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## What's HUD Got to Do With It?: How HUD's Disparate Impact Rule May Save the Fair Housing Act's Disparate Impact Standard

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**WHAT'S HUD GOT TO DO WITH IT?:  
HOW HUD'S DISPARATE IMPACT RULE  
MAY SAVE THE FAIR HOUSING ACT'S  
DISPARATE IMPACT STANDARD**

*William F. Fuller\**

*Since 2011, the U.S. Supreme Court has granted certiorari three times on the question of whether disparate impact liability is cognizable under the Fair Housing Act (FHA). The first two times, the parties settled. The question is before the Court once again in Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc., and this time the parties seem unlikely to settle.*

*Disparate impact liability in the civil rights context entails liability for actions that have a discriminatory effect, regardless of an actor's motive. Under the FHA, this can translate into liability for actions that make housing disproportionately unavailable for persons of a protected class or actions that tend to increase or maintain segregated housing patterns.*

*All eleven federal circuit courts that have addressed the question agree that disparate impact claims are cognizable under the FHA. In addition, in the spring of 2013, the U.S. Department of Housing and Urban Development (HUD) promulgated a rule that standardizes the burdens of proof for disparate impact claims under the FHA and specifically states for the first time in a formal administrative rule that disparate impact claims are cognizable under the FHA.*

*The promulgation of HUD's disparate impact rule means that this time around the Supreme Court must give heightened deference to an interpretation of the FHA that authorizes disparate impact claims. This Note argues that despite the near-unanimity of the circuit courts' interpretation of the FHA, the fate of disparate impact claims under the FHA was anything but certain prior to the promulgation of the HUD rule. The HUD rule makes it much more likely that the FHA disparate impact standard will survive, and this Note argues that it should.*

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## INTRODUCTION

Since 2011, the U.S. Supreme Court has granted certiorari three times<sup>1</sup> on the question of whether disparate impact claims—claims brought against a defendant for the discriminatory effect of an action, regardless of the actor’s intent—are cognizable under the Fair Housing Act<sup>2</sup> (FHA). However, the Supreme Court has yet to decide this question; the first two times, the cases settled before oral arguments could be heard. Now, the issue is before the Court a third time and the parties seem unlikely to settle.<sup>3</sup>

For the past forty years, federal circuit courts have allowed disparate impact claims under the FHA,<sup>4</sup> and all eleven circuits that have decided the issue agree.<sup>5</sup> In addition, the U.S. Department of Housing and Urban Development (HUD), the federal agency charged with implementing the FHA, has promulgated a rule that formally establishes that disparate impact claims can be brought under the FHA and standardizes the burdens of proof for the parties in such a case.<sup>6</sup> This new rule is important because HUD’s interpretation of the FHA is afforded a certain amount of deference when the statute is under judicial review.<sup>7</sup>

The FHA declares the policy of the federal government is “to provide, within constitutional limitations, for fair housing throughout the United States.”<sup>8</sup> To accomplish this goal, the FHA aims to (1) prevent and arrest

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1. *Inclusive Cmty. Project, Inc. v. Tex. Dep’t of Hous. & Cmty. Affairs*, 747 F.3d 275 (5th Cir.), *cert. granted*, 135 S. Ct. 46 (2014); *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375 (3d Cir. 2011), *cert. granted*, 133 S. Ct. 2824, *cert. dismissed*, 134 S. Ct. 636 (2013); *Gallagher v. Magner*, 619 F.3d 823 (8th Cir. 2010), *cert. granted*, 132 S. Ct. 548 (2011), *cert. dismissed*, 132 S. Ct. 1306 (2012).

2. 42 U.S.C. §§ 3601–3619, 3631 (2012).

3. *See* Greg Stohr, *Showdown Over Landmark Housing Law Looms at U.S. Supreme Court*, BLOOMBERG (Sept. 25, 2014, 12:00 AM), <http://www.bloomberg.com/news/2014-09-25/showdown-over-landmark-housing-law-looms-at-u-s-supreme-court.html>.

4. *See* Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11,459, 11,462 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100.500).

5. *See id.*

6. *See* 24 C.F.R. § 100.500 (2014); Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. at 11,474–75.

7. *See infra* Part I.B.2.

8. 42 U.S.C. § 3601 (2012).

discrimination in housing and (2) desegregate communities within the United States.<sup>9</sup>

Despite these admirable goals, housing segregation has declined only slightly since the passage of the FHA in 1968.<sup>10</sup> One way to measure the rate of segregation in a geographical area or community is the 100-point “dissimilarity index,” in which a score of 100 indicates total segregation, a score of zero “indicat[es] a population that is randomly distributed by race,” and a score of sixty or higher is considered “highly segregated.”<sup>11</sup> As of 2000, twelve major American cities, including New York, Washington, D.C., Philadelphia, and Chicago, had dissimilarity indexes over eighty.<sup>12</sup>

The causes of such de facto segregation are varied and include: economic factors, individual preferences of white persons to live in predominantly white neighborhoods, and disparate treatment of people of color by landlords and sellers of property.<sup>13</sup> The effect of these conditions is self-perpetuating segregation and discrimination.<sup>14</sup> Racial minorities living in “ghetto-like enclaves” suffer from higher rates of disease, unemployment, crime, and reduced educational and financial opportunities.<sup>15</sup> This, in turn, has the negative effect of reinforcing stereotypes and reinforcing the preference of whites to live in majority-white neighborhoods.<sup>16</sup>

The government has played a role in perpetuating segregation and stereotypes by enforcing housing codes more strictly in minority-occupied housing,<sup>17</sup> “providing inferior municipal services to minority neighborhoods[,] . . . and, perhaps the most common of all, employing zoning and other land-use techniques to block or limit the location of affordable housing developments.”<sup>18</sup>

Disparate impact claims are often used to challenge the effects of zoning policies and urban redevelopment projects. Some argue that these claims are vital to decreasing segregation today and preventing segregation patterns in the future.<sup>19</sup> The disparate impact standard is especially

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9. Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. at 11,466; *see also* United States v. Starrett City Assocs., 840 F.2d 1096, 1100–01 (2d Cir. 1988) (discussing the “dual goals” of the FHA).

10. *See* 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, 131 (2011).

11. *Id.*

12. *See id.* at 132.

13. *See id.* at 134–35.

14. *See id.* at 135 (“The economic/attitudinal causes of segregation and on-going discrimination reinforce one another.”).

15. *Id.*

16. *See id.*

17. In some neighborhoods, this has the effect of making affordable rental housing unavailable for a larger proportion of people of color. *See infra* notes 116–28 and accompanying text (discussing such an effect in *Gallagher v. Magner*, 619 F.3d 823 (8th Cir. 2010), *cert. granted*, 132 S. Ct. 548 (2011), *cert. dismissed*, 132 S. Ct. 1306 (2012)).

18. Schwemm, *supra* note 10, at 136.

19. *See* Valerie Schneider, *In Defense of Disparate Impact: Urban Redevelopment and the Supreme Court’s Recent Interest in the Fair Housing Act*, 79 MO. L. REV. 539, 576

important in urban redevelopment decisions—one of the main factors shaping U.S. cities and towns—because these decisions are usually made through diffuse processes in which intentional discrimination may be impossible to prove.<sup>20</sup>

Considering the near unanimity<sup>21</sup> with which federal courts and agencies have allowed disparate impact claims under the FHA and the arguably vital role disparate impact claims have in furthering the policies of the United States, why has the Supreme Court shown a recent interest in this issue? This Note aims to shine some light on this question and also addresses the issue of whether disparate impact claims are cognizable under the FHA.

In Part I, this Note contextualizes the FHA in the social and legal landscape at the time of its passage. It then defines disparate impact in the context of fair housing, describes the roots of this legal concept as it pertains to FHA claims, and shows how disparate impact claims are proven using the prima facie case and burden-shifting regimes of HUD's disparate impact rule, 24 C.F.R. § 100.500. Last, this part briefly describes the legislative history of the FHA and courts' and commentators' interpretation of that history to determine whether disparate impact liability is cognizable under the Act.

Part II of this Note introduces the three cases in which the Supreme Court has granted certiorari on the question of whether disparate impact claims are cognizable under the FHA. It then describes the development of FHA disparate impact case law, the precedents upon which the circuit courts relied, and the reasoning behind the decisions. Next, Part II discusses two recent Supreme Court cases that interpret language from other civil rights statutes that is arguably similar to the FHA's language. Then, Part II examines how these cases have affected recent interpretations of the FHA and how they might affect the Supreme Court's interpretation of the FHA in the future. Finally, this part discusses the limited instances in which federal courts have reviewed the HUD disparate impact rule.

In Part III, this Note argues that the disparate impact standard of the FHA cannot stand on the prevalence or consistency of judicial precedent alone because the case law is rife with fundamental, logical holes. Instead, this Note argues, the disparate impact standard under the FHA must rest on statutory interpretation alone. Because the text of the FHA is ambiguous as to the cognizability of disparate impact claims, the survival of the disparate impact standard will rise and fall on the reasonability of HUD's

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(2014) (arguing that the FHA's success depends on a disparate impact plaintiff's ability to challenge housing decisions that are made through diffuse processes in which discriminatory intent may be impossible to prove); Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM. U. L. REV. 357, 411–19 (2013) (arguing that, despite the relatively low rate of success for individual disparate impact claims, the disparate impact standard is a vital tool in accomplishing the goals of the FHA).

20. See Schneider, *supra* note 19, at 576.

21. So far, the D.C. District Court is the only federal court to hold that disparate impact claims are not cognizable under the FHA. See *Am. Ins. Ass'n v. Dep't of Hous. & Urban Dev.*, No. 13-00966 (RJL), 2014 WL 5802283, at \*13 (D.D.C. Nov. 7, 2014).

interpretation of the statute. Finally, this Note argues that HUD's interpretation of the statute is reasonable.

### I. THE HISTORICAL CONTEXT OF THE FAIR HOUSING ACT AND A BASIC PRIMER TO HUD'S DISPARATE IMPACT RULE

Part I introduces the FHA by first describing the historical and legal contexts in which Congress passed the FHA. This part goes on to define "disparate impact" and describe the historical legal development of disparate impact cases under the FHA.

Next, Part I describes HUD's disparate impact rule, 24 C.F.R. § 100.500. This part introduces the text of the rule and explains how the rule creates a burden-shifting test for determining disparate impact liability under the FHA. Then, this part explains the deference standard that courts apply to agency rules and interpretations that implement a statute when that statute is under judicial review.

Finally, this part briefly describes the use of the FHA's legislative history to determine Congress's purpose and the meaning of the FHA as it pertains to disparate impact claims.

#### A. *An Overview of the Fair Housing Act*

This section begins by briefly painting a picture of the cultural and legal climate in which the FHA was enacted. It then describes how the disparate impact standard functions in other areas of the law, particularly in constitutional equal protection and employment discrimination claims, which constitute the historical provenance of FHA disparate impact claims. Finally, this section illustrates how the FHA disparate impact standard functions in a practical sense by outlining the burdens of proof that each party bears in a FHA disparate impact claim.

#### 1. The Historical Context of the Fair Housing Act

The FHA was passed at a moment of heightened racial tension in the United States.<sup>22</sup> Beginning in the mid-1960s, riots broke out in a number of African American urban areas.<sup>23</sup> In response, President Lyndon Johnson commissioned a report on civil unrest in urban areas, known as the Kerner Report, which concluded that: "Race prejudice has shaped our history decisively; it now threatens to affect our future. White racism is essentially responsible for the explosive mixture which has been accumulating in our cities since the end of World War II."<sup>24</sup> Among other things, the report

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22. For a more complete discussion of the social context in which the FHA was enacted, see Schneider, *supra* note 19, at 549–53.

23. *Id.* at 552.

24. NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS: SUMMARY OF THE REPORT 9 (1968) [hereinafter KERNER REPORT]; see also Schneider, *supra* note 19, at 551–53 (discussing the effect of the Kerner Report).

recommended “the elimination of barriers to choice in housing and the passage of a national and enforceable ‘open housing law.’”<sup>25</sup>

This report was released on March 1, 1968, in the midst of a Senate filibuster to block the passage of the FHA, and the report’s release acted as a push to garner the two-thirds vote needed to end the filibuster and pass the bill through the Senate on March 11, 1968.<sup>26</sup> The assassination of Dr. Martin Luther King, Jr., on April 4 of the same year “served as a catalyst for the [FHA’s] quick passage through the House with its essential provisions intact.”<sup>27</sup> President Johnson signed the FHA into law exactly one week after Dr. King’s assassination.<sup>28</sup>

The year 1968 “marked the beginning of the modern era of fair housing law.”<sup>29</sup> In addition to the passage of the FHA, in *Jones v. Alfred H. Mayer Co.*,<sup>30</sup> the Supreme Court construed the Civil Rights Act of 1866<sup>31</sup> to prohibit racial discrimination in both private and public housing.<sup>32</sup> As Robert G. Schwemm, a preeminent scholar in the field of fair housing law, notes in his treatise, *Housing Discrimination Law and Litigation*, the combined effect of the passage of the FHA and the Supreme Court’s decision in *Jones* meant that the private housing market would be subject to federal antidiscrimination laws for the first time.<sup>33</sup>

The FHA differs from the Civil Rights Act of 1866 in key ways. First, the FHA extends the protections of the federal fair housing laws to personal traits not covered in the Civil Rights Act of 1866—which only prohibits discrimination on the basis of race or color—such as religion, sex, familial status, handicap or disability, and national origin.<sup>34</sup>

Second, the FHA expands the scope, under federal law, of the type of discriminatory acts that are prohibited in the housing context. Whereas prior to 1968 only discrimination in the sale or rental of property was

25. Schneider, *supra* note 19, at 553 (quoting KERNER REPORT, *supra* note 24, at 23); see also Rigel C. Oliveri, *Is Acquisition Everything? Protecting the Rights of Occupants Under the Fair Housing Act*, 43 HARV. C.R.-C.L. L. REV. 1, 25 (2008).

26. See Schneider, *supra* note 19, at 553.

27. *Id.*

28. *Id.*

29. ROBERT G. SCHWEMM, *HOUSING DISCRIMINATION LAW AND LITIGATION*, § 1:1 (2014).

30. 392 U.S. 409 (1968).

31. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27.

32. See *Jones*, 392 U.S. at 413; SCHWEMM, *supra* note 29, § 1:1. The *Jones* Court specifically dealt with the provision now codified in 42 U.S.C. § 1982 (2012). See *Jones*, 392 U.S. at 412–13. The Civil Rights Act of 1866 grants, inter alia, “[a]ll citizens of the United States . . . the same right . . . as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.” 42 U.S.C. § 1982 (2012).

