

IS DISPARATE IMPACT HAVING ANY IMPACT? AN APPELLATE ANALYSIS OF FORTY YEARS OF DISPARATE IMPACT CLAIMS UNDER THE FAIR HOUSING ACT

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*After four decades of unanimity in the circuit courts, with several denials of certiorari by the Supreme Court, the Court has recently granted certiorari in two cases to resolve the apparently settled question of whether the disparate impact theory is cognizable under the Fair Housing Act (FHA). Although these two recent cases, *Magner v. Gallagher* and *Mount Holly v. Mount Holly Gardens Citizens in Action, Inc.*, may have raised questions about the potential reach of disparate impact theory, they are not representative FHA cases with respect to their outcomes or their facts. The circuit courts in both cases reversed summary judgment and reinstated plaintiffs' disparate impact claims, which is exceedingly rare given its occurrence only twice before in forty years. In general, plaintiffs have obtained positive outcomes in only 20% of their FHA disparate impact claims considered on appeal. Further, plaintiffs' positive FHA disparate impact outcomes have been affirmed only 33.3 % of the time, compared with defendants' affirmance rate of 83.8%. The facts of *Magner* and *Mount Holly* are not representative considering that these disparate impact challenges were made against housing improvement plans, rather than housing barriers. Housing improvement challenges typically seek to prevent the disproportionate displacement of minorities from existing housing opportunities, whereas housing barrier challenges seek to remove barriers and create housing opportunities for minorities where they do not presently exist. Only one other housing improvement case prior to *Magner**

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and Mount Holly had resulted in a positive outcome for plaintiffs in forty years. Housing barrier challenges almost always further the nondiscrimination and integration purposes of the FHA. Housing improvement challenges may or may not further the purposes of the FHA, depending on the facts of the case. This means that summary judgment will not be appropriate in some housing improvement cases. Housing barrier cases represent the predominant type of FHA disparate impact claim considered on appeal and the predominant type of claim among those on which plaintiffs have obtained positive outcomes. Given the persistence of residential racial segregation and Congress's purpose in enacting the FHA to eliminate such segregation, the disparate impact theory remains a vital tool for overcoming barriers to housing opportunity and should be upheld.

TABLE OF CONTENTS

Introduction.....	359
I. The Role of Housing Barrier Cases in Early FHA Disparate Impact Challenges.....	364
II. Disparate Impact Challenges to Housing Improvement Regulations	374
A. <i>Magner v. Gallagher</i>	375
B. <i>Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly</i>	381
C. <i>Charleston Housing Authority v. U.S. Department of Agriculture</i>	384
D. Unsuccessful Housing Improvement Cases at the Appellate Level.....	386
III. A Quantitative Analysis of Forty Years of FHA Disparate Impact Cases at the Appellate Level.....	391
A. Party Outcomes in FHA Disparate Impact Cases, 1974–2013.....	392
B. Data by FHA Disparate Impact Case Type: Housing Barrier and Housing Improvement Cases.....	399
IV. HUD's Disparate Impact Rule and Its Application to Housing Improvement Cases.....	403
V. Will the FHA Disparate Impact Theory Survive?	409
VI. Should the FHA Disparate Impact Theory Survive?	411
Conclusion	420
Appendix A: Forty Years of FHA Disparate Impact Claims—Reverse Chronological Listing of Appellate Cases	422
Appendix B: Forty Years of FHA Disparate Impact Claims—Listing of Appellate Cases by Case Type	432

INTRODUCTION

For forty years, the Fair Housing Act (FHA) has prohibited not only practices that are undertaken pursuant to a discriminatory motive, but also unjustified practices with discriminatory effects.¹ Every circuit court to decide the question, which includes all but the D.C. Circuit, has considered the broad purposes of the FHA and analogous interpretations of Title VII and determined that liability can be imposed under the FHA on a showing of discriminatory effects.² The Supreme Court has never squarely addressed the question but after repeatedly denying certiorari in the earliest appellate cases to apply a disparate impact standard, it issued a per curiam affirmance of an appellate finding of disparate impact in an FHA case.³ The U.S. Department of Housing and Urban Development (HUD) issued a final rule in 2013 establishing uniform standards for evaluating FHA effects claims.⁴ Prior to the promulgation of its regulation, HUD, like the courts, had long interpreted the FHA to prohibit discriminatory effects, even in the absence of any evidence of discriminatory intent.⁵

Despite the well-settled nature of the jurisprudence and HUD's regulatory interpretation, the Supreme Court recently decided to review the disparate impact standard as a method of proof under the FHA.⁶ After the Supreme Court granted certiorari in 2011 in an Eighth Circuit decision upholding the disparate impact claim on an unusual set of facts, the City of St. Paul, the petitioner in the case, decided to withdraw its petition, thus preventing Supreme Court review.⁷ However, in 2012, the township of Mount Holly, New Jersey

1. See ROBERT G. SCHWEMM & SARA K. PRATT, NAT'L FAIR HOUSING ALLIANCE, DISPARATE IMPACT UNDER THE FAIR HOUSING ACT: A PROPOSED APPROACH 3 (2009), available at <http://www.nationalfairhousing.org/Portals/33/DISPARATE%20IMPACT%20ANALYSIS%20FINAL.pdf> ("Four decades of . . . litigation has produced a strong consensus that the Act does include an impact standard.")

2. See *id.* at 6–7 (citing cases from each circuit).

3. See *Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15, 18 (1988) (per curiam) (refusing to reach the question of the appropriateness of the disparate impact test).

4. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,463 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100).

5. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. 70,921, 70,921 (proposed Nov. 16, 2011) (to be codified at 24 C.F.R. pt. 100).

6. *Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, 133 S. Ct. 2824 (2013) (granting petition for writ of certiorari to the U.S. Court of Appeals for the Third Circuit), *cert. dismissed*, No. 11-1507, 2013 WL 6050174 (Nov. 15, 2013); *Magner v. Gallagher*, 132 S. Ct. 548 (2011) (granting petition for writ of certiorari to the U.S. Court of Appeals for the Eighth Circuit).

7. *Magner*, 132 S. Ct. 1306 (2012) (dismissing certiorari pursuant to Rule 46.1 of the Rules of the Supreme Court).

subsequently filed a similar petition for certiorari in a separate case, which provided the Court with another opportunity to review the theory.⁸ The Court granted the petition in the summer of 2013,⁹ but that case also resolved prior to oral argument, again preventing Supreme Court review.¹⁰

Why would the Court intervene to assess disparate impact theory in housing cases after allowing the theory to rest undisturbed for so many decades? Is it possible to trace the evolution of the theory from its first appearance in housing jurisprudence to determine whether the theory has strayed from its original function? Is the theory still necessary and important in accomplishing the congressional purpose of the FHA, which, beyond the overarching nondiscrimination goal “to provide, within constitutional limitations, for fair housing throughout the United States,”¹¹ also includes the integration goal of replacing segregated neighborhoods with “truly integrated and balanced living patterns”?¹²

In exploring the possible causes of the Court’s recent scrutiny of disparate impact theory in housing cases, this Article examines two types of housing regulation.¹³ One type of regulation may be described as “housing barrier” regulation. The earliest disparate impact cases brought under the FHA challenged this type of regulation.¹⁴ A housing barrier regulation may operate in one of

8. *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 (2013), *and cert. dismissed*, 2013 WL 6050174 (November 15, 2013).

9. *Mount Holly*, 133 S. Ct. 2824 (2013) (granting petition for writ of certiorari to the U.S. Court of Appeals for the Third Circuit).

10. *Mount Holly*, 2013 WL 6050174 (Nov. 15, 2013) (dismissing certiorari pursuant to Rule 46.1 of the Rules of the Supreme Court).

11. 42 U.S.C. § 3601 (2012).

12. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (quoting 114 CONG. REC. 3422 (1968) (statement of Sen. Walter Mondale)). Courts are sometimes “faced with a conflict between the goal of integration and the goal of expanding minority housing opportunities,” such as in the context of tenant selection policies designed to maintain integration by limiting the number of housing units for minority group members. ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION § 7.3 (2013 ed.). Congress did not consider the conflict because it “believed that integration and nondiscrimination were complementary goals.” *Id.* (citing *United States v. Starrett City Assoc.*, 840 F.2d 1096 (2d. Cir. 1988)).

13. For a description of other types of housing regulation and practices that are subject to challenge using disparate impact theory, see *infra* Parts III.B, and Appendix B. For example, several industry trade groups representing homeowners’ insurers recently filed a federal complaint seeking to block enforcement of HUD’s disparate impact rule against their members. *American Ins. Ass’n v. HUD*, No. 1:13-cv-00966 (D.D.C. filed June 26, 2013).

14. See, e.g., *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 149 (3d Cir. 1977) (affirming finding of racial impact in termination of a public housing project by city agencies following the urban renewal clearance of black families and creation of all-white community); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d

several respects: to prevent the construction of housing that will likely be used by minority groups in places that currently lack minority residents; to confine housing that will be used by minority group members to neighborhoods where minority households already predominate; or to otherwise deny minority households freedom of movement in a wider housing marketplace.¹⁵ In short, housing barrier regulations frequently perpetuate racial segregation. The other type of regulation, which has recently captured the Court's attention, may be called "housing improvement" regulation. This is a regulation or plan purportedly designed to improve the condition of housing and/or the surrounding neighborhood, typically through some combination of demolition and replacement of housing units, but also through other means such as the imposition of minimum housing standards or revitalization plans.¹⁶ The challenges to such a regulation typically center on the involuntary displacement of residents from their homes, with such displacement disproportionately affecting minorities.¹⁷

The remedy sought is a key distinction between the disparate impact challenges to these two types of regulation. The remedy for a successful disparate impact challenge to a housing barrier regulation is the removal of the housing barrier and the creation of housing opportunities where they might not have previously existed, whereas the remedy for a disparate impact challenge to a housing improvement regulation is usually preventing displacement from housing opportunities where they already exist. If successful, a disparate impact challenge to a housing barrier regulation will almost always further both the nondiscrimination and the integration purposes of the FHA.¹⁸ A disparate impact challenge to a housing improvement regulation may or may not further the twin purposes of

1283, 1285, 1294 (7th Cir. 1977) (ruling that the Village of Arlington Heights's refusal to relax a zoning ordinance requiring single family homes would violate the FHA if it would effectively prevent the construction of low-cost housing anywhere within the confines of the municipality); *United States v. City of Black Jack*, 508 F.2d 1179, 1183, 1188 (8th Cir. 1974) (holding that a zoning ordinance barring the construction of new multi-family housing units in a predominantly white area violated the FHA).

15. See *infra* Part I (assessing early FHA disparate impact challenges to housing barrier regulations).

16. See *infra* Part II (analyzing disparate impact challenges to housing improvement regulations).

17. See *infra* Part II (discussing zoning ordinances that displaced residents through condemnations, demolitions, and redevelopment plans, among other methods).

18. See SCHWEMM, *supra* note 12, § 7.3 ("[I]n exclusionary zoning cases . . . the conclusion that Title VIII is designed to promote integration has generally led courts to an expansive interpretation of the statute that advances the housing opportunities of minorities.").

the FHA, as more fully described below.¹⁹ Accordingly, disparate impact challenges to housing improvement regulations must be analyzed with particular care to ensure that the FHA's purposes of expanded housing opportunity and integration are furthered by such challenges. This Article concludes that this careful analysis can be accomplished consistent with the proof standards articulated in HUD's regulation.

Given the persistence of residential racial segregation and Congress's purpose in enacting the FHA to eliminate such segregation, the disparate impact theory remains a relevant, if misunderstood, tool for accomplishing Congress's purpose. Consequently, the disparate impact theory should be upheld.

Part I of this Article considers the earliest applications of the disparate impact theory in FHA cases, which involve challenges to housing barrier regulations. It then considers more recent applications of the theory challenging barrier regulations and argues that the theory remains relevant and effective in removing barriers to housing opportunity and mobility, thereby curbing the perpetuation of segregation.

In Part II, this Article explores two recent cases that illustrate the vulnerability of the disparate impact theory when used to challenge housing improvement regulations. In both cases, the circuit courts reversed summary judgment granted by the district courts and reinstated the disparate impact claims. Defendant-appellees in both cases petitioned for Supreme Court review, with the Court granting certiorari in each (with both cases dismissed by the petitioner shortly before oral argument). These recent successes for plaintiff-appellants in the housing improvement context have given the Supreme Court an opening to attack the theory when it would appear to stymie local government efforts to counteract neighborhood blight. What is misleading about the two recent summary judgment reversals is that they mask an overwhelmingly unsuccessful track record for plaintiffs challenging housing improvement regulations and plans using FHA disparate impact theory. This Article conducts a qualitative review of the cases and finds only one other success in this context for plaintiffs at the appellate level, consisting of an affirmance of a trial court ruling for plaintiffs with a remand to determine whether plaintiffs' requested relief (re-occupancy) would actually further the purposes of the FHA.²⁰

19. See *infra* Part IV.

20. *Charleston Hous. Auth. v. U.S. Dep't of Agric.*, 419 F.3d 729 (8th Cir. 2005).

Part III of this Article reports a quantitative analysis of forty years of FHA disparate impact appellate jurisprudence and finds that the courts have had little difficulty disposing of all manner of disparate impact claims under the FHA. Plaintiffs have received positive decisions in only 20%, or eighteen of the ninety-two FHA disparate impact claims considered on appeal. Although defendants were able to have 83.8% of their positive FHA disparate impact outcomes affirmed on appeal, plaintiffs were able to hold onto only 33.3% of their positive outcomes. Plaintiffs have been able to reverse only four summary judgments in forty years, including the two recent reversals granted review by the Court. These data also reveal that, at the appellate level, the predominant type of FHA disparate impact claim, and the predominant type of claim on which plaintiffs are receiving positive outcomes, is the housing barrier claim. Comparing plaintiffs' outcomes in housing barrier and housing improvement cases, plaintiffs succeeded twice as often in housing barrier cases (42%) than in housing improvement cases (21%). These findings are illustrated in more detail in Figures 1 through 9.

Part IV reviews the standards recently proposed by HUD for analyzing FHA disparate impact claims and considers whether they might be applied to housing improvement regulations in a way that furthers the nondiscrimination and integration purposes of the statute. The FHA is concerned with opportunity, not maintaining the status quo of substandard, segregated housing. If the challenged plan, which must be supported by evidence, revitalizes housing while setting the stage for exclusion and increased segregation, then it will be difficult to justify as legitimate and nondiscriminatory. On the other hand, if the plan revitalizes housing while creating opportunity and integration, then plaintiffs will be hard-pressed to identify a less discriminatory alternative. If history is any judge, most housing improvement challenges would continue to be decided on summary judgment. However, summary judgment will not always be an appropriate vehicle for resolving these challenges. Community and neighborhood revitalization plans will almost always be legitimate in the abstract but whether they are racially exclusionary will depend on the facts of a particular case.

Part V briefly considers whether the FHA disparate impact theory is likely to survive Supreme Court review, assuming that the Court continues to grant certiorari on the issue. Although it leaves the briefing of the statutory construction issue to the litigants, this Article observes that the earliest appellate courts to review the theory engaged in a statutory construction analysis. They interpreted the

FHA consistent with the Supreme Court's interpretation of Title VII, which recognized a discriminatory effects method of proof. Given that Congress did not simultaneously consider the FHA when it amended Title VII to include the disparate impact standard, it is odd that the Court would jettison the disparate impact theory without questioning any of the other proof methods borrowed from Title VII, such as that created by the Court for disparate treatment cases in *McDonnell Douglas*. Of perhaps most relevance, the Court recently recognized the disparate impact method of proof in age discrimination cases with Justice Scalia casting the deciding vote on the basis of his deference to the U.S. Equal Employment Opportunity Commission (EEOC).²¹

Part VI of this Article addresses whether the FHA disparate impact theory should survive, given its limited success and potential for perverse outcomes in housing improvement cases. This Article concludes that the most perverse consequence of all would be the Court's revocation of the disparate impact method of proof in all FHA cases, even those challenging housing barrier regulations. There is no need for panic over the use of disparate impact theory in the housing improvement context because these claims are fact-intensive and can further the purposes of the FHA if improvement plans set the stage for exclusion. The appellate courts have overwhelmingly controlled for perverse outcomes considering the forty-year history of the FHA. This Article concludes that despite the limitations of disparate impact theory, it remains a vital tool for eliminating the segregation the FHA was enacted to combat.

I. THE ROLE OF HOUSING BARRIER CASES IN EARLY FHA DISPARATE IMPACT CHALLENGES

Litigants have used the disparate impact theory over the years to challenge a variety of housing-related regulations, policies, practices, and decisions.²² For example, in addition to housing barrier and housing improvement challenges operating at the neighborhood or municipal level, litigants have used the disparate impact theory to challenge tenant assignment or rental policies operating at the level of a single landlord or apartment complex.²³ Others litigants have

21. *Smith v. City of Jackson*, 544 U.S. 228, 247 (2005) (Scalia, J., concurring).

22. See *infra* Figure 7, Appendix B.

23. See *infra* Figure 7, Appendix B; see also *Graoch Assocs. #33, L.P. v. Louisville/Jefferson Cnty. Metro Human Relations Comm'n*, 508 F.3d 366, 369 (6th Cir. 2007) (affirming summary judgment dismissal of disparate impact claim challenging landlord withdrawal from section 8 program based on failure to establish prima facie case); *Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban*

used the theory to challenge home lending and insurance practices.²⁴ The authoritative decisions have recognized “two kinds of racially discriminatory effects which a facially neutral decision about housing can produce.”²⁵ The first kind of impact occurs in the form of “a greater adverse impact on one racial group than on another.”²⁶ The second is evaluated with respect to the impact on the community involved: “if it perpetuates segregation and thereby prevents interracial association it will be considered invidious under the Fair Housing Act independently of the extent to which it produces a disparate effect on different racial groups.”²⁷ These two kinds of effects may be present individually or in combination in both housing barrier and housing improvement cases. Regardless, effects alone do not establish liability under the FHA.²⁸ Housing improvement regulations tend to involve the first kind of impact challenge, whereas housing barrier regulations tend to implicate the second kind, though not always.

The earliest FHA cases analyzing disparate impact theory involve challenges to housing barrier regulations and illustrate the continuing salience of disparate impact theory under the FHA. For example, in *United States v. City of Black Jack*,²⁹ decided in 1974, a non-profit organization challenged an ordinance prohibiting the construction of any new multi-family dwellings in the virtually all-white suburban city of Black Jack, Missouri.³⁰ The nonprofit, the Inter Religious Center for Urban Affairs, had sought “to create alternative housing opportunities for persons of low and moderate income living in the ghetto areas of St. Louis” in the form of 108

Dev., 56 F.3d 1243, 1254, 1257 (10th Cir. 1995) (reversing, based on adequate showing of business necessity, HUD Secretary’s decision that found a three-person occupancy limit in a mobile home park created a disparate impact); *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 985 (4th Cir. 1984) (reversing bench trial decision against plaintiffs on disparate impact claim challenging building-wide evictions pursuant to new, all-adult rental policy, finding that plaintiffs established a prima facie case).

24. See, e.g., *Estate of Davis v. Wells Fargo Bank*, 633 F.3d 529, 539, 541 (7th Cir. 2011) (affirming summary judgment for lack of evidence showing defendant’s conduct had a racially based disparate impact on borrowers); *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996) (reversing jury finding of disparate impact of bank’s refusal to issue a commitment letter to cooperative housing owners because claim cannot be based on “a single act or decision”).

25. *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977); see also *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 937 (2d Cir.) (same), *aff’d per curiam*, 488 U.S. 15 (1988).

26. *Arlington Heights*, 558 F.2d at 1290.

27. *Id.*; see *infra* note 244-49 and accompanying text.

28. See *infra* note 94 and accompanying text.

29. 508 F.2d 1179 (8th Cir. 1974).

30. *Id.* at 1183.

units of two-story townhouses.³¹ The city of Black Jack was incorporated following public awareness of the planned housing development, whereupon the residents acquired the zoning power to restrict multi-family development.³² The district court had found that the virtually all-white population in the suburbs of St. Louis County had doubled and triggered a housing boom, whereas blacks were concentrated “in the city and in pockets in the county,” thereby confined disproportionately “in overcrowded or substandard accommodations.”³³

In reviewing the challenged housing barrier regulation, the Eighth Circuit analogized to Title VII protections against barriers to equal employment: “[j]ust as Congress ‘requires the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification[,]’ such barriers must also give way in the field of housing.”³⁴ Thus, the court was explicit in its treatment of the challenged regulation as a market barrier that restricted the housing choices of blacks.³⁵ Such a barrier regulation, if shown to have a racial impact, would be antithetical to the twin purposes of the FHA. As the court noted, local discretion “must be curbed where the clear result of such discretion is the segregation of low-income [b]lacks from all [w]hite neighborhoods.”³⁶ Regardless of whether such a barrier regulation was racially motivated or merely “artificial, arbitrary, and unnecessary,” the court found that “[e]ffect, and not motivation, is the touchstone.”³⁷

The rationale is similar to that used in employment cases. Neutral regulations or practices with discriminatory effects can operate as the functional equivalent of intentional discrimination.³⁸ In the particular factual context of *City of Black Jack*, a neutral zoning regulation prohibiting multi-family housing in an all-white suburb of St. Louis would have achieved the same effect as a facially discriminatory zoning ordinance. The court found that “[t]he

31. *Id.* at 1182.

32. *Id.* at 1182–83.

33. *Id.* at 1183.

34. *Id.* at 1184 (alteration in original) (citation omitted) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

35. *Id.*

36. *Id.* (internal quotation marks omitted).

37. *Id.* at 1184–85.

38. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988) (“[T]he necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination.”).

ultimate effect of the ordinance was to foreclose 85 percent of the blacks living in the metropolitan area from obtaining housing in Black Jack, and to foreclose them at a time when 40 percent of them were living in substandard or overcrowded units.”³⁹ As the Eighth Circuit stated: “we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.”⁴⁰ The Supreme Court denied certiorari in the case.⁴¹

In another seminal disparate impact case brought under the FHA, *Metropolitan Housing Development Corp. v. Village of Arlington Heights*,⁴² the Seventh Circuit in 1977 favorably reviewed a disparate impact challenge to a zoning barrier regulation. A religious order contracted with a housing development corporation to create 190 townhouse units of low-cost housing that were to be racially integrated.⁴³ The developer petitioned for rezoning of the property (zoned for single-family detached homes) to allow for construction of multi-family units.⁴⁴ After a winding procedural history in which the Supreme Court reversed the Seventh Circuit’s prior ruling that a racially disparate impact violated the Equal Protection Clause,⁴⁵ the Seventh Circuit on remand decided that a racial impact could violate the FHA.⁴⁶ The court noted that Arlington Heights remained almost totally white and a refusal to rezone the plaintiffs’ land for an integrated, multi-family development “had the effect of perpetuating segregation.”⁴⁷ Analogizing to Title VII, and considering the broad purposes of Congress in enacting Title VIII, the court found that a violation of the FHA could be established without a showing of discriminatory intent.⁴⁸ Applying a four-part balancing test,⁴⁹ the

39. *City of Black Jack*, 508 F.2d at 1186.

40. *Id.* at 1185 (internal quotation marks omitted). The Eighth Circuit notes in dicta that there was also evidence in the record to support a finding of discriminatory intent in the enactment of the housing barrier regulation. However, the court decided to rest its holding on the disparate impact theory. *Id.* at 1185 n.3.

41. *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).

42. 558 F.2d 1283 (7th Cir. 1977).

43. *Id.* at 1286.

44. *Id.*

45. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 254–55, 264–65 (1977) (holding that proof of intent is required to establish a violation of the Equal Protection Clause (citing *Washington v. Davis*, 426 U.S. 229 (1976))). The Supreme Court also affirmed the lower courts’ ruling that the plaintiffs had not carried their burden of proving discriminatory purpose. *Id.* at 270.

46. *Arlington Heights*, 558 F.2d at 1290.

47. *Id.* at 1288.

48. *Id.* at 1288–90.

49. The court considered the following: (1) the strength of plaintiff’s showing of discriminatory effect; (2) whether there was some showing of discriminatory intent;

court weighed in plaintiffs' favor the fact that Arlington Heights was overwhelmingly segregated and plaintiffs merely sought to enjoin the defendant "from interfering with their plans to dedicate their [own] land to furthering the congressionally sanctioned goal of integrated housing."⁵⁰ The court considered it a close case, remanding to the district court the question whether the development could be built on other land that was already zoned for multi-family development.⁵¹ But ultimately, the court held that it "must decide close cases in favor of integrated housing."⁵² The Supreme Court denied certiorari in this second Seventh Circuit decision.⁵³

A third case demonstrating the prominent role of zoning barrier regulations in early disparate impact challenges brought under the FHA is *Resident Advisory Board v. Rizzo*,⁵⁴ decided in 1977. Prior to demolition in 1960, 46% of a five-block area designated for public housing in the Whitman Urban Renewal Area in South Philadelphia had been occupied by black families.⁵⁵ After demolition of the site dedicated for public housing, the Redevelopment Authority of Philadelphia condemned several additional blocks of row houses in the area adjacent to the public housing site.⁵⁶ New single-family residences were built in these adjacent areas and were occupied by white families.⁵⁷ Government-funded urban renewal efforts, then, transformed the southeast Whitman neighborhood of Philadelphia from an integrated neighborhood to an all-white neighborhood.⁵⁸

The public housing rebuilding process that followed sparked considerable controversy. After a ten-year planning period for the public housing site, in 1970, various city agencies (with the approval of the Mayor and City Council) selected a developer to construct 120 detached townhouses.⁵⁹ Following community opposition, which included "thirty women . . . gather[ing] around the bulldozer and backhoe, blocking the operations of the contractor, refusing to leave

(3) the defendant's interest in taking its challenged action; and (4) whether the plaintiff sought to affirmatively compel the provision of housing or merely restrain the defendant from interfering with the provision of housing. *Id.* at 1290.

