Assessing HUD's Disparate Impact Rule: A Practitioner's Perspective

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The U.S. Department of Housing and Urban Development recently promulgated a regulation articulating a uniform standard for analyzing evidence of disparate impact in cases brought under the Fair Housing Act. The authors, from the firm of Relman, Dane & Colfax, offer a practitioner's perspective of the new "Discriminatory Effects Rule," trace its roots through four decades of FHA litigation, and offer their views on the major substantive and procedural issues facing counsel on both sides of such litigation in the coming decade.

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Introduction

The Fair Housing Act[1] ("FHA" or "the Act") begins with a bold pronouncement that captures the spirit of a law passed six days after the assassi-

[1] 42 U.S.C. §§ 3601–19, 3631 (2006).

nation of Dr. Martin Luther King, Jr.:[2] "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."[3] Congress recognized in adopting the Act that despite existing statutory prohibitions against certain forms of explicit discriminatory conduct, "local ordinances *with the same effect*, although operating more deviously to avoid the Court's prohibition, were still being enacted."[4] In amending the FHA in 1988, Congress reaffirmed its commitment to eradicating zoning policies and practices that have a discriminatory effect by including protections for people with disabilities and declining to adopt proposed amendments that would have imposed an intent requirement on the Act. The committee report declared: "The Act is intended to prohibit the application of special requirements through land-use regulations, restrictive covenants, and conditional or special use permits *that have the effect of* limiting the ability of such individuals to live in the residence of their choice in the community."[5]

Consistent with these statements of legislative intent, courts across the country have applied the disparate impact standard in evaluating claims under the FHA, in recognition that "[e]ffect, not motivation, is the touchstone because a thoughtless housing practice can be as unfair to minority rights as a willful scheme."[6] Every circuit to consider the question — eleven in all — has held that the FHA prohibits housing practices that have a disparate impact on a protected group, even in the absence of discriminatory intent.[7] Likewise, over the course of twenty years of formal adjudications, the U.S. Department of Housing and Urban Development ("HUD"), the agency with authority to administer the FHA,[8] has consistently concluded that disparate impact claims are cognizable under the Act.[9] Over the FHA's

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[2] Schanz v. Vill. Apartments, 998 F. Supp. 784, 788 (E.D. Mich. 1998) (citing 136 CONG. REC. E1221 (daily ed. Apr. 25, 1990)).

[3] 42 U.S.C. § 3601 (2006); *see also* Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972) ("Congress considered [this policy] to be of the highest priority.").

[4] 114 CONG. REC. 2699 (1968) (emphasis added) (statement of Sen. Mondale).

[5] H.R. REP. NO. 100-711, at 24 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2185 (emphasis added).

[6] Smith v. Anchor Bldg. Corp., 536 F.2d 231, 233 (8th Cir. 1976).

[7] *See* Langlois v. Abington Hous. Auth., 207 F.3d 43, 49 (1st Cir. 2000); Mountain Side Mobile Estates P'ship v. Sec'y of HUD, 56 F.3d 1243, 1251 (10th Cir. 1995); Keith v. Volpe, 858 F.2d 467, 482–83 (9th Cir. 1988); Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 935–36 (2d Cir. 1988), *aff'd in part*, 488 U.S. 15 (1988); Hanson v. Veterans Admin., 800 F.2d 1381, 1386 (5th Cir. 1986); Arthur v. City of Toledo, 782 F.2d 565, 574–75 (6th Cir. 1986); United States v. Marengo Cnty. Comm'n, 731 F.2d 1546, 1559 n.20 (11th Cir. 1984); Smith v. Town of Clarkton, 682 F.2d 1055, 1065 (4th Cir. 1982); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 146 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights (*Arlington Heights II*), 558 F.2d 1283, 1289–90 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978); United States v. City of Black Jack, 508 F.2d 1179, 1184–85 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).

[8] 42 U.S.C. § 3608(a) (2006); *see also* Meyer v. Holley, 537 U.S. 280, 287 (2003).

[9] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,461 & nn.12–16 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100) [hereinafter HUD Statement]; 60 Fed. Reg. 61,846, 61,866–68 (Dec. 1, 1995) (codified at 24 C.F.R. pt. 81).

forty-five-year history, courts have applied the disparate impact standard to a wide range of practices that were alleged to harm protected groups disproportionately. These practices include exclusionary zoning ordinances,[10] the administration of Section 8 vouchers,[11] lending practices,[12] mortgage insurance policies,[13] landlord and housing provider reference policies,[14] occupancy restrictions,[15] and the demolition and siting of subsidized housing.[16]

Despite four decades of unanimity among the federal circuits that the FHA imposes disparate impact liability, defendants have periodically challenged the applicability of the disparate impact standard under the FHA. The Supreme Court's 2005 decision in *Smith v. City of Jackson*,[17] in which the Court held that the text of the Age Discrimination in Employment Act ("ADEA") supports disparate impact liability,[18] reignited those challenges. In the wake of *Smith*, litigants and interested third parties, such as the banking industry, have sought to draw distinctions between the text of the FHA and statutory language in the ADEA to argue that unlike the ADEA, the FHA does not support disparate impact liability.[19]

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[10] *See, e.g.*, *Huntington*, 844 F.2d at 937–38; JOSEPH D. RICH, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, HUD'S NEW DISCRIMINATORY EFFECTS REGULATION: ADDING STRENGTH AND CLARITY TO EFFORTS TO END RESIDENTIAL SEGREGATION 5–7 (2013), *available at* http://www.lawyerscommittee.org/admin/fair_housing/documents/files/disparate-impact-summary-final-5-17-13.pdf, *archived at* http://perma.cc/0MJYZGKsYDk (surveying cases).

[11] *See* Graoch Assocs. #33, L.P. v. Louisville/Jefferson Cnty. Metro Human Relations Comm'n, 508 F.3d 366, 376–77 (6th Cir. 2007) (holding that a housing provider may be held liable under the disparate impact standard for withdrawing from Section 8 program); Langlois v. Abington Hous. Auth., 234 F. Supp. 2d 33, 62–64 (D. Mass. 2002) (applying the disparate impact standard to residency preference in Section 8 program).

[12] *See* Miller v. Countrywide Bank, N.A., 571 F. Supp. 2d 251, 258 (D. Mass. 2008); Hargraves v. Capital City Mortgage Corp., 140 F. Supp. 2d 7, 20 (D.D.C. 2000).

[13] *See* Nat'l Fair Hous. Alliance, Inc. v. Prudential Ins. Co. of Am., 208 F. Supp. 2d 46, 63 (D.D.C. 2002) (denying motion to dismiss allegations that mortgage insurance criteria had a disparate impact).

[14] *See* Fair Hous. Justice Ctr. v. Edgewater Park Owners Coop., Inc., No. 10 CV 912 (RPP), 2012 WL 762323, at *10–11 (S.D.N.Y. Mar. 9, 2012) (discussing cooperative policy of requiring reference from existing owners).

[15] *See* United States v. Tropic Seas, Inc., 887 F. Supp. 1347, 1360 (D. Haw. 1995) (finding occupancy restriction to have a disparate impact on families with children); Tim Iglesias, *Moving Beyond Two-Person-Per-Bedroom*, 28 GA. ST. U. L. REV. 619, 645–53 (2012) (arguing that occupancy restrictions have a disparate impact on families).

[16] *See* Charleston Hous. Auth. v. U.S. Dep't of Agric., 419 F.3d 729, 740–42 (8th Cir. 2005) (demolition); Jackson v. Okaloosa Cnty., 21 F.3d 1531, 1542–43 (11th Cir. 1994) (site selection).

[17] 544 U.S. 228 (2005).

[18] *Id.* at 233–40; *see also* HUD Statement, *supra* note 9, at 11,465–67 (addressing objections to disparate impact under the FHA based on *Smith*).

[19] *Smith*, 544 U.S. at 235–40; *see also* Petition for Writ of Certiorari at 15–18, Twp. of Mount Holly v. Mount Holly Gardens Citizens in Action, Inc., No. 11-1507 (U.S. June 11, 2012), 2012 WL 2151511. As persuasively shown in the respondents' Brief in Opposition to the Petition for Writ of Certiorari, *Magner v. Gallagher*, No. 10-1032 (U.S. June 15, 2011), there are in fact important similarities between the ADEA and the FHA that fully support a conclusion that disparate impact is equally cognizable under the latter as the former. *See id.* at 43–59 (discussing relevant similarities in the legislative history and judicial interpretations of the two Acts and refuting the petitioners' assertion that the statutory phrasing "because of

That debate recently reached the doorstep of the U.S. Supreme Court. Following a September 2011 Third Circuit decision allowing disparate impact claims brought by African American and Latino homeowners challenging a New Jersey township's redevelopment plan to proceed to trial,[20] the Township of Mount Holly sought a writ of certiorari on two questions: whether disparate impact claims are cognizable under the FHA, and if so, which framework courts should use to analyze these claims.[21] On June 17, 2013, after requesting and receiving briefing from the Solicitor General arguing the Court should not take the matter up,[22] the Supreme Court granted certiorari to address the first question only.[23] Shortly prior to the scheduled oral argument, on November 15, 2013, the Supreme Court dismissed the case under Supreme Court Rule 46,[24] following press reports the parties had reached a settlement agreement resolving the underlying litigation.[25]

Four months before the grant of certiorari, HUD promulgated a final rule, "Implementation of the Fair Housing Act's Discriminatory Effects Standard" ("Final Rule" or "the Rule"),[26] in which HUD "formalizes its long-held recognition of discriminatory effects liability under the Act and, for purposes of providing consistency nationwide, formalizes a burden-shifting test for determining whether a given practice has an unjustified discriminatory effect, leading to liability under the Act."[27] Notwithstanding the resolution of *Mount Holly*, the Final Rule, as the definitive interpretation by the federal agency charged with FHA enforcement, will be of central importance to federal courts in the adjudication of disparate impact cases going forward.[28]

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race" etc. in the FHA signaled congressional intent to restrict FHA liability to disparate treatment).

[20] Mount Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375, 377 (3rd Cir. 2011), *cert. granted*, 133 S. Ct. 2824 (2013), *cert. dismissed*, No. 11-1507, 2013 WL 6050174 (U.S. Nov. 15, 2013).

[21] Petition for Writ of Certiorari, *supra* note 19, at i.

[22] Twp. of Mount Holly v. Mount Holly Gardens Citizens in Action, Inc., 133 S. Ct. 569 (2012) (mem); *see* Brief for the United States as Amicus Curiae, *Mount Holly*, No. 11-1507 (U.S. May 17, 2013).

[23] Twp. of Mount Holly v. Mount Holly Gardens Citizens in Action, Inc., 133 S. Ct. 2824 (2013) (mem). In 2011, the Supreme Court had granted certiorari in *Gallagher v. Magner*, 619 F.3d 823 (8th Cir. 2010) to address the same question, but the parties to the *Magner* litigation settled their dispute before it was argued to the Supreme Court, resulting in the dismissal of the petition. Magner v. Gallagher, 132 S. Ct. 548 (2011), *cert. dismissed*, 132 S. Ct. 1306 (2012).

[24] Order Dismissing Writ of Certiorari, *Mount Holly*, No. 11-1507 (U.S. Nov. 15, 2013), 2013 WL 6050174.

[25] *See* Adam Liptak, *Fair-Housing Case Is Settled Before It Reaches Supreme Court*, N.Y. TIMES (Nov. 13, 2013), http://www.nytimes.com/2013/11/14/us/fair-housing-case-is-settled-before-it-reaches-supreme-court.html, *archived at* http://perma.cc/09Dhz2wn6E1.

[26] HUD Statement, *supra* note 9, at 11,461 & nn.12–16.

[27] *Id.* at 11,460.

[28] This is especially true with respect to the measure of deference to be accorded to the Rule. Though a full discussion of the doctrine of agency deference is beyond the scope of this Article, the fact that HUD has exclusive authority to administer the FHA and promulgated the Rule pursuant to its statutory notice-and-comment rulemaking powers places the Final Rule squarely within the test for full judicial deference. *See* Smith v. City of Jackson, 544 U.S. 228,

In this Article we consider what the Rule accomplishes, why it matters for fair housing plaintiffs and defendants, and questions that it leaves open for practitioners and the courts to resolve with the benefit of HUD's guidance. Five particular aspects of the Rule that provide guidance to fair housing practitioners, both plaintiffs and defendants, bear emphasis in this Introduction:

First, the Rule brings uniformity. While circuit courts have unanimously found disparate impact claims cognizable under the FHA, they have employed various analytical approaches in applying the disparate impact standard. HUD acknowledges these in explaining the Rule's purpose of "offer[ing] clarity to persons seeking housing and persons engaged in housing transactions as to how to assess potential claims involving discriminatory effects."[29]

Second, the Rule affirms that the disparate impact standard should be applied in a pragmatic and case-specific manner. It recognizes that an evaluation of a challenged practice's disparate impact frequently involves a sliding-scale analysis. For example, when statistical evidence of disparate impact is strong, little or no evidence of intent will be required. Conversely, a case with less compelling statistical evidence might still support a disparate impact finding when supported by some evidence of discriminatory intent.

Third, the Rule makes clear that disparate impact is not a "gotcha" standard of liability intended to trap unwitting defendants; nor does it require quotas or set-asides. When a defendant, using evidence that is neither hypothetical nor speculative, can establish a legitimate, nondiscriminatory justification for a practice that may have a discriminatory effect, that defendant can prevail unless the plaintiff then demonstrates the existence of a less discriminatory alternative practice that achieves the same objective.

Fourth, by providing guidance on the discernment of less discriminatory alternatives — a showing for which the Rule assigns some responsibility to both plaintiffs and defendants — HUD focuses practitioners' attention on achieving the FHA's ultimate goal: the pursuit and implementation of best practices that achieve legitimate business or governmental objectives through the least discriminatory means possible, revealing the Rule's emphasis on equitable outcomes rather than "gotcha" liability.

Fifth, the Rule does not answer every question that might arise in the course of future disparate impact litigation. Practitioners and courts should use the flexibility and practical nature of the Rule in addressing these open issues, some of which we consider in Parts II and III.

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243 (2005) (Scalia, J., concurring) (describing a regulation promulgated by the agency with authority to issue rules and regulations to carry out the ADEA after notice-and-comment rulemaking as "an absolutely classic case for deference to agency interpretation"); *see also* City of Arlington v. FCC, 133 S. Ct. 1863, 1868–75 (2013) (Scalia, J.) (culling examples of regulations to which full judicial deference has been afforded).

[29] HUD Statement, *supra* note 9, at 11,460.