33. SCHWEMM, *supra* note 29, § 1:1.

34. See 42 U.S.C. § 3604; *Jones*, 392 U.S. at 413–14. The prohibitions under the FHA, however, are not broader than those found in the Civil Rights Act of 1866 in every sense; rather, they are different in scope. See generally SCHWEMM, *supra* note 29, § 27. For example, the Civil Rights Act of 1866 may be used to create liability in cases of harassment, where the harassment interferes with a person’s use and enjoyment of real (and personal) property and is motivated by race. *Id.* § 27:12. It is not always the case that liability exists under the FHA for acts of harassment in the housing context, even when it is motivated by the victim’s protected trait. See generally Oliveri, *supra* note 25.

prohibited,<sup>35</sup> the FHA bars: discrimination in the “terms, conditions, or privileges,” or “the provision of services or facilities in connection” with the sale or rental of a dwelling;<sup>36</sup> the making, printing, or publishing, or causing to be made, printed, or published, “any notice, statement, or advertisement” in connection with the sale or renting of a dwelling that “indicates any preference, limitation, or discrimination” on the basis of a protected trait;<sup>37</sup> “represent[ing] to any person because of [a protected trait] that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available;”<sup>38</sup> and other actions, such as discrimination in financing<sup>39</sup> or brokerage services<sup>40</sup> related to the sale or rental of a dwelling.

Third, the FHA changes the way that housing discrimination statutes are enforced. Whereas housing-related antidiscrimination claims under the Civil Rights Act of 1866 are enforced exclusively by private parties who bring suit against defendants,<sup>41</sup> the FHA allows for enforcement of its substantive provisions by the U.S. Attorney General<sup>42</sup> and the Secretary of HUD,<sup>43</sup> in addition to enforcement by private parties.<sup>44</sup>

Finally, and most importantly for the purposes of this Note, whereas the Civil Rights Act of 1866 imposes liability only for intentional discrimination in housing,<sup>45</sup> courts often interpret the FHA as imposing liability for both intentional discrimination and acts with a discriminatory effect.<sup>46</sup>

## 2. Defining Disparate Impact Liability Under the Fair Housing Act

Disparate impact liability refers to the idea that civil liability can be created under antidiscrimination laws for acts that have a discriminatory effect, regardless of an actor’s intent.<sup>47</sup> Disparate impact liability may be

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35. See, e.g., *Jones*, 392 U.S. at 413.

36. 42 U.S.C. § 3604(b).

37. *Id.* § 3604(c).

38. *Id.* § 3604(d).

39. *Id.* § 3605.

40. *Id.* § 3606; see also *Jones*, 392 U.S. at 413–14 (explaining that the FHA prohibits many more discriminatory acts than the Civil Rights Act of 1866).

41. *Jones*, 392 U.S. at 417; SCHWEMM, *supra* note 29, § 27:21.

42. 42 U.S.C. § 3614 (authorizing the Attorney General to “commence a civil action in any appropriate United States district court” in certain instances).

43. *Id.* § 3610 (authorizing the Secretary of HUD to file a housing discrimination complaint on his or her own initiative).

44. *Id.* (detailing procedures for an aggrieved individual to file a complaint directly with HUD); *id.* § 3613 (detailing procedures for an aggrieved individual filing a direct court action).

45. SCHWEMM, *supra* note 29, § 27:19.

46. E.g., *Inclusive Cmty. Project, Inc. v. Tex. Dep’t of Hous. & Cmty. Affairs*, 747 F.3d 275 (5th Cir. 2014), *cert. granted*, 135 S. Ct. 46 (2014). *But cf.* *Am. Ins. Ass’n v. Dep’t of Hous. & Urban Dev.*, No. 13-00966 (R.J.L.), 2014 WL 5802283, at \*13 (D.D.C. Nov. 7, 2014).

47. See Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 EMORY L.J. 409, 411 (1998).

thought of in relation to disparate treatment, which is an act of intentional discrimination where “[p]roof of discriminatory motive is critical.”<sup>48</sup>

The distinction between purposeful discrimination and neutral acts with a discriminatory effect is not always clear. Sometimes, the disparate impact of an action on a protected class may be critical evidence to proving discriminatory intent.<sup>49</sup> Other times, disparate impact is a stand-alone basis for finding a violation of a person’s civil rights.<sup>50</sup> This second situation is the focus of this Note and the FHA case, *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*,<sup>51</sup> which is currently before the U.S. Supreme Court. The sole question before the Court in *Inclusive Communities* is: “Are disparate-impact claims cognizable under the Fair Housing Act?”<sup>52</sup>

### 3. The Evolution of Disparate Impact Under the Fair Housing Act

FHA disparate impact liability is historically rooted in analogies to disparate impact liability in constitutional equal protection cases and Title VII<sup>53</sup> employment discrimination cases.<sup>54</sup> Today, practitioners and commentators prefer finding disparate impact liability by analogy to Title VII,<sup>55</sup> especially because the Supreme Court no longer recognizes disparate impact claims in constitutional equal protection cases.<sup>56</sup>

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48. See *Smith v. City of Jackson*, 544 U.S. 228, 249 (2005) (O’Connor, J., dissenting) (quoting *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)); accord *Mahoney*, *supra* note 47, at 411–17 (discussing the difference between disparate treatment and disparate impact); George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1298 (1987).

49. See *Washington v. Davis*, 426 U.S. 229, 254 (1976) (Stevens, J., concurring). Justice Stevens writes:

[T]he line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court’s opinion might assume. I agree, of course, that a constitutional issue does not arise every time some disproportionate impact is shown. On the other hand, when the disproportion is [sufficiently dramatic] . . . it really does not matter whether the standard is phrased in terms of purpose or effect.

*Id.* (citations omitted).

50. See, e.g., *Inclusive Cmty. Project, Inc. v. Tex. Dep’t of Hous. & Cmty. Affairs*, 747 F.3d 275 (5th Cir. 2014), *cert. granted*, 135 S. Ct. 46 (2014).

51. 135 S. Ct. 46 (2014).

52. Petition for a Writ of Certiorari for Petitioners at i, *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 46 (2014) (No. 13-1371).

53. 42 U.S.C. §§ 2000e to 2000e-17 (2012).

54. See *Mahoney*, *supra* note 47, at 425–27.

55. See *id.* at 447–50 (arguing that the Title VII analogy is the proper basis for finding disparate impact liability under the FHA).

56. See *infra* notes 183–91.

*a. Equal Protection and Its Relationship  
to Disparate Impact Liability Under the Fair Housing Act*

The first circuit court to impose disparate impact liability under the FHA relied almost exclusively on constitutional equal protection cases that arose in the context of fair housing.<sup>57</sup>

The Fourteenth Amendment of the U.S. Constitution provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”<sup>58</sup> The Supreme Court has described the Equal Protection Clause as “essentially a direction that all persons similarly situated should be treated alike.”<sup>59</sup> This direction was extended to the federal government under the Due Process Clause of the Fifth Amendment<sup>60</sup> in *Bolling v. Sharpe*.<sup>61</sup> Subsequent cases tend to treat the Fifth and Fourteenth Amendments as imposing the same directives of equal treatment on both state and federal governments.<sup>62</sup>

Constitutional equal protection claims require that the claimant show that the alleged bad actor acted with discriminatory intent.<sup>63</sup> In the landmark Supreme Court case *Washington v. Davis*,<sup>64</sup> two African American applicants for employment in the Washington, D.C. police department filed a suit against the Commissioner of the District of Columbia, among others, alleging that a written personnel test that operated to disqualify more African American applicants than white applicants violated the Due Process Clause of the Fifth Amendment.<sup>65</sup> The *Davis* Court disagreed and held that constitutional equal protection plaintiffs must prove that a defendant’s action was motivated, at least in part, by the plaintiff’s protected trait.<sup>66</sup>

Prior to *Davis*, many federal circuit courts held that disparate impact claims were cognizable under the Equal Protection Clause.<sup>67</sup> The Equal Protection Clause disparate impact standard was often applied in the housing context, and in some instances, federal courts relied on such housing discrimination cases as direct authority for finding that the FHA authorized disparate impact claims.<sup>68</sup>

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57. *See infra* Part II.A.1.

58. U.S. CONST. amends. V, XIV.

59. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).

60. The Due Process Clause of the Fifth Amendment provides that no person shall “be deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V.

61. 347 U.S. 497, 500 (1954).

62. *See, e.g.*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 213–17 (1995) (discussing the evolution of equal protection claims under the Fifth Amendment and declining to diverge from the general rule that “obligations imposed by the Fifth and the Fourteenth Amendments [are] indistinguishable”).

63. *See, e.g.*, *Washington v. Davis*, 426 U.S. 229, 237 (1976).

64. *Id.*

65. *Id.* at 232–33.

66. *Id.* at 238–39.

67. *See infra* Part II.A.1.

68. *See infra* Part II.A.1.

*b. The Roots of the Disparate Impact Standard  
in Title VII Employment Discrimination  
and Its Effect on the Fair Housing Act*

While one can no longer prove discrimination via disparate impact in constitutional equal protection cases, disparate impact liability is firmly grounded in employment discrimination civil rights statutes.<sup>69</sup>

In *Griggs v. Duke Power Co.*,<sup>70</sup> an employment discrimination case, the Supreme Court first sanctioned disparate impact liability in statutory civil rights law.<sup>71</sup> In *Griggs*, Duke Power Co. required, as a condition to employment or advancement in the company, that employees pass a facially neutral general intelligence test or have a high school diploma.<sup>72</sup> The Supreme Court held that the test requirement violated Title VII of the Civil Rights Act of 1964<sup>73</sup> because it was not a business necessity and it worked to disqualify a disproportionately large number of African Americans.<sup>74</sup>

The *Griggs* Court cited Title VII, section 703(a)(2) and 703(h), as the foundation for disparate impact liability under that Act.<sup>75</sup> Section 703(a)(2) makes it unlawful for an employer “to limit, segregate, or classify” employees or to “otherwise adversely affect” an employee’s status as an employee because of his or her race or other protected trait.<sup>76</sup> Section 703(h) creates an exception to this rule for “any professionally developed ability test provided that such test . . . is not designed, intended[, ] or used to discriminate because of race” or other protected trait.<sup>77</sup>

The underlying holding in *Griggs*, and the statutory authority on which the Court relied, is important to understanding disparate impact liability under the FHA, because the holding in *Griggs* would soon be adopted in early disparate impact cases under the FHA,<sup>78</sup> often by direct analogy.<sup>79</sup>

#### 4. The Concept of the Prima Facie Case

It is important to note that a defendant is not liable for discrimination simply because he or she takes a course of action that has a disparate impact

69. See, e.g., George Rutherglen, *Disparate Impact, Discrimination, and the Essentially Contested Concept of Equality*, 74 *FORDHAM L. REV.* 2313, 2314 (2006) (stating that “[t]he theory of disparate impact acquired its firm foothold in civil rights law in” the seminal disparate impact in employment discrimination case, *Griggs v. Duke Power Co.*).

70. 401 U.S. 424 (1971).

71. See Rutherglen, *supra* note 69, at 2314; Rutherglen, *supra* note 48, at 1297.

72. See *Griggs*, 401 U.S. at 428.

73. 42 U.S.C. §§ 2000e to 2000e-17 (2012).

74. See *Griggs*, 401 U.S. at 431–32.

75. See *id.* at 426 n.1; see also 42 U.S.C. § 2000e-2(a)(2), e-2(h).

76. 42 U.S.C. § 2000e-2(a)(2).

77. *Id.* § 2000e-2(h). This language is identical to the earlier version quoted in *Griggs*. *Griggs*, 401 U.S. at 426 n.1. Section 703(a)(2) and (h) were cited in the first footnote, in the first sentence of *Griggs*, but the text of the statutes received little treatment after that, as the Court instead relied on legislative history and the EEOC’s interpretation of the statute. See *id.* at 434–36.

78. For a more thorough discussion of this, see *infra* Part II.A.2.

79. See, e.g., *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights (Arlington Heights II)*, 558 F.2d 1283, 1289 (7th Cir. 1977).

on a protected class.<sup>80</sup> For both disparate treatment and disparate impact cases, without direct evidence of discriminatory intent, plaintiffs must rely on circumstantial evidence, governed by the prima facie case framework.<sup>81</sup>

The prima facie frameworks for both disparate impact and disparate treatment claims under the FHA were adopted directly from Title VII.<sup>82</sup> For example, the prima facie framework for disparate treatment under the FHA is derived directly from the landmark Supreme Court case *McDonnell Douglas Corp. v. Green*,<sup>83</sup> which established the prima facie case and burden-shifting framework for Title VII disparate treatment claims.<sup>84</sup> For disparate impact claims under the FHA, the framework is again borrowed from Title VII, this time mirroring the disparate impact framework codified in section 703(k).<sup>85</sup> HUD's newly promulgated disparate impact rule, discussed below, lays out the burden-shifting framework for disparate impact claims under the FHA.

### B. HUD's Disparate Impact Rule and Chevron Deference

This section first introduces HUD's disparate impact rule, 24 C.F.R. § 100.500, by explaining how it formalizes the prima facie case and burden-shifting framework for disparate impact claims under the FHA. It then explains the reasoning behind promulgating the rule, and the need to formalize the disparate impact standard. Last, this section explains how courts give deference to agency rules by applying the two-step test set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>86</sup>

#### 1. HUD's Rule: What It Says, What It Does, and Why It Does What It Says

Under § 100.500, a prima facie case is established under the FHA<sup>87</sup> by showing that a defendant's action has or had a discriminatory effect.<sup>88</sup> An

80. *Cf. Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375, 385 (2011) (stating that courts need not worry that the disparate impact 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 . . .").

81. *See* SCHWEMM, *supra* note 29, § 10:2.

82. *See id.*

83. 411 U.S. 792 (1973).

84. *See id.* at 802 (applying the prima facie case framework to employment discrimination cases under Title VII); SCHWEMM, *supra* note 29, § 10:2 & nn.26–29 (laying out the prima facie case framework and collecting cases).

85. *See* 42 U.S.C. § 2000e-2(k) (2012); Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,459, 11,474 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100.500) (stating that the burden-shifting scheme in HUD's disparate impact rule is consistent with the effects standard in Title VII); *cf. Prop. Cas. Insurers Ass'n of Am. v. Donovan*, No. 13 C 8564, 2014 WL 4377570, at \*25 (N.D. Ill. Sept. 3, 2014) (stating that the approach found in HUD's disparate impact rule is similar to the approach found in section 703(k)).

86. 467 U.S. 837 (1984).

87. HUD states that § 100.500 applies to 42 U.S.C. §§ 3604(a)–(b), 3604(f)(1)–(2), 3605, and 3606. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11,463.

action has a discriminatory effect when it “actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of” a protected trait.<sup>89</sup> If a defendant’s action has a discriminatory effect, the defendant may not be liable if the defendant has a “legally sufficient justification” for its action.<sup>90</sup> A legally sufficient justification is one that is “necessary to achieve one or more substantial, legitimate, nondiscriminatory interests,” and cannot “be served by another practice that has a less discriminatory effect.”<sup>91</sup>

If the *defendant* establishes step one above—that is, that the challenged practice is necessary to achieve a substantial, legitimate, nondiscriminatory purpose—then the *plaintiff* has the ultimate burden of proving that the practice could be served by a less discriminatory practice.<sup>92</sup>

HUD stated that the regulation was needed “to formalize HUD’s long-held interpretation of the availability of ‘discriminatory effects’ liability under the [FHA] and to provide nationwide consistency in the application of that form of liability.”<sup>93</sup> There was a need to formalize the standard because of the various approaches that HUD and the different federal circuit courts of appeals took when deciding disparate impact cases under the FHA.<sup>94</sup> Previously, HUD and several circuit courts applied varying three-step burden-shifting tests; other courts used a multifactor balancing test; and others, still, used a mix between the two.<sup>95</sup> At least one court applied a different burden to private defendants and public defendants.<sup>96</sup>

Thus, HUD emphasized that it was not creating any new forms of liability but simply formalizing the standards that courts and federal agencies already applied in disparate impact claims.<sup>97</sup>

## 2. Chevron Deference

HUD has the ability to standardize the framework by which federal courts review FHA disparate impact claims because courts are required to give a certain level of deference to an agency’s construction of the statute

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88. 24 C.F.R. § 100.500(a) (2014).