50. *Id.* at 1293 (discussing the remedy sought by plaintiffs); see *id.* at 1291 & n.9 (describing the continued racial segregation of Arlington Heights).

51. *Id.* at 1293-94.

52. *Id.* at 1294.

53. *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

54. 564 F.2d 126 (3d Cir. 1977).

55. *Id.* at 131.

56. *Id.* at 132.

57. *Id.*

58. *Id.* at 133.

59. *Id.*

the property when so requested,” various city agencies withheld police assistance, blocked construction, and sought to cancel the project.⁶⁰ A newly elected mayor campaigned on a platform of blocking public housing (which he equated with “[b]lack housing”) from being constructed in white neighborhoods in the city.⁶¹ State court litigation proceeded but was ineffective in resolving the controversy.⁶² A class of plaintiffs living in segregated neighborhoods in Philadelphia and eligible to reside in the project, as well as two organizational plaintiffs, filed a federal action in 1971.⁶³ After over four years of “pretrial maneuvering”⁶⁴ a fifty-seven day trial commenced in 1975, resulting in the entry of injunctions in 1976 against the city and its agencies ordering them to “take all necessary steps” for construction of the project and to refrain from taking any action in interference with construction.⁶⁵

On appeal, the Third Circuit upheld the district court’s finding that the city had acted with discriminatory intent.⁶⁶ As for the other city agencies, the Philadelphia Housing Authority and the Redevelopment Authority of Philadelphia, the court applied a disparate impact test and held that “in Title VIII cases, by analogy to Title VII cases, un rebutted proof of discriminatory effect alone may justify a federal equitable response.”⁶⁷ The court upheld the district court’s finding that the agencies’ actions had a discriminatory impact, noting that their termination of the public housing project was undertaken “in connection with [other] urban renewal activities” that transformed an integrated community into one in which “virtually no black families were to be found.”⁶⁸ The court also found that blacks made up “a substantial proportion of those who would be eligible to

60. *Id.* at 134–37. Despite the compatibility of the project with the surrounding neighborhood and the potential for the public housing tenants to become homeowners, the local neighborhood organization reversed course and withdrew its support for the project. *Id.* at 134.

61. *Id.* at 136.

62. *Id.* at 135–36.

63. *Id.* at 137.

64. *Id.* at 136.

65. *Id.* at 138.

66. *Id.* at 144–45. The court noted the city’s joining in the community’s racially motivated opposition, the (Democratic) mayor’s explicitly racial statements equating public housing with “[b]lack housing” and his refusals to place such housing in white neighborhoods, and the city’s steps to terminate the project with knowledge of the racially discriminatory effect. *Id.* at 142.

67. *Id.* at 146. Further, the court explained that Congress in 1968 rejected an amendment to Title VIII that would have required proof of discriminatory intent. *Id.* at 147 (citing 114 CONG. REC. 5221–22 (1968) (statement of Sen. Baker)).

68. *Id.* at 149.

reside” in the terminated project.⁶⁹ Cancellation of the housing project “erased” an opportunity for blacks to leave highly segregated neighborhoods and “contributed to the maintenance of segregated housing in Philadelphia.”⁷⁰ After determining that the city agencies offered no justifications for their actions to terminate the housing project, the court upheld the district court’s injunctions against these agencies.⁷¹ The Supreme Court denied certiorari in the case.⁷²

Housing barrier regulations continued to provide fertile ground for disparate impact challenges in subsequent decades.⁷³ In the 1980s, in *Huntington Branch, NAACP v. Town of Huntington*,⁷⁴ plaintiffs challenged a zoning scheme that “restrict[ed] private construction of multi-family housing to a narrow urban renewal” zone where minority residents already resided, and a refusal to amend the zoning ordinance to allow private multi-family construction in a white neighborhood where virtually no minorities resided.⁷⁵ Housing Help, Inc., one of the plaintiffs challenging the zoning scheme, proposed development of 162 units in a neighborhood that was 98% white for tenants expected to include significant numbers of minority group members.⁷⁶ The Second Circuit found that plaintiffs easily met their prima facie burden because they were able to demonstrate, in addition to other elements, both a “disproportionate harm” to blacks and a “segregative impact on the entire community.”⁷⁷ The court

69. *Id.* The court had previously noted that the waiting list for public housing in Philadelphia was composed primarily of racial minorities—95%. *Id.* at 142.

70. *Id.* at 142.

71. *Id.* at 150. When reading *Rizzo*, one cannot help but wonder whether the residents might have brought a disparate impact challenge to the urban renewal plan before they were displaced. At the same time, would such a challenge have been premature? Was the exclusion of low income housing by the white beneficiaries of the urban renewal plan foreseeable? Was the segregative impact of the urban renewal plan in *Rizzo* inevitable?

72. *Resident Advisory Board v. Rizzo*, 564 F.2d 126 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978).

73. *See, e.g.*, *Smith v. Town of Clarkton*, 682 F.2d 1055, 1058–59, 1065–66 (4th Cir. 1982) (upholding a district court ruling in favor of plaintiffs under the disparate impact theory where town officials withdrew from a multi-municipality housing authority, effectively blocking construction of fifty units of public housing that had been approved for a virtually all-white town).

74. 844 F.2d 926 (2d Cir.), *aff’d per curiam*, 488 U.S. 15 (1988).

75. *Id.* at 928.

76. *Id.* at 930–31.

77. *Id.* at 938. The court found that, compared with whites, a greater percentage within the minority community was income-eligible for subsidized housing. *Id.* The court also noted that minorities were disproportionately represented on waiting lists for subsidized housing units and certificates. *Id.* In addition, the court found that the town’s zoning scheme and refusal to rezone “perpetuated segregation in the Town.” *Id.* at 937–38.

found the justifications offered by the town “insubstantial.”⁷⁸ The court then directed the district court to order the town to rezone the plaintiff’s proposed site to allow for multi-family development and remove the zoning barrier limiting private development of multi-family housing to the urban renewal area.⁷⁹ The Supreme Court affirmed that part of the judgment implicating its mandatory jurisdiction, that is, the invalidation of the zoning ordinance, “without endorsing the precise analysis” of the Second Circuit.⁸⁰

In the 1990s, in *Jackson v. Okaloosa County*,⁸¹ the Eleventh Circuit reversed the dismissal of an FHA disparate impact claim challenging a policy that imposed special approval requirements for any public housing project sited in an unincorporated five-mile area of the county.⁸² A public housing applicant and a resident had challenged the policy as excluding public housing from a predominantly white area and concentrating that housing in one predominantly African-American neighborhood; the plaintiffs alleged disparate impact on African-Americans because they comprised 86% of the public housing waiting list.⁸³ The Eleventh Circuit held that the “action should not have been dismissed on the pleadings.”⁸⁴

A more recent, vivid example of the use of disparate impact theory to challenge housing barrier regulations involves the post-Katrina zoning activity of St. Bernard Parish, a suburban parish of New Orleans that experienced total devastation following Hurricane Katrina.⁸⁵ Following the storm in 2005, St. Bernard Parish established a variety of restrictions on multi-family housing development and single-family rentals, including a measure restricting the rental of single-family residences to blood relatives.⁸⁶ Given the racial

78. *Id.* at 940.

79. *Id.* at 942.

80. See *Huntington Branch*, 488 U.S. at 18 (“[W]e note jurisdiction, but limit our review to that portion of the case implicating our mandatory jurisdiction. Thus, we expressly decline to review the judgment of the Court of Appeals insofar as it relates to the refusal to rezone the project site.”).

81. 21 F.3d 1531 (11th Cir. 1994).

82. *Id.* at 1534–35.

83. *Id.* at 1542–43.

84. *Id.* at 1544.

85. See Stacy E. Seicshnaydre, *How Government Housing Perpetuates Racial Segregation: Lessons from Post-Katrina New Orleans*, 60 CATH. U. L. REV. 661, 696–702 (2011) (describing the restrictive measures taken by St. Bernard Parish to circumscribe its repopulation and redevelopment in the wake of Hurricane Katrina and the subsequent legal challenges to such measures).

86. St. Bernard Parish, La., Ordinance SBPC #670-09-06 § I(A) (Sept. 19, 2006) (prohibiting the rental of single-family residences “by any person or group of persons, other than a family member(s) related by blood within the first, second or third direct ascending or descending generation(s), without first obtaining a Permissive Use Permit from the St. Bernard Parish Council”); St. Bernard Parish, La.,

composition of the parish, which as of 2000 was 88.3% white and 7.6% black, and given the fact that white families owned 93% of all owner-occupied houses in the parish, a single-family property owner and a fair housing organization challenged the regulations, alleging discriminatory intent and effect.⁸⁷

With respect to the impact claim, the fair housing center argued that the regulatory scheme in St. Bernard Parish made rental housing unavailable to those who disproportionately needed that housing in the New Orleans metropolitan area—blacks and Hispanics.⁸⁸ The plaintiffs also argued that the scheme “perpetuate[d] segregation by preserving the Parish as an overwhelmingly all-white enclave.”⁸⁹ Although the parties resolved the claims through a consent decree, St. Bernard Parish subsequently enacted another moratorium on multi-family housing developments consisting of five or more units.⁹⁰ This prompted additional litigation by the fair housing center and a developer seeking to build four mixed-income complexes of seventy-two units each.⁹¹ The developer anticipated that 50% of the residents of the development would be black and that another 25% would be comprised of other minority groups.⁹² The district court ruled in favor of plaintiffs on both the intent and impact claims, finding violations of the parties’ consent order and the Fair Housing Act.⁹³

Ordinance SBPC #632-11-05 (Nov. 1, 2005) (establishing “a moratorium on the re-establishment and development of any multi-family dwellings in St. Bernard Parish throughout the disaster recovery period”).

87. See Affidavit of Dr. Calvin P. Bradford at 5–6, *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish*, 641 F. Supp. 2d 563 (E.D. La. 2009) (No. 06-07185) (establishing the racial composition and home ownership patterns of the parish through the affidavit of a housing development expert); see also Amended Complaint for Injunctive Relief, Declaratory Judgment, and Remedial Relief at 2, *id.* (No. 06-07185) (alleging discriminatory intent and effect).

88. Amended Complaint, *supra* note 87, at 2–3.

89. *Id.* at 2.

90. Consent Order at 5–8, 11, *Greater New Orleans Fair Hous. Action Ctr.*, 641 F. Supp. 2d 563 (E.D. La. 2009) (No. 06-07185); St. Bernard Parish, La., Ordinance SBPC #905-09-08 (Sept. 16, 2008).

91. *Greater New Orleans Fair Hous. Action Ctr.*, 641 F. Supp. 2d at 566.

92. *Id.* at 568. The court found that income-qualified African American households and families were at least 25%, and in some cases 86%, more likely to be affected by the multi-family moratorium than Caucasian households and families. *Id.* at 577–78.

93. *Id.* After the filing of at least five more motions for contempt, wherein the housing developer and fair housing center challenged a variety of overt and covert measures designed to block the development, and in light of the HUD’s threat to withhold other funding, construction on the development proceeded. Seicshnaydre, *supra* note 85, at 700–02. For additional description of the litigation challenging the post-Katrina zoning regulation enacted in St. Bernard Parish, see *id.* at 696–704. The Defendants filed notices of appeal throughout the district court proceedings; the appeals are consolidated and pending in the U.S. Court of Appeals for the Fifth Circuit. *E.g.*, *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish*, 641 F. Supp. 2d 563 (E.D. La. 2009), *appeal docketed*, No. 09-30134 (5th Cir. Feb. 26, 2009).

Of course, the availability of the disparate impact theory in FHA cases has not always resulted in relief for plaintiffs. As the Seventh Circuit noted in *Arlington Heights*, “we refuse to conclude that every action which produces discriminatory effects is illegal. Such a per se rule would go beyond the intent of Congress and would lead courts into untenable results in specific cases.”⁹⁴

Plaintiffs bringing FHA disparate impact challenges to zoning barriers have sometimes failed at the prima facie stage because of thin proof of impact.⁹⁵ In a 2007 FHA disparate impact challenge to a cost-increasing regulation, for example, the Tenth Circuit affirmed summary judgment based on the plaintiff’s insufficient showing that the cost-increasing building regulation had a disparate impact on a minority group because of that group’s lower income.⁹⁶ Rather, the Tenth Circuit ruled, plaintiff needed to make a specific showing as to the amount of the increase, along with a showing “that this increase disparately impacts the ability of members of the protected group to buy a dwelling” as compared with non-protected group members.⁹⁷

Aside from offering thin proof of impact generally, some challenges to housing barriers have failed to demonstrate the existence of a discriminatory barrier in the first place. In 2009 for example, in *Artisan/American Corp. v. City of Alvin*,⁹⁸ developers sought to build two developments of thirty-six subsidized rental units in a city near Houston that was asserted to be 45% Hispanic and to contain most of the low-income housing in the county.⁹⁹ The Fifth Circuit affirmed summary judgment dismissing the developer’s disparate impact challenge to a 300-foot separation requirement (between apartment projects and single-family residential dwellings) because the developer was unable to identify anyone affected by the denial of his permit or show that a shortage of affordable housing actually

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

95. *See, e.g., White Oak Prop. Dev., LLC v. Washington Twp.*, 606 F.3d 842, 851 (6th Cir. 2010) (affirming summary judgment and finding that the plaintiff “presented no evidence . . . about the possible impact the prohibition on multifamily dwellings would have on minority populations in the Township”); *Greengael, LC v. Bd. of Supervisors of Culpeper Cnty.*, No. 07-CV-00005, 2007 WL 2301570, at *3–4 (W.D. Va. Aug. 7, 2007) (granting summary judgment and finding “there are no facts in the record which would indicate that the inability to construct multifamily homes in the M-2 zone will disproportionately harm minorities”), *aff’d per curiam*, 313 F. App’x. 577 (4th Cir. 2008).

96. *See Reinhart v. Lincoln Cnty.*, 482 F.3d 1225, 1226, 1230–31 (10th Cir. 2007) (affirming summary judgment dismissing disparate impact claim challenging land use regulations for lack of proper prima facie proof).

97. *Id.* at 1230.

98. 588 F.3d 291 (5th Cir. 2009).

99. *Id.* at 294.

existed.¹⁰⁰ The plaintiff certainly could not show that the denial of his permit to build subsidized housing furthered racial segregation, or that his proposed development would help further the integration purposes of the FHA. To the contrary, the Fifth Circuit noted that additional low-income developments would actually further the concentration of racial minorities in the city.¹⁰¹

Similarly, in *Burrell v. City of Kankakee*,¹⁰² the Seventh Circuit in 1987 affirmed a trial judgment dismissing an FHA disparate impact challenge to a delay in processing section 8 Housing Assistance Payment contracts.¹⁰³ In addition to finding a lack of evidence of discriminatory effect on availability of housing to minorities, the court found that the delays stemmed from concern about the undue concentration of assisted housing in the ward where plaintiff's properties were located.¹⁰⁴

Thus, in the earliest FHA disparate impact cases and continuing into more recent decades, plaintiffs have used the theory to challenge barriers to the development of housing opportunities outside racially segregated neighborhoods. Courts have nevertheless imposed rigorous prima facie proof requirements and have been less likely to impose liability in cases where the effect of plaintiff's barrier challenge would be to increase segregation rather than eliminate it.

II. DISPARATE IMPACT CHALLENGES TO HOUSING IMPROVEMENT REGULATIONS

Although the precise proof standards governing FHA disparate impact challenges have varied,¹⁰⁵ there is no disagreement among the circuits as to the theory's validity.¹⁰⁶ The quiet, if muddled, landscape on which the disparate impact theory has rested since shortly after the passage of the FHA was disrupted by the Supreme Court's

100. *See id.* at 295, 298–99 (noting that the concentration of low-income housing in the city “suggest[s] that there is no shortage” (alteration in original)).

101. *Id.* at 299 n.20; *see also* *Hallmark Developers, Inc. v. Fulton Cnty.*, 466 F.3d 1276, 1285, 1287 (11th Cir. 2006) (affirming post-trial judgment dismissing FHA disparate impact challenge to refusal to rezone property for low income housing, noting testimony that there was adequate housing for low and moderate income residents and the property was located in an area already predominately populated by minorities).

102. 815 F.2d 1127 (7th Cir. 1987).

103. *Id.* at 1130.

104. *Id.* at 1130–31.

105. *See* SCHWEMM & PRATT, *supra* note 1, at 21–26; *see also id.* at 21 (noting that “few appellate decisions have carefully examined the burden of justification in a FHA impact case, and these decisions reflect, accurately, that some issues have not been authoritatively resolved”). *But see infra* Part IV (discussing HUD's final rule setting forth uniform standards for evaluating FHA disparate impact claims).

106. *Supra* notes 1–5 and accompanying text.

decision in 2011 to grant certiorari in *Magner v. Gallagher*.¹⁰⁷ In *Magner*, the Eighth Circuit did not consider the more prevalent FHA challenge to a housing barrier regulation, but rather reviewed enforcement of a housing improvement regulation.¹⁰⁸ In contrast to the earlier discussion involving challenges to housing barrier regulations, this section will begin with the most recent challenges to housing improvement regulations and then consider the historical treatment of these challenges by the lower courts.

A. *Magner v. Gallagher*

In *Magner*, the plaintiff owners (or former owners) of rental property in St. Paul, Minnesota challenged the city's housing code enforcement scheme, which had been on the books since 1993, but which the city began to enforce with vigor in 2002.¹⁰⁹ The city targeted rental properties for its enforcement efforts.¹¹⁰ The plaintiff property owners rented primarily to low-income, rent-assisted households, of which blacks made up a disproportionate percentage.¹¹¹ The property owners complained that the city's aggressive code enforcement tactics increased their costs of doing business in the form of higher maintenance costs and fees.¹¹² They also claimed that the city's enforcement efforts resulted in making their properties unavailable through condemnations and forced sales.¹¹³ The court listed the particular code violations that the city cited against the plaintiffs, which included "rodent infestation, missing dead-bolt locks, inadequate sanitation facilities, inadequate heat, inoperable smoke detectors, broken or missing doors and screens, and broken or missing guardrails or handrails."¹¹⁴ The plaintiffs did not challenge the city's code standards as frivolous or unnecessary. They instead argued that the city's requirement that they bring their substandard housing into compliance increased their

107. 132 S. Ct. 548 (2011) (granting petition for writ of certiorari to the U.S. Court of Appeals for the Eighth Circuit).

108. See *infra* notes 116–118 and accompanying text (describing the appellants' claim in *Magner* that the city's enforcement of its housing code had a discriminatory impact on the appellants' tenants).

109. *Gallagher v. Magner*, 619 F.3d 823, 828–29 (8th Cir. 2010).

110. *Id.* at 829.

111. *Id.* at 830. The district court noted plaintiffs' claim that between 60% and 70% of their tenant base was black. See *Steinhauser v. City of St. Paul*, 595 F. Supp. 2d 987, 995 (D. Minn. 2008) (reporting tenant demographics).

112. *Magner*, 619 F.3d at 830.

113. *Id.*

114. *Id.*

costs, which resulted in a decrease in the amount of affordable housing in the city.¹¹⁵

Significantly, St. Paul did not enact a housing ban against rental properties or even target rental properties for demolition but rather targeted rental properties for improvement.¹¹⁶ In arguing that the housing improvement regulation made housing unavailable, the property owners required the court to make an additional inferential step between the regulation and the asserted impact.¹¹⁷ The court concedes that the claim is indirect: the housing code enforcement “burdened [the] Appellants’ rental businesses, which indirectly burdened their tenants.”¹¹⁸ In deciding whether the plaintiffs satisfied their prima facie burden of impact, the court could have decided that the claim was too attenuated. Indeed, neither the district court’s nor the Eighth Circuit’s opinion clarified whether the property owners actually demonstrated the effect of the minimal housing standards on their rental rates.

The idea that a landlord must from time to time reinvest some of his or her rental proceeds for the purpose of property maintenance is hardly novel.¹¹⁹ The fact that a majority of the plaintiffs’ tenants received federal rental assistance suggests that the plaintiffs were not only guaranteed rental payments from the government, but were also receiving fair market rents as determined by HUD on an annual basis.¹²⁰ Housing code compliance could simply reduce plaintiffs’ profit margin, rather than necessitate a rental increase. Moreover, any rental increase caused by compliance with the housing code would not necessarily be unaffordable to all of plaintiffs’ tenants, nor

115. *See id.* at 834–35 (discussing the property owners’ argument that the city experienced a shortage of affordable housing).

116. *See id.* at 829 (explaining the city’s goal of compelling property owners to take more responsibility for their buildings or forcing changes in ownership).

117. *Id.* at 835 (“Though there is not a single document that connects the dots of Appellants’ disparate impact claim, it is enough that each analytic step is reasonable and supported by evidence.”).

118. *Id.*

119. *See* CHRISTOPHER LEE, NAT’L APARTMENT ASSOC., EXECUTIVE SUMMARY: 2013 SURVEY OF OPERATING INCOME & EXPENSES IN RENTAL APARTMENT COMMUNITIES 65, available at <http://www.naahq.org/sites/default/files/naa-documents/income-expenses-survey/2013-Income-Expenses-Summary.pdf> (discussing the increase of capital expenditures for rental property in 2012 reflecting that deferred maintenance and market competition required rental property upgrades).

120. *Magner*, 619 F.3d at 830; *U.S. Housing Market Conditions Summary: Fair Market Rents*, U.S. DEP’T OF HOUSING & URB. DEV., <http://www.huduser.org/periodicals/USHMC/winter98/summary-2.html> (last visited Nov. 27, 2013) (“For the Section 8 program to work properly, certificate and voucher holders must have an adequate supply of decent, safe, and sanitary rental units to choose from. Higher quality units command higher rents, so FMRs must be sufficiently high to provide acceptable choices for participants.”).

would it have to be permanent. The plaintiffs did not appear to show that strict enforcement of the housing code raised their costs to such an extent that they could no longer rent their apartments at the rental rates established by the government for subsidized housing.¹²¹ The court opinions do not indicate how many of the plaintiffs' units were removed from the city's affordable housing inventory, despite the plaintiffs' allegations that some of the penalties included condemnations and revoked rental registrations. Instead, the court accepted the argument that a cost-increasing regulation that burdens rental businesses (notwithstanding improving quality) resulted in a per se decrease in affordable housing.¹²²

The court suggested that there was more than one way to use statistics to show impact,¹²³ and this is certainly true. The notion that a policy that bars or reduces affordable housing may have a disproportionate effect on racial minorities is well established,¹²⁴ but the plaintiffs presented thin proof that the city's code enforcement regulation actually exacerbated an affordable housing shortage.¹²⁵

Especially troubling is the failure of the court to consider the implications of this aspect of its holding for the thousands of people who must regularly trade quality for affordability. This is particularly true for poor black renters using HUD rental assistance who frequently live in worse or more segregated conditions compared

121. See LEE, *supra* note 119, at 67 ("Economic losses tend to be lower in subsidized properties with their lower rents and relatively tight supply.").

122. The court insists that it is requiring plaintiffs to demonstrate a causal link between the defendant's neutral policy and the shortage of affordable housing, see *Magner*, 619 F.3d at 836 n.4, but this link is not apparent from the record. The court merely maintains that the evidence shows that there was a shortage of affordable housing and that the City's "aggressive code enforcement exacerbated that shortage." *Id.* at 836.

123. *Id.* at 837.

124. See, e.g., *supra* notes 81–84 and accompanying text (discussing housing barrier regulation that imposed special approval requirements for public housing construction in predominantly white area of county).

