The Fair Housing Act After *Inclusive Communities*: Why One-Time Land-Use Decisions Can Still Establish a Disparate Impact

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The Fair Housing Act (FHA) is a civil rights statute that prohibits housing discrimination against several protected classes. One theory of liability under the FHA is disparate impact, in which a plaintiff alleges that the defendant's policy or practice, although facially neutral, nevertheless has discriminatory effects because it disproportionately negatively affects a protected class. In its 2015 opinion, Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, the Supreme Court affirmed that the FHA includes disparate impact liability but also potentially limited its applicability—the Court distinguished between a defendant's policy and a one-time decision by a defendant, hinting that the latter might not be able to substantiate a disparate impact claim.*

This Comment argues that such a distinction is unfounded. One-time land-use decisions should not be categorically excluded from disparate impact liability under the FHA for three reasons. First, one-time employment decisions may serve as the basis for disparate impact liability under two analogous civil rights statutes—Title VII and the Age Discrimination in Employment Act—indicating that the same is true for one-time land-use decisions under the FHA. Second, the distinction between a policy and a one-time decision is untenable and provides little guidance for courts. Third, seminal appellate court cases which first established disparate impact liability under the FHA involved one-time land-use decisions, indicating that such decisions constitute the heartland of disparate impact theory.

The Comment concludes by providing further clarity about which particular one-time land-use decisions should enable litigants to establish successful disparate impact claims. It argues that claims based on zoning decisions and closures of residential buildings should be per se permitted, but that other claims may be less successful or altogether excluded. Ultimately, absent the inclusion of one-time land-use decisions as a basis for disparate impact liability, the FHA will lose much of its power as a tool to combat residential discrimination, segregation, and inequality in the land-use context.

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INTRODUCTION

Consider a residential building—say, an apartment complex or a homeless shelter—that has some sort of problem: it has physically deteriorated, or there is frequent crime on the premises. For these reasons, the city uses its powers—through the application of housing code violations or the exercise of eminent domain[1]—to close the building and evict the residents. But the residents do not want their building to be torn down. Maybe they have lived in the building, or the neighborhood, their entire lives. Perhaps it is inconvenient and costly to find another place to live. Absent that building, they might be completely priced out of the community. The residents may wish "to be able to remain in [their building] and participate in the revitalization of their community if they so choose, rather than being uprooted from the homes they have lived in for many years, separated from their neighbors, friends and families."[2] For many reasons, the residents do not agree with the city's decision.

Most importantly, the people who live in this residential building are overwhelmingly members of a class that is protected by federal civil rights legislation. In fact, a large proportion of people of color in the community will be impacted by the building's closure, as compared to a very small proportion of the community's white residents. The building's residents want to use the protection of the Fair Housing Act[3] (FHA) to prevent the closure of their building, alleging that it would have a disparate impact on residents of a certain race.[4] Maybe the residents will not win their case—after all, they might not be able to prove that there is a prima facie case of discrimination if their statistical proof is weak,[5] or maybe the city can successfully invoke the defense that

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1 Municipalities can exercise eminent domain powers delegated to them by the state. *See* EUGENE MCQUILLIN, *Authority of Legislature to Delegate to Municipalities Power to Condemn*, *in* 11 THE LAW OF MUNICIPAL CORPORATIONS § 32:15 (3d ed. 1950).

2 Adam Liptak, *Fair-Housing Case Is Settled Before It Reaches Supreme Court*, N.Y. TIMES (Nov. 13, 2013), https://www.nytimes.com/2013/11/14/us/fair-housing-case-is-settled-before-it-reaches-supreme-court.html.

3 Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601–3619).

4 This example closely mirrors several FHA cases litigated in federal courts in recent years, including *Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly*, 658 F.3d 375 (3d Cir. 2011), and *City of Joliet v. New W., L.P.*, 825 F.3d 827 (7th Cir. 2016).

5 *See, e.g.*, Artisan/Am. Corp. v. City of Alvin, 588 F.3d 291, 298–99 (5th Cir. 2009) (affirming summary judgment for the defendant because the plaintiff failed to provide

it has a legitimate reason for closing the building that cannot be achieved any other way.[6]

But before they can even make their case, and the district court can consider these issues, the residents' claim is summarily rejected because it challenges a one-time land-use decision, not a formal policy of the city.[7] As a result, unless the residents can demonstrate that the city had racially discriminatory intent in demolishing their building—something they are unlikely to prove[8]—they will be displaced with no legal recourse under the FHA. Accordingly, this Comment evaluates whether disparate impact claims should be shut down merely because they challenge a single decision, rather than a policy.

If the distinction between policies and one-time decisions is upheld by courts, other land-use decisions could face the same fate. For instance, local zoning boards make one-off zoning decisions all the time that are facially neutral but, in reality, exclude and disproportionately impact people of color.[9] Major land-use decisions about public infrastructure, such as where to build major highways, have often disproportionately impacted communities of color, displacing them from their homes.[10] And much of

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evidence that the denial of a permit to build affordable housing had a disparate impact on people of color, "rest[ing] entirely on conclusory analytics of highly-generalized data").

6 *See, e.g.*, Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth., 417 F.3d 898, 903–06 (8th Cir. 2005) (finding in favor of the defendant, the St. Louis Housing Authority, because its redevelopment of a public housing complex had legitimate and nondiscriminatory justifications, including "reducing the concentration of low-income housing and developing sustainable, mixed income communities").

7 In disparate impact litigation under the FHA, the district court usually rules against the plaintiff at the summary judgment stage. *See* Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM. U. L. REV. 357, 422–31 app. A (2013) (collecting cases, most of which were decided at the summary judgment stage). But some cases are dismissed earlier. *See, e.g.*, Khan v. City of Minneapolis, 2018 WL 948796, at *5 (D. Minn. Feb. 20, 2018), *aff'd*, 922 F.3d 872 (8th Cir. 2019) (granting the defendant's motion for judgment on the pleadings). Even if a case reaches final judgment, the court could reject the plaintiff's disparate impact claim because it is based upon a one-time decision before considering the rest of the plaintiff's claims.

8 Seicshnaydre, *supra* note 7, at 415 (2013) ("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." (quoting Smith v. Town of Clarkton, 682 F.2d 1055, 1064 (4th Cir. 1982))).

9 *See generally* James C. Clingermayer, *Heresthetics and Happenstance: Intentional and Unintentional Exclusionary Impacts of the Zoning Decision-Making Process*, 41 URB. STUDS. 377 (2004) (describing how procedures and rhetoric disguise the exclusionary nature of many zoning decisions).

10 *See, e.g.*, RAYMOND A. MOHL, THE INTERSTATES AND THE CITIES: HIGHWAYS, HOUSING, AND THE FREEWAY REVOLT 21–27 (2002). For instance, one study "found that

the country's persistent racial residential segregation[11] can be traced to single decisions by housing authorities to build public housing in low-income communities of color.[12] If disparate impact claims based upon each of these one-time decisions are precluded, individuals who are negatively impacted will be left powerless—and the FHA toothless—against many of the prevailing practices used to perpetuate housing inequality today.

The FHA makes it unlawful "[t]o refuse 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, color, religion, sex, familial status, or national origin."[13] Although the FHA was initially used to sue those who had engaged in intentional discrimination in housing, circuit court interpretations broadened the scope of this section of the statute to include disparate impact claims.[14] A plaintiff claiming disparate impact liability alleges that a government or private entity's policy or practice, although facially neutral, has discriminatory effects; in other words, it disproportionately negatively impacts a protected class.[15] In its 2015 *Texas Department of*

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minorities made up 85 percent of the families displaced by the North-South Freeway" in Camden, New Jersey. *Id.* at 24.

[11] JOHN R. LOGAN & BRIAN J. STULTS, METROPOLITAN SEGREGATION: NO BREAKTHROUGH IN SIGHT 2 (2021).

[12] KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 224–26 (1987). For a specific example, see the *Gautreaux* litigation, in which the Seventh Circuit found that the Chicago Housing Authority, along with the Department of Housing and Urban Development (HUD), had unconstitutionally perpetuated racial inequality by siting public housing in historically Black neighborhoods. Gautreaux v. Romney, 448 F.2d 731, 739–41 (7th Cir. 1971).

[13] 42 U.S.C. § 3604(a). Although other sections of the FHA further specify particular practices that are prohibited, see 42 U.S.C. §§ 3604–3606, 3617, this is the primary section upon which disparate impact liability is based.

[14] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,461, 11,462 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100) ("[A]ll federal courts of appeals to have addressed the question agree that liability under the Act may be established based on a showing that a neutral policy or practice has a discriminatory effect even if such a policy or practice was not adopted for a discriminatory purpose.").

[15] Disparate impact claims have been used to challenge a variety of practices. *See, e.g.*, Reyes v. Waples Mobile Home Park Ltd. P'ship, 903 F.3d 415, 419–21 (4th Cir. 2018) (landlord policy requiring tenants to provide documentation of U.S. citizenship); Sw. Fair Hous. Council, Inc. v. Maricopa Domestic Water Improvement Dist., 17 F.4th 950, 955–56 (9th Cir. 2021) (utility's practice of charging public housing tenants larger security deposits before they could receive water services); Keith v. Volpe, 858 F.2d 467, 484 (9th Cir. 1988) (municipal decision that prevented construction of housing to benefit people of color).

Housing and Community Affairs v. Inclusive Communities Project, Inc.[16] decision, the Supreme Court officially recognized disparate impact claims under the FHA.[17]

Although the Supreme Court recognized disparate impact liability, it also potentially limited its applicability by hinting that claims based upon one-time decisions may be excluded. Specifically, the Court stated that "a plaintiff challenging the decision of a private developer to construct a new building in one location rather than another will not easily be able to show this is a policy causing a disparate impact because such a one-time decision may not be a policy at all."[18] This statement—which was not based in the text of the FHA—was only dicta. Thus, it remains unclear whether a one-time land-use decision can substantiate a disparate impact claim under the FHA—or, alternatively, if some types of single decisions might be able to establish disparate impact claims and others not. Subsequent circuit court decisions have adopted the distinction between policies and one-time decisions to varying degrees, with two appellate courts rejecting disparate impact claims based on one-time land-use decisions[19] and another declining to endorse the distinction.[20]

Resolution of whether one-time land-use decisions can give rise to disparate impact claims has important implications for the use of the FHA as a tool to combat discrimination in housing. Most obviously, whether a one-time land-use decision can serve as the basis for a disparate impact claim affects the scope—and therefore, the number—of disparate impact claims that can potentially succeed under the FHA. If a single land-use decision cannot form the basis of disparate impact liability, many potentially meritorious fair housing claims will be foreclosed.

If plaintiffs cannot challenge one-time land-use decisions under a theory of disparate impact, they will have little opportunity

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16 576 U.S. 519 (2015).

17 *Id.* at 546.

18 *Id.* at 543.

19 *New West*, 825 F.3d at 830 (rejecting a disparate impact claim based upon a city's use of eminent domain to condemn a housing complex primarily housing residents of color); Ellis v. City of Minneapolis, 860 F.3d 1106, 1112–13 (8th Cir. 2017) (rejecting a disparate impact claim based upon the city's application of its housing code to close individual properties primarily occupied by tenants of color).