89. *Id.*

90. *Id.* § 100.500(b), (c)(2).

91. *Id.* § 100.500(b)(i)–(ii).

92. *Id.* § 100.500(c)(2)–(3).

93. Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. at 11,460.

94. Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 76 Fed. Reg. 70,921, 70,923 (Nov. 16, 2011) (to be codified at 24 C.F.R. pt. 100.500).

95. *Id.*

96. *Id.* HUD’s standard applies equally to private and public defendants. *See* Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. at 11,476.

97. *See* Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. at 11,476 (“[T]he rule does not establish a new form of liability, but instead serves to formalize by regulation a standard that has been applied for decades, while providing nationwide uniformity of application.”).

that the agency is charged with administering.<sup>98</sup> This does not mean that courts must automatically apply any rule that an agency creates: under the Administrative Procedure Act<sup>99</sup> (APA), courts must set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>100</sup> This judicial review of agency action is governed by the two-step *Chevron* deference test.<sup>101</sup>

The basic two-step test is this: If the reviewing court is reviewing an agency’s interpretation of a statute that the agency is charged with administering, then the court must first ask “whether Congress has directly spoken to the precise question at issue,” that is, whether the statute is “silent or ambiguous with respect to the specific issue” (Step One).<sup>102</sup> If the statute speaks directly to the specific issue at hand, that is the end of the inquiry, “for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”<sup>103</sup>

However, if the statute is silent or ambiguous as to the specific question at issue, the court must then ask “whether the agency’s answer [or interpretation] is based on a permissible construction of the statute” (Step Two).<sup>104</sup> At Step Two, the court must defer to the agency’s interpretation if it is “reasonable,” and the court may not substitute its own interpretation for that of the agency.<sup>105</sup>

Thus, when a court reviews HUD’s disparate impact rule, it must ask: (1) whether Congress spoke directly to the precise issue of whether disparate impact claims are cognizable under the FHA, and (2) if not, whether HUD’s interpretation of the FHA as allowing such claims is reasonable.<sup>106</sup>

### C. A Side Note on the Fair Housing Act’s Legislative History

This section briefly explains the legislative history of the FHA. Generally speaking, for at least the past twenty-five years, courts have been reluctant to use legislative history to decipher the meaning of the text of a

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98. *E.g.*, *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

99. 5 U.S.C. § 706(2)(A) (2012).

100. *Id.*

101. *Chevron*, 467 U.S. 837; *see also* Christopher J. Walker, *Chevron Inside the Regulatory State: An Empirical Assessment*, 83 FORDHAM L. REV. 703, 706 (2014) (stating that *Chevron* established the two-step *Chevron* deference test).

102. *Chevron*, 467 U.S. at 842–43.

103. *Id.*

104. *Id.* at 843.

105. *Id.* at 842–44.

106. *See* Prop. Cas. Insurers Ass’n of Am. v. Donovan, No. 13 C 8564, 2014 WL 4377570, at \*21, 24 (N.D. Ill. Sept. 3, 2014) (giving *Chevron* deference to HUD’s burden-shifting framework but holding that HUD’s application of the rule to the insurance industry without adequate explanation was arbitrary and capricious, and remanding to HUD for further explanation). *But see* Am. Ins. Ass’n v. Dep’t of Hous. & Urban Dev., No. 13-00966 (RJL), 2014 WL 5802283, at \*7 (D.D.C. Nov. 7, 2014) (applying *Chevron* to HUD’s disparate impact rule and concluding that the rule failed at Step One, and finding, moreover, that HUD’s entire disparate impact rule was arbitrary and capricious).

statute.<sup>107</sup> For reasons discussed below, legislative history seems even less desirable as a tool to determine the meaning of the FHA.<sup>108</sup> However, many courts and practitioners continue to turn to the legislative history of the FHA as a thumb on the scale to determine legislative intent.<sup>109</sup>

The FHA was introduced as a floor amendment to the Civil Rights Act of 1968 after the publication of the Kerner Report on civil unrest in urban areas and immediately following the assassination of Dr. Martin Luther King, Jr.<sup>110</sup> Because the FHA was passed as a floor amendment, it lacks “committee reports and other documents usually accompanying congressional enactments.”<sup>111</sup>

For example, in *Resident Advisory Board v. Rizzo*,<sup>112</sup> the Third Circuit recognized that Congress’s intent regarding the availability of disparate impact claims under the FHA was difficult to discern from its legislative history because the legislative history is “sketchy.”<sup>113</sup>

Nonetheless, the court buttressed its statutory analysis of the FHA by stating that while the Senators debated the FHA on the floor, one senator “introduced an amendment that would have required proof of discriminatory intent to succeed in establishing a Title VIII claim,” but the legislators ultimately rejected this bill.<sup>114</sup> Thus, the *Rizzo* court seemed to infer that Congress, by rejecting the proposed amendment, had in some form condoned the disparate impact standard under the FHA.<sup>115</sup>

107. See 2 JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION* 158–60, 163–67 (Foundation Press 2013). In discussing the controversy over the use of legislative history to determine the meaning of a statute, the authors note that “over the last quarter-century the Supreme Court and the federal courts of appeals have reduced their reliance on legislative history . . . and have placed greater emphasis on the text and on sources of semantic meaning, like dictionaries.” *Id.* at 163–64. *But cf., e.g.,* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 572 (2005) (Stevens, J., dissenting) (“Because ambiguity is apparently in the eye of the beholder, I remain convinced that it is unwise to treat the ambiguity *vel non* of a statute as determinative of whether legislative history is consulted.”).

108. See *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 210 (1972) (stating that “[t]he legislative history of the [Fair Housing] Act is not too helpful”); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 147 (3d Cir. 1977) (“[T]he legislative history of Title VIII is somewhat sketchy.”); Mahoney, *supra* note 47, at 436 n.108 (“Because there is so little of use in the legislative history, courts hardly ever advert to it in construing the FHA.”); Oliveri, *supra* note 25, at 25–26 (discussing why “looking to legislative history in interpreting the FHA is problematic”).

109. *Cf. Rizzo*, 564 F.2d at 147 (citing the FHA’s legislative history to buttress its statutory analysis); Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11,459, 11,476 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100.500) (“The legislative history of the Act informs HUD’s interpretation.”); Brief for Respondent at 2–12, *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, No. 13-1371 (Dec. 17, 2014), 2014 WL 7242817 (providing extensive discussion of the legislative history of the FHA).

110. See *Rizzo*, 564 F.2d at 147 n.29; *supra* Part I.A.1.

111. *Rizzo*, 564 F.2d at 147 n.29.

112. 564 F.2d 126 (3d Cir. 1977).

113. *Id.* at 147.

114. *Id.*

115. *Cf. id.* (calling the introduction and subsequent rejection of the proposed amendment “significant”).

II. A “DERELICT ON THE WATERS OF THE LAW”?:  
WHY THERE IS DOUBT AS TO WHETHER DISPARATE IMPACT CLAIMS  
ARE COGNIZABLE UNDER THE FAIR HOUSING ACT  
AND WHAT HUD’S GOT TO DO WITH IT

Part II begins by discussing the three different cases in which the Supreme Court has granted certiorari on the question of whether disparate impact claims are cognizable under the FHA. This part explains why the first two cases settled before oral arguments and why the case currently before the court is unlikely to settle.

Next, Part II describes three of the original circuit court cases to hold that disparate impact claims are cognizable under the FHA. This part explains the reasoning behind each of these cases, tracing the reasoning back along two lines of thought: disparate impact liability under the Equal Protection Clause and under Title VII. It then explains how these early cases each relied upon an analogy to equal protection cases and why such an analogy is no longer valid. This part goes on to demonstrate that the survival of the disparate impact standard under the FHA must rely on the text of the FHA itself because the Supreme Court has invalidated the equal protection line of analysis.

Part II then summarizes the reasoning of recent Supreme Court decisions that analyzed language in other civil rights statutes that is similar to the FHA’s text and explains how this reasoning might affect future analyses of the text of the FHA. Finally, this part discusses how federal courts have applied *Chevron* to the HUD disparate impact rule and how the recent Supreme Court decisions have affected the *Chevron* analysis in one of these decisions.

A. *Third Time’s the Charm? The Supreme Court Grants Certiorari on the Question of Whether the FHA Authorizes Disparate Impact Liability*

The Supreme Court first granted certiorari on the question of whether disparate impact claims are cognizable under the FHA in *Gallagher v. Magner*.<sup>116</sup> In *Gallagher*, a number of landlords who owned or formerly owned multi-family housing buildings—most of which were occupied primarily by low-income tenants—sued the city of St. Paul, Minnesota for unequal enforcement of housing codes, alleging violations of the FHA<sup>117</sup> for both disparate treatment and disparate impact on the basis of race and ethnicity.<sup>118</sup> The director of St. Paul’s Department of Neighborhood Housing and Property Improvement specifically increased housing code enforcement on rental properties to raise revenue and “for the sake of the neighborhood.”<sup>119</sup> The district court dismissed both claims, and the plaintiffs appealed to the Eighth Circuit.<sup>120</sup> The Eighth Circuit affirmed the

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116. 619 F.3d 823 (8th Cir. 2010), *cert. granted*, 132 S. Ct. 548 (2011).

117. 42 U.S.C. § 3604(a)–(b) (2012).

118. *Gallagher*, 619 F.3d at 830.

119. *Id.* at 829 (internal quotation marks omitted).

120. *Id.*

dismissal of the disparate treatment claim<sup>121</sup> but reversed and remanded the disparate impact claim to the district court, because St. Paul's unequal enforcement of the housing code made housing unavailable or more expensive for a disproportionately large number of African American residents compared to white residents.<sup>122</sup>

St. Paul appealed from the remand on the disparate impact claim and petitioned the Supreme Court for certiorari on two questions:

1. Are disparate-impact claims cognizable under the Fair Housing Act?
2. If such claims are cognizable, should they be analyzed under the burden-shifting approach used by three circuits, under the balancing test used by four circuits, under a hybrid approach used by two circuits, or by some other test?<sup>123</sup>

The Supreme Court granted certiorari on only the first question.<sup>124</sup>

However, the city withdrew its petition,<sup>125</sup> and the Supreme Court never heard oral arguments on *Gallagher*.<sup>126</sup> Allegedly, at the request of the Obama Administration,<sup>127</sup> St. Paul agreed to withdraw its petition in exchange for the Department of Justice declining to intervene in a civil fraud suit alleging that St. Paul had defrauded the federal government of millions of dollars in community development funds.<sup>128</sup>

The Supreme Court granted certiorari on this question a second time in *Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly*.<sup>129</sup> In *Mt. Holly*, the Township of Mount Holly, New Jersey had created a redevelopment plan known as "the Gardens."<sup>130</sup> The Gardens was the only neighborhood in all of Mount Holly that was mostly comprised of minorities,<sup>131</sup> and the 2000 census classified nearly all residents of the Gardens as "low income," with most being classified as "very low" or "extremely low" income.<sup>132</sup> The redevelopment plan called for the demolition of all of the housing then in place, and the replacement of the

121. *Id.* at 831–33, 845. One plaintiff was able to point to specific racially derogatory comments made by code enforcement officers and police officers when visiting his property, but the plaintiffs failed to bring these comments to the attention of the trial judge. *Id.* at 832.

122. *Id.* at 837–38, 845.

123. Petition for a Writ of Certiorari for Petitioner at i, *Magner v. Gallagher*, 132 S. Ct. 548 (2012) (No. 10-1032).

124. *Gallagher*, 132 S. Ct. 548.

125. *Gallagher*, 132 S. Ct. 1306 (dismissing writ of certiorari).

126. See, e.g., Trevor Burrus, *How Mischievous Obama Administration Officials Scuttled an Important Supreme Court Case*, FORBES (Sept. 2, 2013, 10:00 AM), <http://www.forbes.com/sites/trevorburrus/2013/09/02/how-mischievous-obama-administration-officials-scuttled-an-important-supreme-court-case/>.

127. See Stohr, *supra* note 3; cf. STAFF OF H.R. COMM. ON OVERSIGHT & GOV'T REFORM, 113TH CONG., ET AL., DOJ'S QUID PRO QUO WITH ST. PAUL: HOW ASSISTANT ATTORNEY GENERAL THOMAS PEREZ MANIPULATED JUSTICE AND IGNORED THE RULE OF LAW 1 (2013) [hereinafter DOJ'S QUID PRO QUO].

128. DOJ'S QUID PRO QUO, *supra* note 127, at 1.

129. 658 F.3d 375 (3d Cir. 2011), *cert. granted*, 133 S. Ct. 2824, *cert. dismissed*, 134 S. Ct. 636 (2013).

130. *Id.* at 379.

131. *Id.* at 377.

132. *Id.* at 378.

houses with 520 new housing units—fifty-six of which would be deed-restricted affordable housing units, and eleven of those fifty-six to be offered on a priority basis for current residents.<sup>133</sup> Relocation funds of up to \$7,500 per family were authorized, but most could not afford to live in the Township of Mount Holly any longer.<sup>134</sup> The township began to acquire and demolish houses in the area in 2008 and, by summer of 2009, the township had demolished nearly 200 buildings, with even more being left vacant or severely damaged by the demolition process.<sup>135</sup>

In May 2008, an association of the Gardens' residents filed suit in federal court, alleging, among other things, violations of the FHA because of the disproportionate negative effect that the redevelopment plan had on persons of color.<sup>136</sup> On appeal from a grant of summary judgment for the defendant township, the Third Circuit concluded that the residents had made a prima facie case and deserved to have their claims heard on the merits.<sup>137</sup>

The township petitioned for a writ of certiorari to the Supreme Court on the same two questions<sup>138</sup> that were presented in *Gallagher*.<sup>139</sup> Again, the Supreme Court granted certiorari only to the first: whether disparate impact claims are cognizable under the FHA.<sup>140</sup>

However, this case also settled before oral arguments could be heard, this time allegedly at the behest of civil rights advocacy groups.<sup>141</sup> Again, the Supreme Court dismissed the writ of certiorari and the question remained unanswered.<sup>142</sup>

This issue is before the Supreme Court again in a 2014 case from the Fifth Circuit, *Inclusive Communities*. In this case, the nonprofit community group Inclusive Communities Project (ICP) sued the Texas Department of Housing and Community Affairs (TDHCA) for “maintaining and perpetuating segregated housing patterns” through its distribution of low-income housing tax credits (LIHTCs).<sup>143</sup> The LIHTC program is a federal tax credit program administered by state agencies, which gives tax credits to developers of affordable housing.<sup>144</sup> LIHTCs are distributed by TDHCA to developers through a competitive program, and these credits can be sold off by the developer to finance low-income housing projects.<sup>145</sup> ICP alleges

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133. *Id.* at 379.