125. See Brief for the United States as Amicus Curiae in Support of Neither Party at 30, *Magner v. Gallagher*, 132 S. Ct. 1306 (2012) (No. 10-1032) ("[T]he court failed to identify evidence adequately supporting a finding that the challenged enforcement practices in fact caused any reduction in available affordable housing."). Plaintiffs attempted to link the city's aggressive enforcement practices and the loss of affordable units by offering a Vacant Buildings Report, which showed an increase from 367 to 1466 in vacant homes over a nearly five year period. *Magner*, 619 F.3d at 835. However, the district court noted that the report attributed the increase in vacant buildings to foreclosures stemming from other economic factors, not from code enforcement. *Steinhauser v. City of St. Paul*, 595 F. Supp. 2d 987, 998 (D. Minn. 2008).

with similarly situated whites using the assistance and compared with blacks not using any assistance at all.¹²⁶

There is no doubt that societal norms regarding minimal housing standards have changed and will continue to change.¹²⁷ Although safe and sanitary features such as adequate heat, locks, handrails, smoke detectors, and the absence of rats might have once been considered luxuries, the City of St. Paul has determined that these features are now necessities.¹²⁸ The idea that the business model of the subsidized plaintiff landlords precluded their provision of these features to the minority tenants who disproportionately rented from them is difficult to fathom. The idea that the government is willing to subsidize property owners at fair market rates even when they fail to provide such basic features is even more galling. Given the absence of any proof demonstrating that the government-established rents that most of the plaintiff landlords were receiving were not sufficient to pay for handrails and smoke detectors, the plaintiffs' prima facie showing was lacking.

Admittedly, the court noted that in many instances the city cited between ten and twenty-five violations per property and that some plaintiffs owned over forty properties.¹²⁹ The cumulative nature of the violations, then, could have imposed significant expenditures that the plaintiffs could not make all at once.¹³⁰ Yet, is the (federally subsidized) plaintiff landowner who maintains dozens of properties in substandard condition more aggrieved or simply more derelict? In essence, the plaintiffs were operating under a more lenient enforcement regime, and then that regime changed. However, the standards themselves do not appear to have changed. This is the aspect of the plaintiffs' claim that pushes the envelope. In

126. See Elizabeth Julian & Michael M. Daniel, *HUD-Assisted Low-Income Housing: Is It Working and for Whom?*, POVERTY & RACE, July–Aug. 2009, at 3, 6–7 (analyzing a HUD study entitled *Characteristics of HUD-Assisted Renters and Their Units in 2003*, which used 2003 American Housing Survey data matched with HUD rental-assistance data and included demographic data for hundreds of units, projects and neighborhood conditions).

127. See *City of St. Louis v. Brune*, 515 S.W.2d 471, 476–77 (Mo. 1974) (en banc) (per curiam) (finding that the city ordinance requiring adjacent tub or shower facilities in each dwelling unit, thus forbidding units serviced by hall shower, was confiscatory as applied and violated the owner's due process rights; enforcement of the ordinance did not implicate public health concerns, rather it "involve[d] a matter of inconvenience to those tenants who choose to pay a minimum rent in return for incomplete facilities").

128. *Magner*, 619 F.3d at 830 (detailing plaintiffs' code violations).

129. *Id.*

130. See *Brune*, 515 S.W.2d at 475–76 (citing cases discussing confiscatory nature of some housing code enforcement in relation to the market value of the affected properties).

challenging the City of St. Paul's decision to enforce its housing code more strictly on the basis that it increased costs, the plaintiff landlords are essentially asserting—on behalf of their black tenants—a right to live in substandard housing,¹³¹ which furthers neither the antidiscrimination nor the integration purposes of the FHA. When viewed against the plaintiffs' lack of proof that the city's standards were unreasonable or were actually resulting in a demonstrable (rather than speculative) loss of affordable housing, this claim borders on the offensive. The FHA was certainly not enacted to give an owner of a condemned unit, declared "unfit for habitation,"¹³² the right to continue renting the condemned unit to a desperate tenant. Nor was the FHA enacted to give low-income persons of color an "equal opportunity" to live in rat-infested squalor.¹³³

However, there is another aspect to plaintiffs' disparate impact claim that appears to drive the Eighth Circuit's decision to reinstate it. In addition to arguing that the city's stricter enforcement increased their costs, which by itself fails to engender much sympathy, the plaintiff landlords challenged the city's aggressive tactics.¹³⁴ They complained that "the City issued false Housing Code violations and punished property owners without prior notification, invitations to cooperate with [the city], or adequate time to remedy Housing Code violations."¹³⁵ Plaintiffs essentially argued that the purpose and effect of the aggressive code enforcement tactics was to put them out of business rather than to achieve compliance with the code. The plaintiffs' suggestion that the city enforced the code with

131. See ROBERT C. ELLICKSON AND VICKI L. BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 469 (3d. ed. 2005) (weighing the merits of housing code enforcement against housing affordability and the welfare of poor households).

132. *Steinhauser v. City of St. Paul*, 595 F. Supp. 2d 987, 992 (D. Minn. 2008).

133. See Amicus Brief of the United States, *supra* note 125, at 31 ("[A]ggressive enforcement of a housing code can lead to an *increase* in the availability of low-income housing that meets minimal safety standards, thus potentially benefitting groups who are disproportionately represented in low-income housing."). This case has a similar flavor to the use of the FHA disparate impact theory to challenge the closure of a group home following investigation of child abuse complaints. See *Omni Behavioral Health v. Miller*, 285 F.3d 646, 655–56 (8th Cir. 2002). No one wants to diminish group home options for children of color with special needs, but the FHA was not enacted to provide group home operators immunity from investigation because of the status of their residents. And the FHA was certainly not enacted to facilitate the abuse of disabled children of color. The Eighth Circuit affirmed summary judgment dismissing the FHA claim, which was a hybrid intent and effects claim. *Id.* Of course, evidence of targeted enforcement based on race and lack of probable cause might support a claim of disparate treatment.

134. *Magner*, 619 F.3d at 838 ("Appellants complain about *how* the City enforced the Housing Code—not just the code's standards and requirements.")

135. *Id.* at 834.

particular vigor against protected groups is essentially a disparate treatment claim, which may not have been adequately developed in the lower court and may have been mislabeled as a disparate impact claim.¹³⁶ This claim has some support in the record based on statements demonstrating the city's desire to reduce the number of low-income tenants living in the city.¹³⁷

Of particular importance, the Eighth Circuit did not rule for plaintiffs on the merits. The court merely decided that the plaintiff landlords satisfied their prima facie burden. The court remanded on the alternative district court ruling that plaintiffs did not, at the summary judgment stage, satisfy their final burden of offering “a viable alternative that satisfies the [City’s] legitimate policy objectives while reducing the . . . discriminatory impact’ of the City’s code enforcement practices.”¹³⁸ The court found that a genuine issue of fact existed as to whether the city’s former code enforcement program was a viable alternative, given that it “generated a cooperative relationship with property owners, achieved greater code compliance, and resulted in less financial burdens on rental property owners,” which presumably then resulted in the maintenance of “a consistent supply of affordable housing.”¹³⁹ Thus, the most generous reading of the plaintiffs’ allegations, which requires some parsing of the opinion, is that the city’s tactics, not increased costs, were preventing the plaintiff landlords from achieving compliance with the city’s housing code. An alternative program focused on achieving compliance, rather than putting landlords out of business, they argue, would better accomplish the city’s legitimate objectives while reducing any discriminatory impact.¹⁴⁰

136. The district court found that much of the plaintiffs’ disparate impact argument in the briefs was centered on the city’s targeting of the landlords for enforcement on the basis of the race of their tenants. *Steinhauser*, 595 F. Supp. 2d v. 997 n.5. The court properly identified this as an intent claim and analyzed it as such. *Id.* After concluding that plaintiffs did not assert a claim of intentional discrimination based on circumstantial evidence, the court considered the plaintiffs’ direct evidence of discrimination and found that it did not establish a claim of disparate treatment. *Id.* at 1000, 1005–06. The Eighth Circuit upheld the district court’s dismissal of plaintiffs’ disparate treatment claims. *Magner*, 619 F.3d at 833.

137. *Magner*, 619 F.3d at 832.

138. *Id.* at 837 (alterations in original) (quoting *Darst-Webbe Tenant Ass’n Bd. v. St. Louis Hous. Auth.*, 417 F.3d 898, 906 (8th Cir. 2005)).

139. *Id.* at 838. At the district court level, the plaintiffs argued that the city could achieve its objectives by adopting the federal Housing Quality Standard (HQS), but the court found that plaintiffs did not meet their burden in support of this alternative or demonstrate that HQS would have a lesser impact on rents, low-income housing, or a protected class. *See Steinhauser*, 595 F. Supp. 2d at 999 (determining that adopting HQS would not be a less discriminatory alternative).

140. *See Magner*, 619 F.3d at 838 (characterizing the alternative program as successful at addressing and eliminating complaints against participating landlords).

Given that the Eighth Circuit's decision still required the plaintiff landlords to prove their allegations at trial, it is curious that the Supreme Court decided to grant certiorari on a reversal of summary judgment.¹⁴¹ It is possible that the city would have prevailed after trial. In any event, the city decided to withdraw the appeal following the completion of all briefing in the case and shortly before oral argument.¹⁴² Resolution of the impact standard under the FHA would have to wait for another day.

B. Township of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.

It was not long before the Court would be presented another opportunity to review the FHA disparate impact standard, again in the housing improvement context. In June 2012, the Township of Mount Holly, New Jersey filed a petition for certiorari challenging the Third Circuit's reversal of summary judgment on a disparate impact challenge to a housing improvement plan.¹⁴³ The township sought to redevelop a thirty-acre neighborhood called "the Gardens," which was the only predominantly minority neighborhood it had.¹⁴⁴ After several iterations, the township's redevelopment plan required the demolition of the existing 329 market rate homes that were affordable to its low and moderate income residents and replacement with 464 more expensive market-rate units and fifty-six affordable units.¹⁴⁵ The existing units housed both renters and homeowners, and the structures were mostly two-story row houses of eight to ten units.¹⁴⁶

A residents' association and twenty-three current and former residents challenged the redevelopment first in state court, which found no violations of state law and the anti-discrimination claims

141. See *infra* Part II.D. (offering evidence that most cases concerning disparate impact challenges to housing improvement plans are dismissed before trial and that the summary judgment reversals in *Magner* and *Mount Holly* were anomalous).

142. *Magner v. Gallagher*, 132 S. Ct. 1306 (2012) (dismissing certiorari pursuant to Rule 46.1 of the Rules of the Supreme Court).

143. Petition for Writ of Certiorari at 1, Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc., No. 11-1507 (June 11, 2012) [hereinafter *Mount Holly Cert. Petition*]. The petition sought review of the decision in *Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly*, 658 F.3d 375, 377, 382 (3d Cir. 2011), which held that the plaintiffs' statistical submission demonstrating that the township's redevelopment plan had a disparate impact on minorities should have survived summary judgment.

144. *Mount Holly*, 658 F.3d at 377.

145. *Id.* at 378-79.

146. *Id.* at 378.

unripe.¹⁴⁷ The plaintiffs then filed in federal court alleging, among other things, that the redevelopment plan had a disparate impact on African American and Hispanic persons.¹⁴⁸ The plaintiffs alleged that African Americans were eight times more likely to be affected by the redevelopment than were whites, and Hispanics were eleven times more likely to be affected.¹⁴⁹ The parties particularly disputed who would be eligible to return to the development, with plaintiffs claiming 21% of African-American and Hispanic households in the county as eligible compared to 79% of whites.¹⁵⁰ The district court considered the absolute number of African American and Hispanic residents in the county who could afford to return, which far exceeded the number of replacement units at the Gardens, rather than using proportional statistics to compare the impact of redevelopment on various groups.¹⁵¹

The Third Circuit reversed the district court's grant of summary judgment for the township.¹⁵² The court held that the district court erred in rejecting plaintiffs' proportional statistical submissions, which it reasoned should have been reviewed in the light most favorable to them.¹⁵³ The court acknowledged that the district court was grappling with a "valid and practical concern," namely, the consequences of upholding a disparate impact challenge to a housing redevelopment plan, which could "render the Township powerless to rehabilitate its blighted neighborhoods."¹⁵⁴ The court recognized, however, that there was ample precedent to uphold the particular method the plaintiffs selected to meet their prima facie burden.¹⁵⁵ The court rejected the notion that perpetuation of segregation is the only method of proving impact,¹⁵⁶ and the court seemed constrained to rule that a redevelopment plan targeted at the town's only

147. *Id.* at 380.

148. *Id.* at 380–82. The plaintiffs also alleged that the redevelopment plan was undertaken with discriminatory intent, but the Third Circuit upheld the district court's dismissal of that claim. *Id.* at 387.

149. *Id.* at 382. The plaintiffs argued, using 2000 census data, that 22.54% of all African-American residents and 32.31% of all Hispanic households in Mt. Holly would be affected by the demolitions, whereas only 2.73% of white households would be affected. *Id.*

150. *Id.* at 382.

151. *Id.* at 383.

152. *Id.* at 377.

153. *Id.* at 382. The Third Circuit also noted the district court's error in requiring a showing that all minorities were treated differently than all whites, a showing applicable to disparate treatment cases, not disparate impact cases. *See id.* at 383.

154. *Id.* at 385.

155. *Id.* at 382 (citing *Keith v. Volpe*, 858 F.2d 467, 484 (9th Cir. 1988); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 929 (2d Cir. 1988)).

156. *Id.* at 385.

predominantly minority neighborhood was bound to have a disproportionate impact on them as a group.¹⁵⁷ Rather than avoiding perverse results by straining to block plaintiffs' prima facie case, the court found that the "inquiry must continue."¹⁵⁸

Similar to *Magner*, no one disagreed that the township had a legitimate interest in alleviating blight.¹⁵⁹ The battleground in *Mount Holly*, other than the prima facie showing of impact, was whether that interest could be achieved in a way that would not displace residents involuntarily from their homes and price them out of their neighborhood and indeed the town.¹⁶⁰ Frequently in disparate impact cases challenging housing improvement plans, the battle is over whether and how units can be rehabilitated rather than demolished.¹⁶¹ Not surprisingly, the plaintiffs' expert indicated that remediation did not require "wholesale destruction," and suggested alternatives that included staged rehabilitation.¹⁶² Because the township offered evidence that rehabilitation was not economically feasible, the court found that a factual issue did exist as to whether the defendant had met its initial burden of showing that there were no less discriminatory alternatives to its redevelopment plan.¹⁶³

157. *Id.* at 382.

158. *Id.* at 385. The court, having earlier accused the district court of conflating the disparate treatment and impact standards, followed suit in its discussion of the necessity of a "searching inquiry into the motives behind a contested policy to ensure that it is not improper." *Id.* The court further explained that the prima facie case does not establish liability, but "simply results in a more searching inquiry into the defendant's motivations—precisely the sort of inquiry required to ensure that the government does not deprive people of housing 'because of race.'" *Id.* At the same time, the court noted that the "[e]ffect, not motivation, is the touchstone." *Id.* It is possible that the court is concerned about the motivation behind the redevelopment plan and is allowing use of the disparate impact theory to "smok[e] out subtle or underlying forms of intentional discrimination." *Id.* (quoting Christine Jolls, Commentary, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 652 (2001)).

159. *Id.* at 385.

160. *See id.* at 379 (describing resident fears of displacement and inability to afford a home in the Gardens or anywhere else in the town); *see also id.* at 383 (noting that residents claimed even the affordable units would be out of reach for most Gardens residents).

161. *See, e.g.,* Charleston Hous. Auth. v. U.S. Dep't of Agric., 419 F.3d 729, 734 (8th Cir. 2005) (asserting that the housing authority's plan to revitalize through demolition would create a disparate impact on racial minorities).

162. *Mount Holly*, 658 F.3d at 386–87.

163. *Id.* at 387. The court articulated the township's proof as requiring a showing that the alternatives proposed an undue hardship. *See id.* at 386. In HUD's disparate impact regulation, promulgated after the Third Circuit's decision in *Mount Holly*, plaintiffs, rather than defendants, will have the burden of proving that a less discriminatory alternative to the challenged practice exists that will serve the defendant's interests. *See* 24 C.F.R. § 100.500(c)(3) (2013) (indicating that a plaintiff may prevail even if the defendant meets his or her burden of proof if the plaintiff can demonstrate that the defendant's legitimate interests can be served by a practice with less discriminatory effect).

Neither the *Magner* nor the *Mount Holly* circuit courts, therefore, in reversing the district court's dismissal of plaintiffs' disparate impact claims, entered a final judgment in favor of plaintiffs. They simply allowed the cases to proceed to trial, finding that plaintiffs met their prima facie burden and created a fact issue on the question of whether there were less discriminatory alternatives to the defendants' methods of improving housing conditions in the relevant communities.

The Supreme Court granted *Mount Holly's* petition for the purpose of deciding whether the disparate impact theory was cognizable under the FHA.¹⁶⁴ Before oral argument, the case was resolved and the petition withdrawn.¹⁶⁵

C. Charleston Housing Authority v. U.S. Department of Agriculture

In the only other successful FHA disparate impact challenge to a housing improvement plan found at the appellate level, the Eighth Circuit considered whether the demolition of housing predominantly occupied by minority groups constituted a violation of the FHA. In 2005, in *Charleston Housing Authority v. U.S. Department of Agriculture*,¹⁶⁶ the housing authority sought to revitalize through the demolition of a fifty-unit public housing development occupied almost entirely by African Americans.¹⁶⁷ Current and former residents along with a non-profit organization challenged the demolition alleging a disparate impact based on race.¹⁶⁸ In ruling for plaintiffs following trial, the district court found that the demolition plan did have a disparate impact in violation of the FHA, ultimately ordering the housing authority to reopen the apartment complex and give priority to former residents.¹⁶⁹ The Eighth Circuit upheld the district court's finding that plaintiffs satisfied their prima facie burden, whether based on the waiting list population, the income-eligible population,

164. *Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, 133 S. Ct. 2824 (2013) (granting petition for writ of certiorari to the U.S. Court of Appeals for the Third Circuit), *cert. dismissed*, No. 11-1507, 2013 WL 6050174 (Nov. 15, 2013); *Mount Holly Cert. Petition*, *supra* note 143, at i.

165. *Mount Holly*, 2013 WL 6050174 (Nov. 15, 2013) (dismissing certiorari pursuant to Rule 46.1 of the Rules of the Supreme Court).

166. 419 F.3d 729 (8th Cir. 2005).

167. *Id.* at 733.

168. *Id.* at 734. In an aspect of the case not relevant here, the housing authority filed a separate action against the U.S. Department of Agriculture (USDA) that was consolidated with the fair housing case, in which it sought to remove statutory and contractual restrictions requiring it to operate the property as public housing. *Id.* at 733-34. The USDA had helped finance the renovation of the property in 1981. *Id.* at 733.

169. *Id.* at 736-37.

or the population of actual apartment tenants.¹⁷⁰ The court considered the housing authority's purported justification of reducing the concentration of low-income housing. While noting that density reduction was a legitimate goal recognized by Congress, the Eighth Circuit upheld the district court's factual finding that the housing authority failed to demonstrate the need for de-concentration in the circumstances of the case.¹⁷¹ In a very significant final turn, however, the court refused to affirm the district court's order requiring that the apartments be reopened for occupancy, and instead remanded to the district court for it to hold an evidentiary hearing on "current conditions at the apartments and evidence regarding proposals for redevelopment."¹⁷² Despite holding that the demolition plan had a disparate impact on African-American tenants, the Eighth Circuit recognized that the passage of time might have "materially change[d] circumstances" so that an alternative to re-occupancy might "affirmatively further fair housing in a more positive fashion."¹⁷³ Thus, although the court's opinion left the door open to possible re-occupancy, it is not clear that the plaintiff's successful showing of disparate impact would block the demolition.

Charleston Housing Authority demonstrates the need for a fact-intensive inquiry in challenges to housing improvement regulations to ensure that the purposes of the FHA are furthered by the challenge. Even though the circuit court agreed that the demolition plan would have a racially disparate impact, it was not willing to grant the relief the plaintiffs requested. In cases challenging demolition of housing overwhelmingly occupied by minorities, prima facie proof of impact may be straightforward.¹⁷⁴ The purported justifications based

170. *Id.* at 741.

171. *Id.* at 742. The district court had blended the burdens in its disparate impact analysis by characterizing the defendant housing authority's justifications as "pretextual"—an analysis more appropriate in a disparate treatment case. *See id.* at 741 (reviewing the district court's factual determinations on the Housing Authority's justifications). Such discussion of pretext is unnecessary because, if a defendant is unable to support its purported justifications with sufficient evidence, as the housing authority was in this case, then it will hardly be able to demonstrate a "manifest relationship" between the proposed action and the justification, or that the proposed action is "necessary" to achieve its objectives. *See id.* at 741 (setting forth defendant's disparate impact burden of proof in the Eighth Circuit).

172. *Id.* at 742–43.

173. *Id.* at 742.

174. *But see* Anderson v. Jackson, No. 06-3298, 2007 WL 458232, *1, *9 (E.D. La. Feb. 6, 2007) (explaining that proposed public housing demolition plans where 100% of the population is African American do not per se create adverse impact. The plaintiffs must provide supporting evidence that the plan caused a "statistical disparity between the African-American residents and non-protected

on the revitalization of blighted housing may also be straightforward. However, as more fully explored in Part IV, the circuit court understood that FHA disparate impact theory can and should be focused on whether a less discriminatory alternative to wholesale demolition is available that does not maintain the status quo of racially segregated, substandard housing.¹⁷⁵

What is misleading in the discussion of all three of these cases and what may be escaping the Supreme Court is that historically, plaintiffs have been terrifically unsuccessful at the appellate level in disparate impact challenges to housing improvement plans. In fact, with the exceptions of *Magner*, *Mount Holly*, and *Charleston Housing Authority*, plaintiffs have failed in every other appeal involving an FHA disparate impact challenge to a housing improvement plan, as set forth in the next subsection.

D. Unsuccessful Housing Improvement Cases at the Appellate Level

The recent string of successes in the ability of FHA disparate impact plaintiffs to survive summary judgment or preserve post-trial judgments in challenges to housing improvement plans is not representative of the forty-year history of the FHA.¹⁷⁶ More particularly, FHA disparate impact challenges to the enforcement of housing codes against property owners based on theories similar to those urged in *Magner* have been unsuccessful on appeal. In 2009, in *Bonaser v. City of Norcross*,¹⁷⁷ the Eleventh Circuit affirmed summary judgment dismissing an Hispanic homeowner's disparate impact challenge to a city's enforcement of a single-family zoning ordinance against her.¹⁷⁸ The plaintiff alleged that the city selectively enforced its ordinance against her because she rented rooms to Hispanic persons in a white neighborhood.¹⁷⁹ Although the plaintiff brought intent and effects claims, she appeared to conflate the theories in arguing that the city's selective enforcement, which would by definition be influenced by some consideration of race or national

individuals" or "evidence to support their claim that the proposed demolition plans perpetuate segregation").

175. See *Charleston*, 419 F.3d at 742 (directing the district court to consider "alternative proposals for revitalization . . . that will affirmatively further fair housing in a more positive fashion than reoccupancy of the existing apartments").

176. See *infra* Part III (analyzing FHA disparate impact theory cases at the appellate level, showing that over the forty-year history, many more cases than not end negatively for plaintiffs).

177. 342 F. App'x 581 (11th Cir. 2009) (per curiam).

178. *Id.* at 586.

179. *Id.* at 583.

origin, had a disparate impact.¹⁸⁰ Ultimately, the appellate court rejected both claims and found that the plaintiff presented no evidence that the enforcement of the ordinance had an impact on the city's Hispanic population generally.¹⁸¹

Other noteworthy cases illustrate the difficulty of challenging code enforcement schemes using disparate impact theory. In 1999, in *Catanzaro v. Weiden*,¹⁸² a plaintiff challenged the decision of Middletown, New York to demolish two of his buildings (each containing eight low-income apartments) almost immediately following their damage in a car accident; plaintiff's theory was that the city engaged in a "calculated campaign" to drive out minorities by making low-income housing units unavailable.¹⁸³ On panel rehearing, the Second Circuit noted that the plaintiffs were challenging the demolition of two buildings, not the city's overall housing policy.¹⁸⁴ The court affirmed summary judgment for defendant and held the evidence insufficient to demonstrate that any housing policies had a discriminatory effect or that the demolitions were part of discriminatory housing policies.¹⁸⁵ In 1994, in *Armendariz v. Penman*,¹⁸⁶ the Ninth Circuit considered evidence that "a significant number of minorities were impacted" by code enforcement sweeps closing low-income housing units in the Arden-Guthrie neighborhood of the City of San Bernardino, but found the evidence insufficient to avoid summary judgment dismissal of the FHA claim.¹⁸⁷ Again, in arguing that the city's decision to target a particular neighborhood for code enforcement sweeps had a disparate racial impact, plaintiffs failed to challenge the code enforcement scheme generally or provide any racial data for neighborhoods not selected for the sweeps.¹⁸⁸

180. *See id.* at 585–86 (explaining that the use of disparate impact evidence in a selective enforcement case might more appropriately be used to provide circumstantial evidence of discriminatory intent).

181. *Id.* at 586.

182. 188 F.3d 56 (2d Cir. 1999).

183. *Id.* at 58–60.

184. *Id.* at 65.

