736 F.2d 983, 987 (4th Cir. 1984) (holding that, for minority plaintiffs to prevail in a FHA-impact claim, they are "required to prove only that a given policy had a

argument that its challenged policy did not add to segregation in the area. In 2016, a D.C. district court, citing *Betsey* and Title VII precedents like *Connecticut v. Teal*,[326] agreed that the defendant-landlords' policies of not renting to people with criminal records could be challenged for having a disparate impact on blacks even if minorities already occupied most of the defendants' units.[327]

One can agree with these decisions without fully ruling out a "pro-integration" defense to FHA-impact claims. For one thing, the decisions are generally based on the Supreme Court's rejection of a "bottom line" defense in Title VII impact cases, but Title VII precedents are not entirely persuasive here because, as noted above, the FHA's segregative-effect theory has no analogous counterpart in Title VII law.[328] Further, even if *Betsey*, *Mount Holly*, and other FHA cases are correct that a plaintiff's impact-proof in Step One is not to be discounted via a "bottom line" analysis, a defendant might still argue that its challenged policy satisfies Step Two by promoting integration. This was not attempted in any of the cases discussed in the previous paragraph, all of which focused on the plaintiff's Step One proof. Those that mentioned the defendant's Step Two burden looked at other justifications, e.g., rehabilitating a blighted neighborhood in *Mount Holly*.[329]

Consider the case of a defendant-landlord with a "No Criminal Record" policy and an overwhelmingly black clientele that tries to

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discriminatory impact on them as *individuals*" and not also that the policy added to segregation of their group).

326. 457 U.S. 440, 452–56 (1982) (rejecting as a defense to a Title VII impact claim situations where an employer has compensated for a discriminatory test "by hiring or promoting a sufficient number of black employees to reach a nondiscriminatory 'bottom line'"); *see also* Furnco Const. Corp. v. Waters, 438 U.S. 567, 579 (1978) ("A racially balanced work force cannot immunize an employer from liability for specific acts of discrimination.").

327. Alexander v. Edgewood Mgmt. Corp., No. 15-01140 (RCL), 2016 WL 5957673, at *3 (D.D.C. July 22, 2016). According to the *Alexander* opinion, "[t]he logic of the 'bottom line' argument is pernicious. If the Court were to find there could be no disparate impact as a matter of law so long as defendants could show a sufficient baseline [of minority residents], it could justify discrimination against some portions of a class so long as other members were treated favorably." *Id.*

In another 2016 case challenging a landlord's "No Criminal Record" policy, the Justice Department advocated against the defendant's position that its complex's predominately black and Hispanic population precluded liability. *See* Statement of Interest of United States of America at 11–12, Fortune Soc'y, Inc. v. Sandcastle Towers Hous. Dev. Fund Corp., No. CV-14-6410 (VMS) (S.D.N.Y Oct. 18, 2016), http://www.justice.gov/opa/file/903681/download.

328. *See supra* note 25 and accompanying text.

329. *See* Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly, 658 F.3d 375, 385 (3d Cir. 2011).

meet its Step Two burden by arguing not simply that its policy yields better tenants, but that abandoning it would also increase segregation in its complex.[330] Of course, the Step Two burden requires proof that the challenged practice is necessary to achieve a substantial interest of the defendant,[331] which would not be met if this integrative-effect was merely an unintended by-product of the defendant's policy. While housing providers may be under an obligation not to enhance segregation—and thus avoiding segregation-enhancing behavior that might prompt litigation could qualify as a substantial interest[332]—it seems unlikely that a landlord could reasonably argue that it adopted a "No Criminal Record" policy for any reason other than to screen out undesirable tenants. Still, the only landlords that could make this argument would be those that have already rented to substantial numbers of minorities, which at least suggests that an impact claim against them would not accomplish the goal of rooting out unintended bias.[333]