134. *Id.* at 380.

135. *Id.*

136. *Id.* at 380–81.

137. *Id.* at 385.

138. *See supra* note 123 and accompanying text.

139. *See* Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc., 133 S. Ct. 2824 (2013); Petition for a Writ of Certiorari for Petitioner at i, *Mt. Holly*, 133 S. Ct. 2824.

140. Petition for a Writ of Certiorari for Petitioner at i, *Mt. Holly*, 133 S. Ct. 2824.

141. *Cf.* Adam Liptak, *Housing Case Is Settled Before It Goes to Supreme Court*, N.Y. TIMES, Nov. 13, 2013, at A18; Stohr, *supra* note 3 (implying that civil rights groups were behind the settlement).

142. *See* Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc., 134 S. Ct. 636 (2013) (dismissing writ of certiorari).

143. *Inclusive Cmty. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, 747 F.3d 275, 278 (5th Cir.), *cert. granted*, 135 S. Ct. 46 (2014).

144. *See* I.R.C. § 42 (2012); *Inclusive Cmty. Project*, 747 F.3d at 277.

145. *Inclusive Cmty. Project*, 747 F.3d at 277.

that TDHCA has granted LIHTCs to developers for projects in minority-concentrated neighborhoods at a disproportionate rate and denied LIHTCs in predominately white neighborhoods at a disproportionate rate, thereby creating a concentration of low-income housing in minority-concentrated neighborhoods and maintaining patterns of segregation.<sup>146</sup>

The district court held in favor of ICP on the FHA disparate impact claim,<sup>147</sup> and TDHCA appealed.<sup>148</sup> On appeal, the primary question was which standard should be applied in disparate impact claims under the FHA.<sup>149</sup> The district court applied the standard found in *Huntington Branch, NAACP v. Town of Huntington*,<sup>150</sup> which places the burden on the defendant to “(1) justify [its] actions with a compelling governmental interest and (2) prove that there were no less discriminatory alternatives.”<sup>151</sup>

However, between the time that the district court decided the case and the time that the Fifth Circuit heard the appeal, HUD finalized its disparate impact rule, 24 C.F.R. § 100.500, which establishes that the plaintiff bears the burden of showing less discriminatory alternatives.<sup>152</sup> The Fifth Circuit declined to follow *Huntington Beach* and instead applied the test in § 100.500.<sup>153</sup>

Again, the defendants appealed, but this time petitioning the Supreme Court for certiorari on the same two questions presented in *Gallagher* and *Mt. Holly*.<sup>154</sup> Again, the Supreme Court granted certiorari on only the first question: whether disparate impact claims are cognizable under the FHA.<sup>155</sup>

This time, it seems unlikely that the case will settle.<sup>156</sup> Michael Daniel, a lawyer for ICP, stated that ICP has no intention of withdrawing the complaint, and that ICP “can make its case before the Supreme Court.”<sup>157</sup>

*B. How We Got to Where We Are Today:  
An Analysis of the Validity of the Underlying Reasoning  
in Early FHA Disparate Impact Cases*

This section discusses in detail the reasoning behind the first three federal circuit court decisions to address the question of whether disparate impact claims are cognizable under the FHA. This section then explains how the survival of the disparate impact standard under the FHA must rest on the

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146. *Id.* at 278.

147. *Id.* at 276.

148. *Id.*

149. *Id.*

150. 844 F.2d 926 (2d Cir. 1988).

151. *Inclusive Cmty. Project*, 747 F.3d at 279 (citing *Huntington Branch*, 822 F.2d at 939).

152. *See supra* Part I.B.1.

153. *Inclusive Cmty. Project*, 747 F.3d at 282–83.

154. Petition for a Writ of Certiorari for Petitioners at i, Tex. Dep’t of Hous. & Cmty. Affairs v. *Inclusive Cmty. Project, Inc.*, 135 S. Ct. 46 (2014).

155. *Inclusive Cmty. Project*, 135 S. Ct. 46.

156. Stohr, *supra* note 3.

157. *Id.*

text of the statute itself—something that can be demonstrated with close textual analysis and analogies to the text of employment discrimination statutes that have elsewhere been held to authorize disparate impact claims.

1. Early Disparate Impact Decisions Under the FHA Relied on an Invalid Legal Theory Under the Equal Protection Clause

In 1974, the Eighth Circuit decided *United States v. City of Black Jack*,<sup>158</sup> the first federal circuit court case to impose liability under the FHA based solely on a theory of disparate impact.<sup>159</sup> The facts underlying *Black Jack* are typical of what Professor Stacy Seicshnaydre describes as a “housing barrier” case,<sup>160</sup> or a case in which the challenged practice erects a barrier to integrating neighborhoods.<sup>161</sup> In *Black Jack*, a coalition of residents in a formerly unincorporated neighborhood petitioned St. Louis county for incorporation after learning that a low-income housing complex had been approved for an undeveloped plot of land in the neighborhood.<sup>162</sup> The residents succeeded in incorporating the neighborhood and founded the City of Black Jack—a city that was ninety-nine percent white, in stark contrast to surrounding neighborhoods in the St. Louis metropolitan area.<sup>163</sup> Within one week after the City of Black Jack’s municipal authority went into effect, the city began hearings on a new zoning ordinance that would prohibit any new multifamily dwellings from being built within the city’s limits and would make any then-existing multifamily dwellings “nonconforming.”<sup>164</sup> Within one month from the start of the hearings, the city council of Black Jack approved and enacted the ordinance.<sup>165</sup>

The United States sued the City of Black Jack, alleging both disparate treatment and disparate impact violations under the FHA.<sup>166</sup> The district court found that the plaintiffs did not allege sufficient facts to overcome their burden of persuasion for either claim, but the Eighth Circuit reversed and remanded with respect to the disparate impact claim and ordered the district court to permanently enjoin the enforcement of the zoning ordinance.<sup>167</sup>

The Eighth Circuit made two pertinent analytical choices in *Black Jack*: (1) it established the prima facie framework applied in FHA disparate impact claims,<sup>168</sup> and (2) it relied directly on equal protection precedent in

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158. 508 F.2d 1179 (8th Cir. 1974).

159. See Mahoney, *supra* note 47, at 427–28; Schneider, *supra* note 19, at 558.

160. See Seicshnaydre, *supra* note 19, at 365.

161. See *id.* at 361.

162. *Black Jack*, 508 F.2d at 1182.

163. *Id.* at 1183.

164. *Id.*

165. *Id.*

166. See generally *United States v. City of Black Jack*, 372 F. Supp. 319 (E.D. Mo. 1974).

167. *Black Jack*, 508 F.2d at 1188.

168. *Id.* at 1184.

holding that disparate impact claims are cognizable under the FHA without any statutory analysis.<sup>169</sup>

The *Black Jack* court's conclusion that the "burden of proof in [FHA] cases is governed by the concept of the 'prima facie case'"<sup>170</sup> can be traced indirectly to Title VII case law. The two cases the court cites for its conclusion are *Griggs*<sup>171</sup> and *Williams v. Matthews Co.*<sup>172</sup>

The basic reasoning in *Williams* is that, because the concept of the prima facie case governs in disparate treatment claims under Title VII,<sup>173</sup> so too should it govern actions under the FHA.<sup>174</sup> In *Williams*, the Eighth Circuit adopted the disparate treatment burden-shifting regime directly from the Supreme Court case *McDonnell Douglas Corp.*<sup>175</sup>

Six months later, the Eighth Circuit decided *Black Jack* and cited to *Williams* for the proposition that the burden of proof in FHA cases is governed by the concept of the prima facie case.<sup>176</sup> However, instead of citing *Griggs*<sup>177</sup> for the proposition that a prima facie case can be established with a showing of a disparate impact—which would have paralleled the reasoning in *Williams*—it instead cited to a number of equal protection cases that were brought in the context of fair housing.<sup>178</sup>

The *Black Jack* court relied directly on equal protection precedent in finding disparate impact liability under the FHA.<sup>179</sup> As Peter E. Mahoney notes in his article: "The [equal protection] cases were not referred to by analogy. The Court based its holding squarely upon them, without any attempt to explain the leap from constitutional to statutory bases."<sup>180</sup> To understand why the court relied solely on equal protection cases while simultaneously eschewing statutory analysis of the FHA,<sup>181</sup> one should note

169. *Id.* at 1184–87; Mahoney *supra* note 47, at 428–29 & 428 n.65 (collecting cases upon which the *Black Jack* court relied).

170. *Black Jack*, 508 F.2d at 1184 (quoting *Williams v. Matthews Co.*, 499 F.2d 819, 826 (8th Cir. 1974)).

171. *See supra* notes 69–75 and accompanying text.

172. 499 F.2d 819 (8th Cir. 1974).

173. *See supra* note 84 and accompanying text.

174. *See Williams*, 499 F.2d at 826 ("We think that the concept of the 'prima facie case' applies to discrimination in housing as much as to discrimination in other areas of life." (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973))).

175. *See supra* notes 83–84; *see also Williams*, 499 F.2d at 827 (adopting prima facie case framework from *McDonnell Douglas* and applying it to FHA disparate treatment claim).

176. *Black Jack*, 508 F.2d at 1184.

177. This may be explained simply by the fact that *Griggs* makes no mention of the prima facie case. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

178. *See Black Jack*, 508 F.2d at 1184–85; *infra* note 182.

179. *Black Jack*, 508 F.2d at 1184–87; *see also Mahoney supra* note 47, at 428–29 & 428 n.65 (collecting cases upon which the *Black Jack* court relied).

180. Mahoney, *supra* note 47, at 429 n.71.

181. *Id.* at 428. "Indeed, *Black Jack* lacks any substantive analysis of the language of the FHA or of the employment law disparate impact cases, focusing instead on a balancing test derived wholly from the constitutional cases." *Id.*; accord Kirk D. Jensen & Jeffrey P. Naimon, *The Fair Housing Act, Disparate Impact Claims, and Magner v. Gallagher: An Opportunity to Return to the Primacy of the Statutory Text*, 129 BANKING L.J. 99, 125–26 (2012); Andrew L. Sandler & Kirk D. Jensen, *Disparate Impact in Fair Lending: A Theory*

that all of the equal protection cases upon which the *Black Jack* court relied arose in the housing context, although only some included an FHA claim.<sup>182</sup>

However, complete reliance on these cases as direct authority turned out to be problematic.<sup>183</sup> Several years later, in *Washington v. Davis*, the Supreme Court directly overturned three of the cases relied upon in *Black Jack* and overturned the rest of the cases relied upon in *Black Jack* by implication.<sup>184</sup> In *Davis*, the Court rejected a disparate impact standard of liability under the Equal Protection Clause in the context of employment discrimination.<sup>185</sup> The next year—in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*<sup>186</sup>—the Supreme Court reaffirmed its rejection of disparate impact liability under the Equal Protection Clause but this time specifically in the fair housing context.<sup>187</sup>

*Arlington Heights* came to the Supreme Court on appeal from *Arlington Heights I*,<sup>188</sup> in which the Seventh Circuit held that the Village of Arlington Heights's refusal to rezone property sought to be developed by the plaintiff had a disparate impact on people of color, and therefore violated the Equal Protection Clause of the Fourteenth Amendment.<sup>189</sup> Citing *Washington v. Davis*, the Supreme Court reaffirmed its view that disparate impact claims are not cognizable under the Equal Protection Clause.<sup>190</sup>

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*Without a Basis & the Law of Unintended Consequences*, 33 BANKING & FIN. SERVICES POL'Y REP. 18, 18 (2014).

182. Many of the cases that the *Black Jack* court relied on lacked a FHA component or the courts gave the FHA claims cursory treatment. See *United Farmworkers of Fla. Hous. Project, Inc. v. City of Delray Beach*, 493 F.2d 799, 801–02 (5th Cir. 1974) (refusal by municipality to offer sewer services to housing project occupied mostly by African Americans and Hispanic residents; FHA claim given cursory treatment); *Hawkins v. Town of Shaw*, 437 F.2d 1286, 1288 (5th Cir. 1971) (discriminatory impact in availability of municipal services; no FHA component), *aff'd en banc*, 461 F.2d 1171 (1972); *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108, 109 (2d Cir. 1970) (discriminatory impact of zoning ordinances; FHA claim brought, but not discussed, and FHA claim not decided); *Dailey v. City of Lawton*, 425 F.2d 1037, 1038 (10th Cir. 1970) (discriminatory impact of zone change; no FHA component or claim); *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 923 (2d Cir. 1968) (discriminatory impact of redevelopment project; no FHA claim); *Citizens Comm. for Faraday Wood v. Lindsay*, 362 F. Supp. 651, 658 (S.D.N.Y. 1973) (discriminatory effect analysis under Equal Protection Clause for failed city housing project; FHA claim given cursory treatment), *aff'd*, 507 F.2d 1065 (2d Cir. 1974); *Banks v. Perk*, 341 F. Supp. 1175, 1177, 1182 (N.D. Ohio 1972) (revocation of public housing building permits denied plaintiffs equal protection; no FHA claim, and no FHA analysis, but FHA said to be violated because of a denial of equal protection).

183. See *Jensen & Naimon*, *supra* note 181, at 125–27; *Mahoney*, *supra* note 47, at 429–31; *Sandler & Jensen*, *supra* note 181, at 18.

184. *Mahoney*, *supra* note 47, at 429–30.

185. See *supra* notes 63–66 and accompanying text.

186. 429 U.S. 252 (1977).

187. See *id.* at 264–65, 268; *Mahoney*, *supra* note 47, at 430.

188. *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights (Arlington Heights I)*, 517 F.2d 409 (7th Cir. 1975), *rev'd*, 429 U.S. 252 (1977).

189. *Id.* at 415.

190. *Arlington Heights*, 429 U.S. at 264–65.

Therefore, within a few short years of the *Black Jack* decision, the Supreme Court not only invalidated the majority of the law on which the *Black Jack* decision relied, but also held that this authority remained invalid within the specific context of fair housing. As Mahoney succinctly states: “The Supreme Court’s unmistakable rejection of the disparate impact theory of equal protection liability cut *Black Jack* from its constitutional moorings, apparently rendering its holding, within eighteen months, a ‘derelict on the waters of the law.’”<sup>191</sup>

The Seventh Circuit did not decide the FHA claim in *Arlington Heights I*.<sup>192</sup> Thus, the Supreme Court did not reach the question of whether the FHA authorized disparate impact liability.<sup>193</sup> Instead, on remand, and the Seventh Circuit, in *Arlington Heights II*,<sup>194</sup> once again found that the Village of Arlington Heights had engaged in discrimination under a theory of disparate impact, but this time, it found that Arlington Heights was liable under section 804(a) of the FHA.<sup>195</sup>

## 2. *Arlington Heights II* and *Rizzo*: A Mixed Bag

Along with *Black Jack*, two subsequent cases decided in 1977, *Arlington Heights II* and *Rizzo*, are sometimes discussed as the three “original FHA disparate impact cases.”<sup>196</sup> Unlike the *Black Jack* court, the *Arlington Heights II* court and the *Rizzo* court engaged in a statutory analysis of section 804(a).<sup>197</sup> Both cases display similar reasoning<sup>198</sup> and, thus, will be discussed together.