20 Mhany Mgmt., Inc. v. County of Nassau, 819 F.3d 581, 619 (2d Cir. 2016) ("We decline Defendants' invitation to draw a line defining what constitutes a 'one-off' zoning 'decision' as opposed to a zoning 'policy.'").

to bring another FHA claim. There are two other relevant theories of liability under the FHA. First, there is disparate treatment, where the plaintiff alleges that the defendant intentionally discriminated against them because of the plaintiff's membership in a protected class.[21] Second, there is segregative effect, where the plaintiff alleges that the defendant's practices, rather than disproportionately affecting a protected class, cause "harm to the *community generally* by creating, increasing, reinforcing, or perpetuating segregated housing patterns."[22] Intentional discrimination is extremely difficult to prove; courts have previously noted that the "requirement that the plaintiff prove discriminatory intent before relief can be granted under the [FHA] is often a burden that is impossible to satisfy."[23] Segregative effect claims remain underdeveloped in the case law and are therefore also very difficult to prove.[24] And there are one-time land-use decisions that neither theory may reach; for example, the closure of a building with predominantly tenants of color could cause a disparate impact on the basis of race, but may not stem from intentional discrimination nor perpetuate residential segregation throughout the community.[25] Thus, preclusion of disparate impact liability for one-time decisions would pose a significant risk for the continued

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[21] *Inclusive Cmtys.*, 576 U.S. at 524. For example, a plaintiff may allege that a landlord intentionally refused to rent an apartment to their family or imposed discriminatory terms and conditions on the rental due to a family member's disability. *See, e.g.*, Corey v. Sec'y, U.S. Dep't of Hous. & Urb. Dev. *ex rel.* Walker, 719 F.3d 322, 324 (4th Cir. 2013).

[22] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11,469 (emphasis added). Segregative effect claims are often brought alongside disparate impact claims because both rely on practices that may not be intentionally discriminatory but still have discriminatory effects. Robert G. Schwemm, *Segregative-Effect Claims Under the Fair Housing Act*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 709, 712–14 (2017). Most commonly, segregative effect claims are brought against municipalities in predominantly white areas with exclusionary zoning practices, with the plaintiff arguing that the zoning policies create segregation in the region. *Id.*

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

[24] Schwemm, *supra* note 22, at 735–36 ("[T]he issue of what, if anything, the segregative-effect theory *adds* to potential FHA liability remains open for future litigation." (emphasis in original)).

[25] For instance, if tenants are displaced from one neighborhood with predominantly residents of color to another, it will be difficult for the plaintiffs to claim that the decision increased or sustained residential segregation in the community. *See id.* at 753 ("In fact, the defendants' actions in those cases, by attacking housing that was disproportionately occupied by minorities, might be seen as reducing segregation by causing the dispersal of impacted minority families throughout the relevant communities." (emphasis omitted)).

efficacy of the FHA as a method to challenge these invidious practices that perpetuate segregation[26] and inequalities in education, income, and health.[27]

This Comment proceeds as follows. Part I begins by providing background about how disparate impact claims are established and adjudicated under the FHA. Part II describes how one-time land-use decisions have been treated by courts—before *Inclusive Communities*, in the *Inclusive Communities* opinion, and afterward. In Part III, this Comment argues that one-time land-use decisions should not be categorically excluded from disparate impact claims under the FHA for three reasons: because one-time decisions establish disparate impact liability under analogous civil rights statutes, the distinction between single decisions and policies is difficult to draw, and one-time decisions have historically formed the core of FHA disparate impact liability. Finally, Part IV provides further clarity about which particular one-time land-use decisions should be able to establish successful disparate impact claims, arguing that claims based upon zoning decisions and closures of residential buildings should be per se permitted, but that other claims may be less successful or altogether excluded.

I. ADJUDICATION OF DISPARATE IMPACT CLAIMS UNDER THE FHA

This Part outlines how disparate impact claims under the FHA are established by plaintiffs and adjudicated by federal courts. This explanation provides important context for the rest of the Comment; namely, how the current adjudicatory framework will enable courts to evaluate liability for one-time land-use decisions and ensure they can weed out disingenuous or frivolous

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[26] *See* Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 46–47 (2003) (describing how eminent domain and urban renewal programs led to the displacement of communities of color and entrenched racial residential segregation); Jonathan Rothwell & Douglas S. Massey, *The Effect of Density Zoning on Racial Segregation in U.S. Urban Areas*, 44 URB. AFFS. REV. 779, 801–02 (2009) (finding that stricter zoning regulations led to greater racial residential segregation).

[27] *See* RAJ CHETTY & NATHANIEL HENDREN, THE IMPACTS OF NEIGHBORHOODS ON INTERGENERATIONAL MOBILITY I: CHILDHOOD EXPOSURE EFFECTS 33–34 (2017) (finding that the neighborhood in which a child grows up has a significant impact on a variety of outcomes in adulthood, such as income and college attendance); Michael R. Kramer & Carol R. Hogue, *Is Segregation Bad for Your Health?*, 31 EPIDEMIOLOGIC REVS. 178, 189 (2009) (finding that racial residential segregation has negative impacts on health).

claims based upon such one-time decisions, as described in Part IV.

Before the Supreme Court's *Inclusive Communities* decision, much of the doctrine surrounding FHA interpretation was developed in the federal circuit courts. Although the circuit courts varied in how they adjudicated disparate impact claims,[28] using several different tests to evaluate disparate impact liability, a clear test emerged across the majority of circuits and was later affirmed by the Supreme Court in *Inclusive Communities*: the three-step burden-shifting test.[29]

Under this framework, the plaintiff has to first prove that there is a prima facie case of disparate impact.[30] To do so, the plaintiff must show that, at first sight, the "challenged practice of the defendant 'actually or predictably . . . has a discriminatory effect'" because it disproportionately impacts members of a protected class.[31] There is no one way for a plaintiff to show a prima facie case of disparate impact.[32] As Professors Robert Schwemm and Calvin Bradford have stated, "courts have eschewed any single test for evaluating statistical evidence in housing cases, instead requiring only that the plaintiff 'offer proof of disproportionate impact measured in a plausible way.'"[33]

That being said, statistical evidence that has successfully demonstrated a prima facie case of disparate impact under the FHA in past cases has typically taken a predictable form. First, the plaintiff must identify the group of protected persons affected by the defendant's discriminatory practice and an "appropriate comparison group[ ]."[34] For example, if the plaintiff were alleging that a defendant's practice has a racially discriminatory effect,

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28 Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,461, 11,462 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100).

29 *See* Charleston Hous. Auth. v. U.S. Dep't of Agric., 419 F.3d 729, 740–42 (8th Cir. 2005); Langlois v. Abington Hous. Auth., 207 F.3d 43, 49–51 (1st Cir. 2000); Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 937–39 (2d Cir. 1988), *aff'd sub nom.*, Town of Huntington, N.Y. v. Huntington Branch, NAACP, 488 U.S. 15 (1988); Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly, 658 F.3d 375, 381–82 (3d Cir. 2011).

30 *Huntington Branch*, 844 F.2d at 938.

31 *Id.* at 934 (quoting United States v. City of Black Jack, 508 F.2d 1179, 1184–85 (8th Cir. 1974)).

32 *See* Robert G. Schwemm & Calvin Bradford, *Proving Disparate Impact in Fair Housing Cases After* Inclusive Communities, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 685, 697 (2016); *see also* Stewart E. Sterk, *Incentivizing Fair Housing*, 101 B.U. L. REV. 1607, 1630–32 (2021) (discussing the use of statistical analysis to show disparate impact).

33 Schwemm & Bradford, *supra* note 32, at 697.

34 *Id.* at 698.

the plaintiff would identify residents of color as the protected class and white residents as the relevant comparison group. Then, the plaintiff must provide evidence about the percentage of protected individuals negatively affected by the defendant's practice and the percentage of individuals in the comparison group that are negatively affected.[35] And finally, the plaintiff must show that the disparity between these two percentages is "sizeable."[36] What exactly constitutes a "sizeable" disparity is not well established in FHA case law, but "major appellate decisions finding a large enough difference . . . to satisfy the plaintiff's burden have all involved" situations in which the proportion of class members who are negatively impacted is at least 25% greater than the proportion of comparison group members who are negatively impacted.[37]

For example, imagine that a plaintiff alleges that a municipality's decision not to rezone a parcel of land, thereby preventing development of affordable housing on that parcel, has a disparate impact on people of color. The plaintiff would argue that, by preventing affordable housing development, the zoning decision excludes low-income people who want to live in the area from doing so. In order to demonstrate that this has a disproportionate impact on people of color, the plaintiff could provide statistical evidence showing that a greater percentage of people of color in the region—as compared to white people—live below the poverty line, or that a greater percentage of individuals on the waiting list for affordable housing are people of color rather than white people. This would demonstrate that, of all the people excluded from living in the municipality by the zoning decision, a much greater percentage are people of color. Thus, the plaintiff would have shown that the zoning decision has a disparate impact on people of color.

In the second step of the burden-shifting test, the defendant must show that, despite this disparate impact on protected class members, they had legitimate, nondiscriminatory reasons for the relevant policy or decision.[38] In the zoning hypothetical, the defendant might present a variety of legitimate reasons for denying the rezoning request. Some of these reasons can be categorized as "plan-specific" issues based upon the developer's plans for the

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35 *Id.* at 699.

36 *Id.*

37 *Id.* at 706–07.

38 *Huntington Branch*, 844 F.2d at 939–40.

parcel of land, such as parking issues, undersized apartment units, or inadequate recreational facilities.[39] Other reasons can be categorized as "site-specific" issues that pose challenges for development on the site in general, such as traffic concerns or health hazards from nearby lots.[40] These reasons "are then scrutinized to determine if they are legitimate and bona fide"—in other words, whether "the proffered justification is of substantial concern such that it would justify a reasonable official" making the decision.[41]

Finally, in the third step, the plaintiff must show that there is a less discriminatory alternative that can meet the same ends for the defendant.[42] Plan-specific issues with zoning requests can usually be "resolved by the less discriminatory alternative of requiring reasonable design modifications" to the developer's plans; for example, if the municipality was concerned about a lack of parking, the developer could alter its plans to provide more parking.[43] Site-specific issues are often more endogenous to the parcel of land and therefore are less likely to have an obvious, less discriminatory alternative.[44] Nevertheless, the plaintiff may be able to show that there are alternatives which address those issues. For example, one plaintiff showed that approving a rezoning request to build multifamily housing would still minimize traffic relative to the current zoning scheme, thereby addressing the defendant's traffic concerns through a less discriminatory alternative.[45]

In 2013, the Department of Housing and Urban Development (HUD) agreed with the majority of circuit courts that disparate impact claims were cognizable under the FHA.[46] As part of its own

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39 *Id.* at 940.

40 *Id.*

41 *Id.* at 939.