Some defendant-municipalities that opposed a group home for disabled persons because of its proximity to another such home have tried this argument. Ever since the FHA was amended in 1988 to outlaw disability discrimination, a major portion of FHA-disability litigation has involved claims against local governments for blocking group homes.[334] A number of these claims have challenged "spacing requirements" that forbid operation of a group home closer than a certain minimum distance from another such facility.[335] In some of these cases, the defendants have tried to justify these spacing requirements as a way of dispersing housing for disabled persons. Courts have generally been skeptical, usually viewing spacing requirements as facially discriminatory (thus reflecting intentional discrimination), therefore resulting in FHA liability unless justified "by the unique and specific

330. Minorities are more likely to have a prior criminal record than whites. *See* Schwemm & Bradford, *supra* note 6, at 741–42 (surveying literature showing that U.S. incarceration rates are much higher for minorities than whites).

331. *See supra* note 13 and accompanying text; *see also* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,470–73 (Feb. 15, 2013) (discussing a defendant's Step Two burden).

332. *Cf.* Ricci v. DeStefano, 557 U.S. 557, 583–85 (2009) (holding that an employer faced with a Title VII disparate-impact claim with a strong basis in evidence may take pro-integration action to avoid liability).

333. *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2522 (2015) (noting that one of the roles of the FHA-impact theory is "to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment. In this way disparate-impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping").

334. *See* SCHWEMM, *supra* note 18, at § 11D:5.

335. *See id.* at § 11D:5 n.15 (collecting cases).

needs and abilities" of people with disabilities.[336] Because these defendants were often seen as using the anti-segregation argument as a pretext to mask weaker and less appealing justifications, this defense has almost always failed.[337] But there is an exception—the Eighth Circuit's 1991 decision in *Familystyle of St. Paul, Inc. v. City of St. Paul*[338]—which held that "the government's interest in deinstitutionalization sufficiently rebutted any discriminatory effect of the [challenged spacing-requirement] laws."[339]

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336. Larkin v. Mich. Dep't of Social Servs., 89 F.3d 285, 290 (6th Cir. 1996) (quoting Marbrunak, Inc. v. City of Stow, 974 F.2d 43, 47 (6th Cir. 1996)); *accord* Bangerter v. Orem City Corp., 46 F.3d 1491, 1503–05 (10th Cir. 1995); Nev. Fair Hous. Ctr., Inc. v. Clark County, 565 F. Supp. 2d 1178, 1182–87 (D. Nev. 2008); Children's All. v. City of Bellevue, 950 F. Supp. 1491, 1496–98 (W.D. Wash. 1997); Arc of N.J., Inc. v. New Jersey, 950 F. Supp. 637, 644–46 (D.N.J. 1996); Ass'n for Advancement of the Mentally Handicapped v. City of Elizabeth, 876 F. Supp. 614, 621–25 (D.N.J. 1994).

337. *See, e.g.*, *Larkin*, 89 F.3d at 290–92; Oconomowoc Residential Programs, Inc. v. City of Greenfield, 23 F. Supp. 2d 941, 954–55 (E.D. Wis. 1998); *Children's All.*, 950 F. Supp. at 1499; *Arc of N.J.*, 950 F. Supp. at 645–46; Horizon House Developmental Servs., Inc. v. Township of Upper Southampton, 804 F. Supp. 683, 697–98 (E.D. Pa. 1992), *aff'd*, 995 F.2d 217 (3d Cir. 1993); *see also* Oconomowoc Residential Programs v. City of Milwaukee, 300 F.3d 775, 787 (7th Cir. 2002) (rejecting anti-clustering justification in the course of ruling in favor of group home's reasonable-accommodation challenge to defendant's spacing requirement); United States v. City of Chicago Heights, 161 F. Supp. 2d 819, 837–39 (N.D. Ill. 2001) (same); United States v. Village of Marshall, 787 F. Supp. 872 (W.D. Wis. 1991) (ruling in favor of group home's reasonable-accommodation challenge to defendant's spacing requirement); K Care, Inc. v. Town of Lac du Flambeau, 510 N.W.2d 697 (Wis. Ct. App. 1993) (same); *cf.* City of Peekskill v. Rehabilitation Support Servs., Inc., 806 F. Supp. 1147, 1156 (S.D.N.Y. 1992) (opining that "[p]reventing housing for disabled people on the grounds that the City has already provided its fair share [of housing for mentally disabled people] . . . comes perilously close to violating the Fair Housing Act").