In *Rizzo*, the City of Philadelphia displaced a number of African American families after it condemned and razed a portion of a five-block radius in the majority-white community of Whitman.<sup>199</sup> The Philadelphia Housing Authority had planned to build a public housing complex on that site, but after facing community resistance, the mayor and the city’s agencies withdrew that plan even after the developer had begun construction.<sup>200</sup> Resident Advisory Board, a community group that

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191. Mahoney, *supra* note 47, at 430 (quoting *Ala. Pub. Serv. Comm’n v. S. Ry. Co.*, 341 U.S. 341, 356 (1951)).

192. *Arlington Heights I*, 517 F.2d 409; *see also Arlington Heights*, 429 U.S. at 271 (referring to the Seventh Circuit’s “unorthodox” resolution of the case based on the constitutional claim and not the statutory claim); Mahoney, *supra* note 47, at 432 (referring to the case on appeal as having an “inverted procedural status”).

193. *Arlington Heights*, 429 U.S. at 271.

194. *Arlington Heights II*, 558 F.2d 1283 (7th Cir. 1977).

195. *Id.* at 1288.

196. Jensen & Naimon, *supra* note 181, at 128; *see also* Mahoney, *supra* note 47, at 427–439 (referring to *Black Jack*, *Arlington Heights II*, and *Rizzo* as the original cases to hold that disparate impact claims are cognizable under the FHA).

197. *See* *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 146–48 (3d Cir. 1977); *Arlington Heights II*, 558 F.2d at 1288–89.

198. *But cf.* Mahoney, *supra* note 47, at 436 (stating that *Rizzo* is the first circuit court case to place “primary analytic reliance” on Title VII cases).

199. *See Rizzo*, 564 F.2d at 129–32.

200. *See id.* at 132, 134–36.

supported the project, sued.<sup>201</sup> The district court found that the city and its mayor had intentionally discriminated against African Americans<sup>202</sup> in violation of the FHA and that its agencies and HUD had violated the FHA under a disparate impact theory because of the discriminatory effect of their actions.<sup>203</sup> On appeal, the Third Circuit affirmed in all respects and clarified that the disparate impact violation occurred under section 804(a).<sup>204</sup>

Both the *Rizzo* and *Arlington Heights II* courts began their statutory analyses by recognizing that a narrow reading of the phrase “because of race” found in section 804(a) of the FHA could act as an obstacle to reading the text of the FHA as authorizing disparate impact claims.<sup>205</sup> However, both courts opted for the broader reading of the “because of” language.<sup>206</sup> The *Arlington Heights II* court reasoned that a defendant can commit an act “because of” race “whenever the natural and foreseeable consequence of that act is to discriminate between races, regardless of . . . intent.”<sup>207</sup>

First, both courts turned to the *Griggs* analysis of Title VII, which contains the same “because of [protected trait]” formulation<sup>208</sup> found in the FHA.<sup>209</sup> The *Arlington Heights II* court read *Griggs* as authorizing disparate impact liability under Title VII “in spite of the ‘because of race’ language” found in section 703(h).<sup>210</sup> The *Rizzo* court also found it significant that the presence of the same “because of” language in Title VII was not a barrier to the *Griggs* Court authorizing disparate impact claims under that Title.<sup>211</sup>

Next, both the *Arlington Heights II* and the *Rizzo* courts focused on *Griggs*’s emphasis on the “broad purposes underlying [Title VII],”<sup>212</sup> in finding that disparate impact claims are cognizable under that Title.<sup>213</sup> Both courts reasoned that the FHA had similarly broad remedial purposes,<sup>214</sup> and thus the broad purposes of the FHA were sufficient to overcome the obstacle that the “because of” language presented.<sup>215</sup> Therefore, both the *Arlington Heights II* court and the *Rizzo* court emphasized the similarities between the remedial purposes of both Title VII

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201. Resident Advisory Bd. v. *Rizzo*, 425 F. Supp. 987, 992 (E.D. Pa. 1976).

202. *See id.* at 1025 (finding that the city had intentionally discriminated against the plaintiffs, the district court pointed to the fact that *Rizzo* “considered public housing to be Black housing and took a stand against placing such housing in White neighborhoods”).

203. *Id.* at 1022–24, 1026.

204. *Rizzo*, 564 F.2d at 130. The Third Circuit also did not “find it necessary to determine precisely which provision of Title VII the City violated.” *Id.* at 140 n.21.

205. *Id.* at 146; *Arlington Heights II*, 558 F.2d 1283, 1288 (7th Cir. 1977).

206. *Rizzo*, 564 F.2d at 146–47; *Arlington Heights II*, 558 F.2d at 1288.

207. *Arlington Heights II*, 558 F.2d at 1288.

208. *See supra* note 77 and accompanying text.

209. *Rizzo*, 564 F.2d at 147; *Arlington Heights II*, 558 F.2d at 1289.

210. *Arlington Heights II*, 558 F.2d at 1289.

211. *See Rizzo*, 564 F.2d at 147.

212. *Arlington Heights II*, 558 F.2d at 1289 n.6.

213. *Rizzo*, 564 F.2d at 147; *Arlington Heights II*, 558 F.2d at 1289.

214. *See infra* notes 263–66.

215. *Rizzo*, 564 F.2d at 147; *Arlington Heights II*, 558 F.2d at 1289.

and the FHA in overcoming statutory language that might otherwise point to liability only for intentional discrimination.<sup>216</sup>

However, both the *Arlington Heights II* and the *Rizzo* courts buttressed their reasoning by citing “a number of courts [that agree].”<sup>217</sup> These agreeing courts did not rely so much on a statutory analysis of the FHA or an analogy to Title VII but instead tended to rely upon equal protection cases or FHA disparate treatment cases.<sup>218</sup> Of the four cases that the *Arlington Heights II* court cited, two relied on equal protection disparate impact cases,<sup>219</sup> one was a disparate treatment FHA case,<sup>220</sup> and the fourth was *Resident Advisory Board v. Rizzo*<sup>221</sup> while it was still in the district court, which relied heavily on an equal protection analysis adopted from *Black Jack*.<sup>222</sup> The *Rizzo* court cited the exact same cases that the *Arlington Heights II* court cited, except, where *Arlington Heights II* cited *Rizzo* in the district court, *Rizzo* cited to *Arlington Heights II*.<sup>223</sup> Accordingly, some commentators have argued that the reasoning in both *Arlington Heights II* and *Rizzo* is weakened by these citations, or at least that such citations add little to the analysis.<sup>224</sup>

Despite this apparent logical flaw in *Black Jack*, *Arlington Heights II*, and *Rizzo*, many modern courts continue to cite these cases as authoritative or persuasive precedent for the conclusion that the FHA authorizes disparate impact claims.<sup>225</sup> For example, in *Inclusive Communities*—the FHA disparate impact case now before the Supreme Court—the Fifth Circuit cited eight different cases in support of the determination that disparate impact claims are cognizable under the Act.<sup>226</sup> One of these cases is *Arlington Heights II*.<sup>227</sup> Of the seven other cases, six cite *Arlington Heights II*, five cite *Rizzo*, and three cite *Black Jack* as support for applying

216. *But cf.* Mahoney, *supra* note 47, at 433, 436 (stating that *Arlington Heights II* relied mostly on equal protection cases and *Rizzo* relied mostly on a Title VII analogy).

217. *Arlington Heights II*, 558 F.2d at 1290; *see also Rizzo*, 564 F.2d at 148 n.31.

218. *See infra* notes 219–23; *accord* Jensen & Naimon, *supra* note 181, at 128 (noting that the *Rizzo* court did not rely solely on its statutory analysis and analogy to Title VII, but also relied on a number of cases grounded in an equal protection analogy); Mahoney, *supra* note 47, at 433 (noting that *Arlington Heights II* “buttressed its statutory disparate impact holding” by citing equal protection cases).

219. *See Kennedy Park Homes Ass’n v. City of Lackawanna*, 436 F.2d 108, 114 (2d Cir. 1970) (holding that the City of Lackawanna had prevented the plaintiffs from exercising their “constitutional right of ‘freedom from discrimination by the States in the enjoyment of property rights’” (quoting *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948))). The Supreme Court explicitly overturned *Kennedy Park Homes* in *Arlington Heights*. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 n.16 (1977); Mahoney, *supra* note 47, at 433.

220. *See Smith v. Anchor Bldg. Corp.*, 536 F.2d 231 (8th Cir. 1976).

221. 425 F. Supp. 987 (E.D. Pa. 1976).

222. *See id.* at 1022; Mahoney, *supra* note 47, at 433.

223. *See Rizzo*, 564 F.2d at 148 n.31 (citing *Arlington Heights II*, *Smith*, *Black Jack*, and *Kennedy Park Homes*).

224. *See Jensen & Naimon*, *supra* note 181, at 125; Mahoney, *supra* note 47, at 429.

225. *See Jensen & Naimon*, *supra* note 181, at 128–29.

226. *See Inclusive Cmty. Project, Inc. v. Tex. Dep’t of Hous. & Cmty. Affairs*, 747 F.3d 275, 280 n.4 (5th Cir. 2014), *cert. granted*, 135 S. Ct. 46 (2014).

227. *Id.*

the disparate impact standard.<sup>228</sup> Each case, except for one, cites at least two of the three, and one cites all three.<sup>229</sup>

*C. Recent Supreme Court Cases Which Arguably Undermine  
Reading the Text of the FHA As Authorizing Disparate Impact Claims*

Some argue that the reasoning in *Arlington Heights II* and *Rizzo*—insofar as they rely on the text of the FHA and an analogy to Title VII—also has been effectively rejected by the Supreme Court in a number of recent cases.<sup>230</sup> First, this section explains that the Supreme Court interprets statutes that have the same language and similar purposes as having a consistent meaning. Next, this section discusses the Supreme Court’s recent interpretation of the key language in several relevant civil rights statutes: the “otherwise adversely affect” language in Title VII and the Age Discrimination in Employment Act<sup>231</sup> (ADEA); and the discriminate/adversely affect “because of” a protected trait language in the same statutes. Finally, this section lays out how scholars and courts have attempted to apply these recent Supreme Court provisions to arguably similar provisions in the FHA.

*Smith v. City of Jackson*<sup>232</sup> is often cited as being the first Supreme Court case to seriously call into question the analogies between the FHA and Title VII.<sup>233</sup> *Smith* is a four-to-one-to-three plurality decision in which the Court held that disparate impact claims are cognizable under the ADEA.<sup>234</sup> In doing so, the *Smith* Court analyzed the language in section 4(a)(1) and

228. *See* *Mt. Holly Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375, 381, 384 (3d Cir. 2011) (citing *Rizzo* and *Black Jack*); *Gallagher v. Magner*, 619 F.3d 823, 833, 836 (8th Cir. 2010), *cert. granted*, 132 S. Ct. 548 (2011), *cert. dismissed*, 132 S. Ct. 1306 (2012) (citing *Arlington Heights II* and *Black Jack*); *Graoch Assocs. #33, L. P. v. Louisville/Jefferson Cnty. Metro Human Relations Comm’n*, 508 F.3d 366, 383 & n.3 (6th Cir. 2007) (citing *Arlington Height II* and *Rizzo*); *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49 & nn.3–4 (1st Cir. 2000) (citing *Arlington Heights II* and *Rizzo*); *Mountain Side Mobile Estates P’ship v. Sec’y of Hous. & Urban Dev.*, 56 F.3d 1243, 1252 (10th Cir. 1995) (citing *Arlington Heights II* and *Rizzo*); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934–35 (2d Cir. 1988) (citing *Arlington Heights II*, *Black Jack*, and *Rizzo*); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982) (citing *Arlington Heights II*).

229. *See supra* note 228.

230. *See infra* Part II.C.2.

231. 29 U.S.C. § 621 (2012).

232. 544 U.S. 228 (2005) (plurality opinion).

233. *Cf.* Michael G. Allen, Jamie L. Crook & John P. Relman, *Assessing HUD’s Disparate Impact Rule: A Practitioner’s Perspective*, 49 HARV. C.R.-C.L. L. REV. 155, 157 (2014) (stating that the decision in *Smith* has “reignited” challenges to the disparate impact standard under the FHA, particularly by attempting to draw distinctions between the language of Title VII and ADEA on one side and the FHA on the other); Jensen & Naimon, *supra* note 181, at 100 (arguing that the Supreme Court’s interpretation of Title VII in *Smith* “makes clear that the anti-discrimination provisions of the FHA do not permit disparate impact claims”). *But cf.* Olatunde C.A. Johnson, *The Agency Roots of Disparate Impact*, 49 HARV. C.R.-C.L. L. REV. 125, 149 & n.156 (2014) (arguing that the “otherwise make unavailable or deny” language found in the FHA establishes a “results test,” and that the holding in *Smith* supports this view).

234. *Smith*, 544 U.S. at 243. Chief Justice Rehnquist took no part in the decision of this case. *Id.*

(a)(2) of the ADEA in the context of an EEOC regulation that arguably created a disparate impact standard under section 4(a).<sup>235</sup>

Justice Stevens delivered the opinion of the Court for Parts I, II, and IV, in which Justices Souter, Ginsburg, Breyer, and Scalia joined.<sup>236</sup> The plurality's opinion in Part III analyzes the text of section 4(a)(1) and (a)(2), and it focuses largely on the *Griggs* Court's interpretation of Title VII.<sup>237</sup> The plurality makes clear that the reason that the reading in *Griggs* is correct is because section 703(a)(2) makes it unlawful to "otherwise adversely affect" an individual's employment status because of a protected trait—language that section 703(a)(1) does not contain.<sup>238</sup>

Justice Scalia did not join Part III of the opinion, but wrote in his concurrence that although he "agree[s] with all of the Court's reasoning" as to Part III, he would prefer to defer to the EEOC's disparate impact rule under a *Chevron* analysis.<sup>239</sup>

The dissent, in which three Justices joined, also analyzed the text of the statute but reached a different conclusion.<sup>240</sup> The dissent agreed that the language in section 4(a)(1) does not authorize disparate impact claims, but the dissent also argued that section 4(a)(2) does not support such claims either.<sup>241</sup>

The dissent in *Smith* reasoned that the language "because of [protected trait]" was the decisive language in the statute, and that this language forced a reading of the statute that only authorizes disparate treatment claims.<sup>242</sup> Citing *Webster's Third New International Dictionary* from 1961, Justice O'Connor argued that "because of" plainly means to act "by reason of" or "on account of" an individual's age, and that this inescapably premises liability under the ADEA on a defendant's discriminatory intent.<sup>243</sup> Just as parallel language should be read consistently among different titles of the United States Code,<sup>244</sup> Justice O'Connor argued that the parallel use of the "because of" language in section 703(a)(1) and (a)(2) should be read as having the same meaning.<sup>245</sup> She argued that the language "because of" is

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235. See *id.* at 243–47 (Scalia, J., concurring) (arguing that the EEOC rule created a disparate impact standard under section 4(a)(2)). But see *id.* at 263–66 (O'Connor, J., dissenting) (arguing that the EEOC rule in question does not apply to section 4(a)). See *infra* note 261 and accompanying text for the full text of the relevant portions of the parallel provisions of Title VII. The text of these provisions of Title VII is identical to the provisions of the ADEA discussed here, except substitute "race, color, religion, sex, or national origin" with "age," and omit "or applicants for employment." Compare 29 U.S.C. § 623(a)(2), with 42 U.S.C. § 2000e-2(a) (2012).