42 *Id.* Prior to *Inclusive Communities*, all but one circuit placed this burden on the plaintiff. The Second Circuit required the defendant to prove that there was no less discriminatory alternative. *Compare Mount Holly*, 658 F.3d at 382 (plaintiff's burden) *with Huntington Branch*, 844 F.2d at 939 (defendant's burden).

43 *Huntington Branch*, 844 F.2d at 939–40.

44 *Id.*

45 *See* Mhany Mgmt., Inc. v. County of Nassau, 2017 WL 4174787, at *11 (E.D.N.Y. Sept. 19, 2017) (finding that rezoning an area to multifamily residential homes still fulfills the county's goal of reducing traffic because "the elimination of the government office buildings and the development of residential housing would have reduced traffic, whether the residences were single or [multifamily]").

46 Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11,461. Although HUD's rulemaking does not directly determine how federal courts interpret the FHA, courts often look to HUD's rules for interpretive guidance, see,

adjudication of the FHA,[47] HUD promulgated a rule formally recognizing disparate impact claims under the FHA in 2013 and implemented the three-step burden-shifting test,[48] mirroring the doctrine of the circuit courts.

Although a few circuits had used alternative tests before 2015,[49] the Supreme Court adopted the three-step burden-shifting framework—the approach taken by the majority of the circuits—in *Inclusive Communities*.[50] There has been some discussion among the circuits about whether the Court intended to implement a slightly more rigorous version of the test, establishing a higher burden for plaintiffs than existed previously.[51] In *Inclusive Communities*, the Supreme Court stated that plaintiffs must show "robust causality" between the defendant's practices and the

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for example, *Inclusive Cmtys.*, 576 U.S. at 542, and HUD may also update its rules based upon judicial doctrine. *See, e.g.*, HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. 60,288, 60,288 (Sept. 24, 2020) (to be codified at 24 C.F.R. pt. 100) ("This rule amends HUD's 2013 disparate impact standard regulation to better reflect the Supreme Court's 2015 ruling in . . . *Inclusive Communities*.").

47 *See* 42 U.S.C. § 3612. HUD brings and adjudicates claims on behalf of aggrieved persons, who may elect to have their claims adjudicated as civil actions in federal court in lieu of administrative hearings. 42 U.S.C. § 3612(a). And, of course, aggrieved persons can always commence their own civil actions. 42 U.S.C. § 3613(a). *See generally Learn About the FHEO Complaint and Investigation Process*, U.S. DEP'T OF HOUS. & URB. DEV., https://perma.cc/N3A4-STJA.

48 Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11,460. HUD's 2013 rule explicitly included one-time decisions in the list of types of actions that could substantiate a disparate impact claim: the rule used the term "practice" to describe these actions, 24 C.F.R. § 100.500(a) (2013), and HUD interpreted "practice" expansively to mean "any facially neutral actions, e.g., laws, rules, *decisions*, standards, policies, practices, or procedures." Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11,468 (emphasis added).

In 2020, HUD amended the rule's relevant language to "policy or practice" throughout, specifically stating that the policy or practice must be "specific" and "identifiable." 24 C.F.R. § 100.500(b) (2020). However, the 2020 amendments never went into effect, see Mass. Fair Hous. Ctr. v. U.S. Dep't of Hous. & Urban Dev., 496 F. Supp. 3d 600, 611–12 (D. Mass. 2020), and HUD recently reverted back to its broader 2013 language. 24 C.F.R. § 100.500(a) (2023).

49 The Seventh Circuit used a four-factor balancing test. Metro. Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977). The Sixth Circuit used a combination of the three-step burden-shifting test and a four-factor balancing test. Graoch Assocs. # 33, L.P. v. Louisville/Jefferson Cnty. Metro Hum. Rels. Comm'n, 508 F.3d 366, 372–74 (6th Cir. 2007).

50 *See* Reyes v. Waples Mobile Home Park Lmd. P'ship, 903 F.3d 415, 424 (4th Cir. 2018) ("In *Inclusive Communities*, the Supreme Court explained that an FHA disparate-impact claim should be analyzed under a three-step, burden-shifting framework.").

51 *Compare* Mhany Mgmt., Inc. v. County of Nassau, 819 F.3d 581, 618 (2d Cir. 2016) ("The Supreme Court implicitly adopted HUD's approach.") *with* Inclusive Cmtys. Project, Inc. v. Lincoln Prop. Co., 920 F.3d 890, 903 (5th Cir. 2019) ("[W]e are convinced the Supreme Court's language in [*Inclusive Communities*] is stricter than [HUD's] regulation.").

demonstrated disparity.[52] But how robust causality changes what statistical evidence plaintiffs have to show at the first step of the burden-shifting test remains unclear.[53] The distinction is not central to this Comment; either way, the general three-step process of analyzing disparate impact liability under the FHA remains intact.

II. ONE-TIME LAND-USE DECISIONS BEFORE AND AFTER *INCLUSIVE COMMUNITIES*

Judicial and regulatory interpretations of the FHA since the 1970s have expanded the scope of the statute to include disparate impact claims,[54] which the Supreme Court affirmed in 2015. But the Court also used cautionary language in its *Inclusive Communities* opinion, suggesting that one-time land-use decisions might not be able to establish disparate impact liability.[55] Part II.A describes the extent to which this distinction between policies and single decisions existed in case law before *Inclusive Communities*. Part II.B outlines the Supreme Court's *Inclusive Communities* decision and its hint that one-time decisions might not be able to establish disparate impact claims. Finally, Part II.C highlights the ambiguity that this created for federal courts addressing disparate impact liability based upon single land-use decisions.

A. One-time Decisions Versus Policies Before *Inclusive Communities*

Before 2015, there was no clear appellate precedent on the distinction between one-time decisions and policies.[56] On the one hand, several of the seminal cases upholding FHA disparate impact claims involved one-time land-use decisions, such as refusals

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52 *Inclusive Cmtys.*, 576 U.S. at 542.

53 *Lincoln*, 920 F.3d at 903 ("Although the Supreme Court's opinion in [*Inclusive Communities*] established 'robust causation' as a key element of the plaintiff's prima facie burden in a disparate impact case, the Court did not clearly delineate its meaning or requirements.").

54 Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,461, 11462 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100).

55 *Inclusive Cmtys.*, 576 U.S. at 539–43.

56 Prior to 2015, the Supreme Court had not addressed whether disparate impact claims were cognizable under the FHA—and, in fact, the Court had rejected several petitions for certiorari asking it to address the issue. Seicshnaydre, *supra* note 7, at 359. As a result, the Court had not had the opportunity to address whether there was a distinction between one-time decisions and policies for disparate impact liability, leaving only scattered discussion of the issue by district and circuit courts.

by municipalities to approve certain housing developments[57] or to rezone particular tracts of land to enable construction of affordable[58] and multifamily[59] housing. This indicates that, in early disparate impact litigation, courts did not always—or even often—reject claims based upon single land-use decisions.

On the other hand, a few opinions distinguished between decisions and policies, finding that the former could not substantiate disparate impact claims under the FHA.[60] For example, the Second Circuit rejected a disparate impact claim based upon a one-time land use decision in 2002.[61] In *Regional Economic Community Action Program v. City of Middletown*,[62] the plaintiffs alleged that the city of Middletown's refusal to grant a special-use permit to open halfway houses for recovering alcoholics had a disparate impact on people with disabilities.[63] The circuit court stated that "[the plaintiff] does not challenge a facially neutral policy or practice; it challenges one specific act: the denial of a special-use permit for [ ] [one] property. No comparison of the act's disparate impact on different groups of people is possible."[64] On this basis, the Second Circuit rejected the plaintiff's disparate impact claim.[65] Similarly, a District of Maryland court stated that a single land-use decision that affected only a small group of people could not establish a disparate impact claim because, "where only one group or class of persons is affected by a particular decision, there is no disparity in treatment between groups and no 'disparate impact.'"[66]

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57 Keith v. Volpe, 858 F.2d 467, 470–71 (9th Cir. 1988).

58 Metro. Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1285 (7th Cir. 1977).

59 Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 928 (2d Cir. 1988), *aff'd*, 488 U.S. 15 (1988).

60 *See* Bryant Woods Inn, Inc. v. Howard County, 911 F. Supp. 918, 939–40 (D. Md. 1996) (holding that the county's denial of a request for an exception to zoning regulations could not serve as the basis of a disparate impact claim), *aff'd*, 124 F.3d 597 (4th Cir. 1997); 2922 Sherman Ave. Tenants' Ass'n v. District of Columbia, 444 F.3d 673, 680 (D.C. Cir. 2006) (rejecting a disparate impact claim based upon the city's closure of an apartment building); Boykin v. Gray, 986 F. Supp. 2d 14, 20–22 (D.D.C. 2013) (holding that the city's closure of a homeless shelter could not be the subject of disparate impact analysis because it was only a "discrete act[ ]"), *aff'd sub nom.*, Boykin v. Fenty, 650 F. App'x 42 (D.C. Cir. 2016).

61 Reg'l Econ. Cmty. Action Program v. City of Middletown, 294 F.3d 35, 53 (2d Cir. 2002).

62 294 F.3d 35 (2d Cir. 2002).

63 *Id.* at 52.

64 *Id.* at 53.

65 *Id.*

66 *Bryant Woods Inn*, 911 F. Supp. at 939.

These cases indicate that, although there was some basis in the FHA case law for the distinction that the Supreme Court later drew in *Inclusive Communities*, these holdings were sparse and based mostly on the number of people affected by the decisions—not on a formal distinction between policies and single decisions. Although a few scholars have asserted that this distinction broadly existed prior to 2015,[67] it does not appear that more than these few scattered (and mostly district court) opinions drew this distinction in the context of the FHA.[68] Further, the analysis in those cases seemed to rely primarily upon the idea that the cases only affected a small group of people, making it difficult to compare the effect of the one-time decision across the population and draw conclusions about a disparate impact.[69] As such, the cases do not outright reject claims based upon one-time land-use decisions, but simply reject the claims in those cases for lack of sufficient evidence.

B. The Supreme Court's Distinction Between One-Time Decisions and Policies in *Inclusive Communities*

In 2015, the Supreme Court officially held that disparate impact claims were cognizable under the FHA in *Inclusive Communities*.[70] The Court largely based its reasoning on an analysis of two analogous civil rights statutes—Title VII of the Civil Rights Act of 1964[71] and the Age Discrimination in Employment Act of 1967[72] (ADEA)—for which the Court had already recognized the validity of disparate impact claims.[73] The Court noted that all three statutes contain similar language: Both the ADEA and Title VII prohibit employers from taking actions "which would deprive or tend to deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee" based upon various protected identity traits.[74] The FHA, in comparison, declares it unlawful to "*otherwise make unavailable* or deny"

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67 *See, e.g.*, Stacy Seicshnaydre, *Disparate Impact and the Limits of Local Discretion After* Inclusive Communities, 24 GEO. MASON L. REV. 663, 673 (2017) (describing the distinction as a "principle in existing law that a single act or decision does not give rise to disparate impact liability").

68 See *supra* note 60 for the relevant cases.

69 *See, e.g.*, *Middletown*, 294 F.3d at 52–53.