In Part I, we start with an overview of analytical approaches historically applied by the courts in considering disparate impact claims under the FHA, with a focus on three emblematic disparate impact cases. In Part II, we consider several implications for practitioners in HUD's decision to adopt a burden-shifting framework and the flexibility the Final Rule preserves for fact finders to consider evidence of discriminatory intent. We also examine the guidance the Final Rule provides as to the appropriate burdens for proving whether a challenged practice is justified by a legitimate, nondiscriminatory objective that could not be served by an alternative, less discriminatory practice. In Part III, we consider potential future applications of the disparate impact standard in the relatively novel contexts of housing restrictions based on tenants' criminal convictions as well as "disorderly conduct" statutes that threaten eviction to victims of domestic violence who make frequent calls to the police.

I. Judicial Approaches to Disparate Impact Before the Final Rule

Federal courts have recognized at least two types of disparate impact under the FHA. Under the first type, a plaintiff may show that the practice imposes a disproportionate harm on members of a protected class, or in other words, that it has a "greater discriminatory impact on members of a protected class" or causes an "adverse impact."[30] Under the second type, a plaintiff may show that the challenged practice tends to create, reinforce, or perpetuate patterns of segregation.[31] As Professor Schwemm explains, perpetuation of segregation claims "have generally been made against municipal defendants who are accused of using their zoning or other land-use powers to block construction of integrated housing developments in predominantly white areas . . . . [Such] claims may be prompted by a particular action or decision of the defendant as well as an across-the-board policy or practice."[32]

In order to establish a prima facie showing of adverse impact or perpetuation of segregation, a plaintiff must generally present statistical evidence showing a disproportionate effect or a segregative effect, respectively.[33] Courts have declined to adopt a "single test" for evaluating this prima facie

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[30] Robert G. Schwemm, Housing Discrimination: Law and Litigation § 10:6 (2008); *see also* Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 934, 937 (2d Cir. 1988), *aff'd in part*, 488 U.S. 15 (1988).

[31] *Huntington*, 844 F.2d at 934, 937–38; *see also* other cases cited *supra* note 7.

[32] Schwemm, *supra* note 30, at § 10:7 (footnote omitted). *But see, e.g.*, *Arlington Heights II*, 558 F.2d 1283, 1293 (7th Cir. 1977) (observing that perpetuation of segregation claims against private defendants have also been recognized).

[33] *See* Mount Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375, 385 (3d Cir. 2011), *cert. granted*, 133 S. Ct. 2824 (2013), *cert. dismissed*, No. 11-1507, 2013 WL 6050174 (U.S. Nov. 15, 2013); *Huntington*, 844 F.2d at 936; Thompson v. U.S. Dep't of Hous. & Urban Dev., 348 F. Supp. 2d 398, 417 (D. Md. 2005).

showing.[34] Instead, a plaintiff may meet her initial burden by presenting any of several types of comparative statistical analyses, depending on "the nature of the particular policy or practice that is being challenged."[35] We discuss several types of evidentiary showings that courts have accepted in section II.A.1.

Courts have likewise employed flexible approaches in considering disparate impact claims once the plaintiff has made a sufficient prima facie showing. Most circuits have employed a burden-shifting analysis.[36] While the precise contours have differed by circuit, the plaintiff generally has the initial burden of proving that a challenged practice caused or predictably will cause a discriminatory effect.[37] If the plaintiff satisfies that burden, then it shifts to the defendant to show that the challenged practice is justified by a substantial, legitimate, nondiscriminatory objective.[38] If such a showing is made, most burden-shifting circuits have assigned a burden to the defendant then to show the absence of any less discriminatory alternatives that could achieve the objective; the Sixth and Eighth Circuits, however, have assigned a burden to the plaintiff to prove the existence of a less discriminatory alternative.[39] Several circuits then conduct a final analysis that weighs the defendant's justifications against the plaintiff's showing of a discriminatory effect.[40]

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[34] *See* 24 C.F.R. § 100.500(a) (2013); *Mount Holly*, 658 F.3d at 382.

[35] SCHWEMM, *supra* note 30, § 10:6.

[36] *See* Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment, 284 F.3d 442, 446 (3d Cir. 2002); Langlois v. Abington Hous. Auth., 207 F.3d 43, 50–51 (1st Cir. 2000); Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev., 56 F.3d 1243, 1251 (10th Cir. 1995); *Huntington*, 844 F.2d at 939; United States v. City of Black Jack, 508 F.2d 1179, 1184–85 (8th Cir. 1974). The Fourth and Sixth Circuits have applied a burden-shifting approach for disparate impact claims against private defendants but use the minority multifactor balancing test for claims against governmental defendants. *See infra* note 41. *Compare* Graoch Assocs. #33, L.P. v. Louisville/Jefferson Cnty. Human Relations Comm'n, 508 F.3d 366, 371–74 (6th Cir. 2007) (private defendant), *and* Betsey v. Turtle Creek Assocs., 736 F.2d 983, 988 (4th Cir. 1984) (private defendant), *with* Arthur v. City of Toledo, 782 F.2d 565, 575 (6th Cir. 1986) (public defendant), *and* Smith v. Town of Clarkton, 682 F.2d 1055, 1065 (4th Cir. 1982) (public defendant).

[37] *See, e.g.*, *Lapid-Laurel*, 284 F.3d at 466–67; *Langlois*, 207 F.3d at 49–50; *Huntington*, 844 F.2d at 935–36; *City of Black Jack*, 508 F.2d at 1184–85; HUD Statement, *supra* note 9, at 11,482.

[38] *See, e.g.*, *Mount Holly*, 658 F.3d at 385–86; *Huntington*, 844 F.2d at 936.

[39] *Compare, e.g.*, *Mount Holly*, 658 F.3d at 382, *Huntington*, 844 F.2d at 936, *and* Dews v. Town of Sunnyvale, 109 F. Supp. 2d 526, 531–32 (N.D. Tex. 2000), *with Graoch*, 508 F.3d at 374, *and* Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth., 417 F.3d 898, 902–03 (8th Cir. 2005).

[40] *See Graoch*, 508 F.3d at 373 (incorporating a balancing test in final stage of burden-shifting analysis); *Mountain Side Mobile Estates*, 56 F.3d at 1252, 1254 (applying balancing test into burden-shifting analysis); *Huntington*, 844 F.2d at 935 (applying balancing test and holding that the *Arlington Heights II* factors may also be considered as part of the final weighing analysis, though not "as a requirement for a prima facie case"). The Third Circuit also recognizes room for weighing a defendant's showing — of a legitimate, nondiscriminatory reason and "that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact" — against any evidence the plaintiff may

A minority of circuits have instead utilized a multifactor balancing test that considers:

> (1) the magnitude of discriminatory effect, (2) whether there is any evidence of discriminatory intent, (3) the defendant's interest in taking the complained-of action, and (4) whether the plaintiffs sought to compel the defendant affirmatively to provide housing for members of a protected class or merely restrain the defendant from interfering with individual property owners who wish to provide such housing.[41]

Although the Fifth, Ninth, and Eleventh Circuits have all recognized disparate impact liability, they have not adopted either the burden-shifting or the multifactor balancing approaches.

The following case studies exemplify the flexibility and breadth of the disparate impact standard, as applied to such diverse conduct as lending practices, exclusionary zoning, and urban renewal. As we will suggest in Parts II and III, HUD's final disparate impact rule preserves this flexibility and will allow for the application of disparate impact in different housing contexts going forward.

A. Lending — Baltimore v. Wells Fargo

Our firm's case, *Baltimore v. Wells Fargo*,[42] shows how disparate treatment and disparate impact can be used as complementary standards. That litigation involved a novel challenge to "reverse redlining" in neighborhoods of color in Baltimore, in the wake of an unprecedented crisis of residential mortgage foreclosures. Our pre-suit statistical analysis demonstrated dramatic racial disparities in foreclosure rates. The same pattern was true for high-cost loans; these risky loan products were far more likely to be found in African American neighborhoods. After filing the complaint, we developed strong evidence of intentional discrimination as well, and both approaches were central to an eventual favorable settlement.

Filed in January 2008, the complaint alleged that the rapid expansion of subprime lending by Wells Fargo contributed to the highest foreclosure rates the City of Baltimore had seen in thirty-five years.[43] Baltimore alleged that the unprecedented rates of foreclosures, resulting from aggressive subprime

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provide showing "that there is a less discriminatory way to advance the defendant's legitimate interest." *Mount Holly*, 658 F.3d at 382 (internal quotation marks omitted).

[41] Cent. Ala. Fair Hous. Ctr. v. Magee, 835 F. Supp. 2d 1165, 1195 (M.D. Ala. 2011) (internal quotation marks omitted), *vacated on other grounds*, No. 11-16114, 2013 WL 2372302 (11th Cir. May 17, 2013). This is the approach used in the Seventh Circuit and, for claims against governmental defendants, the Fourth Circuit. *See Arthur*, 782 F.2d at 575; *Smith*, 682 F.2d at 1065; *Arlington Heights II*, 558 F.2d 1283, 1290 (7th Cir. 1977).

[42] *See* Complaint for Declaratory and Injunctive Relief and Damages, Mayor of Balt. v. Wells Fargo, N.A., No. 08-062 (D. Md. Jan. 8, 2008), 2008 WL 117894.

[43] *Id.* ¶ 15.

lending practices that gave borrowers loans they could not afford, were disproportionately concentrated in the city's nonwhite neighborhoods.[44] In other words, the statistical evidence supported the conclusion that these neighborhoods were "reverse redlined" — targeted for abusive, costly, and inherently risky mortgage products.[45] Indeed, publicly available data suggested that Wells Fargo's underwriting decisions resulted in foreclosure rates in African American neighborhoods in Baltimore that were four times higher than the foreclosure rates in white neighborhoods in the city.[46]

The complaint also alleged that Wells Fargo disproportionately made high-cost loans to African American mortgage customers in Baltimore.[47] For example, Baltimore identified that Wells Fargo's pricing sheets required large basis point increases in rates for loans of less than $75,000, and they required much smaller increases for loans over $150,000.[48] Baltimore alleged that this policy had a foreseeable disproportionate adverse impact on African American borrowers, who were more likely to seek lower dollar-value loans.[49] These reverse redlining practices flourished in neighborhoods of color because these neighborhoods had historically been denied access to credit and other banking services, a legacy of discrimination that left minority residents desperate for credit and, frequently, without the knowledge or experience to identify sound and reliable financial products, making them particularly vulnerable to irresponsible subprime lenders.[50]

After initiating the lawsuit and conducting further investigation, Baltimore was able to amend the complaint to include allegations, based on testimony obtained from former employees, that the bank intentionally targeted African Americans and residents of African American neighborhoods for abusive subprime lending practices, for example by directing subprime loan marketing efforts at African American churches and their congregations, tailoring subprime marketing materials on the basis of race, and declaring one area of the city "not good for subprime loans because it has a predominantly White population."[51] Ex-employees further testified that loan officers used racially derogatory language such as "mud people" and "niggers" in reference to African American borrowers and referred to loans in minority communities as "ghetto loans."[52]

In April 2011, the district court issued an important decision denying Wells Fargo's motion to dismiss, holding that Baltimore had standing to pur-

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[44] *Id.* ¶¶ 24, 28.
[45] *Id.* ¶ 28.
[46] *Id.* ¶ 44.
[47] *Id.* ¶ 47.
[48] *Id.* ¶ 50; John P. Relman, *Foreclosures, Integration, and the Future of the Fair Housing Act*, 41 IND. L. REV. 629, 641 (2008).
[49] Complaint, *supra* note 42, ¶¶ 50–51.
[50] *Id.* ¶ 29.
[51] Third Amended Complaint for Declaratory and Injunctive Relief and Damages ¶¶ 46, 50–63, Mayor of Balt. v. Wells Fargo, N.A., No. 08-062 (D. Md. Oct. 21, 2010).
[52] *Id.*

sue its claims.[53] Not long afterward, the case settled, with Wells Fargo agreeing to provide $4.5 million in direct down payment assistance to Baltimore homebuyers and $3 million to the city for priority housing and foreclosure-related initiatives.[54] Wells Fargo also committed to make $425 million in prime mortgage loans in Baltimore over five years, $125 million of which must be in low- and moderate-income neighborhoods.[55] Concurrently, the U.S. Department of Justice reached a nation-wide fair lending settlement with Wells Fargo worth at least $234.3 million, a large portion of which will benefit Baltimore and its residents.[56]

Baltimore's allegations could have been framed in terms of disparate treatment (i.e., Wells Fargo intentionally targeted minority communities for these predatory practices), but they also fit the disparate impact framework (i.e., Wells Fargo's combination of facially neutral mortgage policies adversely affected minority communities, regardless of discriminatory intent). As we will explore in more detail, this litigation demonstrates how the disparate treatment and disparate impact standards frequently operate in tandem, with the latter functioning "as a means of smoking out subtle or underlying forms of intentional discrimination on the basis of group membership."[57] Indeed, the *Baltimore v. Wells Fargo* litigation presaged the flexibility preserved in the HUD Rule that allows for practitioners to use the two standards as complementary, or symbiotic, methods for establishing liability under the FHA.[58]

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[53] *Mayor of Baltimore*, 2011 WL 1557759, at *6 (D. Md. Apr. 22, 2011). Baltimore alleged injuries caused by the challenged lending practices including "damages based on (1) municipal services provided at vacant Wells Fargo foreclosure properties that became vacant because of Wells Fargo's illegal lending practices; and (2) reduced property tax revenues from limited areas within particular neighborhoods where Wells Fargo's foreclosures constitute a disproportionately high concentration of all foreclosures." Third Amended Complaint, *supra* note 51, ¶ 95; *see also id.* ¶¶ 110–327; Relman, *supra* note 48, at 465.

[54] Collaboration Agreement ¶¶ 1–2, *Mayor of Baltimore*, No. 08-062 (on file with the Harvard Law School Library).

[55] *Id.* ¶ 4.

[56] Consent Order, United States v. Wells Fargo Bank, N.A., No. 12-1150 (D.D.C. Sept. 21, 2012), *available at* http://www.justice.gov/crt/about/hce/documents/wellsfargocd.pdf, *archived at* http://perma.cc/0bgREjvSHHB; *Notification Begins to Borrowers Eligible for Payments from $234.3 Million Lending Discrimination Settlement Between the Department of Justice and Wells Fargo Bank, NA*, U.S. Dep't of Justice, http://www.justice.gov/crt/about/hce/documents/epiq_mailing_english_4-25-13.php (last visited Oct. 31, 2013), *archived at* http://perma.cc/0ZkHR1Y18Uh.

[57] Christine Jolls, *Antidiscrimination and Accommodation*, 115 Harv. L. Rev. 642, 652 (2001).