236. See *Smith*, 544 U.S. at 229 (plurality opinion).

237. See *id.* at 233–34.

238. See *id.* at 245–46 (Scalia, J., concurring).

239. See *id.* at 243.

240. See *id.* 247–68 (O'Connor, J., dissenting).

241. See *id.* at 248–51.

242. See *id.* at 250.

243. *Id.* at 249.

244. Cf. *id.* at 233–34 (Stevens, J., plurality opinion) (arguing that, because ADEA was derived *in haec verba* from Title VII, the parallel provisions of these two statutory schemes should be read to have meanings consistent with each other).

245. See *id.* at 249–50 (O'Connor, J., dissenting).

“precisely the same” in both section 703(a)(1) and (a)(2), and that to read one subsection as foreclosing disparate impact claims, and the other as authorizing them, would give the words in the text different meanings.<sup>246</sup> If Justice O’Connor’s reading of the plain meaning of “because of” is correct, this could have major implications for the interpretation of the FHA, which contains the “because of” language, but does not contain the *exact* “otherwise adversely affect”<sup>247</sup> language thought to redeem disparate impact claims under Title VII and the ADEA.<sup>248</sup>

Justice O’Connor’s reading of the “because of” language in her *Smith* dissent has received support from some of the Court’s subsequent decisions, perhaps most notably in *Gross v. FBL Financial Services, Inc.*<sup>249</sup>

*Gross* is a five-to-four decision in which the Court decided that the disparate treatment provision of the ADEA required that age be a but-for cause of the employer’s decision to take an adverse employment action.<sup>250</sup> This holding itself does not actually affect disparate impact cases under the FHA, but how the Court came to its conclusion is significant.

The Court began its analysis of the text by explaining that “[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.”<sup>251</sup>

The Court then analyzed the “ordinary meaning” of the phrase “because of.”<sup>252</sup> The Court cited three dictionaries for the proposition that the phrase’s plain meaning is “by reason of” or “on account of.”<sup>253</sup> Thus, under the disparate treatment statute, section 4(a)(1), the plain meaning of “discriminate . . . because of age,” is that age must be the *reason* that an employer decided to act—that is, age must be a but-for cause of the action.<sup>254</sup>

The *Gross* Court’s interpretation of “because of” is rather narrow,<sup>255</sup> and it could be an indication of how narrowly the Court might interpret the plain meaning of “because of” in the FHA when the Court decides *Inclusive Communities*. As early as *Arlington Heights II*, courts recognized that the “because of” language found in section 804(a)<sup>256</sup> of the FHA, if read narrowly, could be problematic for bringing disparate impact claims under

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246. *See id.* at 250.

247. *See infra* Part II.C.2.

248. *Cf. Smith*, 544 U.S. at 236 (plurality opinion).

249. 557 U.S. 167 (2009).

250. *See id.* at 176.

251. *Id.* at 175–76 (quoting *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004)).

252. *See id.*

253. *See id.*

254. *See id.*

255. *Cf. Meghan C. Cooper, Comment, Reading Between the Lines: The Supreme Court’s Textual Analysis of the ADEA in Gross v. FBL Financial Services, Inc.*, 45 NEW ENG. L. REV. 753, 770–72 (2010) (arguing that the Court’s interpretation of the ADEA’s “because of” language overturned prior precedent and placed an “[u]nfair and [i]llogical” burden on plaintiffs bringing ADEA claims).

256. 42 U.S.C. § 3604(a) (2012).

the Act.<sup>257</sup> This ongoing debate continues to incite rebukes and defenses of disparate impact claims among litigants and commentators.

*D. The Effect of Smith and Gross on the FHA*

This section explains how *Smith* and *Gross* have already affected interpretations of the FHA. This section also examines the opposing viewpoints of those who argue that the decisions in *Smith* and *Gross* have had no effect on a reading of the FHA that would authorize disparate impact claims, versus those who argue that *Smith* and *Gross* preclude a reading of the FHA as authorizing disparate impact claims.

As indicated above,<sup>258</sup> it is common for commentators and courts to argue that the text of the FHA does or does not authorize disparate impact claims by conducting a close textual analysis of the FHA and comparing the language of the FHA to the language of Title VII.<sup>259</sup>

A complete discussion of these provisions requires that the two statutes be reproduced side by side, in full:

**Fair Housing Act:**

section 804. . . . it shall be unlawful—

(a) To refuse to sell or rent after making a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.<sup>260</sup>

**Title VII:**

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.<sup>261</sup>

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257. See *supra* note 210 and accompanying text.

258. See *supra* Part II.B.

259. Cf. Jensen & Naimon, *supra* note 181, at 108 (comparing the text of Title VII, the ADEA, and the FHA, and showing alleged presence of “disparate treatment” language); Schneider, *supra* note 19, at 564–67 (comparing the language in Title VII and the ADEA to the language in the FHA).

260. 42 U.S.C. § 3604(a)–(b).

261. *Id.* § 2000e-2(a)(1)–(2).

### 1. The Proponents' Arguments

Proponents of the FHA disparate impact standard often argue that the FHA and Title VII are sufficiently similar in language and structure to warrant the conclusion that the FHA authorizes disparate impact claims.<sup>262</sup>

This argument tends to begin with a statement of the FHA's purpose: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."<sup>263</sup> This purpose is often read as giving the FHA's language a generous construction, and the FHA as a whole, a "'broad and inclusive' compass."<sup>264</sup> Recall that both the *Rizzo* and *Arlington Heights II* courts reasoned that the broad remedial purposes of the FHA were sufficient to overcome the argument that certain language in the FHA should be read narrowly to preclude disparate impact claims.<sup>265</sup>

Thus, when the FHA states that it is unlawful to "otherwise make unavailable or deny" a dwelling to a person on the basis of a person's protected trait, courts and commentators read this language broadly as making acts with a discriminatory effect unlawful.<sup>266</sup>

This language, the argument goes, is sufficiently similar to the language "otherwise adversely affect his status as an employee"<sup>267</sup> in section 703(a)(2) of Title VII to conclude that the FHA also authorizes disparate impact claims.<sup>268</sup> As Part II.B discusses, the *Smith* Court confirmed that it is this language in section 703(a)(2) that gives rise to disparate impact liability.

It is argued that both the "otherwise make unavailable" language under the FHA and the "otherwise adversely affect" language of Title VII and the ADEA focus on the "potential discriminatory impacts of actions."<sup>269</sup> While the "affects" language in Title VII and ADEA might be "more explicit" than the language in the FHA, both focus on the unwanted effect on the protected person.<sup>270</sup>

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262. See *infra* notes 266–73 and accompanying text.

263. 42 U.S.C. § 3601; see also *Arlington Heights II*, 558 F.2d 1283, 1289 (7th Cir. 1977); Schneider, *supra* note 19, at 566.

264. City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 731 (1995) (quoting *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972)); see also Schneider, *supra* note 19, at 566; cf. *Olsen v. Stark Homes, Inc.* 759 F.3d 140, 158 (2d Cir. 2014) (according the term "aggrieved person" under the FHA the broadest construction "as is permitted by Article III of the Constitution" (quoting *Trafficante*, 409 U.S. at 209)).

265. See *supra* Part II.A.2.

266. See Johnson, *supra* note 233, at 149 & n.156 (arguing that the "otherwise make unavailable or deny" language found in the FHA establishes a "results test"); Schneider, *supra* note 19 at 566; cf. *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375, 381 (3d Cir. 2011), *cert. granted*, 133 S. Ct. 2824 (2013), *cert. dismissed*, 134 S. Ct. 636 (2013) (stating that a dwelling can be made otherwise unavailable to certain persons by actions that limit the availability of affordable housing).

267. 42 U.S.C. § 2000e-2(a)(2) (emphasis added).

268. See *supra* note 266.

269. Schneider, *supra* note 19, at 566.

270. *Id.*; see also Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,459, 11,466 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100.500).

Further, Professor Valerie Schneider argues that the language “adversely affect” simply would not make sense in the housing context:

[T]he language of the Fair Housing Act would have been strange indeed if Congress had made it illegal to “adversely affect” an individual’s “status” as a potential homeowner or renter. . . .

[R]eading disparate impact analysis into Title VII and the ADEA simply because those statutes contain the word “affect” while the Fair Housing Act omits that word in favor of more descriptive language . . . is the most strained reading possible of the acts. Indeed, no court has held that disparate impact claims must be based on the “adversely affect” phrase alone.<sup>271</sup>

Thus, the difference in language between the FHA and Title VII is a product of necessarily different drafting techniques due to the subject matter being regulated and not based on different legislative intent.

Proponents also address the narrow reading of the “because of” language found in the FHA. The basic argument regarding this language is that a narrow reading would be incompatible with the broad purposes of the FHA and “effects” language discussed in the above paragraph.<sup>272</sup> As early as 1977, in *Arlington Heights II*, courts recognized the possibility that the “because of” language may be read narrowly to restrict the FHA’s application to actions that were motivated by unlawful considerations.<sup>273</sup> However, no circuit court or agency has found this language to be a barrier to disparate impact claims under the FHA.<sup>274</sup> HUD argues explicitly that the use of the “because of” language in section 703(a)(2) of Title VII and section 4(a)(2) of the ADEA takes any force out of the argument that the “because of” language in the FHA requires that a defendant act with unlawful intent in order to be liable under the FHA.<sup>275</sup>

HUD next argues that the legal definition of “discriminate”—a word found in section 804(b) of the FHA and elsewhere—also supports an interpretation of the FHA that authorizes disparate impact claims.<sup>276</sup> In HUD’s implementation of 24 C.F.R. § 100.500, it argues that “[d]iscriminate” is a term that may encompass actions that have a

271. Schneider, *supra* note 19, at 566.

272. See *supra* Part II.A.2 (discussing the *Rizzo* and *Arlington Heights II* analysis of the “because of” language found in the FHA); see also Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. at 11,466 (concluding that the “because of” language does not preclude disparate impact claims, because the same language also appears in Title VII, section 703(a)(2), and ADEA, section 4(a)(2), which both authorize disparate impact claims).

273. See *Arlington Heights II*, 558 F.2d 1283, 1288 (7th Cir. 1977); accord *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 147 (3d Cir. 1977).

274. See Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. at 11,462; cf. *Inclusive Cmty. Project, Inc. v. Tex. Dep’t of Hous. & Cmty. Affairs*, 747 F.3d 275, 280 n.4 (5th Cir.), cert. granted, 135 S. Ct. 46 (2014) (collecting cases from ten circuit courts, which all have held that disparate impact claims are cognizable under the FHA).

275. Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. at 11,466.

276. See *infra* notes 277–84.

discriminatory effect but not a discriminatory intent.”<sup>277</sup> For support of this position, HUD cites two Supreme Court cases: (1) *Alexander v. Choate*,<sup>278</sup> in which the Court “assum[ed] without deciding” that a statute that makes it illegal to “subject [an individual with a disability] to discrimination”<sup>279</sup> authorizes disparate impact claims;<sup>280</sup> and (2) *Board of Education v. Harris*,<sup>281</sup> in which the court held that the word “discriminate” in the Emergency School Authorization Act<sup>282</sup> was ambiguous, and in consideration of the Act’s purpose, policy, legislative history, and text, could encompass a disparate impact test.<sup>283</sup> HUD goes on to say that:

HUD’s extensive experience in administering the Fair Housing Act . . . informs its conclusion that not only can the term “discriminate” be interpreted to encompass discriminatory effects liability, but it must be so interpreted in order to achieve the Act’s stated purpose to provide for fair housing to the extent the Constitution allows.<sup>284</sup>

In addition, a quick look at the history of the legal definition of “discrimination” as found in previous editions of *Black’s Law Dictionary* shows that the definition of “discrimination” has not been static. The term “discrimination” has been in *Black’s Law Dictionary* at least since its third edition, though early versions do not explicitly define discrimination in the civil rights context.<sup>285</sup> The third edition defines discrimination as, “[i]n constitutional law, the *effect* of a statute which confers particular privileges on a class arbitrarily selected from a large number of persons.”<sup>286</sup> By the fourth revised edition, a new definition was included in addition to the language quoted above: “[i]n general, a failure to *treat* all equally; favoritism.”<sup>287</sup> The fifth edition added, for the first time, a definition that explicitly refers to discrimination in the civil rights context and which also includes disparate treatment language: “[u]nfair *treatment* or denial of normal privileges to persons because of their race, age, nationality or religion.”<sup>288</sup> This definition stayed constant through the sixth edition.<sup>289</sup> By the ninth edition, *Black’s Law Dictionary* abandoned the language “in constitutional law” and stated that “discrimination” means:

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277. Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. at 11,466.

278. 469 U.S. 287 (1985).

279. 29 U.S.C. § 794(a) (2012).

280. *Alexander*, 469 U.S. at 299.

281. 444 U.S. 130 (1979).

282. 20 U.S.C. §§ 1601–1619 (1979).

283. *Harris*, 444 U.S. at 140–41.

284. Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. at 11,466.

285. Cf. BLACK’S LAW DICTIONARY 588 (3d ed. 1933) (citing Franchise Motor Freight Ass’n v. Seavey, 235 P. 1000, 1002 (Cal. 1925)).

286. *Id.* (emphasis added).

287. BLACK’S LAW DICTIONARY 553 (4th revised ed. 1968) (emphasis added).

288. BLACK’S LAW DICTIONARY 420 (5th ed. 1979) (emphasis added). This edition also included an explanatory note that states that “[f]ederal statutes prohibit discrimination in employment on basis of [protected traits].” *Id.* (citing Title VII of the Civil Rights Act of 1964).

289. BLACK’S LAW DICTIONARY 467 (6th ed. 1990).

n., (1866) **1.** The *effect* of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, [and other protected classes]. . . . **2.** Differential *treatment*; esp., a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored.<sup>290</sup>

The entry then explains different kinds of discrimination, including race discrimination and sex discrimination.<sup>291</sup> The ninth edition's definition is interesting, because it adds civil rights-specific language in the definition that contains "effects" language and drops it from the section that contains the disparate treatment language.<sup>292</sup>

In 2014, the tenth edition of *Black's Law Dictionary* changed the definition of "discrimination" again, keeping all of the same language quoted from the ninth edition, but adding (as the first entry, in front of the above-quoted language), "**1.** The intellectual faculty of noting differences or similarities."<sup>293</sup> It also added a new subentry of interest: "direct discrimination," which means, "[d]ifferential treatment of a person or a particular group of people based on race, gender, or other characteristic."<sup>294</sup> Finally, the tenth edition also includes another new entry, defining "discriminatory purpose," which is a "design or desire to restrict the rights of a class of people, esp. a protected class."<sup>295</sup>

## 2. The Opponents' Arguments

Those who oppose the theory that disparate impact claims are cognizable under the FHA obviously take a different approach.

