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Disparate Impact Claims Under the Fair Housing Act

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September 24, 2015

Congressional Research Service
7-....
www.crs.gov
R44203

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

The Fair Housing Act (FHA) was enacted "to provide, within constitutional limitations, for fair housing throughout the United States." It prohibits discrimination on the basis of race, color, religion, national origin, sex, physical and mental handicap, and familial status. Subject to certain exemptions, the FHA applies to all sorts of housing, public and private, including single family homes, apartments, condominiums, and mobile homes. It also applies to "residential real estate-related transactions," which include both the "making [and] purchasing of loans ... secured by residential real estate [and] the selling, brokering, or appraising of residential real property." There has been controversy over whether, in addition to outlawing intentional discrimination, the FHA also prohibits certain housing-related decisions that have a discriminatory effect on a protected class. That controversy was settled when, in June 2015, a divided U.S. Supreme Court ruled that disparate impact claims are cognizable under the FHA.

Key Takeaways of This Report

- In February 2013, Department of Housing and Urban Development (HUD) for the first time issued regulations "formaliz[ing] HUD's long-held interpretation of the availability of 'discriminatory effects' liability under the Fair Housing Act and to provide nationwide consistency in the application of that form of liability."
- In June 2015, the Supreme Court held in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project* that disparate impact claims are cognizable under the FHA—a view previously espoused by HUD and the 11 U.S. Courts of Appeals to render opinions on the issue. The Court also outlined certain limiting factors that should apply when assessing disparate impact claims.
- The Supreme Court appears to have adopted a three-step burden-shifting test for assessing disparate impact liability under the FHA. The test outlined by the Court, which is similar though not identical to the one adopted by HUD, places the initial burden on the plaintiffs to establish evidence that a housing decision or policy caused a disparate impact on a protected class. Defendants can counter the plaintiff's *prima facie* showing by establishing that the challenged policy or decision is "necessary to achieve a valid interest." The defendant's "valid interest" will stand unless the "plaintiff has shown that there is an available alternative practice that has less disparate impact and serves the entity's legitimate needs." Going forward, the minority of federal circuits that historically have used a different type of test likely will begin using a burden-shifting scheme consistent with the test outlined in *Inclusive Communities*.
- The Supreme Court stressed that lower courts and HUD should rigorously evaluate plaintiffs' disparate impact claims to ensure that evidence has been provided to support, not only a statistical disparity, but also causality (i.e., that a particular policy implemented by the defendant *caused* the disparate impact).
- The Court also emphasized that claims should be disposed of swiftly in the preliminary stages of litigation when plaintiffs have failed to provide sufficient evidence of causality.
- Although plaintiffs historically have faced fairly steep odds of getting their disparate impact claims past the preliminary stages of litigation, much less succeeding on the merits, the "cautionary standards" stressed by the Supreme Court might result in even fewer successful disparate impact claims being raised in the courts and/or swifter disposal of claims that are raised.

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Introduction

The Fair Housing Act (FHA) was enacted "to provide, within constitutional limitations, for fair housing throughout the United States."[1] It prohibits discrimination on the basis of race, color, religion, national origin, sex, physical and mental handicap, and familial status. Subject to certain exemptions, the FHA applies to all sorts of housing, public and private, including single family homes, apartments, condominiums, and mobile homes. It also applies to "residential real estate-related transactions," which include both the "making [and] purchasing of loans ... secured by residential real estate [and] the selling, brokering, or appraising of residential real property."[2]

In June 2015, the Supreme Court, in *Texas Department of Housing Community Affairs v. Inclusive Communities Project*,[3] confirmed the long-held interpretation that, in addition to outlawing intentional discrimination, the FHA also prohibits certain housing-related decisions that have a discriminatory effect[4] on a protected class.[5]

Historically, courts have generally recognized two types of disparate impacts resulting from "facially neutral decision[s]" that can result in liability under the FHA.[6]

> The first occurs when that decision has a greater adverse impact on one [protected] group than on another. The second is the effect which the decision has on the community involved; if it perpetuates segregation and thereby prevents interracial association it will be considered invidious under the Fair Housing Act independently of the extent to which it produces a disparate effect on different racial groups.[7]

The Supreme Court's holding in *Inclusive Communities* that "disparate-impact claims are cognizable under the [FHA]" mirrors previous interpretations of the Department of Housing and Urban Development[8] (HUD) and all 11 federal courts of appeals[9] that had ruled on the issue.

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[1] 42 U.S.C. §3601. The FHA, 42 U.S.C. §§3601 *et seq.*, was originally enacted as Title VIII of the Civil Rights Act of 1968. For an overview of the FHA, *see* CRS Report 95-710, *The Fair Housing Act (FHA): A Legal Overview*, by (name redacted)

[2] 42 U.S.C. §3605.

[3] 135 S. Ct. 2504 (2015). The Supreme Court had granted *certiorari* in two similar disparate impact cases in each of the previous two terms; however, in both those cases, the parties reached settlement agreements before the Court had the opportunity to issue an opinion on whether disparate impact claims are cognizable under the FHA. *See* Magner v. Gallagher, 132 S. Ct. 1306 (2012) and Twp. of Mt. Holly v. Mt Holly Garden Citizens in Action, Inc., 134 S. Ct. 636 (2013). *See also* CRS Legal Sidebar WSLG1151, *Supreme Court Set to Review Fair Housing Case: Third Time's the Charm?*, by (name redacted)

[4] The term "discriminatory effect" is used interchangeably with the term "disparate impact."