[58] Not long after Baltimore filed suit, the City of Memphis filed a parallel lawsuit against Wells Fargo. The district court in that case also held that the city had established standing and expressly found that the city stated a claim for disparate impact. Like the Baltimore suit, the Memphis suit followed a similar track and ultimately resulted in a favorable settlement for the city. City of Memphis v. Wells Fargo Bank, N.A., No. 09-2857, 2011 WL 1706756, at *11 (W.D. Tenn. May 4, 2011).

B. Exclusionary Zoning — GNOFHAC v. St. Bernard Parish

Following Hurricane Katrina, a municipality adjacent to New Orleans called St. Bernard Parish[59] enacted a series of zoning ordinances that sought to limit the availability of rental and multifamily housing, both of which, in the New Orleans metropolitan area, are disproportionately occupied and needed by African American households.[60] Between November 2005 and December 2011, the parish took repeated steps to restrict and ban such rental and multifamily housing opportunities within its borders.[61]

Our firm and co-counsel brought an FHA challenge against St. Bernard Parish in October 2006, challenging an ordinance that imposed burdensome permitting requirements on single-family homeowners seeking to rent out their properties to anyone other than "blood relatives."[62] After the entry of a 2008 consent order settling the initial suit, the parish enacted a ban on multifamily housing.[63] We then represented an affordable housing provider that successfully intervened in an action to enforce the consent order. On behalf of the housing provider and the Greater New Orleans Fair Housing Action Center, we alleged that the multifamily housing ban, which would have prevented the construction of four proposed affordable housing developments, violated the FHA and the consent order under both the disparate treatment and disparate impact standards.

The disparate impact standard was critical to the development of the litigation. Proving pretext, an important part of a disparate treatment claim, is frequently difficult. Although in this case there was strong circumstantial evidence of discriminatory intent, there was no clear smoking gun. We therefore worked to develop both disparate treatment and disparate impact claims, relying on the latter for statistics showing that whites made up a much greater percentage of St. Bernard Parish's population than they did of the New Orleans metropolitan region as a whole, and that African American households were disproportionately likely to occupy multifamily housing as well as disproportionately eligible for the affordable housing units the devel-

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[59] Louisiana is divided into parishes instead of counties.

[60] Greater New Orleans Fair Hous. Action Ctr. v. Saint Bernard Parish (*GNOFHAC I*), 641 F. Supp. 2d 563, 565 (E.D. La. 2009); Greater New Orleans Fair Hous. Action Ctr. v. Saint Bernard Parish (*GNOFHAC II*), No. 2:06-cv-7185, 2011 WL 4915524, at *1 (E.D. La. Oct. 17, 2011); First Amended Complaint ¶¶ 1–4, Greater New Orleans Fair Hous. Action Ctr. v. Saint Bernard Parish, No. 2:12-cv-322 (E.D. La. Mar. 13, 2012).

[61] *See GNOFHAC II*, 2011 WL 4915524, at *3 (discussing ordinances passed in 2005, 2006, and 2008 including a moratorium on the construction and rehabilitation of multifamily dwellings; several ordinances restricting single-family rental opportunities; a second ban on multifamily housing; a 2009 voter referendum seeking to amend the parish charter to ban multifamily housing; and a third multifamily housing ban that took effect in January 2010).

[62] Complaint for Injunctive Relief, Declaratory Judgment, and Remedial Relief, *GNOFHAC I*, 641 F. Supp. 2d 563 (E.D. La. 2009) (No. 2:06-cv-7185).

[63] In entering the consent order, the parish agreed, inter alia, to be bound not to reenact the Blood Relative Ordinance and not to violate the FHA for the three-year term of the consent order. *See GNOFHAC I*, 641 F. Supp. 2d at 565–66 (describing the consent order and the 2008 multifamily housing ban).

oper sought to provide.[64] The statistical evidence available to us before filing the enforcement motion provided some security that if the court did not find evidence of discriminatory intent, we would still be able to obtain relief under the disparate impact standard.

We ultimately developed abundant evidence of discriminatory intent, as well as evidence to support the disparate impact claim, but the district court's analysis of the moratorium's predictable discriminatory effect on African Americans was important to both rulings.[65] Crediting the proportional numbers analysis by the plaintiffs' expert over the absolute numbers analysis by St. Bernard Parish's expert, the court found that the moratorium disproportionately harmed African Americans and thus had a discriminatory effect.[66]

The court then considered the justifications offered by the parish. In our action, the court conducted this analysis under the *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[67] (*Arlington Heights I*) test for disparate treatment; however, the new disparate impact regulation asks the court to do the same analysis when evaluating disparate impact claims. In that context, the court would ask the defendant to prove the existence of a legitimate, substantial, nondiscriminatory reason for a challenged practice that has a proven discriminatory effect.[68] In *Greater New Orleans Fair Housing Action Center v. Saint Bernard Parish*[69] (*GNOFHAC I*), the court found little evidence to establish any of St. Bernard Parish's purported justifications.[70] Specifically, the parish could not prove that: (a) it lacked infrastructure to support the developments; (b) it was already "flush" with affordable rental properties; (c) the moratorium was narrowly tailored to address high density concerns specific to a different development that was demolished following Hurricane Katrina; and (d) the moratorium was necessary to achieve a goal of updating the parish zoning code.[71]

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[64] *See* Complaint, *supra* note 62.

[65] *GNOFHAC I*, 641 F. Supp. 2d at 565–66. Courts invariably consider statistical disparities in evaluating disparate treatment claims against decision-making governmental bodies. *Id.* at 566–67 ("Central to determining both discriminatory intent and discriminatory effect is an assessment of whether or not the challenged law has a disparate racial impact."). Gross statistical disparities standing alone may suffice in certain contexts to establish disparate treatment. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 339–40 (1977); Comm. Concerning Cmty. Improvement v. City of Modesto, 583 F.3d 690, 703 (9th Cir. 2009) ("[P]roof of disproportionate impact on an identifiable group, such as evidence of 'gross statistical disparities,' can satisfy the intent requirement where it tends to show that some invidious or discriminatory purpose underlies the policy.").

[66] *See GNOFHAC I*, 641 F. Supp. 2d at 567–68 (finding that African American households were 85% more likely than white households to live in the multifamily structures subject to the ban, twice as likely to live in rental housing, and disproportionately income-eligible for the proposed affordable housing opportunities at issue).

[67] 429 U.S. 252 (1977).

[68] 24 C.F.R. § 100.500(c)(2) (2013); HUD Statement, *supra* note 9, at 11,470–72; *see also infra* section II.B.

[69] 641 F. Supp. 2d 563 (E.D. La. 2009).

[70] *Id.* at 574.

[71] *Id.* at 575–76, 577.

Having rejected the parish's asserted justifications, the district court then concluded that because each of the factors articulated by the Seventh Circuit on remand from the Supreme Court in *Metropolitan Housing Development Corp. v. Village of Arlington Heights*[72] (*Arlington Heights II*) supported the plaintiffs' case,[73] the multifamily housing ban "has a discriminatory effect on African Americans and therefore violates the Fair Housing Act, 42 U.S.C. § 3604(a), and the terms of the February 2008 Consent Order."[74]

As we will suggest below in Part II, the analysis in *GNOFHAC I* would fit neatly within the contours of HUD's Final Rule. First, the district court's rigorous analysis of whether any evidence actually supported the parish's asserted justifications is consistent with the burden HUD has placed on defendants to establish a "legally sufficient justification" that is "not hypothetical or speculative."[75] Second, the Final Rule preserves room for the balancing analysis, similar to that applied by the district court, in which the strength of the plaintiff's showing, including any evidence of discriminatory intent and the nature of relief sought, is weighed against the strength of the defendant's showing.

C. Urban Renewal — Mount Holly

Mount Holly Gardens Citizens in Action v. Township of Mount Holly[76] involved a disparate impact challenge to a redevelopment plan that was intended, according to the defendant Township, to eradicate blight and address overcrowding and high crime rates in an underinvested, predominantly nonwhite neighborhood. The Third Circuit's opinion applies a burden-shifting analysis similar to the one established in the new HUD Final Rule[77] and addresses several misapprehensions about disparate impact liability that tend to recur in litigation under the FHA.

The Gardens is a thirty-acre neighborhood in the Township of Mount Holly, New Jersey, designated for redevelopment because the Township alleged it suffered from overcrowding, disproportionate crime rates, and blight.[78] With 392 homes, it was also the Township's only predominantly African American and Hispanic neighborhood.[79] Over the course of several years, the Township adopted a series of redevelopment plans for the Gardens, with the final plan calling for the destruction of most existing homes, the construction of new, predominantly market-rate units, and the setting

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[72] 558 F.2d 1283 (7th Cir. 1977).
[73] *See id.* at 1291 (listing four factors for evaluating disparate impact claims).
[74] *GNOFHAC I*, 641 F. Supp. 2d at 578.
[75] 24 C.F.R. § 100.500(c)(2) (2013).
[76] 658 F.3d 375 (3d Cir. 2011), *cert. granted*, 133 S. Ct. 2824 (2013), *cert. dismissed*, No. 11-1507, 2013 WL 6050174 (U.S. Nov. 15, 2013).
[77] *Id.* at 382–87.
[78] *Id.* at 377–78.
[79] *Id.* at 377.

aside of only eleven units for which the approximately 400 existing households would be granted priority.[80] A coalition consisting of residents and a neighborhood action group eventually challenged the redevelopment plan under the FHA.[81]

On appeal, the Third Circuit agreed with the district court that the plaintiffs had not presented evidence to create a material issue of fact as to whether the redevelopment plan was motivated by discriminatory intent, but reversed the grant of summary judgment with respect to the plaintiffs' disparate impact claim, holding that they established a prima facie case that the renewal plan had an adverse impact on African Americans and Latinos living in the Township.[82]

The Third Circuit began by emphasizing that "[n]o single test controls in measuring disparate impact" and that the plaintiffs need only "offer proof of disproportionate impact, measured in a plausible way."[83] The court then examined the plaintiffs' statistical evidence, including data showing that "African-Americans would be 8 times more likely to be affected by the project than Whites, and Hispanics would be 11 times more likely to be affected" and that only 21% of African American and Hispanic households would be able to afford the proposed new market-rate housing, compared to 79% of white households.[84] In finding that these disparities were sufficient to establish a prima facie case and survive summary judgment, the Third Circuit emphasized that the proper focus in a disparate impact case is the comparative *proportions* of the protected and nonprotected groups that are affected, not the *absolute numbers* of protected and nonprotected households.[85]

The Third Circuit further made clear that disparate impact does not require evidence of discriminatory intent and held that the district court erred in accepting the Township's argument that there was no possibility for discrimination because "100% of minorities in the Gardens will be treated the same as 100% of non-minorities in the Gardens."[86] The FHA "looks beyond such specious concepts of equality to determine whether a person is being deprived of his lawful rights because of his race. . . . [A] disparate impact inquiry requires us to ask whether minorities are disproportionately *affected* . . . ."[87]

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[80] *Id.* at 379.

[81] *Id.* at 380.

[82] *Id.* at 382–85, 387.

[83] *Id.* at 382 (internal quotation marks omitted) (quoting Hallmark Developers, Inc. v. Fulton Cnty., 466 F.3d 1276, 1286 (11th Cir. 2006)).

[84] *Id.*

[85] *Id.* at 383.

[86] *Id.*

[87] *Id.* at 383–84 (citing Doe v. City of Butler, 892 F.2d 315, 323 (3d Cir. 1989)); *see also* Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 934 (2d Cir. 1988) (rejecting the defendant's argument that the court should apply a "'mixed' impact and treatment" analysis, which would mean that "every disparate impact case would include a disparate treatment component," which "cannot be the case"), *aff'd in part*, 488 U.S. 15 (1988).

After concluding that the plaintiffs had established a sufficient prima facie case to survive summary judgment, the Third Circuit observed that the "core of the dispute" for trial was whether alternatives were available to achieve the defendant's objective of "alleviating blight," which according to the court "everyone agrees . . . is a legitimate interest."[88]

As noted above in Part I, the Supreme Court granted the Township's petition for a writ of certiorari in order to answer whether the FHA authorizes disparate impact claims.[89] The settlement of *Mount Holly* will delay the Supreme Court's consideration of this critical question, but should the issue reach the Court in the future, the Justices will have to address the degree of deference appropriately given to HUD's Final Rule. Resolution of this question will be informed by HUD's authority as the agency charged with interpreting and enforcing the FHA,[90] HUD's "long-held interpretation of the availability of 'discriminatory effects' liability" under the FHA,[91] and the fact that in promulgating the Final Rule, HUD engaged in notice-and-comment rulemaking.[92] Notwithstanding the grant of certiorari, the Court's recent jurisprudence suggests that it would afford the Rule greater deference than some critics of the disparate impact standard suggest.

With these case examples in mind, in the following Part we explore the implications for practitioners of the agency's Rule, and in particular its chosen evidentiary framework.

II. The Final Rule from the Perspective of Practitioners

HUD based its Final Rule firmly in the statutory text and legislative history of the FHA,[93] while also drawing from several principles developed in the case law over the past forty-five years. Far from simply adopting the approach of any specific court, HUD thoroughly engaged with the case law and brought its own expertise to bear in adopting some judicial interpretations that the agency found to be true to the letter and spirit of the Act while rejecting others. The agency likewise considered many competing views in the notice-and-comment process, making changes to the November 16, 2011 proposed rule in response to some comments.[94] The resulting Rule presents the agency's carefully considered and authoritative interpretation of the

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[88] *Mount Holly*, 658 F.3d at 385.

[89] Twp. of Mount Holly v. Mount Holly Gardens Citizens in Action, Inc., 133 S. Ct. 2824 (2013) (mem).

[90] *See* HUD Statement, *supra* note 9, at 11,460 (citing 42 U.S.C. §§ 3608(a), 3615 (2006)).

[91] *Id.*; *see also id.* at 11,461–62 (summarizing twenty years of agency interpretations).

[92] *See supra* note 28 and accompanying text; Valentine Props. Assocs., LP v. U.S. Dep't of Hous. & Urban Dev., 501 F. App'x 16, 18 (2d Cir. 2012) (extending *Chevron* deference to a different HUD regulation based on these factors).

[93] HUD Statement, *supra* note 9, at 11,465–66.

[94] *See id.* at 11,460 ("This final rule follows a November 16, 2011, proposed rule and takes into consideration comments received on that proposed rule."); *id.* at 11,463 (summarizing changes from the proposed rule).

scope of the statute it is charged with enforcing, and it establishes a practical analytical framework for evaluating disparate impact claims.

In this Part, we explore several aspects of the Final Rule from a practitioner's perspective: the adoption of a burden-shifting framework, the inherent balance in its placement of burdens of proof and persuasion, and the flexibility the Rule allows fact finders to consider any evidence of discriminatory intent in evaluating all three prongs of the burden-shifting framework.