338. 923 F.2d 91 (8th Cir. 1991).

339. *Id.* at 94; *see also* Harding v. City of Toledo, 433 F. Supp. 2d 867, 872 (N.D. Ohio 2006) (finding, in the course of rejecting group home's motion for a preliminary injunction against defendant-city's spacing requirement, that the challenged buffer zone here was significantly less burdensome than in cases that struck down such requirements); Avalon Residential Care Homes, Inc. v. City of Dallas, 130 F. Supp. 2d 833, 839–42 (N.D. Tex. 2000) (awarding summary judgment against both intent and impact claims challenging city's spacing requirement, although finding material fact issues with respect to plaintiff's reasonable accommodation claim).

However, most courts, differing with *Familystyle*, have viewed spacing-requirements as facially discriminatory, *see supra* note 336 and accompanying text, and thus not "neutral" policies that may be challenged under the disparate-impact theory, *see, e.g.*, *Bangerter*, 46 F.3d at 1503–05; *Oconomowoc Residential Programs*, 23 F. Supp. 2d at 955; *Children's All.*, 950 F. Supp. at 1495. If spacing requirements are indeed best viewed as intentionally discriminatory, then, according to HUD's effect regulation, a defendant could not use an anti-segregation justification to prevail in such a case. *See supra* note 318 and accompanying text.

Familystyle is now seen as somewhat of an outlier in FHA group home litigation.[340] However, it suggests that some uncertainty does exist as to whether defendants can satisfy their Step Two burden in an impact case via an anti-segregation showing. Of course, even if a defendant does succeed in Step Two, the plaintiff may still prevail in Step Three by showing that this anti-segregation goal could be achieved by a less discriminatory alternative.[341]

b. Step Three Considerations

Step Three of a FHA discriminatory-effect case allows a plaintiff to prevail, even if the defendant has established a legitimate justification for its effect-producing action, by proving that a less discriminatory alternative would also serve the defendant's interest.[342] This is an easily understood concept in a disparate-impact case where, say, a landlord's screening device (e.g., a "No Criminal Record" policy) could be modified to exclude fewer protected-class members (e.g., by a "No Recent Felony Conviction" policy). But what would Step Three look like when the plaintiff's prima facie case is based solely on evidence that the defendant's challenged action perpetuates segregation? Few such cases have progressed to the stage where the defendant successfully justified its segregation-producing action, which, in turn, means that courts have had little experience evaluating the plaintiff's Step Three burden of proving a "less segregative alternative."[343]

340. *See* SCHWEMM, *supra* note 18, at § 11D:5 n.15.

341. *See supra* note 14 and accompanying text. In one spacing-requirement case, the court not only ruled against the defendant's anti-segregation justification, but went on to hold that even if this "avoidance of clustering" or "integration" justification was legitimate, "there are less discriminatory ways to accomplish it." *Horizon House*, 804 F. Supp. at 698.

342. *See supra* note 14 and accompanying text.

343. *See, e.g.*, Mhany Mgmt., Inc. v. County of Nassau, 819 F.3d 581 (2d Cir. 2016) (discussed *supra* notes 124–127 and accompanying text); Boykin v. Fenty, 650 F. App'x 42 (D.C. Cir. 2016) (discussed *supra* note 141 and accompanying text); Dews v. Town of Sunnyvale, 109 F. Supp. 2d 526 (N.D. Tex. 2000) (discussed *supra* note 84 and accompanying text); *Horizon House*, 804 F. Supp. 683 (discussed *supra* note 337 and accompanying text); *see also* Anderson Grp., LLC v. City of Saratoga Springs, 805 F.3d. 34, 49–50 (2d Cir. 2015) (upholding jury's determination that plaintiff had made out a prima facie case of race-based segregative effect, albeit ruling for the defendant on this claim presumably after finding that defendant's justifications were legitimate; *supra* notes 106–116 and accompanying text (discussing *Anderson*); *cf.* Langlois v. Abington Hous. Auth., 234 F. Supp. 2d 33, 69–70 (D. Mass. 2002) (holding, after ruling inadequate defendants' proffered justification for their residency preferences challenged here on disparate-impact grounds, that plaintiffs' suggested alternatives were sufficient to prevail in Step Three even if defendants had met their Step Two burden).