[5] Texas Dept. of Hous. & Cmnty Affairs v. Inclusive Communities Project, 135 S. Ct. 2525 (2015).

[6] Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977).

[7] *Id.* The FHA's protections are not limited to race. *See also Inclusive Communities*, 135 S. Ct. at 2522 ("Rather, the FHA aims to ensure that those [valid governmental] priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation.").

[8] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460 (February 15, 2013).

[9] *Vill. of Arlington Heights*, 558 F.2d at 1290 (7th Cir. 1977); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 149-50 (3d 3rd Cir. 1977); Betsey v. Turtle Creek Assocs., 736 F.2d 983, 988-89 (4th Cir. 1984); Keith v. Volpe, 858 F.2d 467, 484 (9th Cir. 1988); Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 938 (2d Cir. 1988), judgment aff'd, 488 U.S. 15 (1988); Jackson v. Okaloosa County, Fla., 21 F.3d 1531, 1543 (11th Cir. 1994); Simms v. First Gibraltar Bank, 83 F.3d 1546, 1555 (5th Cir. 1996); Langlois v. Abington Hous. Auth., 207 F.3d 43, 49-50 (1st Cir. 2000); Charleston Hous. Auth. v. U.S. Dep't of Agric., 419 F.3d 729, 740-41 (8th Cir. 2005); Graoch Assocs. #33, L.P. v. Louisville/Jefferson Cnty Metro Human Relations Comm'n, 508 F.3d 366, 374 (6th Cir. 2007); Reinhart v. Lincoln Conty, 482 F.3d 1225, 1229 (10th Cir. 2007). The U.S. Court of Appeals for the District of Columbia (D.C. Circuit) has (continued...)

However, as discussed further below, HUD and the 11 courts of appeals have not all applied the same criteria for determining when a neutral policy that causes a disparate impact violates the FHA. In a stated attempt to harmonize disparate impact analysis across the country, HUD finalized regulations in 2013 that established uniform standards for determining when such practices violate the act.[10]

The *Inclusive Communities* Court did not expressly adopt the standards established in HUD's disparate impact regulations. Rather, the Court adopted a three-step burden-shifting test that has some similarities with these standards. In addition, the Court outlined a number of limiting factors that lower courts and HUD should apply when assessing disparate impact claims. It likely will take years to gain a strong understanding of how the *Inclusive Communities* decision will affect future disparate impact litigation under the FHA (and other laws such as Title VII of the Civil Rights Act of 1964).[11] While plaintiffs historically have faced fairly steep odds of getting their disparate impact claims past the preliminary stages of litigation, much less succeeding on the merits of those claims, it is possible that the "cautionary standards" stressed by the *Inclusive Communities* majority might result in even fewer successful disparate impact claims and swifter disposal of claims that are raised.

This report provides an overview of how the lower courts and HUD evaluated allegations of discriminatory effects before the Supreme Court's *Inclusive Communities* decision. This discussion is followed by an assessment of *Inclusive Communities* and an analysis of the potential implications of the Court's ruling.

Disparate Impact Analysis Before *Inclusive Communities*

As noted, all of the circuit courts of appeals that had previously addressed the issue held that disparate impact claims are cognizable under the FHA. The U.S. Court of Appeals for the Seventh Circuit, for example, reasoned that "a requirement that the plaintiff prove discriminatory intent before relief can be granted under the statute is often a burden that is impossible to satisfy.... A strict focus on intent permits racial discrimination to go unpunished in the absence of evidence of overt bigotry ... [which] has become harder to find."[12] The Seventh Circuit went on to explain that interpreting the FHA so narrowly as to allow systematic discrimination in housing simply because

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never ruled on the issue. *See Id*. at 46; 2922 Sherman Ave. Tenants' Assoc. v. District of Columbia, 444 F.3d 673, 679 (D.C. Cir. 2006) ("Given that only one side of the issue has been briefed, however, instead of simply adopting the approach of our respected sister circuits, we think it more appropriate to assume without deciding that the tenants may bring a disparate impact claim under the FHA.").

[10] 78 Fed. Reg. at 11460. HUD's regulations were subsequently vacated by the U.S. District Court for the District of Columbia, in a ruling that was issued prior to, and that is at odds with, the Supreme Court's *Inclusive Communities* decision. Am. Ins. Assoc. v. Dept. of Hous. and Urban Dev., 74 F. Supp. 3d 30 (D.D.C. 2014) (interpreting the FHA as only prohibiting intentional discrimination, not discriminatory effects, and vacating HUD's Disparate Impact Rule). The district court's decision was subsequently vacated and remanded for reconsideration in accordance with the Supreme Court's *Inclusive Communities* ruling. Am. Ins. Assoc. v. Dept. of Hous. and Urban Dev. No. 14-5321, Sept. 23, 2015 (D.C. Cir.) (*per curiam*). As of the publication date of this report, the district court has not issued a subsequent ruling.

[11] *See, e.g.*, Abril-Rivera v. Dept. of Homeland Sec., 795 F.3d 245, 255-46 (1st Cir. 2015) (applying aspects of *Inclusive Communities* to "affirm the district court's dismissal of plaintiffs' [Title VII] disparate impact claims.... ").