185. *Id.*

186. 31 F.3d 860 (9th Cir. 1994) (granting summary judgment to defendants on plaintiffs' FHA claim), *aff'd in part, vacated in part en banc*, 75 F.3d 1311 (9th Cir. 1996) (upholding panel dismissal of FHA disparate impact claim). The defendants in this case raised qualified immunity defenses that entitled them to an interlocutory appeal of the district court's denial of summary judgment; the Ninth Circuit reversed the denial. *Id.* at 863.

187. *Id.* at 868–69.

188. *Id.* The court also noted the absence of any allegation of discriminatory intent in the targeting of the Arden-Guthrie neighborhood. *Id.* at 869.

Another case challenging the targeting of neighborhoods for aggressive code enforcement illustrates the importance of developing a strong record of disparate treatment in such cases. In 2006, in *2922 Sherman Avenue Tenants' Ass'n v. District of Columbia*,¹⁸⁹ several tenant groups challenged the targeting of Hispanic neighborhoods for housing code enforcement, which resulted in the closure of certain buildings.¹⁹⁰ The D.C. Circuit set aside the jury verdict in favor of plaintiffs on the disparate impact claim, but remanded so that the jury could be instructed on the disparate treatment claim.¹⁹¹ The D.C. Circuit found that the plaintiffs did not present sufficient evidence of the national origin of the tenants actually residing in the properties targeted for aggressive code enforcement, which was necessary to show actual impact.¹⁹² However, the court found that the plaintiffs had made a sufficient record on the claim that the District of Columbia intentionally selected some buildings and excluded others on the basis of the national origin of neighborhood residents.¹⁹³ The District's initial "Hot Properties" list consisted of seventy-five buildings evenly distributed throughout the District, but their final list included twenty-seven buildings "located in neighborhoods with an average percentage of Hispanic residents 4.1 times as great as the percentage of Hispanics in the city as a whole."¹⁹⁴ This case demonstrates how the discriminatory effects of a code enforcement scheme can establish disparate treatment on a well-developed record that includes other circumstantial evidence of neighborhood targeting.

Thus, many of the disparate impact challenges to housing codes discussed in this Part, including that in *Magner*, demonstrate the danger of relying too heavily on disparate impact theory to do the work of what is essentially a disparate treatment claim. These challenges centered not on the housing codes themselves, but on the targeting of the codes against certain neighborhoods and the enforcement of the codes against plaintiffs to achieve racially discriminatory objectives. The more isolated and targeted the code enforcement action, the more appropriate a disparate treatment challenge. However, a proper disparate impact claim can nevertheless be made, in addition or in the alternative, if the challenge is to a generalized plan of aggressive code enforcement

189. 444 F.3d 673 (D.C. Cir. 2006).

190. *Id.* at 676.

191. *Id.* at 676–77.

192. *Id.* at 680–81.

193. *Id.* at 684.

194. *Id.* at 682.

that is race-neutral, but has the effect of removing or displacing persons of color at a disproportionate rate from a certain neighborhood or jurisdiction.

Plaintiffs bringing FHA disparate impact challenges to enjoin private landlords from displacing tenants in the course of housing rehabilitation activities have also met with limited success. In 1989, in *Gomez v. Chody*,¹⁹⁵ residents of a five-building apartment complex consisting of seventy-three units challenged the manner of their displacement from the apartments during rehabilitation.¹⁹⁶ The residents, 95% of whom were Hispanic, alleged that 60% of the city's Hispanic residents resided at the complex.¹⁹⁷ The Seventh Circuit affirmed summary judgment, finding this evidence insufficient to establish liability given that the entire complex had been declared a public nuisance and unfit for human habitation, effectively displacing every resident of the building.¹⁹⁸ Also important to the court was the fact that the rehabilitation plan "was designed to benefit persons of low to moderate income" and not "a device, intentional or otherwise, to force Hispanics out of Wood Dale."¹⁹⁹ Rather than demolishing the units, the plan would result in rehabilitating them, with 51% of the apartments occupied by low- or moderate-income persons; this could in theory allow displaced residents to return to the complex.²⁰⁰ In a similar case decided in 2007, *Bonvillian v. Lawler-Wood Housing, LLC*,²⁰¹ tenants challenged the closing of a single apartment building for renovation following Hurricane Katrina, arguing that a majority of the affected residents were disabled and members of minority groups.²⁰² The Fifth Circuit affirmed summary judgment dismissing the disparate impact claim, finding that because the building was closed to all tenants, all were equally affected with no disparate impact on protected class members.²⁰³

Plaintiffs seeking to enjoin housing authorities in their efforts to rehabilitate and revitalize public housing also have had considerable difficulty. In 2005, for example, in *Darst-Webbe Tenant Ass'n Board v.*

195. 867 F.2d 395 (7th Cir. 1989).

196. *Id.* at 397.

197. *Id.*

198. *Id.* at 397, 402. The record revealed that "[t]he apartments were in an advanced state of dangerous disrepair, unsanitary, and infested with insects and rodents." *Id.* at 397.

199. *Id.* at 403.

200. *Id.* at 401.

201. 242 F. App'x 159 (5th Cir. 2007) (per curiam).

202. *Id.* at 160.

203. *Id.*

St. Louis Housing Authority,²⁰⁴ plaintiff tenant associations challenged public housing revitalization plans that sought to reduce the density of public housing units and replace them with a mix of subsidized and market rate rental and homeownership units.²⁰⁵ The plaintiffs argued that the housing authority should provide 120 more public housing units on or off site than were being planned.²⁰⁶ On review of a bench trial decision, the Eighth Circuit assumed that the plaintiffs established a prima facie case; the development was racially segregated, with 220 family public housing units occupied almost entirely by African Americans.²⁰⁷ After finding the housing authority's objectives of de-concentration to be legitimate and facially neutral, however, the court found that the plaintiff offered no evidence that its alternative housing mix could accomplish defendants' objectives with less discriminatory effect.²⁰⁸

A qualitative examination of FHA disparate impact challenges to housing improvement plans and regulations at the appellate level therefore reveals that these claims are frequently dismissed before trial, the dismissals are upheld, plaintiffs face difficulty on the claims in the rare trials that do occur, and appellate courts have no trouble affirming the plaintiffs' trial defeats and reversing their trial wins.²⁰⁹ The summary judgment reversals for plaintiffs in *Magner* and *Mount*

204. 417 F.3d 898 (8th Cir. 2005).

205. *Id.* at 900.

206. *Id.* at 901.

207. *Id.* at 900, 902. Other courts have refused to find a prima facie case in a challenge made to the demolition of public housing where virtually all of the residents displaced by a revitalization plan are African American. *See, e.g., Anderson v. Jackson*, No. 06-3298, 2007 WL 458232, at *1, *9 (E.D. La. 2007) (finding prima facie evidence insufficient where plaintiffs failed to show that the proposed demolition of four of New Orleans' largest public housing developments following Hurricane Katrina caused a statistical disparity between the residents who were virtually all African American and any non-protected individuals).

208. *Darst-Webbe*, 417 F.3d at 903, 906; *see also id.* at 904 ("We . . . do not sit as a secondary legislative body to amend or rework funding and planning decisions based on our own, alternative predictive judgments about the likely success of alternative proposed actions.").

209. Of course, this analysis does not capture the cases that are resolved through settlement, cases which may present the strongest prima facie showing of impact. For example, in *Hispanics United of DuPage County v. Village of Addison*, the district court recounted the parties' disparate impact arguments in conducting a fairness hearing on a negotiated consent decree in a case challenging a redevelopment plan. 988 F. Supp. 1130 (N.D. Ill. 1997). The court noted the strength of the plaintiffs' showing of impact:

Over 49% of the TIF district residents are Hispanic, while their Village-wide population is just 13.4%. The districts also contain the two largest Hispanic neighborhoods—in fact the only two majority Hispanic areas—in the Village. Moreover, almost 44% of the Village's entire Hispanic population resides in these two districts.

Id. at 1155.

Holly, while apparently sufficient to capture the attention of the high Court, are aberrational.

A quantitative analysis of how FHA disparate impact claims have fared over their forty-year history is offered next to shed additional light on how the appellate courts have struck the balance in disparate impact cases generally, and in housing barrier and housing improvement cases specifically.

III. A QUANTITATIVE ANALYSIS OF FORTY YEARS OF FHA DISPARATE IMPACT CASES AT THE APPELLATE LEVEL

Over the past forty years, courts have had ample opportunity to define the limits of the disparate impact theory in the context of the FHA. For purposes of this section, the analysis includes all of the disparate impact claims brought under the Fair Housing Act²¹⁰ and actually considered by an appellate court²¹¹ in the more than forty years²¹² since the disparate impact standard was recognized for Title VII by the Supreme Court in 1971.²¹³ After eliminating those cases where the appellate court did not reach the disparate impact claim on procedural grounds,²¹⁴ or because the case was essentially decided on disparate treatment grounds,²¹⁵ ninety-two pertinent cases remain

210. This Article does not consider disparate impact claims challenging discriminatory housing policies where the Fair Housing Act claim may or may not have been made but the court ruled on other grounds, such as under the Equal Protection Clause. *See, e.g.,* *United Farmworkers of Fla. Hous. Project, Inc. v. City of Delray Beach*, 493 F.2d 799, 811 n.12 (5th Cir. 1974) (declining to reach the FHA disparate impact housing claim after ruling on the claim under the Equal Protection Clause); *see also* *Acevedo v. Nassau Cnty.*, 500 F.2d 1078, 1081 (2d Cir. 1974) (ruling on a disparate impact housing claim made under the Equal Protection Clause).

211. For an example of a case that was excluded because the court did not reach the disparate impact claim, *see Bloch v. Frischholz*, 587 F.3d 771, 784 (7th Cir. 2009), in which the court declined to reach disparate impact theory argued on appeal because it was not briefed or considered by the district court in summary judgment proceedings.

212. The analysis spanned from 1974, when the first disparate impact FHA case was decided, *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), until June 30, 2013.

213. *See generally* *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (recognizing a discriminatory effects standard in employment discrimination cases brought under Title VII of the Civil Rights Act of 1964).

214. *See, e.g., In re Countrywide Fin. Corp. Mortg. Lending Practices Litig.*, 708 F.3d 704, 705 (6th Cir. 2013) (affirming denial of class certification on disparate impact claim challenging delegation of discretion to local mortgage brokers on loan pricing policies); *NAACP v. City of Kyle*, 626 F.3d 233, 235 (5th Cir. 2010) (affirming denial of relief under FHA on other grounds, namely, based on lack of standing).

215. There is a case worth mentioning that evaded the Westlaw search because it was decided in 1974, after the Supreme Court adopted the disparate impact theory in *Griggs*, but before courts were regularly using terms such as “disparate impact” and “discriminatory effects”. The case, *Williams v. Matthews Co.*, 499 F.2d 819 (8th Cir. 1974), is for all intents and purposes a disparate treatment case, but the court used *Griggs* and the “fair in form, [but] discriminatory in operation” language to close off

and are set forth in the Appendices.²¹⁶ The analysis focuses on appellate cases, rather than on district court cases or settlements, both because of the accessibility of the data and because of the unique role played by appellate courts in shaping doctrine and controlling for perverse outcomes. The analysis does not address how the litigants fared on any other claim they might have brought under the FHA or on any other constitutional or statutory grounds. First, this section discusses the outcomes in FHA disparate impact cases at the appellate level by decade, type of outcome, whether occurring pre-trial or post-trial, and rate of affirmance. Second, this section provides an analysis of plaintiff and defendant outcomes at the appellate level by type of case, particularly with respect to housing barrier and housing improvement challenges.

A. *Party Outcomes in FHA Disparate Impact Cases, 1974–2013*

Litigants have attempted to use the disparate impact theory in varied housing transactions, on behalf of varied protected classes, and in varied contexts. Few litigants have the resources to hire an expert to develop the kind of statistical analysis often important to establish a prima facie case of disparate impact.²¹⁷ Many claims are dismissed

every possible escape route for a real estate developer who seems to have charmed his way out of liability at trial. *Id.* at 827 n.9, 828. The development company used a purportedly neutral policy as a non-discriminatory reason for refusing to sell a lot in an all-white subdivision to an African American family. *Id.* at 828. The policy, a requirement that lots be sold only to approved contractors, apparently was not applied to whites, was used as a delaying tactic, resulted in none of the approved contractors agreeing to sell to the plaintiff, and helped the developer stall in response to inquiries made by the only contractor who would work with the plaintiff, who was African American. *Id.* at 828 & n.10. The court reversed a bench trial decision in favor of defendant, primarily finding that the evidence established a prima facie case and the defendant's policy both "carried racial overtones" and could not constitute a business necessity because it discriminated "in operation" and rested upon "pure chimera." *Id.* at 828.

216. Applied Westlaw search using the search terms: disp! discrim! /2 impact! effect! & "fair housing act" FHA 3604. The search was over-inclusive by design because there was no reliable way to use Westlaw headnotes or summaries to narrow the search without excluding pertinent cases. Of the 278-case yield of appellate cases, the appellate courts reached the disparate impact FHA claim in ninety-two cases. The analysis includes all pertinent cases yielded in the search, whether "reported" or "unreported." If the case generated multiple appellate decisions on its path to final resolution, it was not counted twice unless the multiple decisions dealt with wholly distinct disparate impact FHA claims.

217. *See, e.g.*, Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251, 257 (2011) ("It is today very rare for plaintiffs other than highly sophisticated and well-funded litigants, such as the U.S. Department of Justice, to prevail under Title VII on a disparate impact theory."); Stacy E. Seicshnaydre, *Is the Road to Disparate Impact Paved with Good Intentions?: Stuck on State of Mind in Antidiscrimination Law*, 42 WAKE FOREST L. REV. 1141, 1147 n.31 (2007) (citing supporting case law where the litigant was unable to demonstrate a prima facie case due to a lack of statistical evidence).

at the summary judgment stage for this reason.²¹⁸ As discussed above, some litigants tack on a disparate impact claim as added insurance when they are concerned about the strength of their intent evidence.²¹⁹ As a result, some of these claims fail because they are inapplicable to the facts and are not well-developed.²²⁰

What is abundantly clear when analyzing the FHA disparate impact case law over the past forty years is that the appellate courts have had little difficulty disposing of all manner of disparate impact claims under the FHA. As shown in Figure 6, plaintiffs have received positive decisions²²¹ in less than 20%, or eighteen of the ninety-two FHA disparate impact claims considered on appeal.²²² When considering these results over four decades, it is apparent that the successes are concentrated in the 1970s and 1980s, with the rate of success for FHA disparate impact plaintiffs dropping in each decade thereafter. To illustrate, all three of the FHA disparate impact cases considered by appellate courts in the 1970s resulted in positive decisions for plaintiffs. This perfect success rate (based on an admittedly small number of cases) dipped in the 1980s, although plaintiffs obtained positive decisions in 47% of cases, or seven out of fifteen, where FHA disparate impact claims were considered on appeal. In the 1990s, plaintiffs' rate of success dropped further to 13%, with only three out of twenty-three appellate cases resulting in a positive decision for plaintiffs on the FHA disparate impact claim. In

218. See *infra* Figure 4.

219. See Seicshnaydre, *supra* note 217, at 1147–49 (discussing how some plaintiffs bring disparate impact claims because of the notion that they are easier to prove than disparate treatment claims).

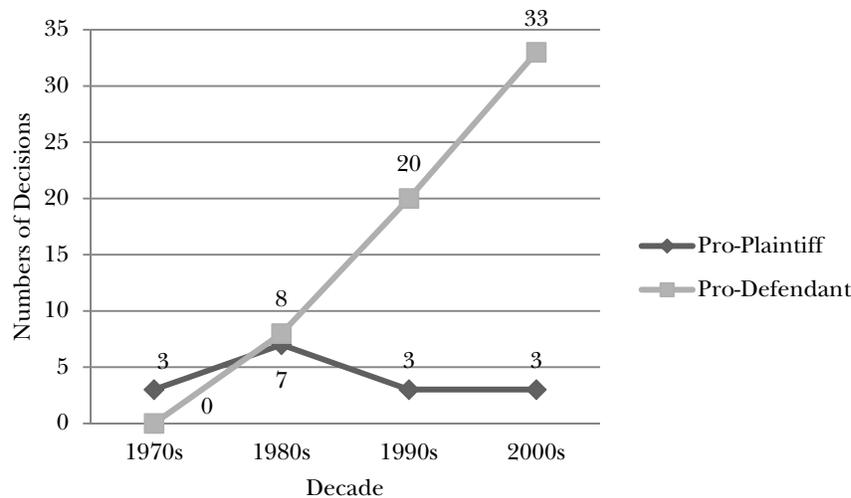
220. This Article does not purport to explain the reason for plaintiffs' low win rate generally. In the employment context, some commentators have offered an anti-plaintiff attitudinal explanation for the differential reversal rates favoring defendants at the appellate level. *E.g.*, Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 104–05 (2009). Authors Clermont and Schwab also provide a refutation of the anti-plaintiff effect as reflecting weak cases that are presented ineffectively and appealed too often. *Id.* at 114 n.34.

221. *Cf.* Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 581 (1998) (“[W]in rates’ are probably the slipperiest of all judicial data. Win rates are inherently ambiguous because of the case-selection effect . . . [which] produces a biased sample from the mass of underlying disputes.”).

222. In the analogous context of employment discrimination appeals, plaintiffs appear to obtain positive outcomes in 15% of all their cases, including appeals of both pretrial and trial adjudications. See Clermont & Schwab, *supra* note 220, at 110 (extrapolated from Display 2 using the reversal rates indicated for both plaintiffs and defendants yielding a calculation of 2073 positive outcomes for plaintiffs over 13,902 total appeals). At the federal district court level, over the period of 1979–2006, “the plaintiff win rate for jobs cases (15%) was much lower than that for non-jobs cases (51%).” *Id.* at 127.

the 2000s, plaintiffs' success rate dropped still further to 8.3%, with three out of thirty-six appellate cases resulting in positive decisions for plaintiffs. Thus far in the current decade, plaintiffs have obtained positive outcomes in only two appellate cases, and the Supreme Court has granted certiorari in both of them, while defendants have obtained positive decisions in thirteen cases. Although the rate of FHA disparate impact appeals has increased in each decade since the 1970s, these increases have not resulted in a very large absolute number of cases for reviewing courts to consider, and the rate of increase in the current decade is thus far below that of the 2000s.²²³ Further, despite the increase in appeals relating to FHA disparate impact claims, plaintiffs' success rate is decreasing, with only a handful of cases each decade resulting in positive outcomes for plaintiffs. These outcomes by decade are illustrated in Figure 1.

*Figure 1: FHA Disparate Impact Decisions on Appeal
Party Outcomes by Decade*

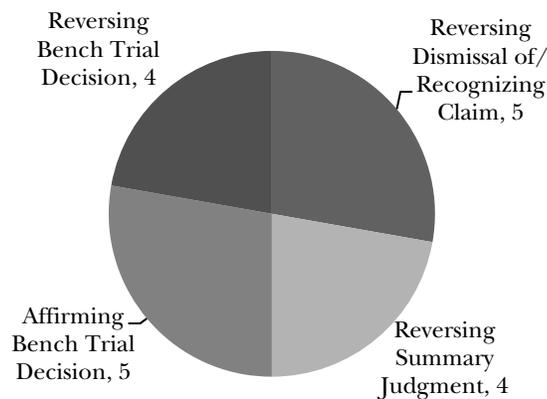


It is also instructive to consider the nature of these eighteen “positive outcomes” for plaintiffs. Figure 2 reveals that not every positive decision represents a final disposition on the merits. Only nine cases, or half, involved review of final trial dispositions. Five

²²³ Three and one-half years into the current decade, reviewing courts have considered fifteen FHA disparate impact claims, which if the pattern continues, would result in forty-three total cases with FHA disparate impact claims on appeal in this decade. This represents an increase of 19% from last decade. The previous decade saw an increase of appeals from twenty-three in the 1990s to thirty-six in the 2000s, or 56.5%.

cases affirmed a bench trial decision for plaintiff and four reversed a negative bench trial decision against plaintiff. Four decisions merely reversed the dismissal of an FHA disparate impact claim at the pleading stage. One decision recognized and delineated the disparate impact standard to be applied in FHA cases and remanded for the lower court to reach the merits. Four cases reversed a dismissal of the FHA disparate impact claim on summary judgment.

Figure 2: FHA Disparate Impact Appellate Decisions—18 Positive Outcomes for Plaintiffs, 1974–2013



With respect to the total of four decisions reversing the dismissal of FHA disparate impact claims on summary judgment, Figure 3 demonstrates that two of these occurred this decade, in 2010 and 2011, with the Supreme Court granting a writ of certiorari in each. Thus, prior to the Supreme Court's recent willingness to grant certiorari to review the question whether the disparate impact theory of liability should apply under the FHA, only two appellate courts in forty years ever reversed the dismissal of plaintiffs' FHA disparate impact claims on summary judgment. This happened once in the late 1980s and once again twenty years later in the 2000s, as shown in Figure 3. This compares to thirty-nine affirmances of summary judgments dismissing FHA disparate impact claims, one reversal of a denial of summary judgment for defendant, three reversals of summary judgments granted in plaintiffs' favor, and a refusal to instruct the jury on disparate impact. In sum, and as revealed in Figure 4, plaintiffs' overall success rate on appeals of summary judgments in the FHA disparate impact context is four of forty-eight cases, less than 10% and less than the overall success rate of FHA disparate impact plaintiffs.

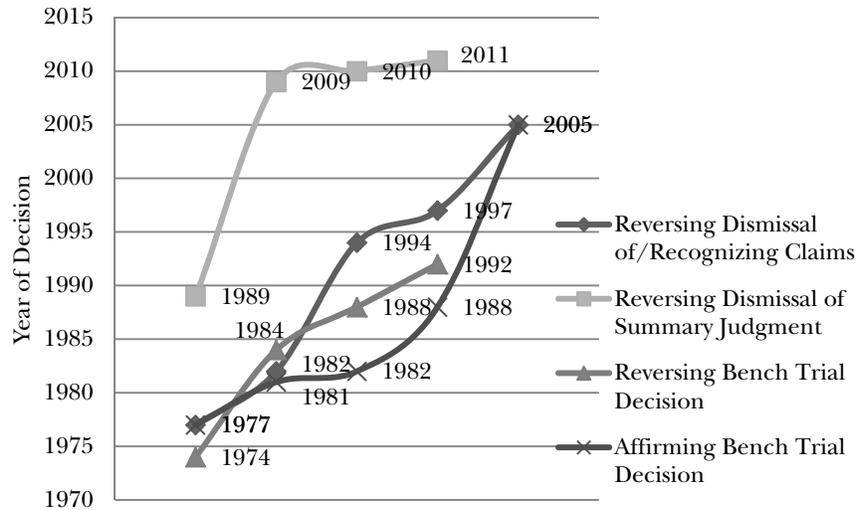


Figure 3: *FHA Disparate Impact Appellate Decisions—18 Positive Decisions for Plaintiffs*

Moreover, the two positive decisions before 2010 reversing summary judgment dismissals of FHA disparate impact claims are limited. The first case, *Doe v. City of Butler*,²²⁴ decided in 1989, cannot even fairly be described as a reversal. The Third Circuit actually affirmed summary judgment on the claim before it, a sex-based FHA disparate impact challenge by domestic violence victims to an ordinance limiting the number of occupants in transitional dwellings.²²⁵ The positive outcome consisted of the Third Circuit's remand to consider whether the challenged ordinance had a disparate impact on the basis of familial status, a newly protected category under the FHA that Congress added after the district court had ruled.²²⁶ The second case, *Committee Concerning Community Improvement v. City of Modesto*,²²⁷ decided in 2009, involved four predominantly Latino neighborhoods outside the city of Modesto that challenged the city's and county's failure to annex them into the

224. 892 F.2d 315 (3d Cir. 1989).

225. *Id.* at 323.

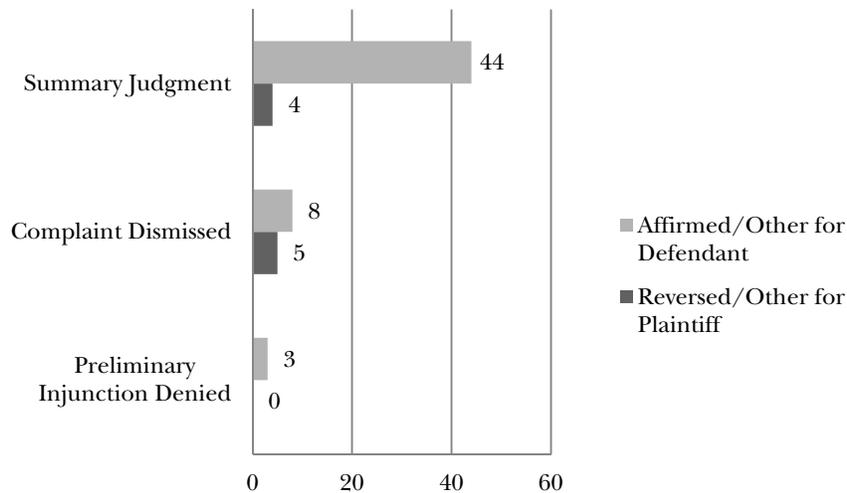
226. *Id.* at 323–24.