A. Adoption of the Burden-Shifting Framework

1. The Plaintiffs' Prima Facie Showing.

The Rule assigns an initial burden of proving that the "challenged practice caused or predictably will cause a discriminatory effect."[95] A *discriminatory effect* is defined 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."[96] Consistent with disparate impact case law dating back to the 1970s, this definition would encompass, for example, challenges to exclusionary zoning ordinances that disproportionately deny housing opportunities to minorities or that perpetuate existing patterns of residential segregation,[97] redlining and reverse redlining, and the disparate impact challenge to the redevelopment plan at issue in the *Mount Holly* litigation.

Courts have recognized three basic categories of statistical proof of a discriminatory effect: (1) a comparison of the proportion of the adversely affected population who are members of the protected class against the proportion of the general population who are members of the protected class (e.g., 50% of those adversely affected are Latino while Latinos make up only 10% of the general population);[98] (2) a comparison of the proportion of all members of the protected class who are adversely affected against the proportion of all persons in the general population who are adversely affected (e.g., 50% of all Latinos are adversely affected while only 10% of the entire

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[95] 24 C.F.R. § 100.500(c)(1) (2013).

[96] *Id.* § 100.500(a).

[97] *See, e.g.*, Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 935–36 (2d Cir. 1988), *aff'd in part*, 488 U.S. 15 (1988); United States v. City of Black Jack, 508 F.2d 1179, 1184–85 (2d Cir. 1974); *GNOFHAC I*, 641 F. Supp. 2d 563, 577–78 (E.D. La. 2009).

[98] *See, e.g.*, Gallagher v. Magner, 619 F.3d 823, 834, 837 (8th Cir. 2010) (holding that plaintiff's statistical showing that while approximately 61% of the population seeking affordable housing was African American, African Americans made up only 11.7% of the city's population established prima facie case that challenged practice had a discriminatory effect on African Americans); Smith v. Town of Clarkton, 682 F.2d 1055, 1060–61, 1065 (4th Cir. 1982) (finding prima facie case of town's withdrawal from low-income authority where 56% of all poverty-level families were African American and 69.2% of all African American families were eligible for low-income housing, but African Americans made up only 40% of the general population).

population is adversely affected);[99] and (3) a comparison of the proportion of all members of the protected class who are adversely affected against the proportion of persons who are not members of the protected class who are adversely affected (e.g., 50% of all Latinos are adversely affected while only 10% of all non-Latinos are adversely affected).[100] A plaintiff may demonstrate the segregative effect of a challenged practice by showing, for example, that low-cost or multifamily housing is not allowed in predominantly white areas of a municipality or that the relevant jurisdiction has a high degree of racial segregation, as shown by its dissimilarity index,[101] and that members of a protected class are disproportionately in need of, or disproportionately likely to occupy, that type of housing.

Just as courts have refused to dictate any exclusive test for establishing a discriminatory effect,[102] HUD's Final Rule does not dictate a single standard for establishing a prima facie case of discriminatory effect. HUD declined to codify "how data and statistics" should be used in the application of the disparate impact standard, because "[g]iven 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."[103] This provides fair housing plaintiffs the flexibility to establish a prima facie case in the most persuasive and appropriate manner possible

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[99] *See, e.g.*, *Magner*, 619 F.3d at 834 (considering evidence that 52% of minority-headed renter households were income-qualified for affordable housing, compared to 32% of all renter households); *see also Huntington*, 844 F.2d at 938 (stating that preclusion of affordable housing adversely impacted African Americans because 24% of African American families needed subsidized housing, compared to only 7% of all Huntington families).

[100] *See, e.g.*, Mount Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375, 382 (3d Cir. 2011) (concluding prima facie case of disparate impact was established by Census data showing that 22.54% of African American households and 32.31% of Hispanic households would be affected by the challenged housing demolition, compared to only 2.73% of white households), *cert. granted*, 133 S. Ct. 2824 (2013), *cert. dismissed*, No. 11-1507, 2013 WL 6050174 (U.S. Nov. 15, 2013).

[101] *See Arlington Heights II*, 558 F.2d 1283, 1291 (7th Cir. 1977) (citing *City of Black Jack*, 508 F.2d at 1183; Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108, 110 (2d Cir. 1970); Kennedy Park Homes Ass'n v. City of Lackawanna, 318 F. Supp. 669, 674 (W.D.N.Y. 1970)); Thaddeus J. Hackworth, *The Ghetto Prison: Federal Policy Responses to Racial and Economic Segregation*, 12 GEO. J. ON POVERTY L. & POL'Y 181, 185 (2005) (explaining that a dissimilarity index measures the racial evenness of an area relative to "perfect integration," in which each census tract would be racially representative of the entire metropolitan area).

[102] *See, e.g.*, *Mount Holly*, 658 F.3d at 382 ("[N]o single test controls in measuring disparate impact." (internal quotation marks omitted) (quoting Hallmark Developers, Inc. v. Fulton Cnty., 466 F.3d 1276, 1286 (11th Cir. 2006))).

[103] HUD Statement, *supra* note 9, at 11,468. The agency rejected suggestions to omit the word "predictably" from the prima facie standard, concluding that the FHA "is best interpreted as prohibiting actions that predictably result in an unjustified discriminatory effect," based on the statutory definition of "aggrieved person" as one who "believes that such person will be injured by a discriminatory housing practice that is about to occur" and the authorization for HUD to take enforcement action, and courts to order relief, with respect to discrimination that "is about to occur." *Id.*

given the type of harm at issue and potential constraints on the availability of statistical data.

The Third Circuit in *Mount Holly*, responding to the Township's argument that "a disparate impact analysis will often allow plaintiffs to make out a prima facie case when a segregated neighborhood is redeveloped," explained that:

> [T]his 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."*[104]

HUD similarly concluded that under the Act, a plaintiff should be able to demonstrate a prima facie case in a variety of ways, but then the defendant may nonetheless avoid liability by proving a legally sufficient justification for any demonstrated statistical disparities, as discussed next.

2. Legally Sufficient Justification.

If the plaintiff presents sufficient evidence to establish a prima facie case, the burden then shifts to the defendant to establish a "legally sufficient justification" for the challenged practice.[105] The Rule defines a "legally sufficient justification" as one that "[i]s necessary to achieve one or more substantial, legitimate, nondiscriminatory interests" where "[t]hose interests could not be served by another practice that has a less discriminatory effect."[106] The justification "must be supported by evidence and may not be hypothetical or speculative."[107] This prong thus imposes a burden of proof, not simply a burden of production, on the defendant,[108] over the objections of some commenters that the second prong should only be a burden of production. Recognizing that many federal courts have analogized the FHA to the burden-shifting framework under Title VII of the Civil Rights Act of 1964,[109] and referencing previous HUD adjudications under the FHA, HUD concluded that assigning defendants a burden of *proof* was appropriate.[110]

We examine the practical and doctrinal implications of HUD's clarification that this constitutes a burden of proof in detail below in section II.B.

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[104] *Mount Holly*, 658 F.3d at 384–85 (emphasis added).
[105] 24 C.F.R. § 100.500(b) (2013).
[106] *Id.* § 100.500(b)(1)(i)–(ii).
[107] *Id.* § 100.500(c)(2).
[108] *Id.*
[109] 42 U.S.C. §§ 2000e–2000e-17 (2006); *see* HUD Statement, *supra* note 9, at 11,462.
[110] HUD Statement, *supra* note 9, at 11,470–72.

3. Less Discriminatory Means.

Should a defendant carry her burden of demonstrating a "legally sufficient justification," the Rule permits the plaintiff to establish that the defendant could achieve her objective using a less discriminatory alternative. The Rule assigns the burden of proving such an alternative to the plaintiff, with whom the ultimate burden of persuasion remains.[111]

HUD received comments arguing that a converse burden should be assigned to the defendant — in other words a burden to show the absence of any less discriminatory alternatives, as currently required in the Second and Third Circuits[112] — on grounds that "plaintiffs may not have the capacity to evaluate possible less discriminatory alternatives."[113] HUD rejected these arguments, stating that its placement of the burden of proving a less discriminatory alternative "does not require either party to prove a negative," is consistent with other statutory schemes including Title VII and the Equal Credit Opportunity Act[114] ("ECOA"), and will further efficiency and certainty in cases involving claims under both the FHA and ECOA.[115] While its choice was not favored by plaintiffs, their attorneys, or fair housing advocates, HUD thus opted for consistency with other civil rights laws.

HUD observed that plaintiffs have access to mechanisms that enable them to meet this burden, for example by using the discovery process to obtain "information regarding the alternatives that exist to achieve an asserted interest, the extent to which such alternatives were considered, the reasons why such alternatives were rejected, and the data that a plaintiff or plaintiff's expert could use to show that the defendant did not select the least discriminatory alternative."[116] At the same time, HUD's decision to put both the burdens of proof and production on the defendant at the second stage incentivizes defendants to assess housing policies and ensure that they are both effective and not unnecessarily exclusionary of protected class members.

This final prong of HUD's burden-shifting Rule may prove dispositive in a case such as *Mount Holly*, where the defendant's objective was "alleviating blight," which the court accepted as "a legitimate interest."[117] In such cases, "the core of the dispute" may turn on whether the plaintiff can prove that the legitimate interests "could have been achieved in a less discriminatory way."[118] As suggested below in section B, the fact finder may consider

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[111] 24 C.F.R. § 100.500(c)(3) (2013).
[112] *See supra* note 39 and accompanying text.
[113] HUD Statement, *supra* note 9, at 11,743.
[114] 15 U.S.C. § 1691 (2012).
[115] HUD Statement, *supra* note 9, at 11,473–74.
[116] *Id.* at 11,474.
[117] Mount Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375, 385 (3d Cir. 2011), *cert. granted*, 133 S. Ct. 2824 (2013), *cert. dismissed*, No. 11-1507, 2013 WL 6050174 (U.S. Nov. 15, 2013).
[118] *Id.*

at the third prong the strength of the prima facie statistical showing. In other words, if the challenged practice's disproportionate effect is egregious, presumably it will be easier for plaintiffs to show that a less discriminatory alternative exists.

B. The Disparate Impact Standard Is Not a Barrier to Pursuing Legitimate Objectives

HUD's Final Rule confirms that the disparate impact standard is not a "gotcha" measure for saddling unwitting defendants with liability under the FHA for two reasons. First, the discriminatory or segregative effect of a challenged practice will often have been immediately apparent and predictable. Second, under the burden-shifting framework, defendants can never be liable *solely* for adopting practices that have adverse effects on a protected class; there is always an opportunity to demonstrate that a challenged practice furthers a legitimate interest or goal, and to show that those interests could not otherwise be adequately served by using a less discriminatory alternative.[119]

In this way, the Final Rule incentivizes the adoption of policies, practices, and decisions that achieve the goals of defendants, while at the same time protecting the individuals covered by the FHA from housing practices that do not further any legitimate, nondiscriminatory purpose. A plaintiff who is able to show the court that a better mechanism exists — one that serves the defendant's goals without unnecessarily excluding people from housing — will stand a much better chance of prevailing. Conversely, if the defendant proves a legitimate justification by a preponderance of the evidence and also proves that no effective, less discriminatory alternative is apparent, the disparate impact claim is unlikely to succeed. The Final Rule maintains this historical balance by requiring a defendant to provide objective, concrete evidence that the challenged practice furthers a substantial, legitimate, nondiscriminatory goal, while allowing the plaintiff to show that less discriminatory alternatives would also achieve that goal.

This balanced nature of the disparate impact analysis is often obscured by rhetorical and ideological attacks on nonexistent straw men. For example, critics have complained for years that disparate impact liability in housing and employment requires quotas or threatens defendants with liability simply for adopting policies that adversely affect protected classes. One critic, for example, argues that the disparate impact standard "pushes people to do one or both of two things: Get rid of legitimate selection criteria, or use

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[119] *See, e.g.*, Graoch Assocs. #33, L.P. v. Louisville/Jefferson Cnty. Metro Human Relations Comm., 508 F.3d 366, 374 (6th Cir. 2007) ("Of course, not every housing practice that has a disparate impact is illegal."); *Arlington Heights II*, 558 F.2d 1283, 1290 (7th Cir. 1977) (same); Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, 860 F. Supp. 2d 312, 323–31 (N.D. Tex. 2012) (extensively analyzing the defendant's justification and claim that justification could not be served through any less restrictive methods).

a racial double standard to ensure that the numbers come out right. . . . Disparate impact makes illegal what any rational person would not define as discrimination."[120] This and similar critiques[121] ignore the actual operation of the standard, which always allows a defendant an opportunity to prove that any discriminatory effect is justified by legitimate, nondiscriminatory objectives, so long as there are no effective alternative practices that have a less discriminatory effect.

HUD correctly rejected such objections to disparate impact liability in the Final Rule. For example, in rejecting a proposal that insurance practices be completely exempted, HUD explained that the proposal "presume[d] that once a discriminatory effect is shown, the policy at issue is per se illegal. This is incorrect."[122] Precisely "because the establishment of a prima facie case, by itself, is not enough to establish liability under the FHA," but instead simply triggers "a more searching inquiry into the defendant's motivations,"[123] disparate impact liability is not a trap for unwitting defendants who are pursuing legitimate nondiscriminatory goals.

Under the Final Rule, the disparate impact standard does, however, demand objective, concrete proof that the goal is real, within the defendant's scope of authority, and cannot be achieved through an alternative practice.[124]

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[120] Roger Clegg, *How Not to Fight Discrimination*, WALL ST. J. (Feb. 25, 2013, 7:00 PM), http://online.wsj.com/article/SB10001424127887324162304578301804194205718.html, *archived at* http://perma.cc/0vbAjCe3S8L.

[121] *See, e.g.*, CHARLES FRIED, ORDER & LAW: ARGUING THE REAGAN REVOLUTION — A FIRSTHAND ACCOUNT 119 (1991); Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 703 n.8 (2006) (discussing criticism that disparate impact leads to quotas); Steven A. Holmes, *President Vetoes Bill on Job Rights; Showdown is Set*, N.Y. TIMES, Oct. 23, 1990, at A1 (noting that, in vetoing 1990 Civil Rights Act, President Bush claimed that the bill would "introduce the destructive forces of quotas into our national employment system"); Review & Outlook, *The Loan Quota Rule*, WALL ST. J. (Jan. 27, 2012), http://online.wsj.com/article/SB10001424052970204616504577171092486999610.html, *archived at* http://perma.cc/04RWzEQYA9n (describing Final Rule as supporting "racial loan quotas"). Others have objected that increasing "compliance and legal costs" are associated with proving that no less discriminatory alternative exists and will ultimately discourage the housing industry from providing new affordable housing to avoid the threat of litigation. *See, e.g.*, Review & Outlook, *supra*. That argument ignores the central point that the existence of disparate impact will encourage a potential defendant to adopt better policies at the outset.