[12] *Vill. of Arlington Heights*, 558 F.2d at 1290 (7th Cir. 1977). Such a holding is not limited to disparate impacts on the basis of race.

it is done "discreetly" would be counter to congressional intent, and "[w]e therefore hold that at least under some circumstances a violation of section 3604(a) can be established by a showing of discriminatory effect without a showing of discriminatory intent."[13]

Beyond agreement that disparate impact claims are cognizable, a number of other commonalities existed among the circuits before the *Inclusive Communities* ruling. For example, courts typically looked to Title VII disparate impact cases in the employment context for guidance in FHA-based claims (and *vice versa*).[14]

Additionally, there was general agreement among the circuits that plaintiffs must rely on more than a mere statistical anomaly to make a *prima facie* showing of a discriminatory effect.[15] The Seventh Circuit, for instance, explained that "we refuse to conclude that every action which produces discriminatory effects is illegal. Such a per se rule would go beyond the intent of Congress and would lead courts into untenable results in specific cases."[16] The circuits generally agreed that plaintiffs must provide *causal* evidence—that is, evidence showing that a particular practice *caused* the disparity on a protected class.[17]

Another important common feature prior to *Inclusive Communities* is that plaintiffs were rarely successful with disparate impact claims, at least at the appellate level. Rather, it appears that most of the plaintiffs' disparate impact claims that were reviewed by federal courts of appeals were dismissed in preliminary stages of litigation before trials. One scholar, who conducted a

[13] *Vill. of Arlington Heights*, 558 F.2d at 1290 (7th Cir. 1977).

[14] *See, e.g.*, *Vill. of Arlington Heights*, 558 F.2d at 1289-90 (7th Cir. 1977); *Betsey*, 736 F.2d at 989 (4th Cir. 1984); *Mountain Side*¸ 56 F.3d at 1251 (10th Cir. 1995); *Simms*, 83 F.3d at 155-56 (5th Cir. 1996); *Langlois*, 207 F.3d at 49-51 (1st Cir. 2000); *Lapid-Laurel*, 284 F.3d at 446-67 (3rd Cir. 2002); Oti Kaga, Inc. v. South Dakota Hous. Dev. Auth., 342 F.3d 871, 883 (8th Cir. 2003); *Tsombandidis*, 352 F.3d at 575-76 (2nd Cir. 2005); Affordable Hous. Dev. Corp. v. City of Fresno, 433 F.3d 1182. 1194-95 (9th Cir. 2006); *Groach*, 508 F.3d at 374 (6th Cir. 2007). *See also Abril-Rivera*, 795 F.3d at 255-56 (1st Cir. 2015) (applying aspects of *Inclusive Communities* to "affirm the district court's dismissal of plaintiffs' [Title VII] disparate impact claims.... ").

[15] The Eleventh Circuit, as discussed below, has held that "A showing of a significant discriminatory effect suffices to demonstrate a *prima facie* violation of the Fair Housing Act. A plaintiff can demonstrate a discriminatory effect in two ways: it can demonstrate that the decision has a segregative effect or that it makes housing options significantly more restrictive for members of a protected group than for persons outside that group." Hallmark Developers, Inc. v. Garrison, 466 F.3d 1276, 1286 (11th Cir. 2006) (internal quotations omitted). *See also* Bonasera v. City of Norcross, 342 Fed. Appx. 581, 585 (11th Cir. 2009).

[16] *Vill. of Arlington Heights*, 558 F.2d at 1290 (7th Cir. 1977).

[17] *See, e.g.*, *Simms*, 83 F.3d at 1555-56 (5th Cir. 1996) ("The relevant question in a discriminatory effects claim against a private defendant, however, is not whether a single act or decision by that defendant has a significantly greater impact on members of a protected class, but instead the question is whether a policy, procedure, or practice specifically identified by the plaintiff has a significantly greater discriminatory impact on members of a protected class. In this case, Simms does not identify an alleged discriminatory policy, procedure, or practice of First Gibraltar, much less provide evidence, statistical or otherwise, that such policy, procedure, or practice had a significantly greater impact on members of a protected class. We therefore conclude that Simms did not present sufficient evidence to establish a violation of the FHA under a discriminatory effects theory of liability." (internal citations and quotations omitted)); Fair Hous. in Huntington Comm. Inc. v. Town of Huntington, 316 F.3d 357, 366 (2nd Cir. 2003) ("In order to make out a prima facie case under the FHA on a theory of disparate impact, a plaintiff must demonstrate that an outwardly neutral practice actually or predictably has a discriminatory effect; that is, has a significantly adverse or disproportionate impact on minorities, or perpetuates segregation."); *Groach*, 508 F.3d at 374 (6th Cir. 2007) ("First, a plaintiff must make a *prima facie* case of discrimination by identifying and challenging a specific housing practice, and then showing an adverse effect by offering statistical evidence of a kind or degree sufficient to show that the practice in question has caused the adverse effect in question ... " (internal citations and quotations omitted)); *Bonasera*, 342 Fed. Appx. at 585 (11th Cir. 2009) ("A plaintiff can demonstrate a discriminatory effect in two ways: it can demonstrate that the decision has a segregative effect or that it makes housing options significantly more restrictive for members of a protected group than for persons outside that group." (internal citations omitted)).

qualitative analysis[18] of the 92 cases in which a federal court of appeals made a substantive ruling on an FHA disparate impact claim from 1971 (when the Supreme Court, in *Griggs v. Duke Power*,[19] first held that disparate impact claims were cognizable under Title VII) through June 2013, found that