First, this side of the argument tends to put a lot of weight in the Supreme Court's *Smith v. City of Jackson* decision, which reasoned that the "otherwise adversely affect" language, found in both Title VII and the ADEA, is the language which gives rise to disparate impact liability under those statutes.<sup>296</sup> The basic argument here is that for a statute to authorize disparate impact claims, it must contain explicit "effects" language, such as the word "affect" or "results."<sup>297</sup> In *American Insurance Ass'n v. U.S. Department of Housing & Urban Development*, Judge Richard J. Leon expressed that "[i]t takes hutzpah (bordering on desperation)" for HUD to argue that the language of section 804(a) resembles the language of Title

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290. BLACK'S LAW DICTIONARY 534 (9th ed. 2009) (emphasis added).

291. *Id.*

292. *Id.* at 535.

293. BLACK'S LAW DICTIONARY 566 (10th ed. 2014).

294. *Id.*

295. *Id.* at 567.

296. See *supra* Part II.C (discussing the *Smith* Court's reasoning); cf. *Am. Ins. Ass'n v. Dep't of Hous. & Urban Dev.*, No. 13-00966 (RJL), 2014 WL 5802283, at \*13 (D.D.C. Nov. 7, 2014) ("In short, *Smith* represents a sea change in approach to the analysis of statutory provisions with respect to disparate-impact liability. . . ."); Jensen & Naimon, *supra* note 181, at 101-02.

297. See *Am. Ins. Ass'n*, 2014 WL 5802283, at \*9; Jensen & Naimon, *supra* note 181, at 104-05; cf. Schneider, *supra* note 19, at 544, 566 (arguing against the "textualist" position that the "magic" word "affects" is necessary for disparate impact claims to be cognizable under the FHA).

VII section 703(a)(2) and ADEA section 4(a)(2), when both of these provisions contain the “effects” language, and FHA section 804(a) does not.<sup>298</sup>

Kirk D. Jensen and Jeffrey P. Naimon provide one of the more thorough arguments taking this approach.<sup>299</sup> Relying on the reasoning in *Smith*, Jensen and Naimon argue that for a statute to authorize disparate impact claims, it must use the language “otherwise adversely affect” or “results in.”<sup>300</sup> The authors point to five different statutes that contain this language, each of which has been interpreted by the Supreme Court as authorizing disparate impact claims.<sup>301</sup> They next list four statutes that follow some form of a “discriminate . . . because of” formulation, each of which has been held by the Supreme Court to authorize only disparate treatment claims.<sup>302</sup> Thus, “when a statute contains language addressing the ‘effects’ or ‘results’ of an action, disparate impact claims under the statute are permitted. When the statute lacks such ‘effects’ language, disparate impact claims under the statute are prohibited.”<sup>303</sup>

Jensen and Naimon then apply this logic to the FHA.<sup>304</sup> However, they do not apply this test to section 804(a), the statute usually cited as the one giving rise to disparate impact liability.<sup>305</sup> Instead, Jensen and Naimon cite section 805(a)<sup>306</sup> of the FHA, which reads: “It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race . . . .”<sup>307</sup> Thus, the FHA provision that they analyze clearly contains the “discriminate . . . because of” formulation they are looking for to argue that the FHA does not authorize disparate impact claims.

Second, the opponents of FHA disparate impact liability will also look to the “ordinary meaning” of “discriminate” to support their position. As noted above, this approach is supported by Supreme Court precedent which requires the interpretation of a statute to begin with the assumption that Congress intended the words it used to have their ordinary meaning.<sup>308</sup>

The “ordinary meaning” of “discriminate,” opponents argue, is some version of “to make a difference in *treatment* or favor on a class or categorical basis in disregard of individual merit.”<sup>309</sup> The word “treatment”

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298. *Am. Ins. Ass’n*, 2014 WL 5802283, at \*9.

299. Jensen & Naimon, *supra* note 181.

300. *Id.* at 105.

301. *Id.*

302. *Id.* at 106.

303. *Id.* at 107.

304. *Id.* at 108.

305. *E.g.*, *Inclusive Cmty. Project, Inc. v. Tex. Dep’t of Hous. & Cmty. Affairs*, 747 F.3d 275 (5th Cir.), *cert. granted*, 135 S. Ct. 46 (2014).

306. 42 U.S.C. § 3605 (2012).

307. *Id.* § 3605(a).

308. *See Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009).

309. *Am. Ins. Ass’n v. Dep’t of Hous. & Urban Dev.*, No. 13-00966 (RJL), 2014 WL 5802283, at \*8 (D.D.C. Nov. 7, 2014) (quoting WEBSTER’S THIRD NEW INTERNATIONAL

found in the dictionary definition of discriminate leads some commentators and at least one court to conclude that the word “discriminate” refers only to intentional discrimination, i.e., disparate *treatment* claims.<sup>310</sup>

In addition to the ordinary meaning of “discriminate,” Jensen and Naimon also look to a legal interpretation of the word, found in the five-to-four Supreme Court opinion, *Jackson v. Birmingham Board of Education*,<sup>311</sup> which states that “[d]iscrimination’ is a term that covers a wide range of intentional unequal treatment. . . .”<sup>312</sup>

Thus, opponents of the disparate impact liability standard under the FHA use a variety of interpretive tools to support their position. All of these tools are used to determine the “ordinary meaning” of the text of the FHA, which, under current Supreme Court jurisprudence, is the goal in any statutory interpretation.

### E. Applying Chevron to HUD’s Disparate Impact Rule

This section describes the reasoning of the only two federal judges to apply the *Chevron* deference test to HUD’s disparate impact rule.

Because the HUD disparate impact rule is so new, there is a dearth of court analysis applying the *Chevron* test to it. As of the end of 2014, only a handful of cases have cited 24 C.F.R. § 100.500, most of which contain little or no discussion of the rule at all.<sup>313</sup> Only two district court cases have actually applied the *Chevron* two-step test to § 100.500.<sup>314</sup>

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DICTIONARY (1966)); Jensen & Naimon, *supra* note 181, at 110 (citing to a 2006 edition of a Random House Dictionary). Jensen and Naimon also cite to an opinion for a five-Justice majority, written by Justice O’Connor in *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 175 (2005), and a law review article from 1983 discussing the Voting Rights Act and the conflation of the concepts of disparate treatment and disparate impact under that Act. See Jensen & Naimon, *supra* note 181, at 110 n.38 (citing James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 VA. L. REV. 633, 635 (1983)).

310. See *supra* note 309.

311. 544 U.S. 167, 175 (2005).

312. *Id.*; see also Jensen & Naimon, *supra* note 181, at 106 n.38.

313. Cf. *Inclusive Cmty. Project, Inc. v. Tex. Dep’t of Hous. & Cmty. Affairs*, 747 F.3d 275, 282 (5th Cir.), *cert. granted*, 135 S. Ct. 46 (2014) (discussing HUD’s authority to adopt rules implementing the FHA, and adopting the burden-shifting test in § 100.500 without any analysis of *Chevron*); *Am. Ins. Ass’n*, 2014 WL 5802283, at \*7 (vacating the rule, and finding that the rule fails on the first step of *Chevron*); *Prop. Cas. Insurers Ass’n of Am. v. Donovan*, No. 13 C 8564, 2014 WL 4377570, at \*24 (N.D. Ill. Sept. 3, 2014) (applying the *Chevron* test and upholding the rule on the second step); *Gabins v. City of Wilmington*, No. 14-043-GMS, 2014 WL 1370110, at \*1 (D. Del. Apr. 4, 2014) (citing § 100.500 as authority without discussion); *Perdue v. City of Wilmington*, No. 14-044-SLR, 2014 WL 5035938, at \*1, 3–4 (D. Del. Oct. 8, 2014) (acknowledging alleged violation of § 100.500 without discussion); *MHANY Mgmt. v. Inc. Vill. of Garden City*, 985 F. Supp. 2d 390, 424 (E.D.N.Y. 2013) (citing § 100.500 in passing, and applying the burden-shifting test found in Second Circuit case law). Although this is not an exhaustive list, it is a representative sample of the treatment that the HUD rule has received in federal court decisions.

314. *Am. Ins. Ass’n*, 2014 WL 5802283, at \*7; *Prop. Cas. Ins. Ass’n of Am.*, 2014 WL 4377570, at \*24.

The first case to apply *Chevron* to HUD's disparate impact rule was *Property Casualty Insurers Ass'n of America v. Donovan*.<sup>315</sup> In *Donovan*, Judge Amy St. Eve of the Northern District of Illinois framed the question on the first step of *Chevron* as whether the FHA spoke directly to how a plaintiff should prove a discrimination claim under the FHA.<sup>316</sup> The court found that the FHA was silent on this question.<sup>317</sup>

The court then went on to Step Two of the *Chevron* analysis, which asks whether HUD's disparate impact rule was a reasonable interpretation of the FHA.<sup>318</sup> It found that HUD's adoption of the three-step burden-shifting test was reasonable for several reasons. First, the burden-shifting framework is very similar to the frameworks already developed by the courts for deciding disparate impact claims under the FHA.<sup>319</sup> Second, the court noted that the burden-shifting test adopted by HUD and the burden-shifting test adopted by Congress in Title VII, are similar and that "[c]ourts have repeatedly turned to Title VII precedent for guidance evaluating disparate impact liability under the FHA (Title VIII) and vice versa."<sup>320</sup> Third, HUD's rule was a "reasonable accommodation of the competing interests at stake," that is, the interest of plaintiffs and the government in eliminating discriminatory housing practices and the interest of defendants in avoiding frivolous litigation.<sup>321</sup>

The next case to apply the *Chevron* two-step test to § 100.500 was *American Insurance Ass'n*. In this instance, Judge Leon of the D.C. District Court found that the HUD rule failed the *Chevron* test at Step One, because the FHA "unambiguously prohibits *only* intentional discrimination."<sup>322</sup> Much of this argument already has been laid out in Part II.C.2, so only a brief reiteration and a short supplement to the argument is required to show how this reasoning is applied in the *Chevron* test.

Judge Leon began his analysis by stating that *Smith* "made clear" that a statute does not authorize disparate impact claims unless there is "*clear* language to that effect."<sup>323</sup>

He then turned to the dictionary meaning of a handful of words found in the section 804(a) of the FHA, as defined by a 1966 edition of *Webster's Third New International Dictionary*.<sup>324</sup> Each definition is important and is analyzed further in Part III of this Note.<sup>325</sup> He defined "refuse" as "to show

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315. *Cf. Prop. Cas. Ins. Ass'n of Am.*, 2014 WL 4377570, at \*24.

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.* at \*25.

320. *Id.* (citing *Kyles v. J.K. Guardian Sec. Servs., Inc.*, 222 F.3d 289, 295 (7th Cir. 2000)).

321. *Id.*

322. *Am. Ins. Ass'n v. Dep't of Hous. & Urban Dev.*, No. 13-00966 (RJL), 2014 WL 5802283, at \*7 (D.D.C. Nov. 7, 2014).

323. *Id.* (citing *Smith v. City of Jackson*, 544 U.S. 228, 235–36 (2005)).

324. *Id.* at \*8; WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1966) [hereinafter WEBSTER'S THIRD].

325. *See infra* Part III.B.

or express a positive unwillingness to do or comply with.”<sup>326</sup> He then defined “make,” found in the phrase “otherwise make unavailable or deny,”<sup>327</sup> as “‘to produce as a result of action, effort, or behavior’ or ‘to cause to happen to or be experienced by someone.’”<sup>328</sup> “Deny” in the last phrase means “‘to refuse to grant’ or ‘to turn down or give a negative answer to.’”<sup>329</sup> Finally, “discriminate” is given very much the same meaning described above,<sup>330</sup> which is essentially to *treat* persons differently on a categorical basis, without regard to merit.<sup>331</sup>

Judge Leon reasoned that the definitions of these words—“refuse,” “make,” “deny,” and “discriminate”—all point to requiring a potential defendant to take intentional discriminatory actions.<sup>332</sup>

Next, Judge Leon pointed to the FHA’s lack of the “effects” language that Title VII and the ADEA include.<sup>333</sup> The absence of the *clear* “effects” language, mixed with the “because of race” formulation<sup>334</sup> found in the FHA, also led Judge Leon to conclude that the provisions found in the FHA do not resemble the disparate impact provisions of Title VII and the ADEA.<sup>335</sup> Not only is the language in section 804(a) different from the disparate impact provisions of Title VII and the ADEA, but “[t]he statutory language in [section 804(a)] is materially *identical* to the statutory language used in the disparate-treatment prohibitions in Title VII and the ADEA.”<sup>336</sup>

For these reasons, Judge Leon reasoned that Congress, when it wrote the FHA, spoke directly on the issue of whether disparate impact claims could be brought under the Act.<sup>337</sup> He concluded that Congress explicitly precluded such claims by the plain language of the statute.<sup>338</sup>

It should be noted that Judges St. Eve and Leon asked slightly different questions during their *Chevron* analyses. On Step One of *Chevron*, Judge St. Eve asked in *Donovan* whether the FHA spoke directly to how a plaintiff should prove his or her discrimination claim.<sup>339</sup> Judge Leon, on the other hand, asked the narrower question—and the one that is before the Supreme Court in *Inclusive Communities*—that is, whether the FHA spoke

326. *Am. Ins. Ass’n*, 2014 WL 5802283, at \*8 (quoting WEBSTER’S THIRD, *supra* note 324).

327. 42 U.S.C. § 3604(a) (2012).

328. *Am. Ins. Ass’n*, 2014 WL 5802283, at \*8 (quoting WEBSTER’S THIRD, *supra* note 324).

329. *Id.* (quoting WEBSTER’S THIRD, *supra* note 324).

330. *See supra* note 309.

331. *See supra* note 309. It should be noted that Judge Leon cited § 3604(a) as the source of the word “discriminate,” but that this word does not appear in that subsection, but instead appears in § 3604(b). *Cf.* 42 U.S.C. § 3604(a)–(b); *Am. Ins. Ass’n*, 2014 WL 5802283, at \*8.

332. *Am. Ins. Ass’n*, 2014 WL 5802283, at \*8. For a critique of the reasoning in this case, see *infra* Part III.B.

333. *Id.*; see also *supra* Part II.C.2.

334. *See supra* Part II.C.2.

335. *Am. Ins. Ass’n*, 2014 WL 5802283, at \*8–9.

336. *Id.* at \*9.