[122] HUD Statement, *supra* note 9, at 11,475; *see also id.* at 11,478 (emphasizing that a showing of adverse impact in the lending context is only the beginning of a disparate impact analysis).

[123] *Mount Holly*, 658 F.3d at 385.

[124] 24 C.F.R. § 100.500(c)(2) (2013); *see also* HUD Statement, *supra* note 9, at 11,471 (refusing to declare certain interests as per se legitimate and instead requiring a case-by-case approach). In *Inclusive Communities Project, Inc. v. Texas Department of Housing & Community Affairs*, 860 F. Supp. 2d 312 (N.D. Tex. 2012), the district court engaged in a searching analysis of available alternatives, presaging the same inquiry now embodied in the Final Rule. *Id.* at 326–31. Although in *Inclusive Communities* the district court placed the burden of showing no less discriminatory alternatives on the defendant, the analysis of available alternative practices that would lessen the discriminatory effect of the challenged formulas for allocating low-income housing tax credits is consistent with the Final Rule's recognition that even where a defendant seeks to further a legitimate goal, the FHA requires that if it can achieve that goal through alternative practices that have a less discriminatory or less segregative effect, it must utilize the less harmful alternative practices.

HUD further made clear that disparate impact liability does not preclude a defendant from denying credit or any other housing-related product or service to unqualified individuals.[125] Disparate impact liability will not attach if the defendant shows that the challenged practice is necessary to achieve the nondiscriminatory objective and the plaintiff cannot identify adequate, less discriminatory alternatives.

1. The Defendant's Burden at the Second Stage is One of Proof, Not Simply Production.

Under the Rule, a defendant can establish a "legally sufficient justification" only by proving with objective evidence that the challenged practice "[i]s necessary to achieve one or more substantial, legitimate, nondiscriminatory interests."[126] In the Final Rule, HUD further explains that:

> A "substantial" interest is a core interest of the organization that has a direct relationship to the function of that organization. The requirement that an entity's interest be substantial is analogous to the Title VII requirement that an employer's interest in an employment practice with a disparate impact be job related. . . . The determination of whether goals, objectives, and activities are of substantial interest to a respondent or defendant such that they can justify actions with a discriminatory effect requires a case-specific, fact-based inquiry. The word "legitimate," used in its ordinary meaning, is intended to ensure that a justification is genuine and not false, while the word "nondiscriminatory" is intended to ensure that the justification for a challenged practice does not itself discriminate based on a protected characteristic.[127]

Prior to the Final Rule, some courts treated as a mere formality the defendant's burden of establishing a justification for conduct that has a discriminatory effect. For example, in considering a challenge to a public housing authority's imposition of a residency preference for the allocation of Section 8 vouchers, the court in *Langlois v. Abington Housing Authority*[128] required only a burden of production from the defendant, which justified its practice on the sole ground that "[p]references for local residents ha[d] a considerable history" in the relevant community.[129]

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[125] HUD Statement, *supra* note 9, at 11,476.
[126] 24 C.F.R. § 100.500(b)(1)(i), (c)(2) (2013).
[127] HUD Statement, *supra* note 9, at 11,470.
[128] 207 F.3d 43 (1st Cir. 2000).
[129] *Id.* at 51. The court's analysis at this step resembled rational-basis review in the equal protection context. *See, e.g.*, FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993) (noting that for purposes of rational-basis review, it suffices for the defendant to simply advance some rational objective that could be served by the challenged conduct).

That lenient burden was consistent with Title VII disparate treatment case law. Under the *McDonnell Douglas Corp. v. Green*[130] test that applies to disparate treatment claims under Title VII, after an employee has proven a prima facie case of discrimination, the burden shifts to the defendant to "articulate some legitimate, nondiscriminatory reason for the employee's rejection."[131] The employee must then prove that the articulated nondiscriminatory reason is a pretext for discrimination.[132] The defendant's burden at the second stage in such cases is only one of production, not proof — meaning that the defendant does not need to persuade the court that it was actually motivated by the proffered reasons.[133] The defendant's burden under the *McDonnell Douglas* test is a particularly easy one to meet because it is rare that the defendant cannot articulate *some* nondiscriminatory justification for her action.

But in Title VII disparate impact cases — as in HUD's Final Rule — the defendant carries both a burden of production *and proof* to show that the challenged practice is job-related and consistent with business necessity.[134] That burden is more demanding because it requires a defendant to establish these factors by a preponderance of the evidence. HUD's new rule not only adopts this higher burden for defendants, but it also elaborates that a legally sufficient justification "must be supported by evidence and may not be hypothetical or speculative."[135] Uniform application of the standards in the Rule means that courts should no longer take lightly a defendant's burden at the second stage of the burden-shifting analysis,[136] and that plaintiffs will face meaningful burdens at the final stage.

HUD's assignment of a burden of proof is consistent with the approach applied by the Eighth Circuit in *Charleston Housing Authority v. U.S. Department of Agriculture*,[137] which held that the defendant housing authority had not produced sufficient evidence to show that the challenged housing demolition was necessary to attain any of its stated objectives (which were reducing low-income housing density, crime, and drug use), even though they were legitimate goals in the abstract.[138] In *GNOFHAC I*, the district

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[130] 411 U.S. 792 (1973).

[131] *Id.* at 802; *see also* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).

[132] *Burdine*, 450 U.S. at 253.

[133] *Id.* at 254–55.

[134] *See, e.g.*, 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006); HUD Statement, *supra* note 9, at 11,463 ("The final rule also replaces the word 'demonstrating' with 'proving' in § 100.500(c)(3) in order to make clear that the burden found in that section is one of proof not production."); 1 BARBARA T. LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 119 (C. Geoffrey Weirich et al. eds., 4th ed. 2007).

[135] 24 C.F.R. § 100.500(b)(2) (2013).

[136] *Compare* Langlois v. Abington Hous. Auth., 207 F.3d 43, 51 (1st Cir. 2000), *with* Langlois v. Abington Hous. Auth., 234 F. Supp. 2d 33, 66, 69 (D. Mass. 2002) (on remand, describing appellate position as approving of proffered justification because it passed a "simple justification" test).

[137] 419 F.3d 729 (8th Cir. 2005).

[138] *Id.* at 741–42.

court similarly scrutinized six justifications advanced by the parish for the challenged zoning ordinance and concluded that it did not actually further any of the parish's asserted goals.[139] Other courts have held that defendants cannot meet their burden by advancing post hoc or unsupported rationalizations, also suggesting a burden of proof rather than a mere burden of production.[140]

Practitioners would be well advised to study the Eighth Circuit's discussion of the lack of evidence supporting the defendant housing authority's asserted justifications in *Charleston Housing Authority*[141] and the district court's analysis of the pretextual nature of the defendant's asserted justifications in *GNOFHAC I*[142] for clear applications of this burden of proof in future FHA cases where the Final Rule applies.

2. *The Rule Assigns Complementary Burdens to Defendants and Plaintiffs Regarding the Necessity of the Challenged Practice.*

Under the Final Rule, the defendant must prove not only a legitimate justification, but also that the challenged practice is "necessary" to achieve that identified legitimate, substantial, and nondiscriminatory interest.[143] To meet this burden, a defendant presumably must present evidence that the practice is in fact designed to achieve the stated interest.[144] "Necessary" further implies that the defendant must show that the measure is "required" or "essential,"[145] in the sense that other alternatives are ineffective or unworkable. A defendant should support this burden with evidence, if it exists, that it considered other practices but concluded they were less effective or too difficult to implement. The defendant's obligation to consider alternatives before imposing a policy with an adverse impact on a protected class should inform the plaintiff's task at both stage two — challenging the defendant's proof that the challenged practice was necessary — and stage three — demonstrating the existence of less discriminatory alternatives — of the burden-shifting test.[146]

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[139] *See GNOFHAC I*, 641 F. Supp. 2d 563, 574–78 (E.D. La. 2009); *supra* section I.B.

[140] *See, e.g.*, Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 940 (2d Cir. 1988), *aff'd in part*, 488 U.S. 15 (1988).

[141] 419 F.3d at 741–42.

[142] 641 F. Supp. 2d at 574–76, 578.

[143] 24 C.F.R. § 100.500(b)(1)(i), (c)(2) (2013).

[144] *Cf. Huntington*, 844 F.2d at 940 (finding that the challenged zoning practice at issue would not effectively achieve the defendant's objectives).

[145] *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1510 (3d ed. 1981).

[146] In other words, if the defendant fails to produce any documents or testimony showing that it sought to confirm whether the challenged practice was "necessary" before implementing the practice, the fact finder may properly consider that failure in deciding whether the defendant has met its burden of establishing a legitimate, nondiscriminatory justification. Likewise, if a defendant does show that it considered alternatives, a plaintiff should probe the sincerity and seriousness with which those alternatives were weighed.

In this respect, the Final Rule reflects HUD's considered judgment that its burden-shifting framework ought to mirror Title VII's disparate impact test: the Uniform Guidelines on Employee Selection Procedures allow employers to validate selection practices that have an adverse impact by, among other things, conducting "an investigation of suitable alternative selection procedures . . . which have as little adverse impact as possible."[147] Some courts, likewise, have required employer defendants to investigate suitable, less discriminatory alternatives as part of their burden to establish the necessity of the challenged practice.[148] As is the case under Title VII's disparate impact standard, however, HUD placed the final burden of persuasion on the plaintiff. If the defendant establishes that a legitimate justification exists and that the challenged practice was necessary to achieve it, the plaintiff can still prevail by proving the existence of a less discriminatory alternative to the challenged practice.

In this regard, the Final Rule embodies something of a hybrid between prior competing tests, in which some courts placed the burden of showing alternatives on the plaintiff and other courts placed this burden on the defendant. While HUD placed the ultimate burden of proving the existence of a less discriminatory alternative on the plaintiff, it nonetheless required the defendant to prove that its policy is "necessary," in other words that other options were ineffective or unworkable.[149]

This partitioning of the burdens of demonstrating necessity on the one hand and less discriminatory alternatives on the other hand embodies the inherent pragmatism of the disparate impact standard. Consider the example of a municipality seeking to promote homeownership, but doing so by eliminating all rental-housing opportunities, in circumstances where rentals are disproportionately needed by African Americans. In such a case, the plaintiff might demonstrate that alternatives — such as tax credits for first-time homebuyers earning below a certain income ceiling, grants for the purchase of owner-occupied homes, or provisions ensuring long-term affordability of units within a home-ownership program — would achieve the same goal

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[147] 29 C.F.R. § 1607.3(B) (2013).

[148] *See* Officers for Justice v. Civil Serv. Comm'n, 979 F.2d 721, 728 (9th Cir. 1992); *see also* Ricci v. DeStefano, 557 U.S. 557, 632 n.11 (2009) (Ginsburg, J., dissenting); LINDEMANN & GROSSMAN, *supra* note 134, at 153–54.

[149] The Final Rule's placement of a burden on the defendant to show that the challenged practice is necessary, while requiring the plaintiff to bear the ultimate burden of proving the existence of effective alternatives, comports, to a degree, with the Third Circuit's approach. That court places a burden on the defendant to "show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact," in other words that the practice is necessary, but then places a final burden on the plaintiff "to demonstrate that other practices are available," in other words that there are alternatives that could achieve the defendant's objectives that, while potentially less effective, are also less discriminatory. Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 149 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); *see also* Mount Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375, 382 (3d Cir. 2011), *cert. granted*, 133 S. Ct. 2824 (2013), *cert. dismissed*, No. 11-1507, 2013 WL 6050174 (U.S. Nov. 15, 2013); *supra* note 40.

with less discriminatory effect, thus rebutting the defendant's position that the restriction was necessary to achieve its stated objective.[150] Similarly, in the lending context, if a defendant could achieve its legitimate business goals by using alternative credit analyses that have a less discriminatory effect while providing as much or more efficiency, it may be liable under the disparate impact standard if it does not employ the least discriminatory alternative.[151] In these instances, the disparate impact standard reasonably requires that the defendant choose the less discriminatory practice to achieve its legitimate goals.[152] If a defendant could achieve its legitimate goal — for example a governmental entity's desire to eradicate urban blight or a private defendant's profit motivation — without disproportionately excluding protected classes from housing opportunities, then why wouldn't it do so?

3. Evidentiary Implications of the Burdens of Proving Necessity and the Existence of Less Discriminatory Alternatives.

The Final Rule makes clear that fair housing defendants may avoid the risk of liability under the disparate impact standard if they seek out practices that are objectively effective and nondiscriminatory. If a defendant can show that it investigated alternative practices and reasonably determined that none existed, a trier of fact may be reluctant to impose liability. The Final Rule thus incentivizes defendants to identify practices that will further their core interests on the front end, before any litigation.

At the same time, a plaintiff should develop evidence of less discriminatory alternatives in building a disparate impact case — both because the Rule assigns the burden of showing less discriminatory alternatives to the plaintiff and as a matter of due diligence in developing the theory of a successful FHA challenge. Evidence that a defendant either failed to consider alternatives at all, or knew that an effective alternate practice existed and did not adopt it, may be probative that something besides the proffered legally sufficient justification is at stake. In fact, it may be a hint that intentional discrimination is at play, as we suggest in more detail below in section II.C.3.

When the record developed through discovery reveals that the defendant did not consider less discriminatory alternatives to meet its objectives, a plaintiff will have strong grounds for challenging a defendant's proffer at the second stage, as well as at the third stage. The absence of discovery about alternatives the defendant may have considered will be probative in and of

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[150] *See, e.g.*, 26 U.S.C. § 1400C (2006) ("First-time homebuyer credit for District of Columbia"); HUD, HOME AND NEIGHBORHOODS: A GUIDE TO COMPREHENSIVE REVITALIZATION TECHNIQUES App. 3 (2004), *available at* http://archives.hud.gov/offices/cpd/affordablehousing/modelguides/200320.pdf, *archived at* http://perma.cc/0aXQ7oHaqqs.

[151] *See, e.g.*, Peter P. Swire, *The Persistent Problem of Lending Discrimination: A Law and Economics Analysis*, 73 TEX. L. REV. 787, 836–38 (1995) (considering alternative selection practices that mitigate the discriminatory effects of lending practices).

[152] *See infra* section II.C.3.

itself, as a signal that the defendant cannot satisfy its burden of proof at the second stage.[153] In contrast, if the defendant produces robust evidence that it considered alternatives and reasonably rejected them because they were less effective, it will be difficult for a plaintiff to convince a fact finder that the defendant should adopt the alternatives the plaintiff proposes.