- plaintiffs obtained "positive outcomes" in only 18 cases[20] (i.e., 19.5% of the cases);[21]
- most of the cases (64 of 92 or 69.6%) were decided by the appellate courts before trials at the preliminary stages (i.e., pleading, summary judgment, or preliminary injunction) of litigation;[22]
- district court rulings in favor of plaintiffs were *reversed* by the appellate courts two-thirds of the time (12 of 18 decisions), in spite of the fact that it is estimated that lower courts are generally affirmed approximately 80% of the time;[23] and
- lower court rulings in favor of defendants were only reversed by the appellate courts 12 times out of 74 cases (i.e., 16.2% of the cases).[24]

As a result, the scholar concluded that,

> [w]hatever has prompted the Court's sudden interest in examining the question of disparate impact liability under the FHA [*i.e.*, by granting *certiorari* in disparate impact cases in two successive terms], this interest cannot be attributable to plaintiffs' high rate of success or the appellate courts' general unwillingness to impose a rigorous and exacting review of the claims at every stage of the proceedings.[25]

While commonalities did exist, the courts did not agree on every aspect of disparate impact analysis. Importantly, the courts were not in agreement as to how to determine if a discriminatory effect violates the act. The First,[26] Second,[27] Third,[28] Fifth,[29] Eighth,[30] and Ninth[31] Circuit Courts

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[18] Stacy E. Seichnaydre, *Is Disparate Impact Having an Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 Am. U. L. Rev. 357 (2013).

[19] 401 U.S. 424 (1971).

[20] The "positive outcomes" by circuit are: First Circuit: 0; Second Circuit: 2; Third Circuit: 3; Fourth Circuit: 2; Fifth Circuit: 0; Sixth Circuit: 1; Seventh Circuit: 1; Eighth Circuit: 4; Ninth Circuit: 4; Tenth Circuit: 0; Eleventh Circuit: 1. Stacy E. Seichnaydre, 63 Am. U. L. Rev. at Appx. A (2013).

[21] *Id.* at 393-94. There has been a steady increase of appellate decisions in each decade since *Griggs*. Three appellate decisions were issued in the 1970s, 15 in the 1980s, 23 in the 1990s; 36 in the 2000s; and 15 from 2010 through the first half of 2013. *Id.* 393-94. However, the number of plaintiffs' "positive outcomes" has not increased at the same pace as the total number of appellate decisions—three in the 1970s; seven in the 1980s; three in the 1990s; three in the 2000s; and two in the first three and one-half years of the 2010s. *Id.*

[22] *Id.* Half of the plaintiffs' "positive outcomes" were in the 28 post-trial appeals. *Id.*

[23] *Id.* at 398-99.

[24] *Id.*

[25] *Id.* at 399.

[26] *See, e.g.*, *Langlois*, 207 F.3d at 43 (1st Cir. 2000).

[27] *See, e.g.*, *Tsombandidis*, 352 F.3d at 565 (2nd Cir. 2005).

[28] *See, e.g.*, *Lapid-Laurel*, 284 F.3d at 442 (3rd Cir. 2002). *But see* Hartman v. Greenwich Walk Homeowner's Assoc., Inc., 71 Fed. Appx. 135 (3rd Cir. 2003) (applying a four-factor test).

[29] *See, e.g.*, Inclusive Cmtys. Project, Inc. v. Texas Dept. of Hous. & Cmty. Affairs, 747 F.3d 275, 281-83 (5th Cir. 2014) (applying the burden-shifting test established in regulations issued by HUD; prior to this case, the Fifth Circuit Court of Appeals " ... has not previously addressed the question of what legal standards apply to a disparate impact housing discrimination claim.").

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

of Appeals generally applied burden-shifting tests to assess the validity of a disparate impact claim pursuant to the FHA. Yet there were some differences in the tests applied, even among the courts that applied burden-shifting schemes. For example, all courts that used burden-shifting tests agreed that the burden is initially on the plaintiff to make a *prima facie* showing, generally with the use of statistics, that a specific policy results in a disparate impact upon a protected class, and that, upon such a showing, the burden shifts to the defendant to show that the policy was initiated for some nondiscriminatory, legitimate purpose.[32] From there, most of these courts shifted the burden to the plaintiff to submit proof of a viable, less discriminatory alternative.[33] The Second Circuit, on the other hand, upon a defendant's showing of a nondiscriminatory, legitimate purpose, kept the onus on the defendant to show there is not a less discriminatory alternative that would allow the defendant to meet the same legitimate purpose.[34]

Rather than the three-step burden-shifting test, the Seventh[35] Circuit historically applied a four-factor balancing test originally set out in the *Village of Arlington Heights* decision. These factors are

> (1) [the] strength of the plaintiff's statistical showing; (2) the legitimacy of the defendant's interest in taking the action complained of; (3) some indication—which might be suggestive rather than conclusive—of discriminatory intent; and (4) the extent to which relief could be obtained by limiting interference by, rather than requiring positive remedial measures of, the defendant.[36]

The Sixth[37] and Tenth[38] Circuit Courts of Appeals applied hybrid approaches using elements from both the Seventh Circuit's balancing test and a burden-shifting framework. The Fourth Circuit

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[31] *See, e.g.*, *Affordable Hous. Dev. Corp.*, 433 F.3d at 1182 (9th Cir. 2006).

[32] *See, e.g.*, *Huntington Branch*, 844 F.2d at 935-36 (2nd Cir. 1988); *Langlois*, 207 F.3d at 51 (1st Cir. 2000); *Lapid-Laurel*, 284 F.3d at 466-67 (3rd Cir. 2002); *Darst-Webbe*, 417 F.3d at 901-02 (8th Cir. 2005); *Graoch*, 508 F.3d at 374 (6th Cir. 2007); *Affordable Hous. Dev. Corp.*, 433 F.3d at 1195-96 (9th Cir. 2006).