70 *Inclusive Cmtys.*, 576 U.S. at 546–47.

71 42 U.S.C. § 2000e-2.

72 29 U.S.C. § 623.

73 *Inclusive Cmtys.*, 576 U.S. at 530–34.

74 42 U.S.C. § 2000e-2(a)(2); 29 U.S.C. § 623(a)(2) (emphasis added).

housing based upon membership in a protected class.[75] The Court reasoned that these relevant phrases play the same role in the respective statutes, using the phrase "otherwise" to indicate that they are "catchall phrases looking to consequences, not intent."[76] The Court stated that because Congress passed the FHA shortly after passing the previous two pieces of legislation, it is likely that Congress intended for the text across all three to be similarly interpreted.[77] Thus, it held that the FHA's language indicates that liability can be established based upon "the consequences of an action rather than the actor's intent."[78]

The Court also looked to Congress's history of amendments to the FHA.[79] After nine circuits had already determined that the FHA included disparate impact liability, Congress amended the statute in 1988, retaining the text upon which those appellate interpretations were based. The Court argued that Congress would not have retained the FHA's statutory text if it disagreed with the circuit courts' interpretation.[80] Indeed, Congress's amendments added exemptions to the FHA that assumed the validity of disparate impact claims.[81]

The Court further noted that disparate impact claims are consistent with the core purpose of the FHA: to eradicate discriminatory practices in housing.[82] Recognizing that, historically, disparate impact claims have been integral to combatting racially exclusionary zoning laws, the Court noted that disparate impact liability plays a crucial role in weeding out "unconscious prejudices and disguised animus that escape easy classification as disparate treatment."[83]

But the Court cautioned against an expansive understanding and acceptance of disparate impact claims.[84] To safeguard against

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75 42 U.S.C. § 3604(a) (emphasis added).

76 *Inclusive Cmtys.*, 576 U.S. at 534–35.

77 *Id.*

78 *Id.* at 534.

79 *Id.* at 535–39.

80 *Id.* at 535–36.

81 *Inclusive Cmtys.*, 576 U.S. at 537. For example, one of the amendments stated that the FHA did not prohibit housing discrimination based on an individual's criminal drug convictions. Since persons with criminal records are not a protected class under the FHA, it would be superfluous to include this exemption unless Congress meant to preempt disparate impact claims based on the racial and gender disparities in the prosecution and conviction of drug offenses. *Id.* at 538.

82 *Id.* at 539.

83 *Id.* at 540.

84 *Id.* at 542.

plaintiffs asserting that there is a disparate impact based upon mere statistical disparities or racial imbalances in housing, the Court indicated that plaintiffs must show that the defendant has a policy: "a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity."[85] The Court also stated that there must be a "robust causality" between the defendant's policy and the disparity.[86] As part of these requirements, the Court noted that a one-time decision, such as the decision by a private developer regarding the location of a new building, "may not be a policy at all."[87] By using the word "may," the Court suggested that one-time land-use decisions might not be able to substantiate disparate impact claims in certain contexts, but ultimately left the question open for interpretation by the circuit courts.

Without the additional requirement of robust causality and potential exclusion of one-time decisions from disparate impact claims, the Court warned that the FHA could become a tool to force private developers and housing authorities to change their policy priorities, which was not the purpose of the FHA.[88] The Court also generally sought to prevent the proliferation of abusive disparate impact claims. It was concerned that extensive litigation might cause developers to stop developing affordable housing and prevent governmental authorities from enforcing health and safety codes, both of which would be antithetical to the purpose of the FHA.[89]

C. Subsequent Circuit Court Opinions Regarding One-Time Land-Use Decisions

Since *Inclusive Communities*, several circuit courts have had the opportunity to address the distinction between one-time decisions and policies, coming to different conclusions about whether a one-time decision can serve as the basis for a disparate impact claim. Two circuit courts—the Seventh and Eighth Circuits—have rejected disparate impact claims based upon one-time land-

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85 *Inclusive Cmtys.*, 576 U.S. at 542.

86 *Id.* ("A robust causality requirement ensures that '[r]acial imbalance . . . does not, without more, establish a prima facie case of disparate impact' and thus protects defendants from being held liable for racial disparities they did not create." (quoting Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 653 (1989))). As noted in Part I, what constitutes robust causality remains unclear.

87 *Id.* at 543.

88 *Id.* at 540–42.

89 *Id.* at 544.

use decisions.[90] In contrast, the Second Circuit declined to endorse this distinction, and stated that, even if the distinction was meaningful, a one-time zoning decision could still constitute a policy.[91]

1. The Seventh and Eighth Circuits have held that one-time land-use decisions cannot substantiate disparate impact claims.

In 2016, the Seventh Circuit rejected a disparate impact claim in part because it was based upon a one-time land-use decision. In *City of Joliet v. New West, L.P.*,[92] the plaintiffs alleged that the City's use of eminent domain to condemn and demolish a housing complex would have a disparate impact on the complex's predominantly Black tenants, leading to their displacement.[93] In its decision, the Seventh Circuit noted that the Supreme Court in *Inclusive Communities* "stressed the importance of considering both *whether a policy exists* and whether it is justified."[94] Given the Supreme Court's hint that one-time decisions may not be policies, the Seventh Circuit held that "the condemnation of [the housing complex] is a specific decision, not part of a policy to close minority housing in Joliet," and rejected the plaintiffs' disparate impact claim.[95] Thus, the Seventh Circuit endorsed the distinction between one-time land-use decisions and policies, holding that the former cannot establish disparate impact claims.

Similarly, the Eighth Circuit has held that individual applications of a city's housing code to particular properties do not necessarily constitute city policy and therefore cannot serve as

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90 *See* City of Joliet v. New W., L.P., 825 F.3d 827, 830 (7th Cir. 2016) (use of eminent domain to condemn and demolish a housing complex); Ellis v. City of Minneapolis, 860 F.3d 1106, 1112–13 (8th Cir. 2017) (application of housing code to individual properties).

91 *See* Mhany Mgmt., Inc. v. County of Nassau, 819 F.3d 581, 619 (2d Cir. 2016).

92 825 F.3d 827 (7th Cir. 2016).

93 *Id.* at 828.

94 *Id.* at 830 (emphasis added).

95 *Id.* The district court, after a bench trial, rejected the plaintiff's disparate impact claim on other grounds. *See* City of Joliet v. Mid-City Nat'l Bank of Chi., 2014 WL 4667254, at *24–25 (N.D. Ill. Sept. 17, 2014) (finding that the plaintiffs failed to "meet their burden of establishing a prima facie claim of disparate impact" in large part because they failed to prove the City's closure of the housing complex had a negative effect on residents), *aff'd sub nom.*, City of Joliet v. New W., L.P., 825 F.3d 827 (7th Cir. 2016). The Seventh Circuit's opinion, which relied upon the distinction between a policy and a single decision, demonstrates how this distinction enables courts to avoid even considering disparate impact claims on their merits.

the basis for a disparate impact claim. In *Ellis v. City of Minneapolis*,[96] the plaintiffs—low-income rental housing providers in Minneapolis—alleged that the city's enforcement of the housing code against them led to the displacement of Black tenants.[97] The plaintiffs did not allege that the formal housing code itself had a disparate impact, but that "the City ha[d] adopted a policy to discourage rental housing and effected such a policy through deliberate or negligent misapplication of the housing code."[98] The Eighth Circuit found that there was no evidence that the city had such a policy to discourage rental housing.[99] The court rejected the argument that the city's application of the housing code was evidence of such a policy, declining to recognize the plaintiffs' "attempt to bootstrap numerous 'one-time decision[s]' together in order to allege the existence of a City policy to misapply the housing code."[100] The court stated that some misapplications of the housing code are inevitable in the "varying and evolving" housing context and cautioned that allowing FHA lawsuits on such a basis would prevent the government from effectively applying health and safety codes.[101] In a similar case several years later, in which a plaintiff alleged that Minneapolis's revocation of his rental licenses based upon housing code violations established a disparate impact, the Eighth Circuit again held that individual housing code decisions could not constitute city policy against renters of color.[102] Therefore, the Eighth Circuit joined the Seventh Circuit in declining to uphold disparate impact claims based upon one-time land-use decisions.

2. The Second Circuit has upheld a disparate impact claim based upon a one-time zoning decision.

The Second Circuit decided differently, upholding a disparate impact claim based upon a single zoning decision. As discussed in Part II.A, long before *Inclusive Communities*, the Second Circuit rejected a disparate impact claim under the FHA based upon a one-time rejection of a permit in *Middletown*.[103] However, after

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96 860 F.3d 1106 (8th Cir. 2017).
97 *Id.* at 1107–08.
98 *Id.* at 1112.
99 *Id.* at 1113.
100 *Id.* (alteration in original) (quoting *Inclusive Cmtys.*, 576 U.S. at 543).
101 *Ellis*, 860 F.3d at 1113–14.
102 Khan v. City of Minneapolis, 922 F.3d 872, 875 (8th Cir. 2019).
103 *Middletown*, 294 F.3d at 53.

Inclusive Communities, in contrast to the other circuit courts, the Second Circuit declined to draw a distinction between one-time decisions and policies when considering a disparate impact claim.[104]

In *Mhany Management, Inc. v. County of Nassau*,[105] the plaintiffs were developers that disputed a rezoning decision that prevented the construction of affordable, multifamily housing that would benefit families of color.[106] In response, the county argued that plaintiffs could not challenge "a single, isolated zoning 'decision'" under a disparate impact theory.[107] In declining to recognize this distinction, the Second Circuit referenced the ADEA and Title VII.[108] It described how other courts have allowed the single decisions of employers to establish disparate impact claims under those statutes—noting that the Seventh Circuit has previously found the distinction between single decisions and practices "analytically unmanageable" in the employment context—and applied the same reasoning to the FHA context.[109] The court further stated that, even if there were such a distinction under the FHA, a single zoning decision could still be considered a policy "given the many months of hearings and meetings . . . and that the change required passage of a local law."[110]

III. ONE-TIME LAND-USE DECISIONS SHOULD BE ABLE TO SERVE AS THE BASIS OF DISPARATE IMPACT CLAIMS

Given the Supreme Court's open-ended language in *Inclusive Communities*, this Comment contends that the FHA should be broadly understood to permit disparate impact claims based upon single land-use decisions made by private and governmental entities. As a threshold matter, the text of the FHA does nothing to resolve this issue. The FHA does not use the term "policy" or "decision" when describing conduct that can establish a claim, nor

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104 *Mhany*, 819 F.3d at 619.

105 819 F.3d 581 (2d Cir. 2016).

106 *Id.* at 598.

107 *Id.* at 619.

108 *Id.*

109 *Id.* (first quoting Council 31, Am. Fed'n of State, Cnty., and Mun. Emps., AFL-CIO v. Ward, 978 F.2d 373, 377 (7th Cir. 1992); and then citing Nolting v. Yellow Freight Sys., Inc., 799 F.2d 1192, 1194 (8th Cir. 1986)).