227. 583 F.3d 690 (9th Cir. 2009).

city and otherwise provide adequate municipal services.²²⁸ The positive outcome in this case was technically a reversal of the earlier dismissal of the FHA claim made at the pleading stage, although the Ninth Circuit restored only part of the FHA claim based on summary judgment evidence of impact considered in the context of other claims.²²⁹ The appellate court found the summary judgment disparate impact evidence insufficient to support a claim relating to the provision of sewer services, but sufficient to support a claim relating to the provision of law-enforcement personnel.²³⁰

Thus, the two “reversals” of summary judgment dismissals of FHA disparate impact claims prior to 2010 are not sweeping victories for plaintiffs. Rather, one has to parse these opinions carefully to identify the disparate impact slivers that survive dismissal. Also, neither of these reversals involved a challenge to a housing improvement plan.

Figure 4: FHA Disparate Impact Pre-trial Decisions on Appeal, 1974–2013



In addition to summary judgment affirmances, Figure 4 demonstrates defendants’ rate of affirmance for dismissals of plaintiffs’ FHA disparate impact claims, with defendants obtaining eight affirmances and plaintiffs obtaining five reversals of complaint

228. *Id.* at 696.

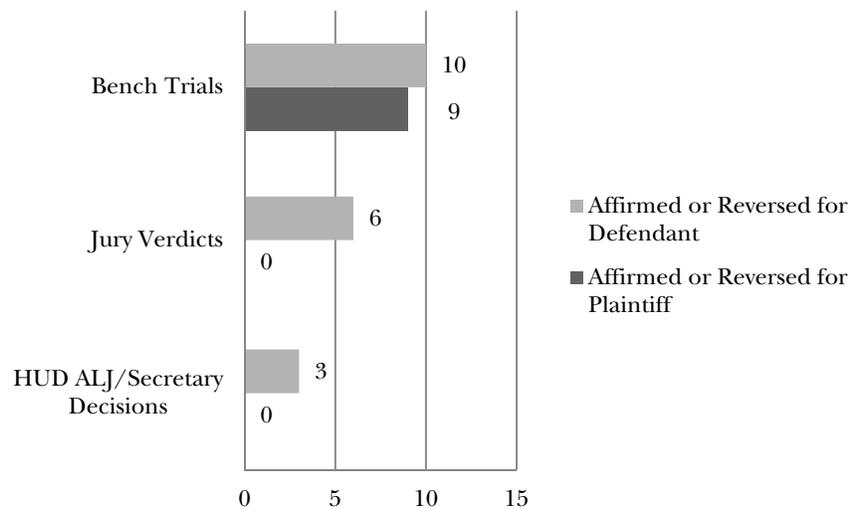
229. *Id.* at 699–700, 714–15. The Ninth Circuit restored the FHA claim after concluding, contrary to the district court, that the FHA did apply to discrimination occurring after the acquisition of housing. *Id.* at 714.

230. *Id.* at 714–15.

dismissals.²³¹ Further, defendants were able to have two denials of preliminary injunction motions affirmed, and one disparate impact finding for plaintiff reversed at the preliminary injunction stage.

When considering post-trial decisions on appeal, Figure 5 demonstrates that plaintiffs and defendants are about even with respect to their ability to obtain positive outcomes following bench trials, with plaintiffs able to affirm five positive and reverse four negative FHA disparate impact bench trial decisions. Defendants were able to affirm nine positive and reverse one negative FHA disparate impact bench trial decisions. Defendants were also able to reverse two HUD administrative law judge (“ALJ”) decisions and one HUD Secretary decision. Plaintiffs obtained no positive outcomes on appeal with respect to jury verdicts, whereas defendants were able to have three positive jury verdicts affirmed and three negative jury verdicts reversed, as shown in Figure 5.

Figure 5: FHA Disparate Impact Post-Trial Decisions on Appeal, 1974–2013



Next, as shown in Figure 6, when considering the affirmance rates for plaintiffs and defendants generally, the data shows that defendants were able to affirm positive decisions obtained in the lower courts in sixty-two of seventy-four cases, or 83.8% of the time.

231. Included in the category of plaintiff reversals and other on complaint dismissals is the Seventh Circuit’s decision on remand in *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1288–90 (7th Cir. 1977) (finding that a showing of discriminatory effects could state a claim under the FHA).

The affirmance rate generally for federal civil appeals is thought to be about 80%.²³² By contrast, plaintiffs were able to have positive results obtained in the lower courts affirmed in only six of eighteen cases, or 33.3% of the time. Thus, plaintiffs in FHA disparate impact cases fared far worse than average when considering the generally high rate of affirmance in federal civil appeals, while defendants enjoyed an affirmance rate that was better than average. Stated another way, defendants were able to have 66.7% of plaintiffs' positive decisions on FHA disparate impact claims reversed, while plaintiffs were able to reverse only 16.2% of defendants' positive decisions on these claims.

Figure 6: FHA Disparate Impact Outcomes on Appeal, 1974–2013

	Pro-Defendant Outcomes on Appeal	Pro-Plaintiff Outcomes on Appeal
Reversal Rate	66.7% (12/18 lower court wins for plaintiff reversed)	16.2% (12/74 lower court wins for defendant reversed)
Affirmance Rate	83.8% (62/74 lower court wins for defendant affirmed)	33.3% (6/18 lower court wins for plaintiff affirmed)
<u>TOTAL OUTCOMES</u>	80.4% (74/92 CASES)	19.6% (18/92 CASES)

Whatever has prompted the Court's sudden interest in examining the question of disparate impact liability under the FHA, this interest cannot be attributable to plaintiffs' high rate of success or the appellate courts' general unwillingness to impose a rigorous and exacting review of the claims at every stage of the proceedings.

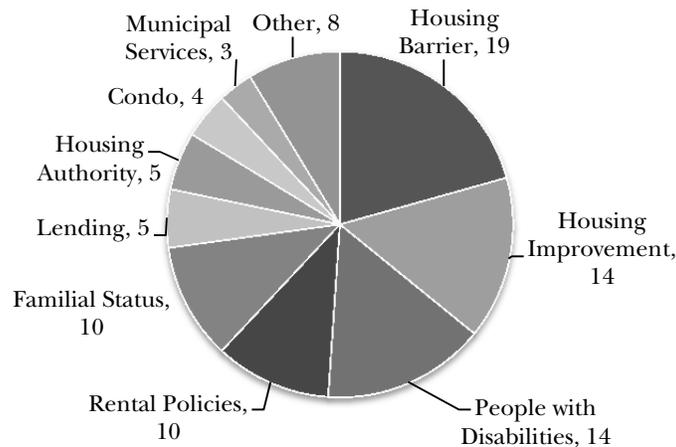
B. Data by FHA Disparate Impact Case Type: Housing Barrier and Housing Improvement Cases

Based on the data analysis below, there appears to be a discernible difference in the way the appellate courts have reviewed challenges to "housing barrier" regulations as opposed to "housing improvement" plans and regulations. In the ninety-two appellate decisions considering FHA disparate impact challenges, nineteen cases dealt

²³². See Clermont and Schwab, *supra* note 220, at 106 (comparing plaintiffs' win rates generally to win rates in jobs cases in district and appellate courts from 1979 to 2006).

with housing barrier rules and fourteen challenged housing improvement or redevelopment plans. Another fourteen challenged policies or regulations on the basis of disparate impact against persons with disabilities.²³³ Although not all disparate impact claims center on these case types, these were the three most common FHA disparate impact challenges reviewed by the appellate courts, as reflected in Figure 7.²³⁴

Figure 7: FHA Disparate Impact Appeals by Case Type, 1974–2013



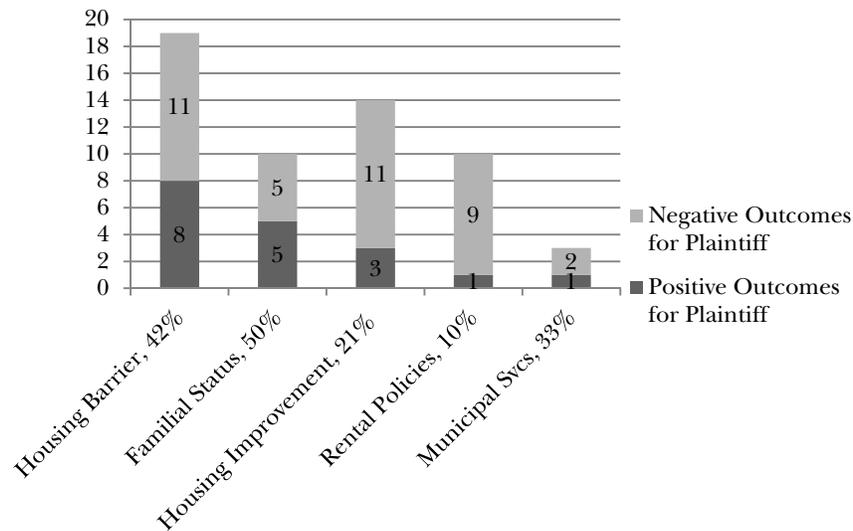
Comparing the rates of success of the housing barrier and housing improvement challenges at the appellate level, the housing barrier challenges were twice as successful. As reflected in Figure 8, the housing barrier disparate impact challenges were successful 42% of the time (eight of nineteen cases), whereas the housing improvement disparate impact challenges were successful 21% of the time (three of

233. Even though the disability-based challenges can be described as seeking to overcome “barriers” for persons with disabilities, they are not included with the “barrier” cases because of the distinct statutory requirements at issue in these cases, such as the requirement that housing providers make “reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.” 42 U.S.C. § 3604(f) (3) (B).

234. As illustrated in Figure 7 and Appendix B, the remainder of the ninety-two FHA disparate impact challenges include ten involving various challenges to rental policies and practices; ten involving challenges to occupancy restrictions or other rules on the basis of familial status; five involving lending and appraisal practices; another five involving housing authority policies; four involving housing cooperative and condominium rules; and three involving a city’s failure to maintain or provide municipal services to property. Eight additional appeals in Figure 7 are included under the category of “other” (highway site selection, city and state funding priorities, steering, and housing advertising restrictions).

fourteen cases). Thus, plaintiffs challenging housing improvement regulations are achieving the same rate of success as are FHA disparate impact plaintiffs on average. On the other hand, plaintiffs challenging housing barrier regulations are twice as successful as FHA disparate impact plaintiffs on average.²³⁵

Figure 8: FHA Disparate Impact Outcomes on Appeal by Case Type, 1974–2013



The *Magner* and *Mount Holly* decisions comprise two of the three positive decisions in the housing improvement context. Stated another way, before 2011 when the Court decided to review the disparate impact standard under the FHA, only one FHA disparate impact challenge to housing improvement plans had resulted in a positive outcome for plaintiffs at the appellate level. This is *Charleston Housing Authority*, discussed in Part II.²³⁶

When shifting focus to examine the type of cases comprising the body of appellate case law resulting in positive decisions for plaintiffs,

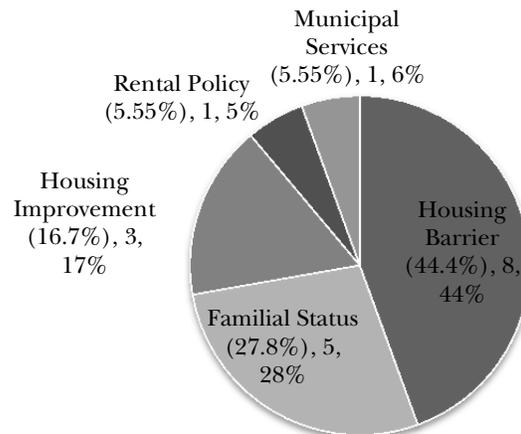
235. See *supra* notes 221–222 and accompanying text (explaining win rates generally and positive outcomes specifically for disparate impact claims on appeal); see *supra* Figure 6 (showing that FHA disparate impact outcomes on appeal were successful 19.6% of the time).

236. See *supra* Figure 8; see also *supra* notes 170–173 and accompanying text (explaining the Eighth Circuit decision to uphold the district court’s finding that the housing authority’s demolition plan had a racially disparate impact, and remanding for the district court to identify an alternative to the proposed re-occupancy that would further fair housing).

which constitutes eighteen of ninety-two cases,²³⁷ the most successful claims brought by plaintiffs were housing barrier claims. Eight of the eighteen, or 44.4% of all positive FHA disparate impact decisions at the appellate level were challenges to housing barriers. The next most successful type of claim among the positive outcomes for plaintiffs were challenges to neutral occupancy rules or other restrictions on the basis of familial status, at five of the eighteen, or 27.8%.

Only three cases out of the eighteen positive decisions, or 16.7%, involved challenges to housing improvement plans. These results are reflected in Figure 9.

Figure 9: FHA Disparate Impact—Distribution of 18 Positive Outcomes for Plaintiffs on Appeal by Case Type, 1974–2013



These data show that the predominant type of FHA disparate impact claim on appeal and also the predominant type of claim on which plaintiffs are receiving positive outcomes at the appellate level is the housing barrier claim. Thus, to the extent that appellate courts have had forty years to oversee the application of disparate impact theory in FHA cases, they have been far more receptive to housing barrier claims than housing improvement claims.

Following the filing of the certiorari petition in *Magner*, but before the filing of the petition in *Mount Holly*, the federal agency with authority to interpret the FHA decided to weigh in.²³⁸ The next Part

237. See *supra* Part III.A (discussing the eighteen positive decisions for plaintiffs in FHA disparate impact appeals).

238. See 42 U.S.C. § 3608(a) (assigning the authority and responsibility of administering the FHA to the Secretary of the HUD); *id.* § 3608(e) (delineating the

analyzes HUD's disparate impact rule and how it might apply to housing improvement challenges.

IV. HUD'S DISPARATE IMPACT RULE AND ITS APPLICATION TO HOUSING IMPROVEMENT CASES

Despite the unanimity among the circuits that a disparate impact method of proof is cognizable under the FHA, a number of different standards have proliferated over the past four decades.²³⁹ The petitions for certiorari in both *Magner* and *Mount Holly* raised the question of which test should govern review of FHA disparate impact cases.²⁴⁰ In November 2011, between the filing of the two certiorari petitions, HUD issued a proposed rule interpreting the disparate impact standard in FHA cases.²⁴¹ On February 15, 2013, after the *Mount Holly* petition was filed, but before it was granted, HUD issued its Final Rule, entitled "Implementation of the Fair Housing Act's Discriminatory Effects Standard."²⁴² HUD issued its rule after decades of adopting and applying the disparate impact standard in formal adjudications, policy statements, and guidance to its staff.²⁴³

In addition to recognizing the validity of a disparate impact approach in FHA cases, HUD's disparate impact rule sets forth the parties' burdens and the burden-shifting framework to be applied.²⁴⁴ In doing so, HUD opted for the burden shifting approach over the

functions of the Secretary in performing this responsibility); *id.* § 3614a ("The Secretary may make rules . . . to carry out this subchapter.").

239. For example, some courts apply a burden-shifting framework similar to that applied in Title VII cases, whereas other courts apply a four-factor balancing test. Compare *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 938–39 (2d Cir.) (applying burden-shifting approach), *aff'd per curiam*, 488 U.S. 15 (1988), with *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977) (applying four-factor balancing test). See generally SCHWEMM & PRATT, *supra* note 1, at 21 (noting "that only a few appellate decisions have carefully examined the burden of justification in a FHA impact case, and these decisions reflect, accurately, that some issues have not been authoritatively resolved").

240. See Petition for Writ of Certiorari at i, *Magner v. Gallagher*, 132 S. Ct. 1306 (2011) (No. 10-1032) (asking, if disparate claims are indeed cognizable under the Fair Housing Act, whether they should "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"); see also *Mount Holly* Cert. Petition, *supra* note 143, at i (same).

241. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. 70,921 (proposed Nov. 16, 2011) (to be codified at 24 C.F.R. pt. 100).

242. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013) (codified in 24 C.F.R. pt. 100).

243. See *id.* at 11,461–62 (discussing how HUD has consistently interpreted the disparate impact standard throughout its FHA enforcement history).

244. *Id.* at 11,479.

four-factor balancing test.²⁴⁵ The plaintiff bears the burden of proving its prima facie case by showing “that a challenged practice caused or predictably will cause a discriminatory effect.”²⁴⁶ Discriminatory effect is defined as a practice that “actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.”²⁴⁷ Once the plaintiff meets its prima facie burden, the defendant has “the burden of proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant.”²⁴⁸ If the defendant meets its burden of justification, the “plaintiff may still prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.”²⁴⁹

HUD emphasizes in its preamble to the Final Rule that “HUD is not proposing new law in this area.”²⁵⁰ In particular, HUD’s rule does not create a new standard on plaintiff’s prima facie burden other than “that a challenged practice caused or predictably will cause a discriminatory effect.”²⁵¹ As the review of the case law in Part II demonstrates, a prima facie showing of disparate impact is not as easily made in a housing improvement case as might be expected.²⁵² Except in the rare instances where courts assumed that the prima facie case was made, they often rejected plaintiffs’ prima facie evidence in both code enforcement and revitalization cases because it was limited to the group disproportionately affected by the housing

245. See *id.* at 11,463 (explaining that some courts have embraced a four-factor test over the burden-shifting framework in FHA cases).

246. 24 C.F.R. § 100.500(c)(1) (2013).

247. *Id.* § 100.500(a).

248. *Id.* § 100.500(c)(2).

249. *Id.* § 100.500(c)(3).

250. Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. at 11,462. HUD goes on to state that “this final rule embodies law that has been in place for almost four decades and that has consistently been applied, with minor variations, by HUD, the Justice Department and nine other federal agencies, and federal courts.” *Id.*

251. 24 C.F.R. § 100.500(c)(1).

252. See *supra* Part II.D; see also Dana L. Miller, Comment, *HOPE VI and Title VIII: How a Justifying Government Purpose Can Overcome the Disparate Impact Problem*, 47 ST. LOUIS U. L.J. 1277, 1296 (2003) (noting that despite the likelihood that any demolition and revitalization plan will have a disparate impact on public housing occupants, who are overwhelmingly protected class members, “this fact alone does not guarantee the plaintiff will be successful in making out a prima facie case”).

“improvement” plan.²⁵³ Many courts have found it insufficient to show simply that those displaced by a plan or scheme are predominantly or even exclusively members of minority groups.²⁵⁴ Plaintiffs must also show that the plan has a disproportionately lesser impact on unprotected groups.²⁵⁵ HUD’s final regulation, which does not alter the law on plaintiffs’ prima facie showing, would not likely have altered any negative case outcomes in the housing improvement arena.

Nor would HUD’s disparate impact rule necessarily have altered the outcomes of *Magner* and *Mount Holly* at the circuit court level, given that these cases turned, at least in part, on the question of whether plaintiffs met their prima facie burdens. Further, the courts found that plaintiffs created a fact issue on the burden HUD has now placed with plaintiffs: whether an alternative exists that would accomplish defendant’s legitimate interests with less discriminatory effect.²⁵⁶ The *Magner* and *Mount Holly* decisions can be reconciled with the greater number of plaintiff losses in housing improvement cases at the appellate level. As an initial matter, the paucity of successful outcomes for plaintiffs in housing improvement cases undermines any suggestion that the FHA disparate impact standard is regularly producing perverse outcomes. At the same time, summary judgment will not always be an appropriate vehicle for resolving FHA disparate impact challenges to housing improvement plans. In *Gomez v. Chody*, the complex had been declared a public nuisance, so the court showed little interest in examining impact.²⁵⁷ In other cases, including *Mount Holly*, the degree of blight in a building,

253. See *supra* text accompanying notes 177–88 (reviewing cases where the plaintiffs’ challenges to a city’s code enforcement scheme or redevelopment plan failed because the plaintiffs did not show the impact on minorities in the community generally).

254. *Id.*

255. See *supra* text accompanying notes 201–03 (discussing how the dismissal of the plaintiffs’ claims in *Bonvillian v. Lawler-Wood Housing, LLC* were affirmed because the disputed action equally affected all parties with no disparate impact on protected class members).

256. The *Mount Holly* court placed this final burden of proof on defendants, but found that plaintiff had created a fact issue on whether an alternative to demolition existed that would serve defendant’s interests with less discriminatory effect. See *supra* note 163 and accompanying text. The *Magner* court placed the final burden on plaintiff, consistent with HUD’s subsequently enacted regulation. See *supra* notes 138–39, 248–49 and accompanying text.

257. See *supra* note 198 and accompanying text (describing how the court in *Gomez* affirmed summary judgment because liability could not be established when every resident was displaced after the entire complex was declared a public nuisance and unfit for human habitation).

neighborhood, or town is a matter of considerable factual dispute.²⁵⁸ What should be done about that blight, namely, whether demolition is justified, is a matter of even greater dispute. Allegations of discriminatory targeting and intent also may need to be assessed. At the heart of many housing improvement cases seems to be the notion that towns manage blight differently—whether they realize it or not—depending on the racial and ethnic makeup of those residing in structures deemed blighted.²⁵⁹ Given the fact that housing improvement plans have operated in particular cases to prevent the return of minorities to the “improved” area, it is understandable for residents targeted for displacement to view such plans with skepticism.²⁶⁰ Community and neighborhood revitalization plans will almost always be legitimate in the abstract, but whether they are racially exclusionary will depend on the facts of a particular case.

Further complicating the picture in housing improvement cases is the fact that HUD’s disparate impact regulation reflects the caselaw defining discriminatory effect in more than one way. A plaintiff can demonstrate discriminatory effects when the plan: 1) “actually or predictably results in a disparate impact on a group of persons,” or 2)

258. See, e.g., *Hispanics United of DuPage Cnty. v. Vill. of Addison*, 988 F. Supp. 1130, 1152 (N.D. Ill. 1997) (“[T]he plaintiffs did not take issue with the general need for redevelopment What they objected to was the Village’s aggressive manner of redevelopment, which, plaintiffs claimed, was wholly unjustified given that these were habitable buildings—buildings that had a lengthy future economic life, were increasing in sales value, were licensed yearly as in compliance with the Housing Code, and were no more densely situated than the average multi-family rental structures in Addison.”); see also Miller, *supra* note 252, at 1306 (“[M]any maintain that the [HOPE VI public housing revitalization] program has been broadly applied to fund the demolition of units that are not truly distressed. For example, in areas where gentrification has begun and a public housing site remains as the last ‘island of affordability,’ there can be considerable pressure to use . . . grant money to reduce the number of affordable units in the area while freeing up real estate for market-rate units.” (footnote omitted)).

259. See, e.g., *Hispanics United*, 988 F. Supp. at 1155 (“Further evidence of discriminatory effect is found in the fact that the Village began [redevelopment] activities in majority Hispanic areas, and never reached the vacant, deteriorating commercial sites or predominantly non-minority sectors in the districts.”).

260. See *id.* at 1141 (noting that “[t]he Village did not discuss replacing any of the units demolished or removed from the market in these neighborhoods with affordable housing until after plaintiffs had filed suit”); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 129–33 (3d Cir. 1977) (describing the refusal of a virtually all white urban renewal community to accept the replacement low income housing that was to be constructed in the community years after the low income residents, many of whom were black or Hispanic, were displaced); see also Miller, *supra* note 252, at 1284 (“The fact that most public housing residents whose suffering justified the revitalization activities do not return after the revitalization has been completed has been widely recognized”); cf. *Keith v. Volpe*, 858 F.2d 467, 471, 484 (9th Cir. 1988) (affirming trial court injunction for residents displaced by a freeway construction against city’s refusal to permit construction of replacement units; plaintiffs demonstrated disparate impact under FHA based on fact that two-thirds of those who would benefit from replacement housing were minorities).

“creates, increases, reinforces, or perpetuates segregated housing patterns” because of a protected category.²⁶¹ The effect of a housing improvement plan on segregated housing patterns may depend on whether short-term or long-term effects are evaluated. A housing improvement plan may have an adverse impact on a community of color in the immediate aftermath of its adoption and implementation, but over time it may have the effect of increasing housing opportunity and reducing segregation. On the other hand, a housing improvement plan may purport to reduce segregation in a generic or superficial way, but its implementation might achieve the exact opposite effect and increase segregation because the plan lacks any detailed mechanism for achieving its purported purpose. For example, after displacement, minority residents of the area targeted for “improvement” may relocate to other segregated neighborhoods or may be excluded from the improved and integrated neighborhood, as discussed above. Summary judgment will not be appropriate if the plaintiff creates a fact issue on whether a housing improvement plan sets the stage for exclusion and segregation.

In the end, an FHA disparate impact challenge to a housing improvement plan or regulation must be framed by the purposes of the statute and not merely to maintain the status quo of substandard housing. The FHA is concerned with more than whether housing is substandard and if it is, whether it must be demolished or whether it can be rehabilitated. The FHA is concerned with opportunity, and the fact that a plan results in the disproportionate displacement of minorities does not reveal, by itself, the overall impact on housing opportunity and segregation. HUD’s disparate impact rule can be applied to ensure that the FHA’s purposes are achieved. For example, the revitalization justification “must be supported by evidence and may not be hypothetical or speculative.”²⁶² This means that a plan must provide sufficient detail so that its impact on housing opportunity and integration may be ascertained.