[33] *See, e.g.*, Mt. Holly Gardens Citizens in Action v. Twp. of Mt. Holly, 658 F.3d 375, 382 (3rd Cir. 2011) (*but see Rizzo*, 564 F.2d at 149 (3rd Cir. 1977) (in an FHA disparate impact case of first impression, holding that the burden of establishing a less discriminatory alternative is on the defendant) ("The discretion of the district court in determining whether the defendant has carried its burden of establishing justification for acts resulting in discriminatory effects may be guided at the least by the following rough measures: a justification must serve, in theory and practice, a legitimate, bona fide interest of the Title VIII defendant, and the defendant must show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact." (internal citations omitted)); *Groach*, 508 F.3d at 373 (6th Cir. 2007); *Darst-Webbe*, 417 F.3d at 901-02 (8th Cir. 2005); *Mountain Side*, 56 F.3d at 1258 (10th Cir. 1995).

[34] *See, e.g.*, *Tsombanidis*, 352 F.3d at 575 (2nd Cir. 2005).

[35] *See, e.g.*, Phillips v. Hunter Trails Cmty. Assoc., 685 F.2d 184, 189-190 (7th Cir. 1982) (*quoting Vill. of Arlington Heights*, 558 F.2d at 1290).

[36] *See also*, Hartman v. Greenwich Walk Homeowners' Assoc., Inc., 71 Fed. Appx. 135, 137 (3rd Cir. 2003).

[37] *See, e.g.*, *Graoch*, 508 F.3d at 374 (6th Cir. 2007) ("Borrowing from our Title VII cases, then, we hold that disparate impact claims against private defendants under the FHA should be analyzed using a form of the *McDonnell Douglas* burden-shifting framework: First, a plaintiff must make a *prima facie* case of discrimination by identifying and challenging a specific housing practice, and then showing an adverse effect by offering statistical evidence of a kind or degree sufficient to show that the practice in question has caused the adverse effect in question. Second, if the plaintiff makes a *prima facie* case, the defendant must offer a legitimate business reason for the challenged practice. Third, if the defendant offers such a reason, the plaintiff must demonstrate that the defendant's reason is a pretext for discrimination, or that there exists an alternative housing practice that would achieve the same business ends with a less discriminatory impact. In order to evaluate the plaintiff's showing, we consider the strength of the plaintiff's showing of discriminatory effect against the strength of the defendant's interest in taking the challenged action." (internal citations and quotations omitted)).

applied a burden-shifting test when the defendant was a private party, but applied the four-factor balancing test with public defendants.[39] Finally, the Eleventh Circuit has explained that "[a] showing of a significant discriminatory effect suffices to demonstrate a *prima facie* violation of the Fair Housing Act" but the plaintiff must also establish evidence of causality—"A plaintiff can demonstrate a discriminatory effect in two ways: it can demonstrate that the decision has a segregative effect or that it makes housing options significantly more restrictive for members of a protected group than for persons outside that group."[40]

HUD's Disparate Impact Rule

For approximately two decades, through internal adjudicatory proceedings, appeals of those proceedings to federal courts, policy guidance, and other means, HUD has interpreted the FHA as supporting disparate impact claims.[41] The agency did not formally adopt the policy through regulations until February 2013. HUD explained in the preamble of the Implementation of the Fair Housing Act's Discriminatory Effects Standard Final Rule (the Rule or the Disparate Impact Rule) that "[t]his regulation is needed to formalize HUD's long-held interpretation of the availability of 'discriminatory effects' liability under the Fair Housing Act and to provide nationwide consistency in the application of that form of liability."[42]

The Rule defines "discriminatory effect" as a practice that

> actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.[43]

HUD adopted the "three-part burden-shifting test currently used by HUD and most federal courts," as described in the previous section, to assess whether a discriminatory effect violates the FHA.[44] Specifically, under the Rule, the plaintiff "has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect."[45] If a plaintiff is able to successfully prove a *prima facie* discriminatory effect, then the burden shifts to the defendant to "prov[e] that the challenged practice is necessary to achieve one or more [of its] substantial,

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[38] *Mountain Side*, 56 F.3d at 1251-52 (10th Cir. 1995) ("To establish a *prima facie* case of disparate impact discrimination, plaintiffs must show that a specific policy caused a significant disparate effect on a protected group. ... [A] prima facie case, once established, as here, could alone suffice to prove a Title VIII violation unless the defendants justify the discriminatory effect which has resulted from their challenged actions. ... The three factors we will consider in determining whether a plaintiff's *prima facie* case of disparate impact makes out a violation of Title VIII are: (1) the strength of the plaintiff's showing of discriminatory effect; (2) the defendant's interest in taking the action complained of; and (3) whether the plaintiff seeks to compel the defendant affirmatively to provide housing for members of a protected class or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing.").

[39] *Betsey*, 736 F.2d at 989 (4th Cir. 1984).

[40] *Hallmark Developers, Inc.*, 466 F.3d at 1286 (11th Cir. 2006) (internal quotations omitted). *See also Bonasera*, 342 Fed. Appx. at 585 (11th Cir. 2009).

[41] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11461 (February 15, 2013).

[42] *Id*. at 11460 (internal citations omitted).

[43] 24 C.F.R. 100.500(a).

[44] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460 (February 15, 2013).