Because many disparate impact cases are resolved either at the first prong (where the plaintiff fails to present sufficient evidence to establish a prima facie case) or at the second prong (where the defendant fails to present evidence to establish a legitimate justification), few cases examine the showing necessary to prove the existence or absence of effective less discriminatory alternatives. Had the *Mount Holly* litigation gone forward in the trial court, this aspect of HUD's burden-shifting framework would have received prominent attention. The Third Circuit has already held that plaintiffs established a prima facie case, and plaintiffs do not contest the legitimacy of defendant's objective of addressing overcrowding and blight. Thus, the outcome of the case would have turned on the reasonableness and efficacy of the plaintiffs' proposed alternatives to the challenged redevelopment plan, such as a rehabilitation program or "a more gradual redevelopment plan [that] would have allowed existing residents to move elsewhere in the neighborhood during one part of the redevelopment, and then move back once the redevelopment was completed."[154] Similarly, in *MHANY Management, Inc. v. County of Nassau*,[155] the district court denied defendants' summary judgment motion with respect to plaintiffs' FHA disparate impact claim, holding that the efficacy of proposed alternatives to the defendant's challenged rezoning, including leaving the previous zoning in place, created material issues of fact to be decided on the merits at trial.[156]

In the formulation HUD has chosen, the defendant is not forced to prove a negative (i.e., that a less discriminatory alternative does not exist), although it must prove, with objective evidence, that its chosen practice is necessary to achieve its objective. The plaintiff retains the ultimate burden of persuasion. Plaintiffs will no doubt continue to advocate for courts to assign the burden of proving that no less discriminatory alternative exists to the defendant, particularly in circuits that adopted such a standard before the promulgation of the Final Rule. Yet the Final Rule leaves a clear avenue for plaintiffs to prevail even with this burden, if they develop a sufficient record using the evidentiary tools at their disposal. Any evidence a plaintiff may garner showing that the defendant considered but rejected effective alterna-

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[153] *See* HUD Statement, *supra* note 9, at 11,474 (observing that plaintiffs may seek from the defendant "information regarding the alternatives that exist to achieve an asserted interest, the extent to which such alternatives were considered, the reasons why such alternatives were rejected, and the data that a plaintiff or plaintiff's expert could use to show that the defendant did not select the least discriminatory alternative").

[154] *Mount Holly*, 658 F.3d at 387–88.

[155] 843 F. Supp. 2d 287 (E.D.N.Y. 2012).

[156] *Id.* at 330.

tives should raise a red flag about the defendant's actual motivation for adopting or retaining the challenged policy if it has a discriminatory or segregative effect.[157] At the same time, HUD's decision to put both the burdens of proof and production on the defendant at the second stage incentivizes defendants to assess housing policies and ensure that they are both effective and not unnecessarily exclusionary of protected class members.

HUD has provided a uniform framework for analyzing disparate impact claims, clearing up a substantial amount of ambiguity in the law. The end result is an evidentiary framework that ensures less discriminatory alternatives are being considered and pursued when possible, increasing the likelihood that housing practices — such as lending and zoning decisions — are based on principled and defensible objective evidence, rather than subjective judgments that can serve as smokescreens for discriminatory prejudices. By requiring the fact finder to make determinations about the necessity of the challenged practice and whether there are alternative practices the defendant could employ, the Final Rule thus furthers the core fair housing goal of dismantling existing structural inequalities, even if they are byproducts of apparently neutral conduct.

C. The Final Rule Leaves Room for the Fact Finder to Consider Evidence of Discriminatory Intent

The Final Rule implicitly, but importantly, leaves room for the fact finder to consider evidence of discriminatory intent at each phase of the burden-shifting framework.

Disparate impact by definition does not require evidence of discriminatory intent, and courts and juries can and do find defendants liable under the disparate impact standard even when there is insufficient evidence of discriminatory intent to satisfy the disparate treatment standard.[158] But while proof of discriminatory intent is never *necessary* to establish disparate impact liability, courts have long recognized that the existence of such evidence is highly relevant to disparate impact.[159]

Disparate impact and disparate treatment are therefore closely aligned. On the one hand, disparate impact is a necessary tool to combat the "arbitrary quality of thoughtlessness [that] can be as disastrous and unfair to

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[157] *See infra* section II.C.3.

[158] *See, e.g.*, Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, 860 F. Supp. 2d 312, 321–331 (N.D. Tex. 2012) (holding following bench trial that organization failed to prove intentional discrimination but did establish disparate impact based on a state's disproportionate allocation of low-income housing tax credits to majority nonwhite areas).

[159] *See, e.g.*, Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 941–42 (2d Cir. 1988) (treating historic evidence of discriminatory opposition as relevant in weighing the plaintiffs' showing of disproportionate effect against the defendant's justification), *aff'd in part*, 488 U.S. 15 (1988); United States v. City of Black Jack, 508 F.2d 1179, 1185 (6th Cir. 1974) (similar).

private rights and the public interest as the perversity of a willful scheme."[160] The deeply entrenched patterns of racial segregation that exist in the United States trace their roots to overtly discriminatory actions stretching back more than a century.[161] As the Supreme Court recognized when it first held disparate impact cognizable in the employment context, the standard furthers congressional intent to disrupt thoughtless policies that "operate to 'freeze' the status quo of prior discriminatory" practices.[162] Recognizing disparate impact liability thus furthers the Act's goal of promoting integrated housing patterns and preventing the perpetuation of racial segregation.[163] At the same time, and relevant here, disparate impact provides an evidentiary means to root out more subtle forms of intentional discrimination — a theoretical basis recently acknowledged by Justice Scalia.[164] Courts have recognized that "[b]ecause explicit statements of racially discriminatory motivation are decreasing, circumstantial evidence must often be used to establish the requisite intent."[165]

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[160] *City of Black Jack*, 508 F.2d at 1185 (quoting Hobson v. Hansen, 269 F. Supp. 401, 497 (D.D.C. 1967)); *see Mount Holly*, 658 F.3d at 385 (quoting Smith v. Anchor Bldg. Corp., 536 F.2d 231, 233 (8th Cir. 1976)).

[161] *See, e.g.*, Olatunde C.A. Johnson, *Stimulus and Civil Rights*, 111 COLUM. L. REV. 154, 162 (2011) (discussing modern legacy of historic discrimination).

[162] Griggs v. Dukes Power Co., 401 U.S. 424, 430 (1971).

[163] *Arlington Heights II*, 558 F.2d 1283, 1289 (7th Cir. 1977) (quoting Otero v. N.Y.C. Hous. Auth., 484 F.2d 1122, 1134 (2d Cir. 1973)); Letter from Nat'l Lawyers' Comm. for Civil Rights Under Law and Affiliates to HUD Office of General Counsel on Implementation of the Fair Housing Act's Discriminatory Effects Standard (Jan. 17, 2012) (listing circumstances in which disparate impact has been critical to challenging existing disparities), *available at* http://www.prrac.org/pdf/HUD_Disparate_Impact_Regulation_Comment_Letter.pdf, *archived at* http://perma.cc/0iT2tgcnA4k.

[164] *See* Ricci v. DeStefano, 557 U.S. 557, 594–95 (2009) (Scalia, J., concurring); *see also* 114 CONG. REC. 2699 (1968) (statement of Sen. Mondale) (recognizing that despite existing statutory prohibitions against certain forms of explicit discriminatory conduct, "local ordinances with the same effect, although operating more deviously in an attempt to avoid the Court's prohibition, were still being enacted"); Jolls, *supra* note 57, at 652. *But see* Richard A. Primus, *Equal Protection & Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 523 (2003) (rejecting notion that disparate impact should be understood as an "evidentiary dragnet for deliberate discrimination").

[165] Hallmark Developers, Inc. v. Fulton Cnty., 466 F.3d 1276, 1283 (11th Cir. 2006) (quoting United States v. Hous. Authority of Chickasaw, 504 F. Supp. 716, 727 (S.D. Ala. 1980)); *see also Arlington Heights II*, 558 F.2d at 1289–90 ("As overtly bigoted behavior has become more unfashionable, evidence of intent has become harder to find. But this does not mean that racial discrimination has disappeared."); *City of Black Jack*, 508 F.2d at 1185 (noting both that "clever men may easily conceal their motivations" and also that "thoughtless" policies that perpetuate segregation can be equally harmful). There are, of course, ample and sobering recent examples of continuing, blatantly racist statements in the housing context. *See, e.g.*, Campbell v. Robb, 162 F. App'x 460, 463 (6th Cir. 2006) (citing landlord's statements that a black cat was his "nigger in the haystack" and that he did not want "a lot of [black people] hanging out in [his] parking lot"); Complaint ¶ 3, Stark Cnty. v. Ruth, No. 5:11-cv-1322 (N.D. Ohio June 28, 2011) (alleging that landlord expressed position that he did not want to rent to "niggers" and "porch monkeys"); Complaint ¶¶ 20–30, Robinson v. Crymes, No. 3:05-cv-49 (M.D. Ga. June 17, 2005) (alleging that seller refused to continue negotiations upon learning that would-be purchasers were an interracial couple).

As a practical matter, this reality often drives successful disparate impact litigation for practitioners. On the front end of litigation, disparate impact allows plaintiffs, in good faith, to challenge practices that have immense and predictable discriminatory effects. In many cases, practitioners will be able to identify evidence of intentional discrimination that would otherwise remain concealed. Even if traditional evidence of intentional discrimination is not revealed, the disparate impact analysis can be framed as a means of combating more subtle intentional discrimination.[166]

On the back end of litigation, courts and juries may acknowledge the historical fact that facially neutral policies can operate to freeze a discriminatory or segregated status quo, while at the same time being hesitant to hold a defendant liable for discriminatory or segregated patterns it may be perpetuating but did not create.[167] In such cases, evidence suggesting any discriminatory intent — even if insufficient to hold a defendant liable under a disparate treatment standard — may help convince an otherwise skeptical fact finder that a practice that causes the very types of discriminatory and segregative harms that the FHA seeks to protect against, even if that practice is facially neutral, is indeed unlawful.

In the *Baltimore v. Wells Fargo* litigation, for example, the plaintiffs pursued both disparate impact and disparate treatment theories of liability, relying on overlapping evidence to support both showings. The plaintiffs alleged that patterns of historical racial discrimination — namely, decades of redlining that deprived minority neighborhoods of access to badly needed credit — laid the groundwork for modern reverse redlining. Even if neutral, Wells Fargo's lending practices had the effect of disproportionately concentrating unaffordable and predatory loans in communities of color that had already been harmed by years of discriminatory lending practices. The plaintiffs alleged that because of these historical patterns of discrimination, the foreclosure crisis had a devastating disparate effect on black and Latino communities, draining them of equity and reinforcing barriers to integration.[168]

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[166] *See, e.g.*, David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 1010–13 (1989). As discussed above in Part I, this strategy was central to the *GNOFHAC I* litigation, in which we ultimately developed an extensive record from the foundational statistical evidence that convinced the court that the challenged housing practices were motivated by discriminatory intent, in addition to having an unlawful disparate impact. 641 F. Supp. 2d 563, 566–79 (E.D. La. 2009).

[167] During closing argument in an FHA case challenging zoning policies that prevented the construction of multifamily housing, on grounds that the restrictive policies denied housing opportunities based on race, an attorney for a municipal defendant appealed to this precise sentiment in arguing to the jury that the plaintiffs' evidence of disparate impact did nothing more than "describe[ ] economic realities to you and they did so with a paradigm or a lens of race . . . . But all of their opinions and all of their comments were merely descriptors of economic realities" that African Americans on average have lower incomes than whites. Transcript of Trial at 1953, Anderson Grp., LLC v. City of Saratoga Springs, No. 05-cv-1369 (N.D.N.Y. July 1, 2010).

[168] Relman, *supra* note 48, at 650.

Although the publicly available evidence suggested that the bank's lending practices were not just the result of neutral policies, there was no guarantee that discovery would uncover evidence by which Baltimore could challenge Wells Fargo's anticipated defense that individual loan decisions were based on neutral underwriting policies. The *Baltimore v. Wells Fargo* litigation thus proceeded using both disparate treatment and disparate impact standards. In the end, the suit did reveal direct evidence of intentional discrimination[169] through the testimony of former employees who came forward and testified that Wells Fargo had intentionally targeted minority communities. The plaintiffs' complementary evidence of discriminatory intent and disproportionate effect in the *Baltimore v. Wells Fargo* litigation substantially strengthened each claim and no doubt contributed to the settlement.

Although not expressly stated in the Final Rule, HUD's formulation leaves room for plaintiffs to develop, and for the trier of fact to consider, evidence of discriminatory intent in disparate impact litigation, in at least three ways: (1) by analyzing the strength of a plaintiff's prima facie case; (2) by analyzing the legitimacy of a defendant's attempt to justify a practice with a demonstrated discriminatory effect; and (3) by analyzing a plaintiff's showing of less discriminatory alternatives.

1. Fact Finders May Rely on Evidence of Discriminatory Intent in Assessing the Strength of the Plaintiff's Prima Facie Case.

Plaintiffs may in some cases struggle to make a prima facie showing if there are insufficient data to present the type of statistical comparisons courts typically recognize.[170] Such gaps in data frequently arise in cases with claims of disability-based discrimination, both because defining the relevant disability is not always straightforward and because statistical data about disability are not publicly collected in the same way as race and national-origin demographical data. Data gaps also frequently arise in proving the racial or ethnic demographics of the "applicant flow," either because the challenged practice precludes the construction of housing, preventing any opportunity for applications to be made, or because the challenged practice affects the applicant flow by discouraging protected group members from applying. In such contexts, the affected population cannot be known and must be predicted.[171]

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[169] *See* Mayor of Balt. v. Wells Fargo Bank, N.A., No. JFM-08-62, 2011 WL 1557759, at *3 (D. Md. Apr. 22, 2011).

[170] *See, e.g.*, Graoch Assocs. #33, L.P. v. Louisville/Jefferson Cnty. Metro Human Relations Comm'n, 508 F.3d 366, 378–79 (6th Cir. 2007) (affirming dismissal of disparate impact claim because plaintiff did not present probative comparator data); Reinhart v. Lincoln Cnty., 482 F.3d 1225, 1231 (10th Cir. 2007) (same); Candlehouse, Inc. v. Town of Vestal, No. 3:11-93, 2013 WL 1867114, at *13 (N.D.N.Y. 2013) (faulting plaintiff for not accurately predicting percentage of residents in group home that would be disabled).

[171] For example, imposition of a residency requirement in a Section 8 program operating in a predominantly white area will disproportionately discourage minority nonresidents from

Under HUD's formulation, the first step of the burden-shifting test requires the plaintiff to prove that a challenged practice "actually or predictably results in a disparate impact on" people in a protected class.[172] This allows for the possibility that plaintiffs could bolster incomplete data with evidence of intentional discrimination. Even if comprehensive data and statistics may not exist conclusively to establish that protected groups will be adversely affected, if such effects are reasonably foreseeable — including to the defendant–decision makers — then that evidence should appropriately be considered as part of the prima facie case. Evidence of such foreseeability not only fits neatly within the intentional discrimination framework,[173] but can fill gaps in evidence supporting the prima facie showing of discriminatory effect.