337. *Id.*

338. *Id.*

339. Prop. Cas. Ins. Ass’n of Am. v. *Donovan*, No. 13 C 8564, 2014 WL 4377570, at \*24 (N.D. Ill. Sept. 3, 2014).

directly to the issue of whether disparate impact claims are cognizable under the Act.<sup>340</sup>

III. THE FAIR HOUSING ACT HAS NO (ORDINARY) MEANING:  
WHY THE COURT SHOULD GIVE DEFERENCE TO HUD'S INTERPRETATION

Part III of this Note argues that HUD's disparate impact rule should be upheld under a *Chevron* analysis, at least as it pertains to section 804(a) and (b) of the FHA, because: (1) the text of the FHA is silent as to the availability of disparate impact claims and (2) a reading of the FHA that authorizes disparate impact claims is reasonable.

To support this conclusion, this part first argues that judicial precedent alone cannot be relied upon to support such a reading, because many early cases relied upon constitutional equal protection disparate impact cases that were invalidated or abrogated by the Supreme Court. Many modern cases continue to cite these early cases as support for the conclusion that disparate impact claims are cognizable under the FHA, weakening the foundation of this claim.

Next, Part III argues that the text of the FHA is silent or ambiguous as to the availability of disparate impact claims under the FHA, and thus, HUD's disparate impact rule passes *Chevron* Step One. This part reaches this conclusion by reviewing the reasoning for and against disparate impact liability under the FHA and ultimately concludes that neither side of the argument is wholly satisfactory. Finally, this part argues that under *Chevron* Step Two, HUD's disparate impact rule is a reasonable interpretation of the Act.

A. A "Derelict on the Waters of the Law"

In spite of forty years of nearly unanimous judicial precedent supporting a disparate impact standard under the FHA, this precedent alone is not sufficient to definitively say that the disparate impact standard should be allowed under the Act. This is true for two compelling reasons: (1) the heavy reliance of early FHA disparate impact cases on invalid equal protection precedent<sup>341</sup> and (2) a lack of statutory analysis in these early cases.<sup>342</sup> This second point is especially troubling, as the Supreme Court often closely ties its holdings in cases interpreting civil rights statutes to the text of the statute in question.<sup>343</sup>

As this Note discusses, the Supreme Court's rejection of the disparate impact standard in constitutional equal protection cases made the holdings in early cases such as *Black Jack*, *Arlington Heights II*, and *Rizzo* less

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340. *Am. Ins. Ass'n*, 2014 WL 5802283, at \*7.

341. *See supra* Part II.A.

342. *See supra* Part II.A.

343. *See, e.g., supra* Part II.C (discussing the Supreme Court's statutory analysis of the ADEA and the reasoning behind its holdings in these cases).

authoritative.<sup>344</sup> Courts continue to cite these cases as authority, making their holdings less robust and somewhat hollow.

The continued citation of these cases as direct support for the rule that disparate impact cases are cognizable under the FHA is not necessarily wrong and does not make the holdings in these cases per se invalid. However, it leaves a logical lacuna in the argument that can only be filled by close adherence to the text of the statute itself, or better yet, an authoritative interpretation by HUD, codified in a rule promulgated with rulemaking power under the APA.<sup>345</sup>

HUD's disparate impact rule, § 100.500, might be able to fill this void, because the rule has the benefit of *Chevron* deference.<sup>346</sup> That is, proponents of the disparate impact standard of liability under the FHA need not prove that the statutory text plainly lends itself to such a reading but only that the FHA is silent or ambiguous as to the standard, and that the HUD rule is a reasonable interpretation of the statute.<sup>347</sup>

This essentially has the effect of lowering the proponents' burden of persuasion when a disparate impact claim is under judicial review. Theoretically, this also should be the case in *Inclusive Communities*.

#### B. A Close Analysis of the Text Shows That the Statute Is Ambiguous

The debate over whether the plain meaning of the text of the FHA supports disparate impact liability only goes to prove that the text of the statute is ambiguous. This section first addresses the unreliability of the use of dictionaries to determine the plain meaning of the text—specifically the use of dictionaries in *American Insurance Ass'n*. Then, this section explains how the structure of section 804(a) straddles the middle ground between Title VII section 703(a)(1) (the disparate treatment provision) and (a)(2) (the disparate impact provision). Finally, this section argues that the reasoning of *Smith* and *Gross* is inconclusive when applied to the FHA, largely because of significant structural differences between the FHA and Title VII.

##### 1. The Use of Dictionaries Is Inconclusive

Courts and commentators sometimes use dictionaries to decipher the plain meaning of a statute.<sup>348</sup> This is especially unhelpful in the context of the FHA. Recall, for example, the discussion of Judge Leon's use of dictionaries in *American Insurance Ass'n*.<sup>349</sup> Judge Leon lists a string of words and definitions, and simply concludes that they all point to

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344. See *supra* Part II.A.

345. See *supra* notes 98, 100 and accompanying text.

346. See *supra* Part I.B.2.

347. See *supra* Part I.B.2.

348. See *supra* Part II.D.

349. See *supra* notes 326–32.

“intentional” conduct, without any real explanation of how that inference is made.<sup>350</sup>

First, the definitions of “refuse” and “deny” used by Judge Leon are neutral regarding an actor’s intent. The definition of “refuse” is essentially a positive unwillingness to do or comply with.<sup>351</sup> The definition of “deny” is essentially “to refuse” or to give a negative answer to.<sup>352</sup> These definitions speak only to actions in themselves and do not so much as hint at motivation, purpose, or treatment based on categorical bias. When the words are viewed within their statutory context, this neutrality becomes even more clear: “refuse”—as in “refuse to sell or rent”—and “deny”—as in “deny[] a dwelling”<sup>353</sup>—are simply verbs that describe an adverse action or injury-causing outcome.

Second, the definition of “make”—as in the phrase “or otherwise make unavailable . . . a dwelling”—that Judge Leon cites is similarly neutral. In fact, if the definition of “make” weighs in favor of either side of the disparate impact debate, it weighs in favor of the proponents’ interpretation of the FHA. Judge Leon defines “make” as “to produce as a *result* of action, effort, or behavior” or “to cause to happen to or be experienced by someone.”<sup>354</sup> Such a definition has the “results”-based language that according to Jensen and Naimon,<sup>355</sup> creates disparate impact liability in civil rights statutes. The presence of the word “results” in the dictionary definition of “make” has as much persuasive force as the presence of the word “treatment” in the common usage dictionary definition of “discriminate.”<sup>356</sup> Realistically, the presence of either of these words in their respective definitions is probably not indicative of Congress’s intent when it included the words “make” and “discriminate” in the various provisions of the FHA.

Moreover, the use of the passive voice in the phrase “to cause to happen to or *be experienced by*” clearly indicates a focus on the effect of an act, not on the actor’s motivations. Last, it is significant that the word “make,” with the built-in results-based definition, is found in exactly the phrase that proponents of the disparate impact standard argue is the effects-based language in the FHA—that is, “otherwise make unavailable or deny.”<sup>357</sup>

Finally, the word “discriminate,” found in section 804(b) of the FHA, also does not connote a requirement that a defendant act with the intention of discriminating. This is made clear by the brief account of the historical development of the legal definition of the word “discrimination,” which explicitly included both disparate effect and treatment language at least thirty-five years prior to the passage of the FHA and continues to contain

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350. *See supra* notes 324–32.

351. *See supra* notes 324–32.

352. *See supra* notes 324–32.

353. 42 U.S.C. § 3604(a) (2012).

354. *See supra* note 328 and accompanying text (emphasis added).

355. *See supra* notes 297–304 and accompanying text.

356. *See supra* note 308 and accompanying text (discussing ordinary meaning of the word “discriminate”).

357. *See supra* notes 266–70 and accompanying text.

the same definitions today, forty years after the passage of the FHA.<sup>358</sup> The fact that a dictionary of common usage such as *Webster's Third*<sup>359</sup> does not include a definition of disparate impact discrimination is hardly surprising. And any force that the disparate treatment language in such dictionaries had in cutting against the availability of disparate impact claims under the FHA is altogether neutralized by the legal definition of “discriminate.”

This account of the plain meaning of the text of the FHA does not mean that the plain meaning of the FHA authorizes disparate impact claims. To the contrary, the “plain meaning” of the FHA is unascertainable as it pertains to the cognizability of disparate impact claims under the Act. That is to say that the FHA is silent or ambiguous regarding this particular issue. For practitioners, judges, or commentators to claim to be able to discern the “true” meaning of the statute, or the true intent of Congress, as it pertains to this issue, based only on the text of the statute, is to promote a fiction of the highest order.

## 2. The Structure of the Statute Also Is Inconclusive and Seems to Place Section 804(a) Somewhere Between Section 703(a)(1) and (a)(2)

Since we cannot rely on the plain meaning of the statute to determine whether the FHA authorizes disparate impact claims, this Note now turns to the structure of section 803(a) and (b) as they compare to Title VII section 703(a)(1) and (a)(2).

Refer back to the full text of the relevant Title VII and FHA provisions reproduced earlier.<sup>360</sup> One can see that, simply stated, the structure of the section 703(a)(1) follows this basic outline: it is unlawful “to fail or refuse to hire . . . or otherwise to discriminate . . . because of race. . . .”<sup>361</sup> Section 703(a)(2) follows a slightly different outline: it is unlawful “to limit, segregate, or classify . . . in any way which would deprive or tend to deprive . . . or otherwise adversely affect [a person’s employment status] because of race. . . .”<sup>362</sup>

Section 804(a) of the FHA begins in a similar manner as section 703(a)(1), by stating that it is unlawful “[t]o refuse to sell or rent . . . or to refuse to negotiate for the sale or rental of” a dwelling “because of race.”<sup>363</sup> But it also makes it unlawful to “otherwise make unavailable or deny” a dwelling because of race.<sup>364</sup> As explained earlier, “otherwise make unavailable” may be read as results or effects language and thus as authorizing disparate impact claims.<sup>365</sup>

In fact, proponents of the disparate impact standard argue that this language is parallel to the “otherwise affect” language found in section

358. *See supra* notes 286–92 and accompanying text.

359. *See supra* notes 308–09 and accompanying text.

360. *See supra* notes 260–61 and accompanying text.

361. *See supra* note 261 and accompanying text.

362. *See supra* note 261 and accompanying text.

363. 42 U.S.C. § 3604(a) (2012); *see also supra* note 260 and accompanying text.

364. 42 U.S.C. § 3604(a); *see also supra* note 260 and accompanying text.

365. *See supra* Part III.B.1.

703(a)(2).<sup>366</sup> It is the act of making a dwelling unavailable that is the undesired effect. Section 703(a)(2) necessarily used the more general word “affect” because the adverse effects in an employment context are naturally more varied—that is, they could include a failure to hire, failure to promote, firing, unequal pay, et cetera. The phrase “otherwise make unavailable” can plausibly be read as the more specific parallel of the phrase “otherwise adversely affect.”

However, “otherwise make unavailable or deny” is not definitively “effects” language. It does not include explicit “effects” language like the words “affect” or “results”—language the Supreme Court specifically focuses on when determining whether a civil rights statute authorizes disparate impact claims.

A discussion of the “because of” language here does not add much at all. The phrase “because of race” appears in both the disparate treatment and disparate impact provisions of Title VII. It is clear that, although the “because of” language can be read narrowly to create liability only for disparate treatment claims, when there is language in the statute that is sufficient to indicate liability for disparate impact, the disparate treatment feel of the “because of” language gives way to a disparate impact standard.

### 3. *Smith* and *Gross* Are Also Inconclusive Regarding the Availability of Disparate Impact Claims Under the FHA

Both *Smith* and *Gross* are helpful guidance in reading the text of the FHA and even offer some guidance on how to interpret the structure of the individual statutes. However, neither is quite the “sea change”<sup>367</sup> in statutory construction that opponents of disparate impact liability make it out to be.

First, the plurality’s statutory analysis in *Smith* interprets language that is not found anywhere in the FHA—that is, the “otherwise adversely affect” language.<sup>368</sup> However, *Smith* is important, because for the first time it makes explicit which provision of Title VII (and the ADEA) gives rise to disparate impact liability—section 703(a)(2). Therefore, it gives scholars and practitioners some guidance on what kind of language will give rise to disparate impact liability based on the plain language of the statute. And, while it does not limit the language that gives rise to disparate impact liability *only* to that language, it does explicitly hold that the language in section 703(a)(1) only authorizes disparate treatment claims.

*Gross* is helpful as well because it interprets the “because of” language that is also found in the FHA. *Gross* held that the “because of” language in the disparate treatment provision of the ADEA required that a claimant’s protected status be a but-for cause of the disparate treatment.<sup>369</sup> This is a strict reading of this language, but it is still not determinative of whether the

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366. See *supra* note 261 and accompanying text.

367. See *supra* note 296.

368. See *supra* Part II.B, C.1.

369. See *supra* Part II.C.

FHA authorizes disparate impact claims. As indicated above, the “because of” language has a very different effect on the rest of the statute if the balance of the statutory language lends itself to a disparate impact reading.

Thus, considering the language and structure of the FHA, as well as the recent Supreme Court cases that have called into question the past forty years of case history surrounding disparate impact liability under the Act, the only clear conclusion that can be made about the FHA is that the FHA is silent, or at least ambiguous, as to whether disparate impact claims are cognizable under the Act.

### C. *The HUD Rule Is a Reasonable Interpretation of the FHA*

This section argues that, under *Chevron* Step Two, HUD’s disparate impact rule is reasonable and that courts should defer to the expertise of HUD in deciding whether disparate impact claims are cognizable under the FHA.

That the HUD rule is reasonable does not seem contentious. It did not create new liabilities, but rather clarified doctrine that had organically developed in nearly every circuit court in the United States.<sup>370</sup> Furthermore, as Judge St. Eve noted in *Donovan*,<sup>371</sup> the burden-shifting test that HUD adopted is similar to the tests that were already being applied by the courts and is also very similar to the burden-shifting test under Title VII.<sup>372</sup>

HUD is also best equipped to determine whether the disparate impact standard is essential to accomplishing the broad remedial purposes of the FHA—that is, ending, ameliorating, and preventing segregation and housing discrimination.<sup>373</sup> HUD has the benefit of having observed, studied, and participated in forty years of disparate impact litigation under the FHA. And while the case law is not the most well-reasoned precedent to rely upon for finding that disparate impact claims are cognizable under the Act, it gives HUD the advantage of knowing in advance how its interpretation will affect such concerns as: the breadth of liability, the likelihood of frivolous claims, and, most importantly, the efficacy of the disparate impact standard in accomplishing the goals of the FHA.

### CONCLUSION

The HUD disparate impact rule, 24 C.F.R. § 100.500, essentially saves the FHA disparate impact standard from an uncertain fate. There is an essential flaw in the FHA’s judicial precedent regarding disparate impact claims that has not been properly dealt with. Thus, the availability of disparate impact claims under the FHA must rest on the text of the statute itself or an interpretation of the statute by an expert such as HUD. The HUD rule essentially fills the void that the judicial precedent and

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370. See *supra* note 97 and accompanying text.

371. See *supra* notes 318–21 and accompanying text.

372. See *supra* note 320.

373. See *supra* note 9 and accompanying text.

ambiguous language leaves by offering the disparate impact standard enough protection to withstand judicial review by the U.S. Supreme Court.