[45] 24 C.F.R. 100.500(c)(1).

legitimate, nondiscriminatory interests.... "[46] Such an interest "must be supported by evidence and may not be not hypothetical or speculative."[47] If this burden is met, then the burden is shifted back to the plaintiff to "prov[e] that the substantial, legitimate, nondiscriminatory interest[] ... could be served by another practice that has a less discriminatory effect."[48]

The Supreme Court in *Inclusive Communities*

On June 25, 2015, in a 5-4 decision, the Supreme Court held that "disparate-impact claims are cognizable under the Fair Housing Act (or FHA).... "[49] However, the Court cautioned that disparate impact claims must rely on more than just "a statistical disparity"[50] and remedies for disparate impact violations "that impose racial targets or quotas might raise [] difficult constitutional questions."[51] The holding was surprising to some given that the Court chose to grant *certiorari* in the case in spite of the fact that there was no circuit split, leading to speculation that the Court was poised to overturn the lower court consensus that disparate impact claims generally are permissible.[52]

The Inclusive Communities Project, Inc. (ICP), "a Texas-based nonprofit corporation that assists low-income families in obtaining housing," sued the Texas Department of Housing and Community Affairs (DHCA) alleging that, by disproportionately distributing federal low-income housing tax credits in black-concentrated metropolitan areas as compared to white-concentrated suburban communities, DHCA perpetuated racial segregation in violation of the FHA.[53] The federal district court held that the plaintiffs had met their initial burden of establishing that DHCA's policy had a discriminatory effect on African-Americans, but concluded that the defendants had failed to prove that there was no viable, less discriminatory alternative. Consistent with precedent in the circuit, the Fifth Circuit agreed with the district court that the FHA authorizes disparate impact claims.[54] However, the Fifth Circuit reversed the district court's ruling because it had placed the burden of proving there were no less discriminating alternative policies on the defendant, in contravention of HUD's disparate impact regulations.[55] A concurring opinion, which was cited favorably by the Supreme Court's majority opinion,[56] also questioned whether the plaintiff sufficiently established a causal connection between the challenged policy and the relevant statistical disparity.[57] The Supreme Court affirmed the Fifth Circuit's judgment that

[46] 24 C.F.R. 100.500(c)(2).

[47] 24 C.F.R. 100.500(b)(2).

[48] 24 C.F.R. 100.500(c)(3). *See supra* n. 10.

[49] *Inclusive Communities*, 135 S. Ct. at 2525.

[50] *Id*. at 2512.

[51] *Id*. at 2524.

[52] *See, e.g.*, Emily Badger, *Supreme Court upholds a key tool fighting discrimination in the housing market*, Wash. Post, Jun. 25, 2015, available at http://www.washingtonpost.com/news/wonkblog/wp/2015/06/25/supreme-court-upholds-a-key-tool-fighting-discrimination-in-the-housing-market/.

[53] *Inclusive Communities*, 135 S. Ct. at 2514.

[54] *Id*.

[55] *Id*. at 2515.

[56] *Id*. at 2524 ("And as Judge Jones observed below, if the ICP cannot show a causal connection between the Department's policy and a disparate impact—for instance, because federal law substantially limits the Department's discretion—that should result in dismissal of this case." *Inclusive Communities*, 747 F. 3d at 283-284 (specially concurring opinion) [(5th Cir. 2014)].").

[57] *Id*. at 2515.

discriminatory effect claims are viable under the FHA, and remanded the case "for further proceedings consistent with this opinion," including, notably, its limiting principles regarding causality and remedies.[58]

To support its interpretation of the FHA, the Court began its analysis with two prior cases: *Griggs v. Duke Power Co.*[59] and *Smith v. City of Jackson*,[60] which the Court described as "provid[ing] essential background and instruction in the case now before the Court." In *Griggs* and *Smith*, the Court interpreted Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967 (ADEA), respectively, as supporting disparate impact claims because both statutes contain language that focuses, not just on the intent or motivation of employers, but also on the discriminatory consequences or effects of their actions.[61] Similarly, FHA Section 804(a) makes it unlawful "[t]o refuse to sell or rent ... or to refuse to negotiate for the sale or rental of, or *otherwise make unavailable* or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."[62] The Court stated that "the logic of *Griggs* and *Smith* provides strong support for the conclusion that the FHA encompasses disparate impact claims ... [because] Congress' use of the phrase 'otherwise make unavailable' refers to the consequences of an action rather than the actor's intent."[63]

The Court added that this conclusion is bolstered by the fact that Congress amended the FHA in 1988 to establish three exemptions to disparate impact liability without making any changes to the statutory language that previous courts had relied upon to conclude that disparate impact claims were cognizable under the act. "In short, the 1988 amendments signal that Congress ratified disparate-impact liability."[64]

After concluding that the FHA supports disparate impact claims, the Court provided guidance as to how disparate impact claims should be assessed. The Court made clear that, before a plaintiff can establish a *prima facie* case of discriminatory effect based on a statistical disparity, courts should apply a "robust causality requirement" that requires the plaintiff to prove that a policy or decision led to the disparity.[65] The Court stressed that a careful examination of the plaintiff's causality evidence should be made at preliminary stages of litigation to avoid "the inject[ion of] racial considerations into every housing decision"; the erection of "numerical quotas" and similar constitutionally dubious outcomes; the imposition of liability on defendants for disparities that they did not cause; and unnecessarily protracted litigation that might dissuade the development of housing for the poor, which would "undermine [the FHA's] purpose as well as the free-market system."[66]

The Court emphasized that disparate impact claims should be further limited by ensuring that defendants, whether private developers or governmental actors, have the ability to counter a *prima facie* case with evidence that the policy or decision in question is "necessary to achieve a valid interest."[67] Further, the Court seemed to indicate that such business decisions—or in cases

[58] *Id*. at 2524.