For example, certain entities receiving federal housing funds — such as state and local governments and public housing authorities — have an affirmative obligation to conduct assessments to identify fair housing impediments faced by members of the FHA's protected classes, and to take appropriate actions to overcome such impediments.[174] A plaintiff can bolster a prima facie disparate impact case by showing that, despite constructive knowledge, the defendant failed to remedy a discriminatory impediment. This is especially true where the defendant erected the impediment, for example through the exercise of zoning or land use. In a hypothetical challenge brought against a city receiving federal funds, if the city is alleged to work a disparate impact against families of color by enforcing a zoning pro-

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applying. Because they have not applied, no precise data will exist on exactly how many were discouraged from seeking housing. *See, e.g.*, Pinchback v. Armistead Homes Corp., 907 F.2d 1447, 1451–52 (4th Cir. 1990) (recognizing that individuals may not apply for housing where it would be futile). Courts hold similarly in the employment context. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 330 (1977) (finding that potential applicants may self-select out of the applicant process because they do not meet challenged criteria); Wheeler v. City of Columbus, 686 F.2d 1144, 1152 (5th Cir. 1982) (recognizing that applicant flow data may be skewed by "inadequate or excessive recruiting efforts, improper deterren[ce] of applicants, unqualified applicants, multiple applications by the same applicant, [and] lack of specificity or improper groupings" (quoting B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 320–21 (Supp. 1979))).

[172] 24 C.F.R. § 100.500(a) (2013).

[173] *See, e.g.*, Anderson Grp., LLC v. City of Saratoga Springs, 557 F. Supp. 2d 332, 337 (N.D.N.Y. 2008), *rev'd in part on other grounds*, 336 F. App'x 21 (2d Cir. 2009) (citing evidence that "City officials knew that minorities were in disproportionate need of affordable housing in Saratoga and they recognized that a lack of affordable housing has significant implications for maintaining community diversity" as probative of the plaintiffs' disparate treatment challenge to a zoning law that precluded affordable housing). In the *GNOFHAC I* litigation, the multifamily housing ban's clear effect on the availability of housing that was disproportionately likely to be occupied by African Americans supported a conclusion that, while facially neutral, the ban not only had a disparate impact, but was motivated by an intent to prevent African Americans from residing in the parish. *See GNOFHAC I*, 641 F. Supp. 2d 563, 577–78 (E.D. La. 2009).

[174] 42 U.S.C. §§ 5304(b)(2), 12705(b)(15) (2006); 24 C.F.R. §§ 91.225(a)(1), 91.325(a)(1), 570.601(a)(2) (2013); *see also* Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act's "Affirmatively Further" Mandate*, 100 KY. L.J. 125, 152–54, 170–75 (2012).

vision that limits the by-right development of multifamily housing, that same city would be hard pressed to claim that it was unaware of the foreseeable discriminatory effect of its ordinance.

2. *Considering Evidence of Intent in Analyzing the Legitimacy of a Proffered Justification.*

Evidence of intentional discrimination may also play a role in evaluating a defendant's showing of a legally sufficient justification for a policy or practice. HUD's Rule instructs the fact finder to apply greater scrutiny to whether the defendant has *proven* that the challenged practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest.[175] The Rule also clarifies that a "legitimate" interest is one that "is genuine and not false,"[176] in other words must be based on "objective facts" and may not be "fabricated or pretextual."[177] By emphasizing that "[a] legally sufficient justification *must be supported by evidence* and *may not be hypothetical or speculative*,"[178] HUD makes clear that any interest on which a defendant relies in seeking to justify a discriminatory effect must *in fact* have prompted the challenged practice. This standard resembles the pretext analysis typically used in disparate *treatment* cases.[179] In this sense, HUD has incorporated an avenue for plaintiffs to employ the types of circumstantial intent evidence — e.g., historical context, departures from normal criteria, shifting or inconsistent explanations, suspicious timing[180] — into a test that does not expressly call for the incorporation of disparate treatment evidence.

Courts have recognized that evidence that a defendant's stated objective is outside the "ambit of legitimately derived authority" may further support the plaintiff's case.[181] On the flip side, a defendant should present evidence, if it exists, supporting its authority to pursue the objective. A similar analy-

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[175] 24 C.F.R. § 100.500(c)(2) (2013).

[176] HUD Statement, *supra* note 9, at 11,470 (emphasizing that the "substantial, legitimate, nondiscriminatory interest" standard was not "a more lenient standard than [the] 'business necessity'" standard in the Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18,266, 18,269 (Apr. 15, 1994)).

[177] *Id.* at 11,471.

[178] 24 C.F.R. § 100.500(b)(2) (2013) (emphasis added).

[179] *See GNOFHAC II*, 648 F. Supp. 2d 805, 809–12 (E.D. La. 2009).

[180] *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp. (*Arlington Heights I*), 429 U.S. 252, 266–68 (1977).

[181] *Arlington Heights II*, 558 F.2d 1283, 1293 (7th Cir. 1977) ("[I]f the defendant is a governmental body acting outside the scope of its authority or abusing its power, it is not entitled to the deference which courts must pay to legitimate governmental action." (internal citations omitted)); Cent. Ala. Fair Hous. Ctr. v. Magee, 835 F. Supp. 2d 1165, 1197 (M.D. Ala. 2011) (holding that plaintiffs demonstrated a substantial likelihood of success on their claim that a state law that restricted housing access on the basis of immigration status would have an unlawful disparate impact on Latinos where, among other facts, "Alabama has exceeded its authority" by seeking to regulate immigration through restricting "housing, and thereby . . . the movement of Latinos into and out of the State"), *vacated as moot*, Cent. Ala. Fair. Hous. Ctr. v. Comm'r, Ala. Dep't of Revenue, No. 11-16114, 2013 WL 2372302, at *1 (11th Cir. May 17, 2013).

sis might now be incorporated within HUD's use of the term "substantial," which HUD explains is a "core interest of the organization that has a direct relationship to the function of that organization."[182] Just as the State's asserted interest in *Central Alabama Fair Housing Center v. Magee*[183] was not "legitimate" because it was ultra vires to its authority,[184] it also could not be "substantial" because regulation of immigration is not a core state authority. Therefore the State could not have met its burden.

3. The Analysis of Whether There Is a Less Discriminatory Alternative May Properly Consider Any Evidence of Discriminatory Intent.

The fact finder should also consider any evidence of intentional discrimination at the final step of HUD's burden-shifting framework in deciding whether a legitimate interest proven by the defendant "could be served by another practice that has a less discriminatory effect."[185]

In close cases where a challenged practice *does* arguably serve some legitimate interests, such as the example of a municipality seeking to promote homeownership, the less discriminatory alternative inquiry may require consideration of a wider scope of evidence, including any evidence of discriminatory intent. HUD makes clear that the alternative need not be "as effective" as the challenged practice; it specifically rejected proposals to add such a modification to the proposed rule.[186] This is fair because for most types of housing practices likely to be challenged under the disparate impact standard, the efficacy of the practice will not be easily quantifiable. As noted above, the Final Rule tracks the statutory framework in Title VII in assigning this burden to the plaintiff. Under that statute, correcting a practice that inflicts a disparate impact can require accommodations by defendants, even if it means adopting less effective policies.[187]

In less black-and-white cases, the trier of fact must ultimately decide how much of a tradeoff a defendant must accept to avoid liability under the FHA. In the lending context, for example, underwriting and pricing models are used to predict the likelihood that a loan applicant will be delinquent in making loan payments three, six, or twelve months in the future. These models frequently use variables, such as credit scores, that have a disparate

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[182] HUD Statement, *supra* note 9, at 11,470. This standard is analogous to the Title VII requirement that an employer's interest be "job related." *Id.* (citing 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006)).

[183] 835 F. Supp. 2d 1165.

[184] *Id.* at 1197.

[185] 24 C.F.R. § 100.500(c)(3) (2013).

[186] HUD Statement, *supra* note 9, at 11,473.

[187] *See* Jolls, *supra* note 57, at 653–55 (providing examples of neutral grooming rules, job selection criteria, English-only requirements, and pregnancy accommodations in which Title VII can require employers to adopt alternatives that are less effective than challenged practice).

adverse impact on African Americans and Hispanics, but they are clearly supported by a basic business justification. It is here that the alternatives analysis becomes particularly important. The model can be changed to include variables that reduce the adverse impact, but they may also degrade the model's predictive power to varying degrees. How much of a decrease in predictive power, if any, must a defendant accept to achieve a less discriminatory effect?[188]

In practice, the outcome will likely turn on a case-by-case inquiry, requiring a comparison of the effectiveness of a challenged practice to that of a proposed alternative. As part of this inquiry, a failure to consider an obvious less discriminatory alternative may itself provide evidence of discriminatory intent. For example, in *Mount Holly*, the Township argued that no effective, economical, less discriminatory alternative would remedy the blighted conditions it seeks to address through the challenged redevelopment plan.[189] The plaintiffs, on the other hand, contended that effective redevelopment did not require the complete destruction and rebuilding of their neighborhood, but could have included rehabilitation and temporary relocation of residents who could then return to their own homes or replacement housing.[190] Given the circumstances, it is difficult to see how these conflicting interests — speed, cost, rehabilitation, prevention of blight, preservation of community ties for long-term residents, and the provision of housing — could be reconciled by a court, prior to trial, under the limited rubric of "effectiveness." Alternatives would likely be more effective at promoting some interests at the cost of others. Thus, in a majority of cases the ultimate weighing of competing, nonquantifiable factors will rest with the fact finder.

This flexible, case-specific approach not only allows fact finders to consider evidence of discriminatory intent, but it can be combined with other evidence of intent at stage two of the burden-shifting framework. To the extent, for example, that a plaintiff has proffered some evidence that the purported justification may be illegitimate in the sense that it is pretextual, that evidence should also weigh in favor of adopting the plaintiff's less discriminatory alternative. If the comparative effectiveness of a justification and a proposed alternative is not easily quantified, the balance should weigh heavily in favor of the alternative that is not tinged with discriminatory in-

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[188] Some scholars have proposed theoretical frameworks to help assess the degree to which a defendant might actually suffer harm from the use of an arguably less effective alternative. Ian Ayres, for example, has suggested that the tradeoff should not be based on profit margins because challenged practices may already constitute anticompetitive conduct with inflated profits to begin with. *See* Ian Ayres, *Market Power and Inequality*, 95 CALIF. L. REV. 669, 669 (2007).

[189] Mount Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375, 387 (3d Cir. 2011), *cert. granted*, 133 S. Ct. 2824 (2013), *cert. dismissed*, No. 11-1507, 2013 WL 6050174 (U.S. Nov. 15, 2013).

[190] *Id.* at 386.

tent.[191] In this sense, "less discriminatory" means both that it will have less of an adverse impact on minority groups *and also* that it is devoid of discriminatory animus.[192]

By leaving room for the consideration of discriminatory intent evidence, the Final Rule preserves the historic symbiotic nature of the disparate treatment and disparate impact standards. The Final Rule will allow plaintiffs to continue pursuing liability under both the disparate treatment and disparate impact standards, and it allows for the analysis applied in some circuits, where evidence of intentional discrimination is weighed at the end of the burden-shifting test along with the strength of the plaintiff's prima facie showing against the defendant's justification.[193]

III. Future Applications of the Disparate Impact Standard

The Final Rule preserves the inherent flexibility of the disparate impact jurisprudence developed over the last four decades, while providing clarity for litigants in future cases as to which side bears which burden of proof and how courts should analyze compliance with these burdens. This flexibility ensures the Rule's relevancy in the coming decades, as fair housing practitioners turn their attention to new types of housing practices that result in unnecessary discrimination against members of statutorily protected groups.

A. Using Disparate Impact to Challenge Criminal Background Checks

One such frontier is the application of the disparate impact standard to criminal background checks by housing providers, a practice that has received increased attention by civil rights advocates in recent years given the undeniable racial dimension to mass incarceration in the United States and its devastating impact on people of color and their communities. The United States has "the highest rate of incarceration in the world . . . surpassing those in highly repressive regimes like Russia, China, and Iran."[194] And, as Pro-

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[191] *Cf., e.g.*, Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 939–40 (2d Cir. 1988) (identifying alternatives to achieve the Town's stated goal that "may actually be more" effective than the multifamily housing ban favored by the Town and concluding that the Town's goals were therefore "weak and inadequate"), *aff'd in part*, 488 U.S. 15 (1988).

[192] Cent. Ala. Fair Hous. Ctr. v. Magee, 835 F. Supp. 2d 1165, 1187 (M.D. Ala. 2011) (deeming evidence of a legislative body's "knowledge of alternatives" probative of discriminatory intent) (citing *Arlington Heights I*, 429 U.S. 252, 266, 268 (1977)); Cano v. Davis, 193 F. Supp. 2d 1177, 1180 (C.D. Cal. 2002) (three-judge court) (Morrow, J.)), *vacated as moot*, No. 11-16114, 2013 WL 2372302, at *1 (11th Cir. May 17, 2013); *cf.* Thompson v. U.S. Dep't of Hous. & Urban Dev., 348 F. Supp. 2d 398, 463 (D. Md. 2005) (holding that HUD's failure to consider any alternatives supported finding that it violated § 3608).

[193] *Huntington*, 844 F.2d at 936, 941–42 (weighing evidence of defendant town's historic opposition to low-income housing in favor of the plaintiffs' disparate impact claim and holding that "while [this history] does not rise to a showing of discriminatory intent, [it] clearly demonstrates a pattern of stalling efforts to build low-income housing").

[194] Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 6 (2010).

fessor Michelle Alexander argues, "while the size of the [criminal justice] system alone might suggest that it would touch the lives of most Americans, the primary targets of its control can be defined largely by race."[195] Throughout the United States, African Americans and Latinos are incarcerated at rates that are disproportionate to their numbers in the general population. As of January 1, 2008, one out of every fifteen (6.7%) black men and one out of every thirty-six (2.8%) Hispanic men, compared to one out of every 106 (0.9%) white men, was incarcerated.[196] According to a 2001 report by the Bureau of Justice Statistics, one in three black males (33.3%) and one in six Hispanic males (16.7%) will be imprisoned at some point in their lives, compared to one in seventeen white males (5.9%).[197] Based on a state-by-state analysis of incarceration rates in 2005, African Americans were incarcerated at a rate 5.6 times higher than whites, and Hispanics were incarcerated at 1.8 times the rate of whites.[198] In seven states African Americans were incarcerated at more than ten times the rate of whites.[199] Nationwide, whites are more likely to be incarcerated in jails than prisons, whereas African Americans and Latinos are more likely to be incarcerated for longer times in prison: "Since jail stays are relatively short compared to prison terms, the collateral consequences of incarceration — separation from family, reduced employment prospects — are generally less severe than for persons spending a year or more in state prison."[200]

Restricting access to housing — as well as employment and public benefits — on the basis of a criminal record will therefore have a disproportionate impact on African Americans and Latinos because these groups are incarcerated, and incarcerated in prison, at rates that are exceptionally disproportionate to their representation in the general population.