If the challenged plan revitalizes housing while setting the stage for exclusion and increased segregation, then the defendant’s revitalization justification cannot be deemed legitimate and nondiscriminatory as required under the rule, because it is serving as a gateway to a housing barrier plan.²⁶³ On the other hand, if the

261. 24 C.F.R. § 100.500(a) (2013).

262. 24 C.F.R. § 100.500(b)(2) (2013).

263. *See id.* § 100.500(c)(2); *see also Resident Advisory Bd.*, 564 F.2d at 133 (citing the district court’s conclusion that “[t]he effect of these urban clearance actions by both RDA and PHA appears to have converted an integrated area of Philadelphia into a

housing improvement plan helps facilitate the purposes of the FHA, such as creating more housing opportunity and integration, the revitalization justification will be legitimate, and it will be more difficult for the plaintiff to identify a less discriminatory alternative. The question whether a less discriminatory alternative exists must center on whether there is an alternative to the challenged housing improvement plan that will both revitalize housing or neighborhoods *and* increase housing opportunity and integration. HUD has now placed this final, substantial burden on plaintiffs.

If history is any judge, most of these FHA housing improvement challenges will continue to be dismissed on summary judgment. The lower courts have demonstrated that they are more than capable of applying a narrowly circumscribed FHA disparate impact standard. However, in those cases where the defendants' revitalization plans are flimsy or plaintiffs can create a fact issue on less exclusionary alternatives, a trial is a small price to pay for integration. Thus, the FHA can serve as an important check on housing improvement plans operating as the functional equivalent of housing barrier plans.

After HUD issued its final rule, the Solicitor General submitted a brief in *Mount Holly* suggesting that review of the FHA disparate impact standard was unwarranted because the appellate courts had not yet had the opportunity to interpret HUD's final rule.²⁶⁴ Further, the Solicitor General suggested that the case was not a proper vehicle for review of the disparate impact standard because the parties had not pressed the issue in the lower courts and the appeal was interlocutory, as the Third Circuit had merely reversed summary judgment and remanded the case for trial.²⁶⁵ The Court granted certiorari nonetheless on June 17, 2013 to decide the sole question of whether disparate impact claims are cognizable under section 804(a) of the FHA.²⁶⁶ Like *Magner*, the case resolved prior to oral argument, again preventing Supreme Court review.²⁶⁷

non-integrated area" (quoting *Resident Advisory Bd. v. Rizzo*, 425 F. Supp. 987, 1009 (E.D. Pa. 1976))).

264. Brief of the United States as Amicus Curiae at 6, *Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, No. 11-1507 (2013).

265. *Id.* at 21-22.

266. See *Twp. of Mount Holly v. Mt. Holly Gardens Citizens In Action, Inc.*, 133 S. Ct. 2824 (2013) (granting petition for writ of certiorari to the U.S. Court of Appeals for the Third Circuit), *cert. dismissed*, No. 11-1507, 2013 WL 6050174 (Nov. 15, 2013).

267. *Mount Holly*, 2013 WL 6050174 (Nov. 15, 2013) (dismissing certiorari pursuant to Rule 46.1 of the Rules of the Supreme Court).

V. WILL THE FHA DISPARATE IMPACT THEORY SURVIVE?

Assuming the Court continues to grant certiorari on the question, it will likely engage in a statutory construction analysis to determine the validity of the FHA disparate impact theory. The parties and amici have covered and will continue to cover this subject extensively in their briefs, and this Article does not seek to improve on their analysis so much as provide a historical and contextual framework for considering the FHA disparate impact theory. That said, this Article offers the following brief observations.

The earliest circuit courts to adopt the disparate impact theory of proof for FHA cases did not ignore issues of statutory construction. They concluded that the “because of race” language of the FHA could be satisfied by a showing of discriminatory effect without a showing of discriminatory intent.²⁶⁸ In so doing, these courts and those that followed considered the broad legislative purposes underlying the FHA,²⁶⁹ judicial interpretations of analogous language in Title VII,²⁷⁰ and the common sense notion that a party can undertake an act “because of race” if “the natural and foreseeable consequence of that act is to discriminate between races, regardless of . . . intent.”²⁷¹ The Court denied petitions for certiorari in three of

268. See, e.g., *Resident Advisory Bd.*, 564 F.2d at 146–47 (analogizing to the statutory text of Title VII and concluding that a prima facie case of liability can be made in FHA cases on a showing of discriminatory effect); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1288–90 (7th Cir. 1977) (finding, in the context of a housing barrier regulation, that “a violation of section 3604(a) can be established by a showing of discriminatory effect without a showing of discriminatory intent”); see also *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49 (1st Cir. 2000) (citing consensus of other circuit courts that the FHA can be violated by actions that have an unjustified racial impact); *United States v. City of Parma*, 494 F. Supp. 1049, 1054–55 (N.D. Ohio 1980), *aff’d in part, rev’d in part*, 661 F.2d 562 (6th Cir. 1981). The court in *City of Black Jack* found that a prima facie case could be made on the basis of discriminatory effects, meaning “that the conduct of the defendant actually or predictably results in racial discrimination,” then on the facts of the case held the City’s ordinance violated Title VIII because it denied persons housing “on the basis of race.” *United States v. City of Black Jack*, 508 F.2d 1179, 1184, 1188 (8th Cir. 1974).

269. E.g., *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934–39 (2d Cir.), *aff’d per curiam*, 488 U.S. 15 (1998); *Resident Advisory Board*, 564 F.2d at 147; *Arlington Heights*, 558 F.2d at 1289–90; *City of Black Jack*, 508 F.2d at 1184.

270. See, e.g., *Huntington Branch*, 844 F.2d at 934–35 (accepting the relevance of Title VII and finding the disparate impact approach applicable to Title VIII cases); *Arlington Heights*, 558 F.2d at 1288–89 (rejecting the argument that Congress required a “more probing standard of review” for Title VII cases); *Resident Advisory Bd.*, 564 F.2d at 147 (noting that the same “because of race” language appears in Title VII and does not require a showing of discriminatory intent); *City of Black Jack*, 508 F.2d at 1184 (noting that Congress requires the removal of racial barriers in the employment context, so “such barriers must also give way in the field of housing”).

271. *Arlington Heights*, 558 F.2d at 1288; cf. Carle, *supra* note 217, at 286–87 (“The idea that both invidious and neutral employment practices could cause

the early cases to recognize disparate impact claims under the FHA.²⁷² In another, *Huntington*, the Court affirmed part of the judgment “[w]ithout endorsing the precise analysis” of the Second Circuit.²⁷³ Some courts also noted the Supreme Court’s acknowledgment on several occasions that different proof standards applied to constitutional and statutory civil rights claims.²⁷⁴ Although a proliferation of standards emerged, no circuit split emerged in the last forty years on the validity of FHA disparate impact theory.

Further, although Congress amended Title VII in 1991 to incorporate the disparate impact standard, it neither contemporaneously amended nor simultaneously considered the FHA such that Congress can be presumed to have intentionally omitted a disparate impact provision from the FHA.²⁷⁵ Moreover, none of the judicially created, burden shifting methods of proof generated over the history of Title VII and Title VIII can be found in the text of the FHA.²⁷⁶ Though the FHA is clear that race (along with other factors) is a prohibited basis for an action, it does not specify any methods of proof.²⁷⁷ For example, the FHA has not been amended to state that the burden-shifting approach set forth in *McDonnell Douglas* for disparate treatment cases is the appropriate

discrimination was familiar to both public officials and activists seeking solutions to structural racial subordination [in the period leading up to the *Griggs* decision].”).

272. See, e.g., *Resident Advisory Bd.*, 564 F.2d 126 (housing barrier regulation), *cert. denied*, 435 U.S. 908 (1978); *Arlington Heights*, 558 F.2d 1283 (housing barrier regulation), *cert. denied*, 434 U.S. 1025 (1978); *City of Black Jack*, 508 F.2d 1179 (housing barrier regulation), *cert. denied*, 422 U.S. 1042 (1975).

273. *Huntington Branch*, 488 U.S. at 18.

274. For example, in *Resident Advisory Board*, the court noted the Supreme Court’s observation in *Washington v. Davis* that the effects standard would have been proper for a Title VII case but was insufficient to support a constitutional violation. *Resident Advisory Bd.*, 564 F.2d at 147 (citing *Washington v. Davis*, 426 U.S. 229, 246–48 (1976)); *accord Arlington Heights*, 558 F.2d at 1288–89. Also, in *Arlington Heights*, the Supreme Court remanded for the Seventh Circuit to consider the FHA claim after it noted the constitutional claim must fail on the same evidence. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977), *remanded to* 558 F.2d 1283; *see also Arlington Heights*, 558 F.2d at 1287 (“[T]he Supreme Court’s decision does not require us to change our previous conclusion that the Village’s action had a racially discriminatory effect. What the Court held is that under the Equal Protection Clause that conclusion is irrelevant.”).

275. See 42 U.S.C. § 2000e-2(k) (2012); *id.* § 3604; *cf.* *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174–75 (2009) (refusing to apply Title VII’s mixed motive burden-shifting framework to the Age Discrimination in Employment Act (ADEA) because Congress considered the two statutes simultaneously in 1991 and amended Title VII to include a mixed motive framework while neglecting to include such a provision in its contemporaneous amendments to the ADEA).

276. See 42 U.S.C. §§ 3601–3619 (failing to mention or give any indication of a burden-shifting framework suggested by the courts).

277. See, e.g., *id.* § 3604(a) (prohibiting any refusal to “sell or rent after the making of 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”).

method of proving that an action was taken “because of race.”²⁷⁸ Yet, all of the courts of appeal that have considered the question have held that the *McDonnell Douglas* framework should also be available under the FHA.²⁷⁹ To eliminate the disparate impact method of proof borrowed from Title VII because it is not written into the FHA, while accepting the other burden-shifting methods of proof borrowed from Title VII, but absent from the FHA statutory text, is disingenuous.²⁸⁰

Finally, the Court held in 2005 that the disparate impact proof standard was available in cases brought under the Age Discrimination in Employment Act in large part because Justice Scalia wrote a concurring opinion noting that EEOC regulations interpreted the ADEA to include a disparate impact standard.²⁸¹ HUD issued a regulation in 2013 interpreting the FHA to include a disparate impact standard, consistent with prior HUD regulations, guidance, and administrative decisions.²⁸² It remains to be seen whether Justice Scalia will vote to uphold the disparate impact standard under the FHA.²⁸³ It also remains to be seen whether the Court will select an FHA case as a vehicle for applying Equal Protection analysis to quash disparate impact liability against governmental entities, as more fully explored below.

VI. SHOULD THE FHA DISPARATE IMPACT THEORY SURVIVE?

Following the qualitative and quantitative analysis set forth in this paper, the question arises whether the FHA disparate impact theory

278. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 804 (1973) (requiring a plaintiff in a Title VII claim to first establish his prima facie case, then switching the burden to the defendant to provide a nondiscriminatory reason for rejecting employment, which may then be rebutted by the plaintiff as pretext).

279. See SCHWEMM, *supra* note 12, § 10:2 (collecting cases); cf. *Gross*, 557 U.S. at 175 n.2 (2009) (noting that “the Court has not definitively decided whether the evidentiary framework of [*McDonnell Douglas*] utilized in Title VII cases is appropriate in the ADEA context”).

280. See *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 935 (2d Cir.) (“Courts and commentators have observed that the two statutes require similar proof to establish a violation.”), *aff’d per curiam*, 488 U.S. 15 (1988).

281. *Smith v. City of Jackson*, 544 U.S. 228, 247 (2005) (Scalia, J., concurring in part and concurring in the judgment). Describing the case to be “an absolutely classic case for deference to agency interpretation,” *id.* at 243, Justice Scalia went on to find that “[t]he EEOC has express authority to promulgate rules and regulations interpreting the ADEA. It has exercised that authority to recognize disparate-impact claims. And, for the reasons given by the plurality opinion, its position is eminently reasonable. In my view, that is sufficient to resolve this case.” *Id.* at 247.

282. Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013) (codified in 24 C.F.R. pt. 100).

283. Justice Kennedy joined Justice O’Connor’s minority opinion (also joined by Justice Thomas) that disparate impact claims were not cognizable under the ADEA. *Smith*, 544 U.S. at 247–48 (O’Connor, J., concurring in judgment).

remains viable in the current era. What purpose does the theory serve, given its relatively low rate of success, the expense and expertise necessary to mount a successful disparate impact challenge, its potentially perverse use in the context of housing improvement plans, and the presumed availability of disparate treatment as an alternative theory should the Court eliminate disparate impact?²⁸⁴ Despite the limitations of the theory, the disparate impact method of proof remains a vital tool for accomplishing the elusive aims of the FHA.

First, the theory's limited success, undoubtedly because of the confusion surrounding the theory and the expense involved in establishing a *prima facie* case, is an inadequate reason to end the theory.²⁸⁵ If anything, the inaccessibility of the claim for most plaintiffs would seem to limit the number of claims and the judicial resources required to be expended on them, should the Court be concerned about that issue.²⁸⁶ In general, the number of FHA administrative claims filed each year is a small fraction of the number of employment claims filed annually.²⁸⁷ Given the unanimity in the lower courts for many decades on the availability of the FHA disparate impact standard, a decision by the Supreme Court recognizing this standard is not likely to create a litigation explosion.

Second, there is no need for panic over the notion that community revitalization plans and code enforcement schemes are subject to challenge using the disparate impact method of proof. Of course,

284. See Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 701 (2006) (examining the limited success of the disparate impact theory in the context of employment discrimination and arguing that "the theory may have had the unintended effect of limiting our conception of intentional discrimination").

285. Cf. Carle, *supra* note 217, at 298 ("[L]itigation victories were not the only goal of the activists who developed disparate impact doctrine. . . . Disparate impact doctrine may be doing important legal work even without substantial numbers of litigation victories because its purpose was and is to encourage employers to reflect on the possible benefits of choosing employment selection processes that better measure the elements of job performance needed for particular positions.").

286. See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2532 (2013) (noting, after construing Title VII to require a more stringent standard of causation for retaliation claims as opposed to status-based claims, the importance of its interpretation to the "fair and responsible allocation of resources" because "claims of retaliation are being made with ever-increasing frequency").

287. HUD reports the filing of 10,242, 10,155, and 9354 administrative housing discrimination complaints annually for the fiscal years 2009-11; the EEOC reports the filing of 93,277, 99,922, and 99,947 charges of employment discrimination for the same time period. U.S. DEP'T OF HOUS. & URBAN DEV., FY2011 ANNUAL REPORT ON FAIR HOUSING 18 (2011), available at http://portal.hud.gov/hudportal/documents/huddoc?id=FY2011_annual_rpt_final.pdf; *Charge Statistics FY 1997 Through FY 2012*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Nov. 27, 2013).

some might claim that even the possibility of litigation, let alone a trial, could deter some risk-averse governmental entities from revitalizing predominantly minority neighborhoods. Yet, disparate impact has been an available theory under the FHA for forty years, it has been used in housing improvement cases, and it has been overwhelmingly unsuccessful. If governmental entities have been slow to revitalize, the disparate impact standard is not the likely cause. As shown in Parts II and III, the lower courts have overwhelmingly controlled for perverse outcomes in FHA disparate impact cases over the past forty years. Only one housing improvement case had ever resulted in a positive decision for plaintiffs on appeal prior to the *Magner* and *Mount Holly* decisions.²⁸⁸ Only two reversals of summary judgments reinstating FHA disparate impact claims had ever occurred prior to *Magner* and *Mount Holly*, but neither involved housing improvement plans. Whatever one thinks of the *Magner* and *Mount Holly* fact patterns, the appellate courts' decision to send these fact-intensive challenges to trial is less than audacious. Some members of the Supreme Court might strike the balance differently, but this fact alone does not warrant the complete and total elimination of the disparate impact theory from the FHA. The Court's interest in reviewing the validity of the theory based merely on a couple of mid-litigation successes for plaintiffs (who may yet lose at trial) suggests a zero tolerance for any possible unfairness visited on a disparate impact defendant. In eliminating the FHA disparate impact theory, however, the Court would be exhibiting an unbounded tolerance for unfairness visited on an unspecified number of future plaintiffs, including those challenging exclusionary housing barriers that perpetuate racial segregation. If the Court decides, in the next case presented for review, that housing improvement plans are inappropriate targets of FHA disparate impact theory, it should otherwise preserve the theory.

As noted in Part IV, a *prima facie* showing of disparate impact does not end the inquiry.²⁸⁹ According to HUD's regulation, defendants will have an opportunity to justify their practices should a *prima facie* case of disparate impact be made. Defendants will often have an

288. See *supra* Part III.B.

289. See *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49–50 (1st Cir. 2000) (“[U]nder statutes like Title VII and Title VIII, merely to show a disparate racial impact is normally not enough to condemn: a vast array of measures, from war-making and the federal budget to local decisions on traffic and zoning, may have a disparate impact. Thus, practically all of the case law, both in employment and housing, treats impact as doing no more than creating a *prima facie* case, forcing the defendant to proffer a valid justification.”).

easier time justifying a housing improvement plan as opposed to a housing barrier, though the justification must be supported by evidence.²⁹⁰ If the housing improvement plan is sufficiently detailed to reveal that it furthers the purposes of the FHA by increasing housing opportunity and/or integration, plaintiffs may have a difficult time establishing the existence of a less discriminatory alternative despite the disproportionate displacement of protected class members. To avoid summary judgment, plaintiffs will need to offer proof either that the defendant's revitalization plan is illegitimate because it sets the stage for exclusion and/or segregation, or its legitimate objectives can be met with less discriminatory effect (i.e., less exclusion and/or segregation). This is a fact intensive inquiry, which should be resolved in accordance with the purposes of the FHA and in favor of integrated housing.²⁹¹ If the facts demonstrate that the housing improvement plan regardless of intent has set the stage for disproportionate exclusion based on a protected basis, then a trial rather than summary dismissal may be necessary. Requiring some fact-intensive inquiries of disparate impact to be tried rather than summarily dismissed is hardly a radical step towards achieving integrated housing.

Third, the disparate treatment standard by itself is an insufficient method of proof to capture the policies and practices used to maintain racial segregation in the United States.²⁹² Although disparate impact challenges are frequently accompanied by disparate treatment claims, plaintiffs in many of the important housing barrier cases discussed in Part I did not prevail on their discriminatory intent claims.²⁹³ Specifically, in *City of Black Jack, Arlington Heights*, and *Huntington*, the plaintiffs prevailed on the FHA disparate impact claim alone, with the appellate court not reaching or ruling against plaintiffs on the disparate treatment claims.²⁹⁴

290. See *supra* note 262 and accompanying text.

291. See *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1294 (7th Cir. 1977) (“[I]f we are to liberally construe the Fair Housing Act, we must decide close cases in favor of integrated housing.”).

292. Of course, if the Court eliminates FHA disparate impact claims, plaintiffs may be able to assert them under state and local laws. See SCHWEMM, *supra* note 12, § 30:2 (“[E]ven if a state or local law’s language mirrors the prohibitions and remedies of the Fair Housing Act, state courts are free to interpret that language more broadly than its federal counterpart.”).

293. See *supra* Part I (discussing early and more recent FHA disparate impact cases involving plaintiffs who attempted to challenge housing barriers using both disparate treatment and disparate impact methods of proof).

294. See *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 937 n.7 (2d Cir.) (“Because we hold that we will no longer require a showing of discriminatory intent in Title VIII disparate impact claims, we do not review Judge Glasser’s findings on intent to discriminate.”), *aff’d per curiam*, 488 U.S. 15 (1988);

To elaborate, community members will frequently express racial animus when acting in support of housing barriers.²⁹⁵ However, their discriminatory purpose will not always be imputed to public sector decision makers.²⁹⁶ As noted by the Fourth Circuit in *Smith v. Town of Clarkton*:²⁹⁷

Municipal officials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority. Even individuals acting from invidious motivations realize the unattractiveness of their prejudices when faced with

United States v. City of Black Jack, 508 F.2d 1179, 1185 n.3 (8th Cir. 1974) (noting, despite support in the record for a finding of intent, that “we do not base our conclusion that the Black Jack ordinance violates Title VIII on a finding that there was an improper purpose”); *Arlington Heights*, 558 F.2d at 1287 (noting that the court had affirmed the district court’s earlier finding that there was no discriminatory purpose behind the Village’s refusal to rezone); cf. *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 144–45 (3d Cir. 1977) (affirming district court finding that the City of Philadelphia was racially motivated in its opposition to a housing project, but not making intent finding with respect to the local housing and redevelopment authorities). The Seventh Circuit in *Arlington Heights* cites *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231 (8th Cir. 1976), as a discriminatory effects case with insufficient intent evidence to support independent relief. *Arlington Heights*, 558 F.2d at 1292. With the benefit of several decades of hindsight, *Smith* reads as a disparate treatment case based on circumstantial evidence and citing discriminatory effects cases for added support. *Smith*, 536 F.2d at 234–36.

295. See *Huntington Branch*, 844 F.2d at 929 (noting that town officials, presumably attempting to placate racial opposition, “repeatedly told whites opposing the . . . project that they would impose a racial quota on occupancy”); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1062 (4th Cir. 1982) (discussing evidence of a constituent statement made off the public record that “he did not want ‘coons either next door or in the town’”); see also *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 257–58 (1977) (“Some of the comments, both from opponents and supporters, addressed what was referred to as the ‘social issue’ . . . of introducing at this location in Arlington Heights low- and moderate-income housing . . . that would probably be racially integrated.”); *City of Black Jack*, 508 F.2d at 1185 n.3 (“Racial criticism of Park View Heights was made and cheered at public meetings.”).

296. Compare *Smith*, 682 F.2d at 1066 (“There can be no doubt that the defendants knew that a significant portion of the public opposition was racially inspired, and their public acts were a direct response to that opposition.”), and *United States v. City of Parma*, 494 F. Supp. 1049, 1083 (N.D. Ohio 1980) (finding that “Parma officials, reacting to racial considerations, departed from their normal practices in determining to reject the . . . building permit application”), with *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 373 F. Supp. 208, 211 (N.D. Ill. 1974) (“[Citizens’] motive[s] may well be opposition to minority or low-income groups, at least in part, but the circumstantial evidence does not warrant the conclusion that this motivated the defendants. They have zoned 60 tracts for the R-5 use and some of it is still vacant and available to plaintiff . . .”). See generally *Arlington Heights*, 558 F.2d at 1292 (“The bigoted comments of a few citizens, even those with power, should not invalidate action which in fact has a legitimate basis.”). For an example of statements made by the public decision maker, rather than community members, see *Resident Advisory Bd.*, 564 F.2d at 136 n.14 (“Mayor Rizzo stated that he considered public housing to be the same as Black housing . . . [and] therefore felt that there should not be any public housing placed in White neighborhoods because people in White neighborhoods did not want Black people moving in with them.”).

297. 682 F.2d 1055 (4th Cir. 1982).

their perpetuation in the public record. It is only in private conversation, with individuals assumed to share their bigotry, that open statements of discrimination are made, so it is rare that these statements can be captured for purposes of proving racial discrimination in a case such as this.²⁹⁸

Fourth, discriminatory purpose is not always the most pertinent or salient area of inquiry when examining housing practices with discriminatory effects. Focusing on the effect of a practice shifts focus away from the hearts and minds of decision makers and instead on the way in which a current practice tends to perpetuate and reinforce old patterns of segregation and exclusion.²⁹⁹ A twenty-first century local government bureaucrat or elected official did not create racial segregation in housing, but he or she can virtually guarantee its perpetuation, with or without discriminatory purpose, by simply engaging in practices that help maintain the residential status quo.³⁰⁰ This could include not only adopting new rules but also enforcing longstanding zoning ordinances that “effectively foreclose the construction of any low-cost housing” in an all-white neighborhood.³⁰¹ Officials also can take advantage of facially neutral rules that “bear no relation to discrimination upon passage, but

298. *Id.* at 1064. The *Smith* court ultimately found the evidence sufficient to sustain liability under either the effects test or one requiring the showing of discriminatory intent. *Id.* at 1067. Of course, discriminatory purpose can be proven by circumstantial evidence of the kind described by the Supreme Court in *Arlington Heights*, such as historical background, the particular sequence of events leading up to the decision, substantive and procedural departures from normal practice, and legislative history. See *Arlington Heights*, 429 U.S. at 266–68; see also *Dews v. Town of Sunnyvale*, 109 F. Supp. 2d 526, 573 (2000) (concluding that the Town of Sunnyvale’s “zoning policies and practices were done with discriminatory intent” under the *Arlington Heights* factors).

299. See John Stick, *Justifying a Discriminatory Effect Under the Fair Housing Act: A Search for the Proper Standard*, 27 UCLA L. REV. 398, 428 (1979) (“[A]ny interpretation of Title VIII that renders it ineffective in combating the large proportion of segregation attributable to practices not intentionally discriminatory, but discriminatory in effect, cannot carry out [Congress’s] legislative intent.”).