110 *Mhany*, 819 F.3d at 619.

does it delineate between ongoing practices and one-time actions.[111] The closest the statute gets to this issue is its use of the term "discriminatory housing practice" in the definitions section of the FHA, which the FHA (unhelpfully and tautologically) defines as "an act that is unlawful."[112] Ultimately, the distinction between one-time decisions and policies is entirely judge-made, leaving no textual guidance for resolving the question at hand.

As a result, this Comment utilizes other forms of legal reasoning to demonstrate that one-time decisions should be able to establish disparate impact claims. Part III.A posits that, given courts' previous reliance upon Title VII and the ADEA when interpreting the FHA, interpretations of the FHA should again follow the other two statutes in allowing one-time decisions to constitute disparate impact claims. Part III.B argues that the distinction between a policy and a one-time decision is untenable and provides little guidance for courts moving forward. Finally, Part III.C describes how three seminal appellate court cases which first established disparate impact claims under the FHA involved one-time land-use decisions, indicating that such decisions constitute the heartland of disparate impact theory.

A. Precedent from the ADEA and Title VII, Both of Which Allow Disparate Impact Claims Based upon One-Time Decisions, Should Apply to the FHA

Courts have often looked to two other civil rights statutes—the ADEA and Title VII—when interpreting the FHA.[113] Indeed, the Supreme Court decided to allow disparate impact claims under the FHA based in large part upon the validity of disparate

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[111] The statute uses the term "policy" in a subsection requiring reasonable accommodations for persons with disabilities, but that subsection is unrelated to the text on which FHA disparate impact claims are based. And even that subsection includes a longer list of actions—not just policies—that can constitute discrimination under the FHA. *See* 42 U.S.C. § 3604(f)(3)(B) (defining discrimination to include "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a handicapped person] equal opportunity to use and enjoy a dwelling").

[112] 42 U.S.C. § 3602(f).

[113] *See* Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 935 (2d Cir. 1988), *aff'd*, 488 U.S. 15 (1988); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 146–47 (3d Cir. 1977); Metro. Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1288–89 (7th Cir. 1977); United States v. Marengo Cnty. Comm'n, 731 F.2d 1546, 1559 n.20 (11th Cir. 1984); *Inclusive Cmtys.*, 576 U.S. at 530–34.

impact claims under these other two statutes.[114] As such, in seeking to resolve whether one-time land-use decisions are cognizable under the FHA, it helps to look at those statutes' treatment of one-time employment decisions for disparate impact claims.

1. The ADEA and Title VII allow one-time employment decisions to substantiate disparate impact claims.

Several circuits have concluded that disparate impact claims under the ADEA and Title VII can be established based upon one-time employment decisions. These circuits have found disparate impact claims are permissible so long as the decision affects a sufficient number of employees to statistically demonstrate a disproportionate impact on members of a protected class.[115] This evidentiary requirement, which is needed for any disparate impact claim—single decision or not—ensures that frivolous disparate impact claims will not proliferate, but also avoids excluding legitimate claims based upon an arbitrary distinction between a policy and a one-time decision.[116]

For example, in *O'Brien v. Caterpillar Inc.*,[117] an employer decided to liquidate an unemployment benefits program, distributing a cut of the benefits to each employee, but the employer conditioned the receipt of the benefits upon retirement for retirement-eligible employees.[118] A group of retirement-eligible employees who opted not to retire—and therefore did not receive any benefits—sued their employer for violation of the ADEA, alleging that the plan had a disparate impact on older employees.[119] In response to the employer's contention "that the liquidation plan [was] a 'one-off event' that [did] not constitute an actionable practice or policy," the Seventh Circuit concluded that one-time employment decisions could establish disparate impact claims.[120]

In doing so, the court distinguished between one-time decisions that affect only one employee and decisions that affect a broader swath of people. It acknowledged that "a single, isolated

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114 *Inclusive Cmtys.*, 576 U.S. at 530–34.

115 *See, e.g.*, O'Brien v. Caterpillar Inc., 900 F.3d 923, 929 (7th Cir. 2018).

116 Council 31, Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO v. Ward, 978 F.2d 373, 377 (7th Cir. 1992).

117 900 F.3d 923 (7th Cir. 2018).

118 *Id.* at 926–27.

119 *Id.* at 927.

120 *Id.* at 929. The employer specifically cited *Inclusive Communities* to support its claim that one-time decisions cannot constitute disparate impact claims under the ADEA. *Id.*

decision to hire or fire an employee may not amount to a policy in the absence of other evidence."[121] But the court held that the employer's plan was actionable because employees could "show significant disparities stemming from [the] single decision"—"[t]hough the liquidation plan is a single event, it applies the same rules to hundreds of employees and causes significant age-based disparities between workers."[122] In other words, the Seventh Circuit held that a single decision can be a policy if it affects many workers.[123] The Seventh Circuit has heard other disparate impact claims under the ADEA based upon one-time employment decisions and agreed that they were permitted under the statute.[124]

Other appellate courts have implicitly affirmed this holding in the context of the ADEA. For instance, in *Nolting v. Yellow Freight Systems, Inc.*,[125] the Eighth Circuit heard an ADEA disparate impact claim based upon the employer's decision to use performance ratings for a single layoff decision—a decision which the plaintiff alleged had a disproportionate impact on older employees, violating the ADEA.[126] The court did not draw a distinction between a policy and a one-time decision, even though there was only one round of layoffs and the performance ratings were not used in a broader employer policy related to hiring or firing.[127]

Similarly, Title VII has been interpreted by several circuit courts to include disparate impact theories based upon one-time employment decisions. Perhaps the most detailed examination of this issue is the Seventh Circuit's opinion in *Council 31, American Federation of State, County & Municipal Employees, AFL-CIO v. Ward*.[128] In that case, the Illinois Department of Employment Security (IDES) laid off several hundred employees, with layoffs

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[121] *Caterpillar*, 900 F.3d at 929. Like the FHA, the ADEA and Title VII do not use the term "policy" anywhere in their texts, instead prohibiting various unlawful employer "practices." *See* 29 U.S.C. § 623(a) (ADEA); 42 U.S.C. § 2000e-2(a)(2) (Title VII).

[122] *Caterpillar*, 900 F.3d at 929 (quoting *Council 31*, 978 F.2d at 378).

[123] *Id.*

[124] *See, e.g.*, Senner v. Northcentral Tech. Coll., 113 F.3d 750, 757 (7th Cir. 1997) ("A single decision by an employer can be an actionable 'employment practice' under a disparate impact theory.").

[125] 799 F.2d 1192 (8th Cir. 1986).

[126] *Id.* at 1195.

[127] *Id.* The Eighth Circuit did not discuss the distinction between one-time decisions and policies at all, indicating that it took for granted that one-time decisions can establish disparate impact liability under the ADEA.

[128] 978 F.2d 373 (7th Cir. 1992).

concentrated in IDES offices with more Black employees, resulting in a disproportionate number of Black employees losing their jobs compared to white employees.[129] The district court dismissed a lawsuit brought by the Black employees alleging a violation of Title VII on a disparate impact theory, concluding that a "disparate impact case requires the identification of a 'specific employment practice.' . . . [A]n 'employment practice' must be a 'repeated, customary method of operation': a single layoff decision does not count."[130]

The Seventh Circuit reversed, holding that there is no reason to exclude single employment decisions from disparate impact claims.[131] The court acknowledged potential worries about expanding the scope of disparate impact liability, but ultimately concluded that there are sufficient safeguards in place to filter out any disingenuous or invidious claims: single decisions might affect only a small group, making it difficult to provide valid statistical comparisons, and most decisions with a disparate impact will still have valid business justifications that provide a defense for employers, meaning that many single employment decisions will be immunized from disparate impact claims.[132]

Various other appellate decisions have also upheld disparate impact claims under Title VII based on single decisions of employers. The Second, Sixth, Ninth, and D.C. Circuits have all agreed that single employment decisions can serve as the basis of disparate impact claims under Title VII, either explicitly[133] or implicitly[134] (by not dismissing the complaints simply because they involve one-time employment decisions). For instance, the Ninth Circuit adjudicated a Title VII case based upon an employer's cost-cutting decision that led to the demotion of all workers with less than five years of seniority.[135] An employee alleged that this

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[129] *Id.* at 375.

[130] *Id.* at 376.

[131] *Id.* at 377.

[132] *Id.* at 377–78.

[133] *See* Lee v. Visiting Nurse Ass'n of L.A., Inc., 1994 WL 579479, at *3 (9th Cir. 1994); Davis v. District of Columbia, 925 F.3d 1240, 1250–51 (D.C. Cir. 2019) (holding that "a targeted group of layoffs pursuant to a [reduction in force] could be reviewed for potential disparate impact").

[134] *See* Sengupta v. Morrison-Knudsen Co., 804 F.2d 1072, 1076–77 (9th Cir. 1986) (single decision to lay off employees); Bridgeport Guardians, Inc. v. City of Bridgeport, 933 F.2d 1140, 1146–48 (2d Cir. 1991) (single administration of a test to determine promotions); Shollenbarger v. Planes Moving & Storage, 297 F. App'x 483, 486 (6th Cir. 2008) (single reduction in force decision).

[135] *Lee*, 1994 WL 579479, at *2–3.

decision had a disparate impact on workers of color, but the district court dismissed the case because it was based upon a single employment decision.[136] The Ninth Circuit reversed, holding that the employee *could* validly make a disparate impact claim (although it still dismissed the case because the plaintiff was unable to meet its burden to establish that there was actually a disparate impact caused by the decision).[137] It noted that "[t]he district court incorrectly stated that a disparate impact claim is not appropriate to a case of a one-time reduction in work force."[138] Instead, the circuit court held that "[d]isparate impact analysis can be used to challenge an employer's subjective criteria for *employment decisions* as well."[139]

2. Single decisions by employers are analogous to one-time land-use decisions, and therefore the latter should also be able to serve as the basis for disparate impact claims.

If disparate impact claims under both the ADEA and Title VII can be based upon single employment decisions, the same should be true for one-time decisions under the FHA. All three statutes contain analogous textual provisions establishing disparate impact liability, and they hold similar purposes: each aims to protect certain groups from discrimination.[140] Given that courts frequently analogize between the three statutes—using precedent from the ADEA and Title VII to interpret the FHA—interpretations of the FHA should follow those of the other two statutes in this instance as well. Indeed, this argument was part of why the Second Circuit upheld a disparate impact claim based upon a one-time zoning decision in *Mhany*.[141]

Applying the logic from the ADEA and Title VII cases to the FHA context is relatively simple. Under the ADEA and Title VII, a single decision by an employer to lay off hundreds of employees can have a disparate impact on employees of a protected class, establishing a disparate impact claim. Similarly, a single land-use decision, such as the closure of an apartment building or refusal to rezone land to build affordable housing, may affect many residents—potentially hundreds of people—such that plaintiffs

136 *Id.*
137 *Id.* at *2–4.
138 *Id.* at *3.
139 *Id.* at *4 (emphasis added).
140 *Inclusive Cmtys.*, 576 U.S. at 539.
141 *Mhany*, 819 F.3d at 619.

can potentially show that the decision had a disparate impact on a protected class. Because the former example has consistently been held sufficient to constitute disparate impact claims under the ADEA and Title VII, the latter should similarly confer liability under the FHA.