[59] 401 U.S. 424 (1971).

[60] 554 U.S. 228 (2005) (plurality).

[61] *Inclusive Communities*, 135 S. Ct. at 2517-18.

[62] *Id*. at 2518 (emphasis added) (*quoting* 42 U.S.C. §3604(a)).

[63] *Id*.

[64] *Id*. at 2521.

[65] *Id*. at 2523.

[66] *Id*. at 2523.

[67] *Id*. at 2522-23.

where the defendant is a governmental entity, decisions made in the public interest—should stand unless the "plaintiff has shown that there is an available alternative practice that has less disparate impact and serves the entity's legitimate needs."[68]

The Court also cautioned that court-ordered remedies for discriminatory effects generally should be race-neutral and focused on eradicating the policy that caused the disparate impact, rather than erecting constitutionally dubious "racial targets or quotas."[69]

The opinion concludes:

> Much progress remains to be made in our Nation's continuing struggle against racial isolation. In striving to achieve our "historic commitment to creating an integrated society," we must remain wary of policies that reduce homeowners to nothing more than their race. But since 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.[70]

The primary dissenting opinion, written by Justice Alito and joined by Chief Justice Roberts and Justices Thomas and Scalia, argued that the statutory text and the circumstances surrounding the original enactment of the FHA indicated that the act was only intended to bar overt discrimination—not disparate impact discrimination.[71] The dissent also disputed the majority's "conten[tion] that the 1988 amendments provide convincing confirmation of Congress' understanding that disparate-impact liability exists under the FHA.... "[72] Instead, the dissenting Justices viewed the 1988 amendments as a compromise between Members of Congress—some of whom agreed that disparate impact claims were cognizable under the FHA and some who did not. To support this argument, the dissent cited several opinions in which the Court rejected similar "implicit ratification" arguments.[73] Additionally, the dissent took issue with the majority's reliance on *Griggs*.[74]

Justice Thomas wrote a separate dissent, to which no other Justice joined. It argued that *Griggs* was wrongly decided, but even if it should be afforded some precedential value, that value should be limited to Title VII cases, rather than expanded to other contexts like the FHA and ADEA.[75]

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[68] *Id*. at 2517-18 (*citing* and *quoting* Title VII and ADEA cases). The Court did not expressly state that the burden should be on the plaintiff to prove the existence of a less discriminatory alternative in the FHA context. Instead, it stated that the plaintiff carries the burden of the third step in the burden-shifting tests applied in Title VII and ADEA cases, and that "[t]he cases interpreting Title VII and the ADEA provide essential background and instruction in the case now before the Court." *Id*.

[69] *Id*. at 2524.

[70] *Id*. at 2525-26. The "Kerner Commission Report" refers to the *Report of The National Advisory Commission on Civil Disorders* (1968). The report was written by a bipartisan commission established by Executive Order 11365, which was issued by President Lyndon Johnson in July 1967 in response to a series of riots and other civil unrest in the country. The commission was chaired by Governor Otto Kerner of Illinois.

[71] *Inclusive Communities*, 135 S. Ct. at 2532-37 (J. Alito, dissenting op.).

[72] *Id*. at 2540 (J. Alito, dissenting op.).

[73] *Id*. at 2537-43 (J. Alito, dissenting op.).

[74] *Id*. at 2543-48 (J. Alito, dissenting op.).

[75] *Id*. at 2526-32 (J. Thomas, dissenting op.).

Significance of the *Inclusive Communities* Decision

It is unclear exactly how the *Inclusive Communities* decision will change the way in which the lower courts and HUD will evaluate disparate impact claims going forward, and any effect likely will vary from circuit to circuit. However, a review of several of the decision's most notable holdings elucidates some potential implications.

First, the Court appears to have adopted a three-step burden-shifting test for assessing disparate impact liability under the FHA. At step one, the plaintiff has the burden of establishing evidence that a housing decision or policy caused a disparate impact on a protected class. At step two, defendants can counter the plaintiff's *prima facie* showing by establishing that the challenged policy or decision is "necessary to achieve a valid interest." The defendant will not be liable for the disparate impact resulting from a "valid interest" unless, at step three, the plaintiff proves "that there is an available alternative practice that has less disparate impact and serves the entity's legitimate needs."

As a result, circuits, such as the Fourth (in cases with public defendants) and Seventh, that historically have used a balancing test likely will begin using a burden-shifting test. Additionally, although the opinion offers scant guidance regarding step three, it seems to conclude that the burden should be on the plaintiff to establish a less discriminatory alternative.[76] Thus, the Second Circuit likely will place the burden on the plaintiff rather than the defendant to establish a less discriminatory alternative in future decisions in light of *Inclusive Communities.* These changes might have taken place even in the absence of the Supreme Court ruling as a result of HUD's disparate impact rule.[77]

In addition, the specific standards that the *Inclusive Communities* Court detailed for each step of the burden-shifting test, though considerably similar, may not be identical to those historically applied by the lower courts and HUD. For example, the standards for steps one and two that are detailed in *Inclusive Communities* seem to be largely consistent with those in HUD's disparate impact rule. However, the Court used somewhat different language that could be interpreted as being more exacting on plaintiffs at step one and more deferential to defendants at step two, as compared to the Rule. Both the Court and HUD's Rule require plaintiffs to establish a *prima facie* case, which must include causal evidence. The Rule states that the plaintiff must "prov[e] that a challenged practice caused *or predictably will cause* a discriminatory effect."[78] The *Inclusive Communities* Court neither expressly endorses nor disapproves of the "predictably will cause" language. The Court and the Rule agree that the burden at the second step is on the defendant. The Court states that defendants can counter a *prima facie* case by proving that the challenged practice is "necessary to achieve a valid interest."[79] The Rule, in contrast, states that the defendant

[76] The Court did not expressly state that the burden should be on the plaintiff to prove the existence of a less discriminatory alternative in the FHA context. *See supra*, n. 70.