300. See *Huntington Branch*, 844 F.2d at 934 (“[A]n intent requirement would strip the statute of all impact on de facto segregation”); *City of Parma*, 494 F. Supp. at 1096 (“These elected officials were opposed to any action which could change the virtually all-white composition of Parma’s neighborhoods.”).

301. *Arlington Heights*, 558 F.2d at 1285, 1292–93 (“If the effect of a zoning scheme is to perpetuate segregated housing, neither common sense nor the rationale of the Fair Housing Act dictates that the preclusion of minorities in advance should be favored over the preclusion of minorities in reaction to a plan which would create integration.” (footnote omitted)); see also *Dews*, 109 F. Supp. 2d at 568 (“There is no question that Sunnyvale’s planning and zoning practices as well as its preclusion of private construction of multifamily and less costly single-family housing perpetuate segregation in a town that is 97 percent white.”); Richard A. Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1347 (“The canonical failure of equal protection analysis, after all, was *Plessy v. Ferguson*’s refusal to understand that a formally neutral action might carry a clear meaning about racial hierarchy.”).

develop into powerful discriminatory mechanisms when applied.”³⁰² The most cursory examination of history undermines the proposition that the government can ever really be “neutral” on segregation. When local governments are not helping to undo segregation, they are almost always helping to keep it in place,³⁰³ with their actions serving as the functional equivalent of intentional discrimination.³⁰⁴

In contrast to the employment context, in which the Court has held that an employer’s structuring of its selection procedures in anticipation of disparate impact liability can constitute intentional discrimination under Title VII,³⁰⁵ a local government’s consideration of its zoning ordinances to ensure that they do not disproportionately exclude certain groups should not implicate what Helen Norton has described as zero-sum notions of equality.³⁰⁶ Inclusive neighborhoods do not “make identifiable third parties worse off in tangible ways.”³⁰⁷

302. *Huntington Branch*, 844 F.2d at 935.

303. *See id.* at 941–42 (noting that the town “demonstrated little good faith in assisting the development of low-income housing” including “a pattern of stalling” such efforts); *City of Parma*, 494 F. Supp. at 1097 (“Every time Parma was confronted with a choice between decisions that would have had an integrative or segregative effect, Parma chose the latter.”); *Dewos*, 109 F. Supp. 2d at 568 (“Instead of sharing its obligation to provide fair housing, Sunnyvale, by hiding behind its exclusive zoning practices, is compelling neighboring communities to assume its obligation.”); *see also infra* notes 314, 316 and accompanying text (rejecting a reading of the Equal Protection Clause that would require governmental actors to accept the status quo of racial segregation in housing).

304. *See supra* notes 29–40 and accompanying text (demonstrating how neutral practices can be as exclusionary as intentional ones, particularly in the context of a neutral zoning regulation as challenged in *City of Black Jack*); *cf. Inclusive Cmty. Project, Inc. v. Tex. Dep’t. of Hous. & Cmty. Affairs*, 860 F. Supp. 2d 312, 323–24 n.19, 331 (N.D. Tex. 2012) (finding that defendant state agency failed to justify disparate impact resulting from its disproportionate denial of tax credits to proposed developments in Caucasian neighborhoods and citing cases discussing disparate impact as functionally equivalent to intentional discrimination).

305. *Ricci v. DeStefano*, 557 U.S. 557, 561–63 (2009). In *Ricci*, the New Haven Fire Department refused to certify certain promotional examinations because of concerns over the validity of the exams, which had a written and oral component, and the disparate impact of the exams on African Americans and Latinos. *Id.* at 562–63. The group who received high scores on the exams claimed that the refusal to use the exams because of disparate impact against certain groups constituted intentional discrimination against other groups, in violation of both equal protection and Title VII. *Id.* The Court ruled only on Title VII grounds, concluding that “race-based action like the City’s in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute. Respondents, we further determine, cannot meet that threshold standard.” *Id.* at 563.

306. *See* Helen Norton, *The Supreme Court’s Post-Racial Turn Towards a Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197, 198 (2010) (arguing against “a zero-sum understanding of equality [which, if applied in the constitutional setting] would treat a government decision maker’s attention to racial and gender hierarchies when choosing among various policy options as inherently suspicious-and thus unconstitutional unless the government’s action survives heightened scrutiny”).

307. *Id.* at 258; *see also* *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (quoting 114 CONG. REC. 2706 (1968) (statement of Sen. Jacob Javits) (referring to

In fact, “[m]ost disparate impact remedies avoid creating such victims.”³⁰⁸ Even in the prototypical housing improvement scenario, assuming it is framed by the purposes of the FHA, the governmental entity would consider how to minimize the racially exclusionary impact of its revitalization efforts. This consideration of prospective impact might result in less displacement and exclusion of the affected group, but not greater exclusion of the non-affected group.³⁰⁹ In this way, *Mount Holly* would be a poor battleground for the “war between disparate impact and equal protection” that Justice Scalia warns “will be waged sooner or later.”³¹⁰ Although there are members of the Court who believe that any decision making based on a policy’s racial outcome “place[s] a racial thumb on the scales” in violation of the Equal Protection Clause,³¹¹ it is difficult to imagine that five Justices would prohibit governmental entities from even considering whether their actions perpetuate residential segregation.³¹² In the analogous setting of school desegregation, Justice Kennedy refused to endorse the view that “the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling.”³¹³ Instead, he regards the notion that “the Constitution mandates that state and local school

“the whole community” as potential victims of discriminatory housing practices).

308. Primus, *supra* note 301, at 1345 (discussing a “visible victims” reading of Ricci that would enable disparate impact doctrine to survive an equal protection challenge if it does not disadvantage determinate and visible innocent third parties).

309. See SCHWEMM & PRATT, *supra* note 1, at 24 n.30 (“The FHA has no comparable provision [to that in Title VII reflecting a concern about quota-like hiring] and, indeed, examples of pro-minority affirmative housing programs have been virtually non-existent throughout the FHA’s history.”).

310. *Ricci*, 557 U.S. at 595–96 (Scalia, J., concurring). Justice Scalia in his concurring opinion in the *Ricci* case warns of the “evil day” when the Court will have to confront whether the disparate impact provisions of Title VII are consistent with the Equal Protection Clause. *Id.* at 594. It was possible, and even likely, that some members of the Court considered *Mount Holly* a good case for framing disparate impact theory in the least desirable way, given its apparent potential to stymie local government efforts to eradicate neighborhood blight. See Primus, *supra* note 301, at 1385–86 and n.190 (discussing the importance of framing and suggesting that the “victory in warfare often goes to the party who succeeds in maneuvering the fight to its chosen ground”). Nevertheless, the equal protection arguments for destroying disparate impact theory seem particularly weak under the FHA.

311. *Ricci*, 557 U.S. at 594 (Scalia, J., concurring). *But see* Primus, *supra* note 301, at 1344 (stating that the “general reading” of Ricci, which would render disparate impact theory unconstitutional per se because it entails race conscious decisionmaking, “is not the only reading available, and it may not be the best one”).

312. See Norton, *supra* note 306, at 212–14 (discussing Justice Kennedy’s unwillingness to embrace “easy solutions” in the context of school desegregation, and his urging that school authorities remain “free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race” (quoting *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788–89 (2007) (Kennedy, J., concurring in part and dissenting in part))).

313. *Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring in part and dissenting in part).

authorities must accept the status quo of racial isolation in schools,” as “profoundly mistaken.”³¹⁴

The disparate impact theory, ironically, can be an important tool for simply getting government out of the way of efforts to end racial segregation in housing. Accordingly, courts have been particularly receptive to disparate impact challenges against government action “which interferes with an individual’s plan to use his own land to provide integrated housing.”³¹⁵ Only a strained reading of the FHA would suggest that Congress intended to permit unjustified governmental interference with its own purpose of opening housing markets and creating more balanced living patterns. An equally strained reading of the Equal Protection Clause would mandate that governmental actors and others accept the status quo of racial isolation in housing.³¹⁶ As recognized in *Arlington*, it is clear that “[c]onduct that has the necessary and foreseeable consequence of perpetuating segregation can be as deleterious as purposefully discriminatory conduct in frustrating the national commitment to replace the ghettos by truly integrated and balanced living patterns.”³¹⁷

314. *Id.* In the school context, Justice Kennedy would not impose strict scrutiny on race conscious mechanisms that “do not lead to different treatment based on a classification that tells each student he or she is to be defined by race.” *Id.* at 789.

315. *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1293 (7th Cir. 1977); *see also* *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 940–41 (2d Cir.) (“In balancing the showing of discriminatory effect against the import of the [defendant’s] justifications, we note our agreement with the Seventh Circuit that the balance should be more readily struck in favor of the plaintiff when it is seeking only to enjoin a municipal defendant from interfering with its own plans rather than attempting to compel the defendant itself to build housing.”), *aff’d per curiam*, 488 U.S. 15 (1988); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982) (noting that the plaintiff did not seek injunctive relief to force the city to build public housing).

316. *See* Barry Goldstein & Patrick O. Patterson, *Ricci v. DeStefano: Does It Herald an “Evil Day,” or Does It Lack “Staying Power”?*, 40 U. MEM. L. REV. 705, 793–94 (2010) (“[E]xamining statutory disparate-impact provisions under the various applicable levels of equal protection review may lead to a bizarre world in which the use of a disparate-impact standard is permissible for groups that receive lower levels of scrutiny under the Equal Protection Clause but not for those that receive the highest level of scrutiny and therefore are in theory entitled to the most protection—those who are discriminated against based on race, national origin, or religion.”).

317. *Arlington Heights*, 558 F.2d at 1289 (internal quotation marks and citations omitted); *see also* *United States v. City of Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974) (“[T]he arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.” (quoting *Hobson v. Hansen*, 269 F. Supp. 401, 497 (D.D.C. 1967))).

CONCLUSION

After forty years of FHA disparate impact jurisprudence, the Supreme Court has decided to review the theory in the exceedingly rare context of summary judgment reversals reinstating plaintiffs' claims. This Article labels these cases, *Magner* and *Mount Holly*, "housing improvement" cases because they involve disparate impact challenges to plans or regulations that purportedly improve housing while displacing persons of color at disproportionate rates. These cases may be contrasted with "housing barrier" cases, which involve challenges to regulations that perpetuate segregation by preventing housing opportunities for minority groups outside of neighborhoods where they already live. Housing barrier cases frequently involve removing barriers to neighborhoods that can provide alternatives to substandard housing,³¹⁸ whereas housing improvement cases frequently involve preventing displacement from housing alleged to be substandard.³¹⁹ Housing barrier cases promote the highest ideals of the FHA, while housing improvement cases meet protected class members where they are—in segregated, substandard housing. Housing barrier cases help protected class members climb the housing ladder to greater opportunity; housing improvement cases help prevent protected class members from being pushed down the ladder or knocked off altogether in the name of improvement. Although disparate impact challenges to housing improvement plans can further the purposes of the FHA on the right facts, prior to *Magner* and *Mount Holly* plaintiffs at the appellate level had only succeeded on this type of claim once in the history of the FHA.

As the quantitative and qualitative analysis of this Article demonstrates, the circuit courts first allowing discriminatory effects to be used as a method of proof in FHA cases considered the theory in the context of housing barrier cases. The courts recognized the broad purpose of the FHA to "replace the ghettos 'by truly integrated and balanced living patterns'"³²⁰ and saw FHA disparate impact challenges to housing barriers as essential to achieving this purpose.

318. See *Town of Clarkton*, 682 F.2d at 1065 (noting, in the context of challenging a housing barrier regulation, that the black population was the "population most in need of new construction to replace substandard housing").

319. See *supra* notes 16–17 and accompanying text (describing that challenges to housing improvement regulations typically stem from the disproportionate impact on minorities displaced by the demolition or rehabilitation of housing units); see also *supra* Part II (reviewing cases involving challenges to housing improvement regulations).

320. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (quoting 114 CONG. REC. 3422 (1968) (statement of Sen. Walter Mondale)).

In the forty years since those earliest housing barrier cases were decided, plaintiffs have struggled to obtain and preserve positive outcomes using the disparate impact theory. Yet, the predominant type of case considering the FHA disparate impact theory at the appellate level remains the housing barrier challenge. And, not surprisingly, housing barrier challenges are the predominant type of case among those positive outcomes achieved by plaintiffs at the appellate level.

The relative success of housing barrier challenges using disparate impact theory might be explained by the close nexus between these claims and the anti-segregation purpose of the FHA. The disparate treatment method of proof will capture only a fraction of housing barriers enacted or enforced in a way that perpetuates segregation. We have fallen short of achieving Congress's integration purpose in enacting the FHA, even with the disparate impact theory.³²¹ It is difficult to imagine how we would fare without it.

321. See *Hispanics United of DuPage Cnty. v. Vill. of Addison*, 988 F. Supp. 1130, 1135 (N.D. Ill. 1997) (“The hallmark of a great society—a true racially and ethnically integrated community—is an elusive goal that unfortunately still has not been achieved in most urban and suburban communities.”).

APPENDIX A: FORTY YEARS OF FHA DISPARATE IMPACT CLAIMS—
REVERSE CHRONOLOGICAL LISTING OF APPELLATE CASES³²²

Case Name	Date	Ruling
Keller v. City of Fremont, 719 F.3d 931 (8th Cir. 2013)	June 28 2013	Reversing summary judgment in favor of plaintiff landlord on disparate impact challenge to ordinance's rental provisions requiring prospective tenants to disclose their immigration status and subjecting landlord to criminal penalties for harboring illegal aliens, based on failure to identify a specific disparate impact sufficient to establish a prima facie case
Steed v. EverHome Mortg. Co., 477 F. App'x 722 (11th Cir. 2012)	July 11, 2012	Affirming summary judgment dismissing disparate impact claim based on failure to establish prima facie case
Cinnamon Hills Youth Crisis Ctr., Inc. v. Saint George City, 685 F.3d 917 (10th Cir. 2012)	July 03, 2012	Affirming summary judgment dismissing disparate impact claim because residential treatment facility challenging zoning ordinance "produced no evidence of disparate impact."
Hopkins v. Springfield Hous. Auth., 485 F. App'x. 137 (7th Cir. 2012)	July 02, 2012	Affirming denial of preliminary injunction on disparate impact claim challenging housing authority policy of inspections and subsidy reductions, based on failure to demonstrate impact
HDC, LLC v. City of Ann Arbor, 675 F.3d 608 (6th Cir. 2012)	Mar. 30, 2012	Affirming dismissal of impact claim because of failure to plead sufficient facts demonstrating that city's cancellation of option agreement had disparate impact against people with disabilities
*Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375 (3d Cir. 2011)	Sept. 13, 2011	Reversing summary judgment and reinstating plaintiffs' disparate impact challenge to a redevelopment plan requiring demolition of affordable homes, finding that plaintiffs established prima facie case of impact on black and Hispanic persons and created fact issue on the existence of less discriminatory alternatives
Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep't of Hous. & Urban Dev., 639 F.3d 1078 (D.C. Cir. 2011)	Apr. 08, 2011	Affirming district court's denial of plaintiffs' first motion for temporary restraining order and preliminary injunction and reversing granting of plaintiffs' second motions for more narrow injunction, finding that data offered to show disparate impact of grant formula in program designed to help homeowners rebuild after hurricanes fell short and could not establish likelihood of success on the merits
R.J. Invs. LLC v. Bd. of Cnty. Comm'rs for Queen Anne's Cnty., 414 F. App'x. 551 (4th Cir. 2011)	Mar. 04, 2011	Affirming judgment after trial entered against developer plaintiff on disparate impact claim challenging county board's refusal to amend its water and sewerage plan to permit development

322. Positive outcomes for plaintiffs are designated with an asterisk.

Case Name	Date	Ruling
Smith v. N.Y.C. Hous. Auth., 410 F. App'x 404 (2d Cir. 2011)	Feb. 18, 2011	Affirming dismissal of complaint for failure to identify facially neutral policy with discriminatory effect against people with disabilities
Estate of Davis v. Wells Fargo Bank, 633 F.3d 529 (7th Cir. 2011)	Jan. 12, 2011	Affirming summary judgment for lack of evidence showing defendant's conduct had a racially based disparate impact on borrowers
*Gallagher v. Magner, 619 F.3d 823 (8th Cir. 2010)	Sept. 01, 2010	Reversing summary judgment and reinstating plaintiff landlords' disparate impact challenge to city's code enforcement scheme for increasing costs and decreasing availability of affordable housing, finding that plaintiffs established prima facie case of racial impact and created fact issue on less discriminatory alternatives
White Oak Property Dev., LLC v. Washington Twp., Ohio, 606 F.3d 842 (6th Cir. 2010)	June 04, 2010	Affirming summary judgment in favor of township on disparate impact claim based on developer's presenting "no evidence" of possible racial impact of prohibition of multi-family dwellings
Quad Enters. Co., LLC v. Town of Southold, 369 F. App'x. 202 (2d Cir 2010)	Mar. 10, 2010	Affirming summary judgment against developer of senior housing for inadequate showing of disparate impact of density and multifamily zoning restrictions on the basis of disability
Ungar v. N.Y.C. Hous. Auth., 363 F. App'x. 53 (2d Cir. 2010)	Jan. 26, 2010	Affirming summary judgment against plaintiffs for lack of showing that public housing authority tenant selection and assignment plan had disparate impact on orthodox Jew
Massbaum v. WNC Mgmt., 361 F. App'x. 904 (9th Cir. 2010)	Jan. 11, 2010	Affirming summary judgment on disparate impact claim based on failure of proof; claim not discernible
Artisan/Am. Corp. v. City of Alvin, 588 F.3d 291 (5th Cir. 2009)	Nov. 13, 2009	Affirming summary judgment based on inadequate showing of discriminatory impact in denial of permit for tax credit housing pursuant to spacing ordinance; most of low income housing units in county located in city of Alvin
*Comm. Concerning Cmty. Improvement v. City of Modesto, 583 F.3d 690 (9th Cir. 2009)	Oct. 8, 2009	Reversing dismissal of FHA disparate impact claim based on summary judgment evidence regarding timely provision of law enforcement personnel; affirming dismissal on provision of sewer services and infrastructure
Bonasera v. City of Norcross, 342 F. App'x. 581 (11th Cir. 2009)	Aug. 21, 2009	Affirming summary judgment dismissing disparate impact claim that selective enforcement of zoning ordinance created disparate impact on Hispanic persons, based on insufficient evidence; claim centered on enforcement and not facially neutral ordinance itself
Green v. Cal. Court Apartments LLC, 321 F. App'x. 589 (9th Cir. 2009)	Apr. 2, 2009	Affirming summary judgment dismissing disparate treatment and disparate impact claims against rental apartments for failure to raise triable issues

Case Name	Date	Ruling
Schwarz v. City of Treasure Island, 544 F.3d 1201 (11th Cir. 2008)	Oct. 8, 2008	Affirming summary judgment dismissing halfway house disparate impact challenge to occupancy turnover rule, based on lack of prima facie evidence
Greengael, LC v. Bd. of Superiors of Culpeper Cnty., 313 F. App'x. 577 (4th Cir. 2008)	Sept. 5, 2008	Affirming grant of summary judgment under FHA for lack of evidence of racially discriminatory effect of zoning change
Khalil v. Farash Corp., 277 F. App'x. 81 (2d Cir. 2008)	May 7, 2008	Affirming summary judgment dismissing disparate impact challenge to lease rule based on familial status for failure to establish prima facie case
Budnick v. Town of Carefree, 518 F.3d 1109 (9th Cir. 2008)	Mar. 11, 2008	Affirming summary judgment dismissing disability-based disparate impact challenge to permitting practices for lack of evidence
Wadley v. Park at Landmark, LP, 264 F. App'x. 279, (4th Cir. 2008)	Feb. 12, 2008	Affirming summary judgment dismissing FHA claim based on lack of evidence of intent and impact regarding enactment of section 8 non-renewal policy
Graoch Assocs. # 33, L.P. v. Louisville/Jefferson Cnty. Metro Human Relations Comm'n, 508 F.3d 366 (6th Cir. 2007)	Nov. 21, 2007	Affirming summary judgment dismissal of disparate impact claim challenging landlord withdrawal from Section 8 program for failure to state prima facie case, after finding that disparate impact applied to such claims
Bonvillian v. Lawler-Wood Hous., LLC, 242 F. App'x. 159 (5th Cir. 2007)	July 13, 2007	Affirming summary judgment dismissing disparate impact claim challenging post-Katrina apartment building closure for failure to show prima facie impact
Reinhart v. Lincoln Cnty, 482 F.3d 1225 (10th Cir. 2007)	Apr. 9, 2007	Affirming summary judgment dismissing disparate impact claim challenging land use regulations for lack of proper prima facie proof
Hallmark Developers, Inc. v. Fulton Cnty., 466 F.3d 1276 (11th Cir. 2006)	Oct. 12, 2006	Affirming judgment following bench trial dismissing disparate impact challenge to refusal to re-zone property for low and moderate income housing; district court had denied summary judgment on the claim
2922 Sherman Ave. Tenants' Ass'n v. District of Columbia, 444 F.3d 673 (D.C. Cir. 2006)	Apr. 14, 2006	Reversing jury verdict favoring tenants on FHA disparate impact claim, and reinstating intent claim, finding evidence insufficient to support claim that initiative targeting buildings in Hispanic neighborhoods for closure disparately affected Hispanic tenants
Affordable Hous. Dev. Corp. v. City of Fresno, 433 F.3d 1182 (9th Cir. 2006)	Jan. 11, 2006	Affirming jury verdict in favor of city on defense to disparate impact claim challenging denial of bond issue for low-income apartment complex; defense to disparate impact defeated jury's other finding of prima facie case of impact
Cnty. Servs. Inc. v. Wind Gap Mun. Auth., 421 F.3d 170 (3d Cir. 2005)	Aug. 31, 2005	Reversing summary judgment in favor of plaintiff service provider for people with disabilities on disparate impact claim based on erroneous determination on disparate treatment claim

Case Name	Date	Ruling
*Charleston Hous. Auth. v. U.S. Dep't of Agric., 419 F.3d 729 (8th Cir. 2005)	Aug. 18, 2005	Affirming trial court ruling in favor of plaintiffs on disparate impact challenge to housing authority revitalization plan calling for demolition of low income rental units, but remanding for reconsideration of injunctive relief ordering re-occupancy of apartments
Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth., 417 F.3d 898 (8th Cir. 2005)	Aug. 8, 2005	After assuming plaintiffs' prima facie case of disparate impact was demonstrated, affirming trial court findings that defendant housing authority justified any disparate impact resulting from public housing redevelopment plan with legitimate objectives and plaintiff failed to demonstrate that alternative plan would meet objectives while reducing disparate impact
*Meyer v. Bear Rd. Assocs., 124 F. App'x. 686 (2d Cir. 2005)	Mar. 7, 2005	Reversing dismissal of disparate impact claim challenging rental pricing policy charging more for groups over four on the basis of familial status
Tsombanidis v. W. Haven Fire Dep't, 352 F.3d 565 (2d Cir. 2003)	Dec. 15, 2003	Reversing bench trial ruling that fire code had disparate impact on people with disabilities, finding that plaintiffs failed to establish prima facie case
Koorn v. Lacey Twp., 78 F. App'x. 199 (3d Cir. 2003)	Oct. 17, 2003	Affirming summary judgment dismissing disparate impact and other claims challenging animal control ordinance for lack of evidence of racial effects
Oti Kaga, Inc. v. S.D. Hous. Dev. Auth., 342 F.3d 871 (8th Cir. 2003)	Sept. 15, 2003	Affirming summary judgment dismissing disparate impact claim challenging state policy of distributing housing funds, based on failure to demonstrate effective alternative policy without discriminatory effects
Hartman v. Greenwich Walk Homeowners' Ass'n Inc., 71 F. App'x. 135 (3d Cir. 2003)	Aug. 4, 2003	Affirming summary judgment dismissing disparate impact challenge to condominium association policy requiring request for variance from association rules, based on lack of evidence
Good Shepherd Manor Found. Inc. v. City of Momence, 323 F.3d 557 (7th Cir. 2003)	Mar. 24, 2003	Affirming refusal to instruct jury on disparate impact because of deficient instruction and theory's inapplicability to particular facts relating to housing for people with disabilities
Fair Hous. in Huntington Comm. Inc. v. Town of Huntington, 316 F.3d 357 (2d Cir. 2003)	Jan. 17, 2003	Affirming denial of preliminary injunction against construction of age-restricted development; town's practice of concentrating family housing in racially segregated areas and age-restricted housing in white areas alleged to have disparate impact and perpetuate segregation
Patel v. City of L.A., 47 F. App'x. 799 (9th Cir. 2002)	Aug. 8, 2002	Affirming dismissal of complaints alleging disparate impact of city's finding that hotels were public nuisances, based on lack of allegations of discriminatory effect