One might argue that this comparison between the housing and employment context is wrong. In fact, some courts have taken the analogy in a different direction, causing them to reject disparate impact claims based upon one-time land-use decisions. These courts misunderstand the appropriate analogy. For an example of how courts have incorrectly analogized between the employment and housing contexts, one can look to the D.C. Circuit's reasoning in *2922 Sherman Avenue Tenants' Association v. District of Columbia*,[142] one of the few pre-*Inclusive Communities* cases in which a circuit court recognized a difference between one-time decisions and policies.[143] In *2922 Sherman Avenue*, tenants sued the District of Columbia for closing several apartment buildings based upon housing code violations, alleging the closures had a disparate impact on Hispanic residents because the apartments were located in Hispanic neighborhoods.[144] Although the tenants ultimately lost because they could not prove a disparate impact,[145] the circuit court's reasoning offers insight into how the analogy between the employment and housing contexts should—and should not—work.

In its opinion, the D.C. Circuit distinguished the closure of a single building from D.C.'s broader initiative to enforce housing codes which led to the building's closure (called the "Hot Properties Initiative").[146] Because this initiative was a formal program administered by D.C.'s Neighborhood Stabilization Program,[147] the circuit court held that it was a policy which could serve as the basis of the tenants' disparate impact claim.[148] In contrast, the court held that the closure of one apartment building was not a policy and therefore could not substantiate a disparate impact claim.[149] The court made this distinction by analogizing the situation to the ADEA and Title VII, stating that "the city's closing of

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142 444 F.3d 673 (D.C. Cir. 2006).
143 *Id.* at 680.
144 *Id.* at 676.
145 *Id.* at 680–82.
146 *Id.* at 680.
147 *2922 Sherman Ave.*, 444 F.3d at 677.
148 *Id.* at 680.
149 *Id.*

[one apartment building] pursuant to the Hot Properties Initiative is similar to an employer's refusal to hire a single individual based on the results of an allegedly discriminatory test."[150] In other words, an employer's test and D.C.'s housing initiative are policies, able to constitute a disparate impact claim, whereas the refusal to hire a single individual and the closure of one apartment building are simply the consequences of those policies and are not actionable on their own.

But this analysis gets the analogy to the employment context wrong. In one-time land-use decisions, there is usually more than one person affected, which is very different from the refusal of an employer to hire a single individual. In this way, single land-use decisions are more analogous to single employer decisions to lay off hundreds of employees than decisions to hire or fire one employee.

To be sure, some one-time land-use decisions will only affect a handful of residents. In those cases, plaintiffs will be unlikely to prove disparate impact given limitations in statistical computing power with small sample sizes. This may be especially true after *Inclusive Communities*, in which the Supreme Court cautioned that there must be "robust causality" between a defendant's practices and the adverse impact.[151] Part IV further explores this issue and discusses how the three-step burden-shifting test would deal with cases affecting a small number of people.

B. The Distinction Between Policies and One-Time Decisions Is Too Opaque to Constitute an Effective Rule

Another reason not to distinguish between one-time decisions and policies is that attempting to strictly cabin the two is very difficult. The difficulty in distinguishing policies from decisions has been highlighted by courts in several other contexts, including interpretations of Title VII[152] and municipal liability under 42 U.S.C. § 1983,[153] and is also applicable to the FHA and one-time land-use decisions. This Section describes why. First, it describes

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150 *Id.*

151 *Inclusive Cmtys.*, 576 U.S. at 542. See *supra* text accompanying notes 52–53 for a discussion of how courts have interpreted the robust causality standard since *Inclusive Communities*.

152 *See, e.g.*, *Council 31*, 978 F.2d at 377.

153 42 U.S.C. § 1983; *see, e.g.*, Pembaur v. City of Cincinnati, 475 U.S. 469, 480–81 (1986). Section 1983 is a federal statute that provides a cause of action against any state or local government official who, acting under the color of state law, deprived an individual of their constitutional or legal rights. 42 U.S.C. § 1983.

how one-time land-use decisions often function like policies because they are implemented using quasi-legislative processes and considerations and sometimes involve the passage of law. Second, policies and one-time decisions are so inextricably intertwined that distinguishing them is difficult; policies are often the consequence of a one-time decision, and one-time decisions often carry out an underlying policy. Third, the Supreme Court has utilized a broad understanding of the term "policy" that includes single decisions in the § 1983 municipal liability context, indicating that policies can include one-time land-use decisions under the FHA, too.

Because the distinction between one-time decisions and policies is tenuous and difficult to administer, courts should not categorically reject disparate impact claims that are based upon single land-use decisions. As an analytical matter, if a policy and one-time decision are often indistinguishable, it does not make sense to include the former and exclude the latter. Further, this becomes a challenging rule for the courts to implement and enforce; courts run the risk of enforcing a rule that is underinclusive of relevant practices that create a disparate impact in the housing context.

Of course, allowing liability based upon single land-use decisions may have the opposite effect: some may worry, as the Supreme Court in *Inclusive Communities* did, that such a rule would swing too far in the opposite direction and become overinclusive. These critics would argue that, although policies and decisions may indeed be intertwined, it is nevertheless more important to draw a bright-line rule excluding one-time decisions in order to avoid the proliferation of spurious litigation. Part IV addresses these concerns more fully. But, as a preliminary matter, the overlap between policies and decisions indicates that concerns about allowing spurious disparate impact claims based upon one-time decisions are overblown. Disparate impact litigation will likely not be used to frivolously challenge small, one-off decisions made by developers or municipalities, but instead will often be used to challenge decisions that are intertwined with underlying policies and are backed by robust, thorough legislative considerations and processes. These types of decisions are important and should be the core of fair housing litigation.

1. Many one-time land-use decisions function like policies.

When analyzed with a critical eye, the purported distinction between policies and decisions quickly breaks down. Someone attempting to distinguish policies from one-time decisions would likely define the former as broader in time and scope than the latter. In other words, they would say that a policy "refers to formal rules or understandings . . . that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time."[154] In contrast, they would assert that a decision is limited to a particular, specific circumstance or question at one point in time. If asked to explain further, they would likely point to a combination of procedural and substantive characteristics that purportedly differ between the two concepts. They may argue, for example, that policies require greater deliberation than a one-time decision or that policies cover a broader range of issues and circumstances than a one-time decision. Under this view, implementation of a policy would be seen much like the passage of a law—in that both require lengthy procedures and ultimately set long-term decision-making frameworks—while a one-time decision would not.

But when one looks closer, it becomes clear that many decisions by governmental actors function as policies in both procedural and substantive respects, such that the distinction between the two is essentially nonexistent. Many one-time land-use decisions are formulated using quasi-legislative decision-making processes, incorporate legislative considerations, and sometimes even involve the passage of a new law.

First, one-time land-use decisions often involve lengthy processes that mimic the process required to pass a law. The Second Circuit in *Mhany* stated that single rezoning decisions are essentially policies "given the many months of hearings and meetings" involved,[155] and the District Court of Arizona in *Avenue 6E Investments, LLC v. City of Yuma*[156] agreed.[157] Similarly, exercise of eminent domain by a government actor to close an apartment building in disrepair, as occurred in *New West*, often involves extensive meetings and deliberations before actual initiation.[158] If the one-

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154 *Pembaur*, 475 U.S. at 480–81.

155 *Mhany*, 819 F.3d at 619.

156 2018 WL 582314 (D. Ariz. Jan. 29, 2018).

157 *Id.* at *6.

158 *See* City of Joliet v. Mid-City Nat'l Bank of Chi., 2014 WL 4667254, at *6 (N.D. Ill. Sept. 17, 2014).

time land-use decisions at hand are the result of a lengthy process of consideration and deliberation, then it is not clear that they are procedurally different from laws and, by extension, policies.

Second, many one-time land-use decisions require the relevant decision-maker to contemplate forward-looking, long-term, broad considerations that are strikingly similar to those scrutinized by legislative decisionmakers. For example, the district court in *Yuma* noted that zoning decisions include "consideration of future growth and development, public streets, pedestrian walkways, drainage and sewers, increased traffic flows, surrounding property values and many other factors which are within the legislative competence."[159] These are exactly the same considerations that a municipality examines when formulating the underlying zoning code, which is clearly a policy. Similarly, the decision to tear down a building in order to build some other structure, such as a freeway, also often requires the municipality to consider various long-term and broadly sweeping consequences of the decision, like its environmental impact and the permanent displacement of the building's residents.[160] As a result, when making single decisions about how the municipality wants development to proceed within its community, it is, in effect, "setting policy."[161]

Finally, some one-time land-use decisions involve actual passage of law, which makes them functionally the same as a policy. For instance, the rezoning decision at issue in *Mhany* was the city's decision to rezone a parcel of land, which required the passage of a local law.[162] In *New West*, the city council had to pass an ordinance authorizing the city to use eminent domain, and the city had to file a condemnation action in state court to initiate the eminent domain proceedings.[163] The passage of an ordinance or legislation indicates that the municipality was acting in a policy-like manner—legally codifying a permanent rule—which negates the idea that decisions and policies are functionally distinct.

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[159] *Yuma*, 2018 WL 582314, at *6 (quoting Wait v. City of Scottsdale, 618 P.2d 601, 603 (Ariz. 1980)); *see also Mhany*, 819 F.3d at 619 (considering rezoning's impact on traffic conditions and school overcrowding).

[160] *See* Keith v. Volpe, 858 F.2d 467, 471 (9th Cir. 1988).

[161] *See Yuma*, 2018 WL 582314, at *6.

[162] *Mhany*, 819 F.3d at 597.

[163] *Mid-City Nat'l Bank*, 2014 WL 4667254, at *7–9.

2. Policies and one-time decisions are often intertwined.

The distinction between policies and one-time decisions is also "analytically unmanageable" because of the inherent reciprocal relationship between the two.[164] First, policies are implemented through one-time decisions. In the Title VII context, the Seventh Circuit has reasoned that "almost any repeated course of conduct can be traced back to a single decision."[165] For instance, the Seventh Circuit reasoned that even *Griggs v. Duke Power Company*,[166] the archetypal Title VII disparate impact case, could be characterized as involving a one-time decision.[167] The defendant had a policy of requiring high school diplomas in order for employees to work in certain departments, which adversely affected Black employees because they disproportionately did not have high school diplomas.[168] The Seventh Circuit noted that this case could be characterized as involving a one-time decision because, at some point, some decision-maker at Duke Power made the decision to establish the diploma requirement.[169] The same analysis can be extended to the land-use context, where any policy, such as a municipal redevelopment plan or zoning code, can be traced back to an original decision to implement that policy.