[77] *See, e.g.*, *Inclusive Communities*, 747 F.3d at 276 (5th Cir. 2014) ("We adopt the standard announced in recently enacted Department of Housing and Urban Development (HUD) regulations regarding burdens of proof in disparate impact housing discrimination cases.... "); *Property Cas. Ins. Assoc.*, 66 F. Supp.3d at 1053 (N.D. Ill. 2014) ("Under these circumstances, HUD's adoption of the three-step burden-shifting approach outlined in the Disparate Impact Rule was reasonable and the Court defers to it.").

[78] 24 C.F.R. §100.500(c)(1) (emphasis added).

[79] *Inclusive Communities*, 135 S. Ct. at 2522-23.

must "prov[e] that the challenged practice is necessary to achieve one or more *substantial*,[80] legitimate, nondiscriminatory interests.... "[81]

Two other major takeaways involve *how* disparate impact claims should be evaluated. The Supreme Court stressed that lower courts and HUD should rigorously evaluate plaintiffs' claims to ensure that evidence has been provided to support not only a statistical disparity, but also causality. Additionally, the Court emphasized that claims should be disposed of swiftly in the preliminary stages of litigation if plaintiffs have failed to establish a *prima facie* case of disparate impact.

As previously mentioned, over the last several decades, plaintiffs have faced fairly steep odds of getting their disparate impact claims past the preliminary stages of litigation, much less succeeding on the merits of those claims. Additionally, all of the federal courts of appeals and HUD, when assessing disparate impact claims, have stated that they were applying tests that required plaintiffs to show that a challenged policy actually caused the disparate impact in order to support a *prima facie* case. Nevertheless, the *Inclusive Communities* decision might result in some lower courts applying the causality standards more stringently than they had previously, thus making it more difficult for plaintiffs to establish *prima facie* cases of discriminatory effects.

The *Inclusive Communities* majority opinion[82] explicitly criticized one specific case—the Eighth Circuit's decision in *Magner v. Gallagher*, a case which the Court had previously granted *certiorari*, but ultimately dismissed because the parties settled out of court. The Court stated that *Magner* "was decided without the cautionary standards announced in this opinion."[83] The primary point of contention likely was not with the three-step burden-shifting test that the Eighth Circuit applied,[84] but rather with *how* the court applied the test.

It is possible that, by its criticism, the *Inclusive Communities* Court might have been signaling its disapproval of the Eighth Circuit's failure to require the plaintiffs to provide evidence that *directly* tied the city's housing code enforcement to a reduction in the affordable housing of African-Americans. Instead, the Eighth Circuit relied on *indirect* evidence and "reasonable ... infer[ences]."[85] In other words, it is possible that the *Inclusive Communities* Court expects lower courts to ensure that plaintiffs have provided evidence at the preliminary stages of litigation that fully "connects the dots" between the neutral policy and the disparate impact, before concluding that plaintiffs have established a *prima facie* case.[86]

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[80] In the preamble to the Rule, HUD defines the term "substantial" to mean "a core interest of the organization that has a direct relationship to the function of that organization." 78 Fed. Reg. at 11,470.

[81] 24 C.F.R. §100.500(c)(2) (emphasis added).

[82] The primary dissenting opinion also criticized *Magner*. *Inclusive Communities*, 135 S. Ct. at 2532, 2548 (J. Alito, dissenting op.).

[83] *Inclusive Communities*, 576 U.S. at 21-22.

[84] The test applied by the *Magner* court was similar, but not identical to the test outlined by the Supreme Court in *Inclusive Communities*. For example, the *Magner* court stated that, at step two, the defendant had the burden of proving that "its policy or practice had a manifest relationship to a legitimate, nondiscriminatory policy objective and was necessary to the attainment of that objective." *Magner*, 619 F.3d at 834 (8th Cir. 2010). In contrast, the Supreme Court stated that the defendant's burden at step two is to prove that the challenged policy is "necessary to achieve a valid interest." *Inclusive Communities*, 135 S. Ct. at 2524.

[85] *Magner*, 619 F.3d at 835 ("... the evidence shows that the City's Housing Code enforcement temporarily, if not permanently, burdened Appellants' rental businesses, which *indirectly* burdened their tenants. Given the existing shortage of affordable housing in the City, it is *reasonable to infer* that the overall amount of affordable housing decreased as a result.") (emphasis added).

[86] *Id*. ("Though there is not a single document that connects the dots of Appellants' disparate impact claim, it is enough (continued...)

In sum, it is possible that the "cautionary standards"[87] stressed by the *Inclusive Communities* majority might result in even fewer successful disparate impact claims being raised, and swifter disposal of claims that are raised. This could, in turn, discourage claims from being raised at all.

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(...continued)
that each analytic step is reasonable and supported by evidence.").

[87] *Inclusive Communities*, 135 S. Ct. at 2524.