But criminal background checks are increasingly widespread[201] and imperil the ability of individuals and their families to obtain safe, stable hous-

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[195] *Id.* at 8; *see also* Corinne A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. TOL. L. REV. 545, 588 (2005) (presenting statistical data showing racial disparities in arrests, sentencing, and incarceration rates).

[196] JENNIFER WARREN, THE PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 6 (2008), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/one_in_100.pdf, *archived at* http://perma.cc/0J6sc7DmvqM.

[197] THOMAS P. BONZCAR, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001, at 1 (2003), *available at* http://www.bjs.gov/content/pub/pdf/piusp01.pdf, *archived at* http://perma.cc/0ZZGhe8mzBN.

[198] MARC MAUER & RYAN S. KING, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 3 (2007), *available at* http://www.sentencingproject.org/doc/publications/rd_stateratesofincbyraceandethnicity.pdf, *archived at* http://perma.cc/0svtArhpVA2.

[199] *Id.* at 10.

[200] *Id.* at 15.

[201] *See* Alfred Blumstein & Kiminori Nakamura, *Redemption in an Era of Widespread Criminal Background Checks*, 263 NIJ JOURNAL 10, 10–11 (2009) (describing prevalence of criminal background checks in general); Rebecca Oyama, *Do Not (Re)Enter: The Rise of Criminal Background Tenant Screening as a Violation of the Fair Housing Act*, 15 MICH. J. RACE & L. 181, 187 (2009).

ing — a virtual prerequisite to successful reentry into the community after incarceration. This creates ripple effects throughout society: an individual's inability to find stable, affordable housing upon release from prison contributes dramatically to recidivism.[202] Blanket bans furthermore entrench existing patterns of segregation by completely denying housing to a class of people that is disproportionately African American and Latino, with the likely effect of concentrating households with at least one person who has a criminal record in the most blighted areas. Because of pervasive racial disparities in our criminal justice system, communities of color have borne and will continue to bear the brunt of criminal background screening by rental housing providers.[203]

HUD's Final Rule provides a clear framework for challenging such practices. The outcome will likely turn on the third prong of HUD's Final Rule, which asks the plaintiff to provide evidence that the defendant's "substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect."[204] At the first prong, a plaintiff will be able to establish a prima facie case so long as the demographics of the relevant housing market are consistent with the nationwide disparities that are presented in detail in Professor Alexander's *The New Jim Crow* and in the Justice Department's Bureau of Justice Statistics.[205] At the second prong, it is possible that a fact finder would accept a defendant's argument that a housing ban against those with criminal records served a substantial and legitimate safety or security interest.[206]

The crux of any such challenge will therefore require analysis of whether alternative practices, even if more costly or time-consuming than a flat ban, will lessen the discriminatory effect, and if so whether that less discriminatory outcome outweighs any increase in administrative burdens

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[202] *See* Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CALIF. L. REV. 323, 346 (2004); Susan K. Gauvey & Katerina M. Georgiev, *Reform in Ex-Offender Reentry: Building Bridges and Shattering Silos*, 44 MD. B. J. 14, 20–21 (2011) ("Unstable housing leads to higher recidivism; every move after a person is released from prison correlates to a 25 percent increase in recidivism."); Devah Pager, *Evidence-Based Policy for Successful Prisoner Reentry*, 5 CRIMINOLOGY & PUB. POL'Y 505 (2006); *Certificates of Rehabilitation*, LEGAL ACTION CENTER, http:www.lac.org/toolkits/certificates/certificates.htm (last visited July 15, 2013), *archived at* http://perma.cc/0ks1Xozkhr3.

[203] *See* John J. Ammann, *Housing Out the Poor*, 19 ST. LOUIS U. PUB. L. REV. 309, 321 (2000); Carey, *supra* note 195, at 545; Eric Dunn & Marina Grabchuk, *Background Checks and Social Effects: Contemporary Residential Tenant-Screening Problems in Washington State*, 9 SEATTLE J. SOC. JUST. 319, 348 (2010); Oyama, *supra* note 201, at 181; *see also* Taja-Nia Henderson, *New Frontiers in Fair Lending: Confronting Lending Discrimination Against Ex-Offenders*, 80 N.Y.U. L. REV. 1237, 1238–40 (2005) (suggesting similar harms result from lending practices that restrict financing based on criminal records).

[204] 24 C.F.R. § 100.400(c)(2) (2013).

[205] *See supra* notes 194, 197.

[206] *But see* Green v. Mo. Pac. R.R. Co., 523 F.2d 1290, 1295–99 (8th Cir. 1975) (holding in a Title VII case that employer failed to prove a business necessity for hiring practice that disqualified anyone with a criminal record); Gregory v. Litton Sys., Inc., 316 F. Supp. 401, 403 (C.D. Cal. 1970) (same).

for the defendant. HUD's instruction that a valid, less discriminatory alternative need not be "'equally effective,' or 'at least as effective,' in serving the [substantial, legitimate, nondiscriminatory] interests"[207] therefore has important implications for such challenges. Indeed, in addressing a comment that expressed "concern that the [discriminatory effects] rule would restrict housing providers from screening tenants based on criminal arrest and conviction records," HUD responded that determining whether such a restriction was lawful would depend on whether it was "supported by a legally sufficient justification" and on "the facts of the [specific] situation."[208]

A plaintiff seeking to challenge a criminal records bar must therefore develop evidence to support its burden on this third prong of the Final Rule's burden-shifting framework. While the alternatives a plaintiff seeks to prove will differ depending on the facts of each case, some possibilities include requiring individualized determinations based on "objective evidence that is sufficiently recent as to be credible, and not from unsubstantiated inferences, that the applicant would pose a . . . [safety] risk" instead of applying a flat ban;[209] allowing for consideration of a prospective tenant's criminal record only at the final stage of the application process instead of it serving as a prescreening mechanism;[210] imposing a temporal limitation, for example applying a restriction only where the prospective applicant has been released from prison for less than six months or one year;[211] or requiring a landlord to consider evidence of the applicant's rehabilitation, including whether the applicant has obtained a certificate of rehabilitation in states that have legislation creating such a procedure.[212]

By applying the framework in HUD's Final Rule, a successful disparate impact challenge to criminal background screening can achieve important results, including incentivizing housing providers to adopt alternative and less discriminatory screening policies, increasing access to housing for a vulnerable population, and perhaps even ferreting out subtle evidence of discriminatory intent motivating blanket bans.

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[207] HUD Statement, *supra* note 9, at 11,473; *see also id.* ("The additional modifier 'equally effective,' borrowed from the superseded Wards Cove case, is even less appropriate in the housing context than in the employment area in light of the wider range and variety of practices covered by the Act that are not readily quantifiable.").

[208] *Id.* at 11,478.

[209] Oyama, *supra* note 201, at 218–19 (citing ROBERT SCHWEMM, HOUSING DISCRIMINATION LAW § 11D(3) (2009)).

[210] *Id.*

[211] *See, e.g.*, Carey, *supra* note 195, at 575 (describing terms of a consent order with the Housing Authority of Atlanta).

[212] *See* Oyama, *supra* note 201, at 214–15.

B. Using Disparate Impact to Challenge "Disorderly Conduct" Ordinances

A recent lawsuit pending in the Eastern District of Pennsylvania, *Briggs v. Borough of Norristown*,[213] presents a novel application of the disparate impact standard to a municipal ordinance that subjects landlords to criminal fines based on "disorderly behavior" by their tenants and threatens "adverse action" against a landlord who "fails to diligently pursue the eviction process" against tenants who are cited for disorderly conduct by the Norristown Police.[214] "Disorderly conduct" is broadly defined to include, inter alia, "domestic disturbances that do not require that a mandatory arrest be made," which the Borough has construed to include calls to the police by victims of domestic violence.[215] In the *Briggs* litigation, the plaintiff is challenging the Norristown Ordinance on several grounds, including an FHA challenge in which she alleges that the Ordinance adversely impacts and penalizes victims of domestic violence, who are disproportionately women.[216]

This litigation should be closely followed by fair housing practitioners. Norristown is not alone in enacting such an ordinance. Nineteen other Pennsylvania cities have similar "disorderly conduct" or "nuisance" ordinances, as do fifty-nine other jurisdictions across the country.[217] Such laws will have disastrous effects on domestic violence victims and their families, as recounted in harrowing detail in the *Briggs* complaint. Among other problems caused by this ordinance, the risk of eviction for calling the police one too many times is sure to chill victims' willingness to call for emergency help, even when being attacked, creating unconscionable safety risks.[218]

These laws furthermore threaten homelessness to some of the most vulnerable members of a community — domestic violence victims and their children. In Norristown, for example, the eviction mandate is triggered by three citations for "disorderly conduct," as determined "in the sole discretion of the Chief of Police," and the determination as to what is considered "disorderly" may be made after the fact.[219] Nationwide, one in five homeless women cites domestic violence as the primary cause of her homeless-

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[213] No. 2:13-cv-2191 (E.D. Pa. filed Apr. 29, 2013).

[214] NORRISTOWN, PA., CODE § 245-3 (2012).

[215] *Id.* § 245-3(b)(5); Complaint ¶¶ 38–135, *Briggs*, No. 2:13-cv-2191.

[216] Complaint ¶¶ 136, 217–30, *Briggs*, No. 2:13-cv-2191.

[217] *Id.*

[218] *See id.* ¶¶ 55–60, 68–75, 87–102; *see also* Annamarya Scaccia, *How Domestic Violence Survivors Get Evicted from Their Homes After Calling the Police*, RH REALITY CHECK (June 4, 2013, 2:16 PM), http://www.rhrealitycheck.org/article/2013/06/04/norristown-ordinance-and-impact-on-domestic-violence-victims-2/, *archived at* http://perma.cc/05nZHmFoPQd.

[219] NORRISTOWN, PA., CODE § 245-3(b)–(c) (2012).

ness, demonstrating a strong correlation between domestic violence and homelessness.[220]

HUD's Final Rule creates an effective framework for addressing the clear disproportionate impact on women caused by the Norristown Ordinance and other "nuisance" ordinances around the country. In order to defend its Ordinance, Norristown must show by a preponderance of the evidence that the Ordinance furthers a substantial, legitimate, nondiscriminatory interest. The pretext inquiry discussed above in section II.B would be equally applicable in *Briggs* and in similar challenges to "disorderly conduct" laws that threaten eviction where vulnerable members of a community seek police protection. Plaintiffs may seek to show that the defendant's asserted justifications, which could include saving money by reducing police response calls and reducing violent crime, are pretextual by borrowing from the "substantive departures" inquiry in the disparate treatment framework.[221] In this way, plaintiffs could establish that the challenged law departs from objectives that most municipalities would presumably value, such as protecting women and their families from violence and preventing homelessness. At the same time, plaintiffs considering such challenges would be wise to gather evidence of less discriminatory alternatives that would still achieve legitimate governmental objectives.

Conclusion

The Supreme Court is now poised to determine whether the FHA's broad mandate to eradicate all forms of housing discrimination throughout the United States imposes liability for practices that have a disparate impact on protected groups. HUD's Final Rule will be front and center in the Court's consideration of this core civil rights issue. The Rule should guide the Court to a conclusion that the FHA does indeed prohibit practices that disproportionately harm protected groups, even absent evidence of discriminatory animus.

HUD's Final Rule, promulgated through notice-and-comment rulemaking, reflects the agency's expert interpretation of the FHA and is well

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[220] *See* Scaccia, *supra* note 218 (citing a study by the National Law Center on Homelessness and Poverty). Domestic violence survivors face discrimination by landlords as well. A test by a Washington, D.C.-based civil rights organization found that 65% of test applicants seeking housing on behalf of a domestic violence survivor were either denied housing or offered less advantageous terms and conditions than applicants not associated with domestic violence. *See* Equal Rights Ctr., No Vacancy: Housing Discrimination Against Survivors of Domestic Violence in the District of Columbia 1–2 (2008). A similar test in New York City found that 27.5% of landlords denied housing on the basis of an applicant's status as a domestic violence survivor. *See* Anti-Discrimination Ctr. of Metro N.Y., Adding Insult to Injury: Housing Discrimination Against Survivors of Domestic Violence 2 (2005).

[221] This inquiry asks whether "factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." *GNOFHAC I*, 641 F. Supp. 2d 563, 574 (E.D. La. 2009) (quoting *Arlington Heights I*, 429 U.S. 252, 267 (1977)).

grounded in the statutory text, the legislative history, and practical lessons gleaned from decades of case law. It provides important clarity to courts and practitioners for new applications of the FHA going forward while maintaining a balanced, flexible approach for evaluating disparate impact challenges in a variety of contexts. The Rule's dual focus on the burden of proof a defendant must meet to justify a proven discriminatory or segregative effect and the burden of proof a plaintiff must meet to show that any such justification can be achieved through a less discriminatory practice will incentivize the adoption of fairer policies that increase, rather than diminish, housing opportunities throughout the country.

In its strong statutory grounding and its flexibility, the Final Rule demonstrates why disparate impact liability is a fundamental component of the legislation that Congress enacted to provide for fair housing throughout the United States. The FHA amounts to a societal pledge that membership in a protected class will not be a basis for denying housing opportunities, a pledge with the "highest priority."[222] Yet housing policies and practices that disproportionately harm protected groups continue to be enacted. Some are well-disguised, calculated acts of discrimination against particular groups. Others may result from a failure to consider the predictable impact of a housing policy or practice rather than affirmative acts of bias. Regardless of motivation, these practices have devastating effects on the ability of minority households to find or maintain housing opportunities.

As a tool for redressing unjustified disparities in access to housing opportunities, the disparate impact standard is and always has been a critical tool for eradicating policies and practices that, whether or not intentional, sustain existing structural inequalities that remain prevalent in our still deeply segregated society. The Final Rule provides a thoughtful and consistent method of applying that standard under the FHA and ensures that disparate impact remains a viable and effective standard of liability for rooting out pervasive but potentially subtle structural barriers that, if left unchallenged, would frustrate Congress's intent: to provide for fair housing throughout the country.[223]

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[222] Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972).
[223] 42 U.S.C. § 3601 (1968) (2006).