The most common type of segregative-effect case has involved a municipal-defendant's blocking of a proposed affordable housing project, with the defendant pointing to traditional zoning concerns (e.g., increased traffic or demands on municipal services) to justify its action. To the extent such concerns are shown to be legitimate, they could presumably be reduced by modifying the proposed development (e.g., by limiting residents' ability to have cars or providing recreational facilities on the grounds).

Courts considering Step Three in FHA disparate-impact cases have looked with favor on modifications of the policy at issue.[344] Note, however, that these were suggested modifications to the defendant's challenged policy—which is what Step Three calls for—and not to the plaintiff's proposed housing. Still, this concept could be adapted to the typical segregative-effect case by suggesting that, instead of blocking the plaintiff's proposal, the defendant approve it but with conditions that meet the latter's legitimate concerns. This would work in most exclusionary zoning cases.

But the more general problem remains. Given that the segregative-effect theory can be used to challenge single actions as well as policies,[345] there may be cases in which it is harder to envision how a plaintiff can prevail in Step Three when the litigation's only real goal is to overturn the defendant's action rather than to modify it.

CONCLUSION

The Fair Housing Act's segregative-effect theory provides an additional way of curbing arbitrary barriers to integrated housing that thwart the FHA's core mission. Like FHA disparate-impact claims, the segregative-effect theory does not require a showing of illegal intent and dates back to appellate decisions from the 1970s. Now bolstered by a 2013 HUD regulation, both segregative-effect and disparate-impact claims are subject to the same three-step burden-shifting scheme, with the plaintiff first having to prove that the defendant's challenged practice causes a discriminatory effect. The segregative-effect theory, however, has received substantially less attention that its disparate-impact counterpart.

This Article provides guidance for evaluating FHA segregative-effect claims. This theory is based primarily on cases challenging municipal land-use restrictions on affordable housing projects. These "heartland" cases, which continue to generate a substantial amount of

344. *See, e.g.*, *Langlois*, 234 F. Supp. 2d at 70; *Horizon House*, 804 F. Supp. at 698.
345. *See supra* Section II.A.1.

litigation, establish the necessary elements of a segregative-effect claim. Because these elements and the statistical proof necessary to support them may be easier to prove than in a disparate-impact case and also because segregative-effect claims may challenge one-time decisions as well as general policies, this theory may succeed in certain types of exclusionary zoning cases where a disparate-impact claim would not.

The segregative-effect theory may also apply in a variety of other situations. These include cases involving local-resident preferences in communities with few minorities and racial steering by private housing providers. Further, the theory applies not just to race and national origin cases, but to all FHA-prohibited bases of discrimination; one example would be claims by group homes for disabled persons, and the theory may support some religion-based claims as well.

This Article has shown how FHA segregative-effect claims differ from those under the disparate-impact theory and how they may make a unique contribution to FHA law. The main focus has been the proof necessary in the crucial Step One or "prima facie case" stage of a segregative-effect case, but the Article also shows that key differences in Steps Two and Three may occur in these two types of FHA-effect cases.

The guidance provided here is offered with the understanding that the FHA's segregative-effect theory is still a work in progress, with more judicial attention and standard-setting needed. This is particularly true with respect to the "how much" issue, i.e., how much a defendant's challenged action must be shown to add to segregation before this theory will require a defendant to provide a justification for that action. This is a crucial issue in all FHA-effect cases, whose main contribution is likely to be the mandate that practices that curb housing opportunities for minorities require a substantial justification. Thus, the Article's ultimate conclusion is that, while the segregative-effect theory holds great promise for advancing the FHA's inclusion goals, it needs more refinement before that promise can be fulfilled.