Case Name	Date	Ruling
Omni Behavioral Health v. Miller, 285 F.3d 646 (8th Cir. 2002)	Apr. 2, 2002	Affirming summary judgment dismissing FHA disparate impact claim challenging investigation of child abuse allegations against group home, which resulted in closure of home for predominantly minority and disabled children; concern about child abuse was legitimate justification for investigation
Lapid-Laurel, L.L.C. v. Zoning Bd., 284 F.3d 442 (3d Cir. 2002)	Mar. 15, 2002	Affirming summary judgment dismissing disparate impact challenge to land use regime regarding senior housing for failure to establish prima facie case
Rekhter v. Cent. Park E. Ltd. P'ship, Kauri Invs. Ltd., 31 F. App'x. 506 (9th Cir. 2002)	Mar. 13, 2002	Affirming summary judgment dismissing disparate impact challenge of Section 8 certificate holder to short-term lease policy for lack of evidence
Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown, 294 F.3d 35 (2d Cir. 2002)	Feb. 19, 2002	Affirming summary judgment dismissing disparate impact challenge to denial of special use permit for housing for people with disabilities as inapplicable theory; reversing summary judgment as to intent and retaliation claims
Macone v. Town of Wakefield, 277 F.3d 1 (1st Cir. 2002)	Jan. 10, 2002	Affirming summary judgment dismissing disparate impact challenge to rescinding of support for low income housing project for failure to establish prima facie case
McZeal v. Ocwen Fin. Corp., 252 F.3d 1355 (5th Cir. 2001)	Mar. 28, 2001	Affirming dismissal of complaint for failure to adequately plead FHA disparate impact claim against holder of note secured by home
Hack v. President & Fellows of Yale Coll., 237 F.3d 81 (2d Cir. 2000)	Dec. 28, 2000	Affirming dismissal of complaint alleging disparate impact and other claims based on failure to allege that Yale's on campus housing requirement resulted in underrepresentation of Orthodox Jews in Yale housing, a pleading standard later abrogated by Swierkiewicz v. Sorema, N.A., 534 U.S. 506 (2002)
Veles v. Lindow, 243 F.3d 552 (9th Cir. 2000) (unpublished table decision)	Nov. 1, 2000	Affirming jury verdict dismissing disparate impact claim challenging rental policy requiring at least one adult member to speak fluent English for lack of evidence and failure to object to exclusion of statistical evidence
Fair Hous. Advocates Ass'n, Inc. v. City of Richmond Heights, 209 F.3d 626 (6th Cir. 2000)	Apr. 13, 2000	Affirming judgment following bench trial dismissing disparate impact claim challenging occupancy standards as discriminating against families with children
Langlois v. Abington Hous. Auth., 207 F.3d 43 (1st Cir. 2000)	Mar. 27, 2000	Ruling against plaintiffs on disparate impact claim challenging local residency preferences in distributing section 8 vouchers, but remanding for determination of whether preliminary injunction could be upheld on other grounds

Case Name	Date	Ruling
Catanzaro v. Weiden, 188 F.3d 56 (2d Cir. 1999)	July 28, 1999	On rehearing, affirming summary judgment dismissing disparate impact claim challenging demolition of two buildings for failure to demonstrate discriminatory effect of overall city housing policies
Jersey Heights Neighborhood Ass'n v. Glendening, 174 F.3d 180 (4th Cir. 1999)	Apr. 5, 1999	Affirming dismissal of fair housing claims challenging highway site-selection process
Caractor v. Town of Hempstead, 159 F.3d 1345 (2d Cir. 1998) (unpublished table decision)	June 11, 1998	Affirming summary judgment dismissing disparate impact claim challenging rental rates set for section 8 program landlords as racially discriminatory
Barklage v. City of San Bernadino, 142 F.3d 442 (9th Cir. 1998) (unpublished table decision)	Apr. 16, 1998	Affirming summary judgment on disparate impact claim challenging zoning ordinance and action on application for an amendment and conditional use permit to operate residential facility for recovering addicts, based on lack of evidence
Salute v. Stratford Greens Garden Apartments, 136 F.3d 293 (2d Cir. 1998)	Feb. 5, 1998	Affirming summary judgment dismissal of disability-based disparate impact claim challenging landlord's refusal to accept section 8 program participants because non-participation was legitimate reason to refuse tenants
*Gilligan v. Jamco Dev. Corp., 108 F.3d 246 (9th Cir. 1997)	Mar. 5, 1997	Reversing dismissal of disparate treatment and disparate impact claims for failure to plead prima facie case; pleading of financial qualification not necessary for disparate impact challenge to policy refusing rental to AFDC recipients
Gamble v. City of Escondido, 104 F.3d 300 (9th Cir. 1997)	Jan. 10, 1997	Affirming summary judgment dismissing disparate impact claim challenging denial of conditional use permit to construct housing for physically disabled, elderly adults, based on inadequate impact evidence
Williams v. 5300 Columbia Pike Corp., 103 F.3d 122 (4th Cir. 2006) (unpublished table decision)	Dec. 3, 1996	(Affirming summary judgment against disparate impact challenge to condominium conversion plan; refusing to apply disparate impact when alleged injury is solely product of facially neutral price
Pfaff v. U.S. Dep't of Hous. & Urban Dev., 88 F.3d 739 (9th Cir. 1996)	July 2, 1996	Reversing HUD ALJ finding of disparate impact of neutral occupancy restriction against families with children; compelling business standard arbitrary as applied given less stringent reasonableness standard previously applied to reasonable occupancy cases

Case Name	Date	Ruling
Ng v. Quiet Forest II Homeowners Ass'n, 87 F.3d 1321 (9th Cir. 1996) (unpublished table decision)	June 19, 1996	Affirming summary judgment dismissing challenge to condominium rules requiring participation of unit owners and prohibiting rental of units for two years, based on lack of evidence of discriminatory purpose or impact on a statutorily protected class
Simms v. First Gibraltar Bank, 83 F.3d 1546 (5th Cir. 1996)	May 31, 1996	Reversing jury finding of disparate impact of bank's refusal to issue a commitment letter based on predicted race of cooperative housing owners, because disparate impact claim cannot be based on "single act or decision"
Carlson v. U.S. Dep't of Hous. & Urban Dev., 81 F.3d 165 (8th Cir. 1996) (unpublished table decision)	Apr. 5, 1996	Reversing HUD ALJ finding of disparate impact of neutral occupancy restriction of three persons per unit against families with children; record did not support the existence of such a restriction)
Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev., 56 F.3d 1243 (10th Cir. 1995)	May 30, 1995	Reversing HUD Secretary decision finding three-person occupancy limit in mobile home park as having disparate impact, based on adequate showing of business necessity
Knapp v. Eagle Prop. Mgmt. Corp., 54 F.3d 1272 (7th Cir. 1995)	May 17, 1995	Affirming jury verdict against plaintiff on fair housing disparate impact claim and trial court's exclusion of expert witness, based on refusal to apply disparate impact to non-acceptance of section 8 housing vouchers
Armendariz v. Penman, 31 F.3d 860 (9th Cir. 1994)	Aug. 1, 1994	Reversing denial of summary judgment (where qualified immunity defense was raised) and dismissing FHA claim challenging closure of low income housing units in series of code enforcement sweeps as having disparate impact on minorities; no proper showing of impact made, nor showing of discriminatory intent
*Jackson v. Okaloosa Cnty., Fla., 21 F.3d 1531 (11th Cir. 1994)	June 8, 1994	Reversing dismissal of complaint alleging policy governing site approval had effect of excluding African American public housing residents from unincorporated area of county and perpetuated segregation
Orange Lake Assocs. Inc. v. Kirkpatrick, 21 F.3d 1214 (2d Cir. 1994)	Apr. 14, 1994	Affirming summary judgment on FHA disparate impact challenge to zoning change from 12 units per acre [R-3] to 2 units per acre [R-2] based on insufficient allegations and proof
Boodram v. Md. Farms Condo., 16 F.3d 408 (4th Cir. 1994)	Feb. 1, 1994	Affirming summary judgment on religion-based disparate impact challenge to condominium association rule prohibiting balcony storage for insufficient evidence; no showing that religious articles could not be stored inside or that rule bore more harshly on plaintiff's Hindu religion

Case Name	Date	Ruling
*U.S. v. Badgett, 976 F.2d 1176 (8th Cir. 1992)	Oct. 9, 1992	Reversing district court ruling against plaintiff after trial dismissing FHA challenge to neutral one-person occupancy limit, finding that disparate impact against families with children not justified
S.-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors, 935 F.2d 868 (7th Cir. 1991)	June 19, 1991	Affirming bench trial decision against realtors who brought FHA challenge to certain anti-solicitation ordinances as having a disparate impact on black home seekers and remanding fair housing challenge to "for sale" sign ban
Familystyle of St. Paul, Inc. v. City of St. Paul, 923 F.2d 91 (8th Cir. 1991)	Jan. 8, 1991	Affirming summary judgment dismissal of disparate impact challenge to state law and zoning code requiring dispersal of group homes for people with mental disabilities as justified by legitimate goal of deinstitutionalization
Funk v. Loyalty Enters. Ltd., 921 F.2d 279 (9th Cir. 1990) (unpublished table decision)	Dec. 28, 1990	Affirming summary judgment dismissing white applicant's disparate impact challenge to first come, first served policy for lack of sufficient evidence of racially discriminatory effect
Vill. of Bellwood v. Dwivedi, 895 F.2d 1521 (7th Cir. 1990)	Jan. 30, 1990	Reversing jury verdict for plaintiff based on discriminatory effect instruction, finding the disparate impact method inapplicable to racial steering cases
*Doe v. City of Butler, 892 F.2d 315 (3d Cir. 1989)	Dec. 29, 1989	Affirming summary judgment dismissing disparate impact challenge by those seeking shelter for domestic violence to ordinance limiting number of occupants in transitional dwellings, based on failure to establish impact on women, but remanding for consideration of impact on familial status
Edwards v. Johnston Cnty. Health Dep't, 885 F.2d 1215 (4th Cir. 1989)	Sept. 20, 1989	Affirming dismissal of claim challenging permitting of substandard migrant farmworker housing for failure to plead racially discriminatory effect
Nickell v. Montgomery Cnty, 878 F.2d 379 (4th Cir. 1989) (unpublished table decision)	June 20, 1989	Affirming summary judgment dismissing disparate impact challenge to zoning ordinance eliminating "noncomplying" multifamily uses and reverting to single family zones, based on failure to demonstrate racially disparate impact on existing renters
Gomez v. Chody, 867 F.2d 395 (7th Cir. 1989)	Jan. 31, 1989	Affirming summary judgment dismissing disparate impact challenge to rehabilitation of apartments declared public nuisance resulting in displacement of tenants who were 95% Hispanic and 60% of Hispanic population in area; building would be rehabilitated and at least 51% of the apartments occupied by low or moderate income persons

Case Name	Date	Ruling
*Keith v. Volpe, 858 F.2d 467 (9th Cir. 1988)	Sept. 19, 1988	Affirming bench trial decision enjoining refusal to permit construction of two housing projects for people displaced by freeway construction, based on disparate impact of refusal and inadequate justifications
*Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926 (2d Cir. 1988)	Apr. 5, 1988	Reversing bench trial decision against plaintiffs on disparate impact claim, finding that refusal to amend ordinance and rezone site to allow multifamily housing to be constructed outside of a racially segregated urban renewal area had a substantial adverse impact on minorities and perpetuated segregation in violation of the FHA
Burrell v. City of Kankakee, 815 F.2d 1127 (7th Cir. 1987)	Apr. 6, 1987	Affirming judgment after trial dismissing FHA disparate impact challenge to delay in processing section 8 Housing Assistance Payment contracts, based on lack of evidence of discriminatory effect on availability of housing to minorities and evidence of concern about undue concentration of assisted housing in first ward
Hanson v. Veterans Admin., 800 F.2d 1381 (5th Cir. 1986)	Sept. 29, 1986	Affirming district court ruling against plaintiff after trial on disparate impact challenge to VA appraisal practices, finding that trial court was entitled to find evidence insufficient to establish racially based negative impact on home values in racially mixed neighborhood
Latinos Unidos De Chelsea En Accion v. Sec'y of Hous. & Urban Dev., 799 F.2d 774 (1st Cir. 1986)	Aug. 12, 1986	Affirming bench trial ruling against plaintiffs on disparate impact challenge to city's funding of housing improvement program for focus on homeownership, based on failure to establish prima case of impact
Arthur v. City of Toledo, 782 F.2d 565 (6th Cir. 1986)	Jan. 24, 1986	Affirming bench trial decision against plaintiffs on disparate impact challenge to referenda repealing ordinances granting authority to construct sewer extensions to two proposed public housing sites, where comparable housing in white neighborhoods eventually built
Southend Neighborhood Imp. Ass'n v. St. Clair Cnty., 743 F.2d 1207 (7th Cir. 1984)	Sept. 17, 1984	Dismissing FHA disparate impact claim after district court stayed for lack of jurisdiction, finding that county's alleged failure to maintain tax delinquent properties in black neighborhoods not shown to violate FHA based on damage to neighboring properties

Case Name	Date	Ruling
*Betsey v. Turtle Creek Assocs. 736 F.2d 983 (4th Cir. 1984)	June 18, 1984	Reversing bench trial decision against plaintiffs on disparate impact claim challenging building-wide evictions pursuant to new all-adult rental policy, finding that plaintiffs established prima facie case based on evidence that 54.3% of nonwhite tenants received eviction notices, as opposed to 14.1% of white tenants
*Smith v. Town of Clarkton, 682 F.2d 1055 (4th Cir. 1982)	June 29, 1982	Affirming bench trial decision finding FHA disparate impact liability based on town's withdrawal from multi-municipality housing authority, effectively blocking construction of 50 units of public housing
*Halet v. Wend Inv. Co., 672 F.2d 1305 (9th Cir. 1982)	Jan. 25, 1982	Reversing dismissal of FHA race-based disparate impact challenge to an adults-only rental policy at pleading stage, finding allegations sufficient to state a claim
*United States v. City of Parma, 661 F.2d 562 (6th Cir. 1981)	Oct. 14, 1981	Affirming bench trial decision finding four land use ordinances to have discriminatory effect in violation of FHA and constituting part of a number of acts having "the purpose and effect of maintaining Parma as a segregated community"
*Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977)	Aug. 31, 1977	Affirming bench trial decision finding disparate impact of local government entities' urban renewal activities in removing black families from the urban renewal area, leaving the area as an all-white community, and terminating the planned public housing project thereafter; although the court did not adopt the district court's "compelling interest" formulation for determining defendants' burden of justification, defendants offered no justification to overcome plaintiffs' prima facie case
*Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977)	July 7, 1977	On remand from Supreme Court, holding FHA violation could be found where refusal to rezone property to permit construction of federally financed low-cost housing had discriminatory effect and perpetuated segregation in the "almost totally white" village of Arlington Heights; remanding to district court to determine FHA violation
*United States v. City of Black Jack, Mo., 508 F.2d 1179 (8th Cir. 1974)	Dec. 27, 1974	Reversing district court finding of no discriminatory effect, finding FHA violation because of discriminatory effect of zoning ordinance prohibiting construction of any new multi-family housing and excluding proposed low-income integrated townhouse development in virtually all-white community

APPENDIX B: FORTY YEARS OF FHA DISPARATE IMPACT CLAIMS—
LISTING OF APPELLATE CASES BY CASE TYPE³²³

Housing Barrier

- R.J. Invs., L.L.C. v. Bd. of Cnty. Com'rs For Queen Anne's Cnty., 414 F. App'x. 551, (4th Cir. 2011)
- White Oak Prop. Dev., LLC v. Washington Twp., 606 F.3d (6th Cir. 2010)
- Artisan/American Corp. v. City of Alvin, 588 F.3d 291, (5th Cir. 2009)
- Greengael, LC v. Bd. of Superiors of Culpeper Cnty., 313 F. App'x. 577, (4th Cir. 2008)
- Reinhart v. Lincoln Cnty, 482 F.3d 1225 (10th Cir. 2007)
- Hallmark Developers, Inc. v. Fulton Cnty., 466 F.3d 1276 (11th Cir. 2006)
- Affordable Hous. Dev. Corp. v. City of Fresno, 433 F.3d 1182 (9th Cir. 2006)
- Macone v. Town of Wakefield, 277 F.3d 1 (1st Cir. 2002)
- *Jackson v. Okaloosa Cnty., 21 F.3d 1531 (11th Cir. 1994)
- Orange Lake Assocs., Inc. v. Kirkpatrick, 21 F.3d 1214 (2d Cir. 1994)
- *Keith v. Volpe, 858 F.2d 467 (9th Cir. 1988)
- *Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926 (2d Cir. 1988)
- Burrell v. City of Kankakee, 815 F.2d 1127 (7th Cir. 1987)
- Arthur v. City of Toledo, 782 F.2d 565 (6th Cir. 1986)
- *Smith v. Town of Clarkton, 682 F.2d 1055 (4th Cir. 1982)
- *United States v. City of Parma, 661 F.2d 562 (6th Cir. 1981)
- *Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977)
- *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977)
- *United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974)

Housing Improvement

- *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375 (3d Cir. 2011)
- *Gallagher v. Magner, 619 F.3d 823 (8th Cir. 2010)
- Bonasera v. City of Norcross, 342 F. App'x. 581 (11th Cir. 2009)
- Bonvillian v. Lawler-Wood Hous., LLC, 242 F. App'x. 159 (5th Cir. 2007)

323. Positive outcomes for plaintiffs are designated with an asterisk.

- 2922 Sherman Ave. Tenants' Ass'n v. District of Columbia, 444 F.3d 673 (D.C. Cir. 2006)
- *Charleston Hous. Auth. v. U.S. Dep't of Agric., 419 F.3d 729 (8th Cir. 2005)
- Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth., 417 F.3d 898 (8th Cir. 2005)
- Koorn v. Lacey Twp., 78 F. App'x. 199 (3d Cir. 2003)
- Patel v. City of L.A., 47 F. App'x. 799 (9th Cir. 2002)
- Catanzaro v. Weiden, 188 F.3d 56 (2d Cir. 1999)
- Armendariz v. Penman, 31 F.3d 860 (9th Cir. 1994)
- Nickell v. Montgomery Cnty., 878 F.2d 379 (4th Cir. 1989) (unpublished table decision)
- Gomez v. Chody, 867 F.2d 395 (7th Cir. 1989)
- Omni Behavioral Health v. Miller, 285 F.3d 646 (8th Cir. 2002)

People with Disabilities

- Cinnamon Hills Youth Crisis Center, Inc. v. Saint George City, 685 F.3d 917 (10th Cir. 2012)
- HDC, LLC v. City of Ann Arbor, 675 F.3d 608 (6th Cir. 2012)
- Quad Enters. Co., LLC v. Town of Southold, 369 F. App'x. 202 (2d Cir. 2010)
- Schwarz v. City of Treasure Island, 544 F.3d 1201 (11th Cir. 2008)
- Budnick v. Town of Carefree, 518 F.3d 1109 (9th Cir. 2008)
- Cmty. Servs., Inc. v. Wind Gap Mun. Auth., 421 F.3d 170 (3d Cir. 2005)
- Tsombanidis v. W. Haven Fire Dep't, 352 F.3d 565 (2d Cir. 2003)
- Good Shepherd Manor Found., Inc. v. City of Momence, 323 F.3d 557 (7th Cir. 2003)
- Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment, 284 F.3d 442 (3d Cir. 2002)
- Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown, 294 F.3d 35 (2d Cir. 2002)
- Barklage v. City of San Bernadino, 142 F.3d 442 (9th Cir. 1998) (unpublished table decision)
- Salute v. Stratford Greens Garden Apartments, 136 F.3d 293 (2d Cir. 1998)
- Gamble v. City of Escondido, 104 F.3d 300 (9th Cir. 1997)
- Familystyle of St. Paul, Inc. v. City of St. Paul, Minn., 923 F.2d 91 (8th Cir. 1991)

Rental Policies

- Keller v. City of Fremont, 719 F.3d 931 (8th Cir. 2013)

- Green v. Cal. Court Apartments LLC, 321 F. App'x. 589 (9th Cir. 2009)
- Wadley v. Park at Landmark, LP, 264 F. App'x. 279 (4th Cir. 2008)
- Graoch Assocs. # 33, L.P. v. Louisville/Jefferson Cnty. Metro Human Relations Comm'n, 508 F.3d 366 (6th Cir. 2007)
- Rekhter v. Cent. Park E. Ltd. P'ship, 31 F. App'x. 506 (9th Cir. 2002)
- Hack v. President & Fellows of Yale Coll., 237 F.3d 81 (2d Cir. 2000)
- Veles v. Lindow, 243 F.3d 552 (9th Cir. 2000) (unpublished table decision)
- *Gilligan v. Jamco Dev. Corp., 108 F.3d 246 (9th Cir. 1997)
- Knapp v. Eagle Prop. Mgmt. Corp., 54 F.3d 1272 (7th Cir. 1995)
- Funk v. Loyalty Enters., Ltd., 921 F.2d 279 (9th Cir. 1990) (unpublished table decision)

Familial Status

- Khalil v. Farash Corp., 277 F. App'x. 81 (2d Cir. 2008)
- *Meyer v. Bear Rd. Assocs., 124 F. App'x. 686 (2d Cir. 2005)
- Fair Hous. Advocates Ass'n, Inc. v. City of Richmond Heights, 209 F.3d 626 (6th Cir. 2000)
- Pfaff v. U.S. Dep't of Hous. & Urban Dev., 88 F.3d 739 (9th Cir. 1996)
- Carlson v. U.S. Dep't of Hous. & Urban Dev., 81 F.3d 165 (8th Cir. 1996)
- Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev., 56 F.3d 1243 (10th Cir. 1995)
- *United States v. Badgett, 976 F.2d 1176 (8th Cir. 1992)
- *Doe v. City of Butler, 892 F.2d 315 (3d Cir. 1989)
- *Betsey v. Turtle Creek Assocs., 736 F.2d 983 (4th Cir. 1984)
- *Halet v. Wend Inv. Co., 672 F.2d 1305 (9th Cir. 1982)

Lending/Appraisal

- Steed v. EverHome Mortg. Co., 477 F. App'x. 722 (11th Cir. 2012)
- Estate of Davis v. Wells Fargo Bank, 633 F.3d 529 (7th Cir. 2011)
- Steed v. EverHome Mortg. Co., 308 F. App'x. 364 (11th Cir. 2009)
- McZeal v. Ocwen Fin. Corp., 252 F.3d 1355 (5th Cir. 2001)
- Simms v. First Gibraltar Bank, 83 F.3d 1546 (5th Cir. 1996)
- Hanson v. Veterans Admin., 800 F.2d 1381 (5th Cir. 1986)

Housing Authority

- Hopkins v. Springfield Hous. Auth., 485 F. App'x. 137 (7th Cir. 2012)
- Smith v. N.Y.C. Hous. Auth., 410 F. App'x. 404 (2d Cir. 2011)
- Ungar v. N.Y.C. Hous. Auth., 363 F. App'x. 53 (2d Cir. 2010)

- *Langlois v. Abington Hous. Auth.*, 207 F.3d 43 (1st Cir. 2000)
- *Caractor v. Town of Hempstead*, 159 F.3d 1345 (2d Cir. 1998) (unpublished table decision)

Condominium Policies

- *Hartman v. Greenwich Walk Homeowners' Ass'n, Inc.*, 71 F. App'x. 135 (3d Cir. 2003)
- *Williams v. 5300 Columbia Pike Corp.*, 103 F.3d 122 (4th Cir. 1996) (unpublished table decision)
- *Ng v. Quiet Forest II Homeowners Ass'n*, 87 F.3d 1321 (8th Cir. 1996) (unpublished table decision)
- *Boodram v. Md. Farms Condo.*, 16 F.3d 408 (4th Cir. 1994) (unpublished table decision)

Municipal Services

- **The Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690 (9th Cir. 2009)
- *Edwards v. Johnston Cnty. Health Dep't*, 885 F.2d 1215 (4th Cir. 1989)
- *Southend Neighborhood Imp. Ass'n v. St. Clair Cnty.*, 743 F.2d 1207 (7th Cir. 1984)

Other

- *Greater New Orleans Fair Hous. Action Center v. U.S. Dep't of Hous. & Urban Dev.*, 639 F.3d 1078 (D.C. Cir. 2011)
- *Massbaum v. WNC Mgmt.*, 361 F. App'x. 904 (9th Cir. 2010)
- *Oti Kaga, Inc. v. S.D. Hous. Dev. Auth.*, 342 F.3d 871 (8th Cir. 2003)
- *Fair Hous. in Huntington Comm. Inc. v. Town of Huntington*, 316 F.3d 357 (2d Cir. 2003)
- *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180 (4th Cir. 1999)
- *S-Suburban Hous. Center v. Greater S. Suburban Bd. of Realtors*, 935 F.2d 868 (7th Cir. 1991)
- *Vill. of Bellwood v. Dwivedi*, 895 F.2d 1521 (7th Cir. 1990)
- *Latinos Unidos De Chelsea En Accion v. Sec'y of Hous. & Urban Dev.*, 799 F.2d 774 (1st Cir. 1986)