The reverse also holds true: one-time land-use decisions usually carry out underlying policies. For example, in *Huntington Branch, NAACP v. Town of Huntington*,[170] the Second Circuit upheld a disparate impact claim against the town and declined to distinguish between the town's underlying exclusionary zoning code and its one-time decision not to rezone the relevant land to allow for the construction of multifamily housing.[171] As the court stated, "[t]here is always some discrete event (refusal to rezone property, refusal to hire someone because he did not graduate from high school) which touches off litigation challenging a neutral rule or policy."[172] Without the underlying zoning policy, there would have been no need for the developer to petition to rezone the parcel in the first place, and the town's ultimate decision upheld the underlying zoning policy's application to the land. Other

164 *Council 31*, 978 F.2d at 377.
165 *Id.*
166 401 U.S. 424 (1971).
167 *Council 31*, 978 F.2d at 377 (citing *Griggs*, 401 U.S. at 427).
168 *Id.*
169 *Id.*
170 844 F.2d 926 (2d Cir. 1988).
171 *Id.* at 934.
172 *Id.*

examples demonstrate the same relationship; decisions to seize and tear down an apartment complex often implement and apply a broader municipal redevelopment plan.[173]

3. One-time decisions are included under a broad definition of "policy."

The Supreme Court has previously ruled that one-time decisions by municipalities fall under a broad definition of "policy." In the context of municipal liability for constitutional violations under § 1983, the Court has defined "policy" broadly as "a course of action consciously chosen from among various alternatives."[174] In *Monell v. Department of Social Services of New York*,[175] the Supreme Court held that "decisions of municipal legislative bodies constitute official policies."[176] It further clarified in a later case that this includes *one-time decisions* by municipalities:

> [I]t is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances. No one has ever doubted, for instance, that a municipality may be liable under § 1983 for a single decision by its . . . legislative body . . . because even a single decision by such a body unquestionably constitutes an act of official government policy.[177]

In its holding, the Court acknowledged that while "official policy" often refers to formal rules, it is also commonly understood to mean a particular course of action chosen by the government's authorized decision-makers, and cited several dictionaries to substantiate this definition.[178] It further reasoned that the municipality should be liable for its conduct, regardless of whether the

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[173] *See, e.g.*, *2922 Sherman Ave.*, 444 F.3d at 677 (describing how the District of Columbia closed an apartment building as part of a broader policy "to enforce the housing code aggressively in the city's 'worst' multi-family apartment buildings").

[174] *Pembaur*, 475 U.S. at 484 (quoting City of Oklahoma City v. Tuttle, 471 U.S. 808, 823 (1985)).

[175] 436 U.S. 658 (1978).

[176] *Yuma*, 2018 WL 582314, at *6 (citing *Monell*, 436 U.S. at 690–95).

[177] *Pembaur*, 475 U.S. at 480.

[178] *Id.* at 480, 481 n.9 (first quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1754 (1981) (defining policy as "a specific decision or set of decisions designed to carry out such a chosen course of action"); and then quoting OXFORD ENGLISH DICTIONARY 1071 (1933) (defining policy as a "course of action adopted and pursued by a government, party, ruler, statesman, etc.; any course of action adopted as advantageous or expedient")).

conduct occurs once or repeatedly.[179] As such, even single decisions can constitute government policy.

Many one-time land-use decisions fit under this definition of a policy because they, too, choose between a variety of alternatives and set forth a course of action about how that particular land can be used moving forward. For example, if a municipality decides to approve a rezoning request, the possible future uses for that parcel of land change. Indeed, one district court has already made this comparison, pointing to the Supreme Court's reasoning in the § 1983 cases and analogizing it to one-time land-use decisions.[180] Although § 1983 is not as closely related to the FHA as Title VII and the ADEA, it is still a federal statute that imposes liability for municipal conduct and is used to vindicate individuals' civil rights, which is analogous to the FHA. If particular conduct constitutes a policy for *Monell* liability, then that same kind of conduct should constitute a policy under the FHA.

C. Core FHA Disparate Impact Cases Are Based Upon One-Time Land-Use Decisions

One-time decisions also should not be excluded because they form the core of disparate-impact-theory cases in the land-use context. Three seminal cases are illustrative: In *Metropolitan Housing Development Corp. v. Village of Arlington Heights*,[181] *Huntington Branch, NAACP v. Town of Huntington*, and *Keith v. Volpe*,[182] each relevant municipality refused to approve a rezoning request or permit required to build affordable housing that would primarily benefit people of color in the area. In each case, the relevant circuit court affirmed for the first time that disparate impact liability was cognizable under the FHA.[183] As a result, these cases demonstrate that one-time land-use decisions constitute the core of disparate impact liability under the FHA.

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[179] *Id.* at 481.

[180] *Yuma*, 2018 WL 582314, at *6 (first citing *Monell*, 436 U.S. at 690–95; and then quoting *Pembaur*, 475 U.S. at 480).

[181] 558 F.2d 1283 (7th Cir. 1977).

[182] 858 F.2d 467 (9th Cir. 1988).

[183] *See Arlington Heights*, 558 F.2d at 1289; *Huntington Branch*, 844 F.2d at 933–35; *Keith*, 858 F.2d at 482–83.

In *Arlington Heights*, the Seventh Circuit held that the village's denial of a rezoning petition that would have led to the construction of affordable housing could establish a disparate impact claim.[184] The court stated that

> the Village's refusal to rezone had a discriminatory effect . . . . Because a greater number of [B]lack people than white people in the Chicago metropolitan area satisfy the income requirements for federally subsidized housing, the Village's refusal to permit [the developer] to construct the project had a greater impact on [B]lack people than on white people.[185]

Although the court ultimately concluded that the statistical evidence for disparate impact was "relatively weak," it acknowledged that one-time decisions could meet the theoretical requirements for a disparate impact claim.[186]

Similarly, in *Huntington Branch*, the Second Circuit found that a town's refusal to rezone land to build affordable housing violated the FHA under a theory of disparate impact.[187] At the time, Huntington—a town located on Long Island in New York—was virtually all white, with the town's Black residents segregated to the only neighborhood zoned for multifamily housing.[188] The NAACP sought to construct racially integrated multifamily housing in another part of Huntington, but the town refused its rezoning request.[189] After the NAACP sued the town for disparate impact liability under the FHA, the court concluded "that the failure to rezone the [ ] site had a substantial adverse impact on minorities. . . . [T]he disproportionate harm to blacks and the segregative impact on the entire community resulting from the refusal to rezone create a strong prima facie showing of discriminatory effect."[190] As a remedy, the court ordered the town to approve the rezoning request so that construction could commence.[191]

Finally, in *Keith*, the Ninth Circuit found that a city's denial of zoning changes and development permits that were needed to build affordable housing was a violation of the FHA because it

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184 *Arlington Heights*, 558 F.2d at 1288.
185 *Id.*
186 *Id.* at 1291.
187 *Huntington Branch*, 844 F.2d at 940–41.
188 *Id.* at 929–30.
189 *Id.* at 928–29.
190 *Id.* at 938.
191 *Id.* at 942.

disproportionately impacted minority residents.[192] The affordable housing in dispute was specifically intended for residents displaced by a new freeway in Los Angeles. After initially fighting the construction of the freeway, residents entered into a consent decree agreeing to the construction so long as the City of Hawthorne, one of the cities through which the freeway would pass, agreed to provide the displaced residents with new, affordable housing.[193] However, the city later reneged on its commitment, voting to deny the zoning and permit requests necessary for the new housing.[194] The court determined that the evidence showed

> [t]hat Hawthorne's refusal to permit construction of the project had a greater adverse impact on minorities. Of the persons who would benefit from the state-assisted housing because they are low-income displacees, two-thirds are minorities. The failure to build the projects had twice the adverse impact on minorities as it had on whites. This showing established a racially discriminatory effect.[195]

These three cases involved some of the earliest disparate impact claims upheld by appellate courts, and each dealt with single land-use decisions. Such decisions helped to establish the viability of disparate impact theory in the first place, and they should not now be excluded. Indeed, the Supreme Court, for all its hedging in *Inclusive Communities*, cited both *Huntington Branch* and *Arlington Heights* with approval.[196] The Court also acknowledged that lawsuits targeting "zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification . . . reside at the heartland of disparate-impact liability."[197] As such, even in *Inclusive Communities*, the Supreme Court acknowledged suits

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192 *Keith*, 858 F.2d at 484.

193 *Id.* at 471.

194 *Id.* at 472.

195 *Id.* at 484 (citation omitted) (citing Keith v. Volpe, 618 F. Supp. 1132, 1150 (C.D. Cal. 1985)).

196 *Inclusive Cmtys.*, 576 U.S. at 535–36, 539.

197 *Id.* at 539. A few scholars have alleged that these cases were based upon the segregative effect theory, not disparate impact theory, and that is why they were allowed to be based upon one-time land-use decisions. *See, e.g.*, Schwemm, *supra* note 22, at 715–20; *see also* Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 MICH. L. REV. 173, 219–20 (2019). But this analysis directly contravenes the Supreme Court's description of these cases as core to the disparate impact theory and overstates the Court's language distinguishing between policies and one-time decisions in *Inclusive Communities*. *See Inclusive Cmtys.*, 576 U.S. at 543.

targeting certain one-time land-use decisions are central to the FHA's purpose to eradicate discrimination in housing.

IV. THE IMPLICATIONS OF A BROADER SCOPE OF VIABLE BASES FOR DISPARATE IMPACT CLAIMS

If one-time land-use decisions are not categorically excluded from disparate impact liability under the FHA, the next question is whether there should be any limits on their inclusion. Part IV.A proposes that, in general, one-time land-use decisions should be able to establish disparate impact claims because they contain the characteristics described in Part III of this Comment. Zoning decisions and the closure of residential buildings are the clearest examples and should be per se included under disparate impact liability, but there may be valid claims based upon other municipal and private decisions, too. Part IV.B describes how the three-step burden-shifting test used by courts to evaluate these claims will ensure that disingenuous litigation against small, one-off decisions won't succeed, alleviating concerns about the broadening of liability under the FHA. Finally, Part IV.C clarifies that this Comment argues for disparate impact liability based upon any given single decision, but that there should not be liability based upon the aggregation of multiple decisions without some underlying policy to connect them.

A. In General, One-Time Land-Use Decisions Should Be Able to Substantiate Disparate Impact Claims

Generally speaking, one-time decisions should be able to substantiate disparate impact claims so long as they exhibit the characteristics described in Part III. Zoning decisions and closure of residential buildings present the easiest cases—as a per se rule, they should be able to substantiate disparate impact claims provided the plaintiff is able to succeed under the three-step burden-shifting test. This is because zoning decisions and closure of residences are analogous to one-time employment decisions, which can establish disparate impact claims, and function like policies. Zoning decisions, too, have been historically core to disparate impact liability under the FHA. Other land-use decisions made by municipalities and private developers should also be able to establish disparate impact liability, although they might face other hurdles and therefore should be evaluated on a case-by-case basis.

1. Zoning decisions and closure of residential buildings should be per se included as bases for disparate impact liability under the FHA.

Single zoning decisions should be able to serve as the basis of disparate impact claims. Zoning decisions mirror single employment decisions in the Title VII and ADEA context—in that they both can affect many employees and residents, respectively—which suggests that zoning decisions should also be able to substantiate disparate impact claims. Zoning decisions also function much like the creation of a legislative policy: they require lengthy proceedings that mirror legislative processes, incorporate the same substantive considerations, rely upon underlying zoning policies that are often exclusionary, and require passage of new laws. Finally, zoning decisions which frustrate attempts to build affordable housing have been repeatedly recognized as valid bases for disparate impact claims by federal courts,[198] with Justice Anthony Kennedy for the *Inclusive Communities* majority describing litigation against exclusionary zoning as the "heartland" of disparate impact liability.[199]

Although some courts have decided otherwise,[200] the one-time decision to close a residential building should also be able to establish a disparate impact claim. As in the employment context, these types of decisions may be made only one time but can affect numerous people, such that the analogy to the ADEA and Title VII applies to these decisions, too. When made by municipal actors, these decisions usually require quasi-legislative action, such as government exercise of eminent domain, making the action sufficiently policy-like. Even private developers that choose to close an apartment complex may use a robust decision-making process mimicking the exercise of a policy. And many of these one-time decisions are intertwined with a broader, underlying policy, such as a revitalization plan.

2. Other land-use decisions should be evaluated for

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198 Seicshnaydre, *supra* note 7, at 400–01.

199 *Inclusive Cmtys*, 576 U.S. at 539.

200 *See 2922 Sherman Ave.*, 444 F.3d at 680; Boykin v. Gray, 986 F. Supp. 2d 14, 20–22 (D.D.C. 2013), *aff'd sub nom.*, Boykin v. Fenty, 650 F. App'x 42 (D.C. Cir. 2016); *New West*, 825 F.3d at 830.

disparate impact liability on a case-by-case basis.

Individuals should have the opportunity to bring a disparate impact claim against other municipal and private development decisions, too, but these other decisions provide a less clear case for disparate impact liability and thus should be evaluated on a case-by-case basis. For example, a decision regarding the location of a new building constructed by a private developer could be subject to disparate impact liability if it disproportionately impacts members of a protected class in a negative way, such as pricing those individuals out of the neighborhood. There is nothing about such a decision that should prohibit a disparate impact claim on the sole basis that it is a single decision rather than a policy—so long as the plaintiff is able to show that the developer's decision caused a disparate impact, their claim should be able to move forward.

Still, it is worth noting that claims based upon decisions like the location of a building may be less likely to succeed. There is far less FHA case law surrounding private development decisions as compared to governmental land-use decisions, making it difficult to predict how the litigation would play out. Additionally, the Supreme Court has expressed reluctance to find liability in these sorts of scenarios—in fact, imposing liability based upon "the decision of a private developer to construct a new building in one location rather than another" is exactly the scenario the Court warned against, cautioning that "such a one-time decision may not be a policy at all."[201]

B. The Three-Step Burden-Shifting Test Will Properly Exclude Frivolous Claims

There may be concern that broadening the types of land-use practices that can establish disparate impact liability will lead to a proliferation of litigation. If every small decision made by a developer or municipality is subject to disparate impact liability, excessive litigation might slow development or clog courts with frivolous allegations. Indeed, one could imagine actors, like those in the NIMBY (Not In My Backyard) movement, litigating in bad faith to prevent new development. However, these concerns are overblown because the three-step burden-shifting test that the

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[201] *Inclusive Cmtys*, 576 U.S. at 543.

Supreme Court implicitly endorsed in *Inclusive Communities* will largely ensure that these disingenuous claims do not succeed.

A court's analysis in such a case could proceed as follows. First, the plaintiff would need to demonstrate that the one-time decision has a disparate impact on residents of color, providing statistical evidence as described in Part I. If a decision is insignificant, a plaintiff will likely be unable to prove a prima facie case of discrimination, terminating the litigation at the first step of the analysis.

For instance, decisions which only affect a small area of physical space (like a small parcel of land or a small residential building) will likely affect fewer people, making it difficult for a plaintiff to provide the needed statistical evidence of a disparate impact. This is because smaller sample sizes provide less statistical power for accurately calculating comparisons between the protected class and comparison group.[202] For example, if a plaintiff were challenging a zoning decision because it prevented development of affordable housing on a small parcel of land, it may be difficult for them to provide valid statistical evidence of a disparate impact because any affordable housing that could have been built on the land would have likely only housed a handful of people. To understand the wide range in sizes of land parcels, one can compare the typical lot size of a single-family home in Chicago—twenty-five by 125 feet,[203] which is less than one-tenth of an acre of land—to the forty-two-acre parcel of undeveloped land that was under consideration in *Yuma*, where the plaintiffs were denied a zoning change needed to develop affordable housing.[204]

Similarly, plaintiffs may fail to prove a prima facie case of disparate impact from decisions which only marginally affect the way in which land can be used. For instance, a municipality's decision to deny rezoning of a plot of land to enable a completely different type of land use—say, rezoning from commercial to residential land use, or from single-family zoning to more dense residential zoning—would enable a plaintiff to allege that the decision excluded potential residents from living there, serving as the

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[202] Schwemm & Bradford, *supra* note 32, at 737 n.196 ("Both the standard error and the confidence intervals are extremely sensitive to the sample size.").

[203] Fran Bailey, *The Standard Chicago Lot Size*, CHI. METRO AREA REAL ESTATE, https://perma.cc/679Y-RRQL.

[204] *Yuma*, 2018 WL 582314, at *1.

basis for a disparate impact claim. In contrast, other land-use decisions affect permissible land use to a much smaller extent, such as a municipality's decision to deny a slight height variance for the buildings on a parcel of land. Although that denial undoubtedly still affects the developmental possibilities on the land,[205] the difference in possible land uses is smaller. In the latter example, a plaintiff may fail to show that the decision absolutely precluded the ability for residents to live on that land, and therefore fail to show that there was a negative impact on a protected class.

If the plaintiff is able to make a prima facie showing of disparate impact, the burden then shifts to the defendant, which would need to demonstrate that it has a legitimate, non-discriminatory reason for the decision. The defendant may also convincingly assert a defense at this stage. For instance, if a developer decided to close a residential building, it would point to the poor housing conditions as a legitimate reason for the closure.[206]

Then, the plaintiff would respond that there are less-discriminatory alternatives to address these problems. Instead of closing a building in poor condition, the defendant could rehabilitate it. This rehabilitation could be gradual, allowing residents to move back in as phases of the redevelopment are completed, rather than permanently displacing them. But, again, the defendant could assert reasonable counterarguments. If health or safety problems are particularly endemic to an apartment building, the defendant may succeed in showing that there is no alternative to closure. The defendant could also respond that the plans proposed by the plaintiff would be cost-prohibitive and accordingly do not pose a realistic alternative.

After hearing both parties' arguments, the court would need to weigh the evidence and make a judgment, all of which is reasonably within the court's purview. Courts make such evaluations all the time—one only need look to the Third Circuit's opinion in *Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly*,[207] which conducted this type of analysis in a case where

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[205] Experience indicates that even seemingly small, highly technical zoning specifications like height restrictions and setback requirements may largely circumscribe the types of development possible on a parcel of land. *See* Daniel Herriges, *What if They Passed Zoning Reform and Nobody Came?*, STRONG TOWNS (Sept. 3, 2020), https://perma.cc/5VDE-STEE.

[206] *See, e.g.*, *New West*, 825 F.3d at 830.

[207] 658 F.3d 375 (3d Cir. 2011).

residents protested the township's closure of buildings that primarily housed residents of color.[208] Courts usually evaluate the disparate impact claim under the three-step test at the summary judgment stage,[209] but they could reasonably dismiss a case earlier if plaintiffs' pleadings are insufficient or proceed to a bench or jury trial when plaintiffs have convincingly asserted their case.

It is true, of course, that even if defendants are ultimately able to defeat any unmeritorious claims, the need to litigate until the summary judgment stage or potentially later could delay development projects and increase the defendant's costs. However, it still seems unlikely that the number of frivolous claims would suddenly spike if this Comment's analysis were accepted by federal courts. Before *Inclusive Communities*, when courts were potentially more open to disparate impact liability based upon one-time decisions, disparate impact claims remained relatively inaccessible to potential plaintiffs given the complexity of proving a prima facie case of disparate impact, "limit[ing] the number of claims and the judicial resources required to be expended on them."[210] Indeed, compared to employment discrimination claims filed with the Equal Employment Opportunity Commission (EEOC), HUD received only one-tenth the number of fair housing claims,[211] and fair housing claims are still significantly outpaced by employment claims after *Inclusive Communities*.[212] Other legal thinkers have found evidence that pleading standards are, as a general matter, sufficiently rigorous to prevent frivolous claims from making it far into legal proceedings.[213] And to the extent that an increase in unmeritorious claims is unavoidable—the

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[208] *Id.* at 382–87.

[209] Seicshnaydre, *supra* note 7, at 422–31, app. A (collecting cases, most of which were decided at the summary judgment stage).

[210] *Id.* at 412.

[211] *Id.* at 412 n.287.

[212] In fiscal year 2021, the most recent year with available data, the EEOC reported 61,331 total charges of employment discrimination, *Charge Statistics (Charges Filed with EEOC) FY 1997 Through FY 2021*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://perma.cc/QR3M-3LYH, whereas HUD reported 11,522 fair housing claims, U.S. DEP'T OF HOUS. & URB. DEV., STATE OF FAIR HOUSING: ANNUAL REPORT TO CONGRESS FY 2021, at 26 (2021). Although these statistics include all claims—not just disparate impact claims—they still indicate that fair housing claims have remained relatively steady.

[213] *See* Claire Williams, Note, *Inclusive Communities and Robust Causality: The Constant Struggle to Balance Access to the Courts with Protection for Defendants*, 102 MINN. L. REV. 969, 1009–12 (2017) (arguing that the *Inclusive Communities* Court's "robust causality" standard adds an unnecessary barrier to disparate impact claims, citing empirical evidence that current pleading standards already sufficiently safeguard against spurious litigation).

somewhat inevitable tradeoff of providing more expansive civil rights and causes of actions to plaintiffs is the likelihood that more litigation will occur—it seems outweighed by the benefits of providing greater FHA protection when there are meritorious cases.

C. Plaintiffs Should Not Be Able to Aggregate Multiple One-Time Decisions

Based upon the analysis in this Comment, there should be two cognizable pathways to disparate impact liability under the FHA. The first is well-accepted by courts: disparate impact liability based upon a defendant's policy that, when applied across many individual instances, disproportionately affects a protected class.[214] The second path to disparate impact liability under the FHA is advocated by this Comment: disparate impact claims based upon a *single* land-use decision made *one time*. But a final, related question is whether litigants can take an approach that falls somewhere in between these two paths—can plaintiffs aggregate multiple one-time decisions to establish disparate impact liability without some underlying policy connecting those decisions? Plaintiffs might try to do so if they are unable to identify a defendant's particular policy causing a disparate impact, and any single decision is too insignificant to establish evidence of a disparate impact, but there is statistical evidence of disparities across many decisions made by a defendant.

If the plaintiff identifies a defendant's policy as the source of the disparate impact, the claim would clearly fit within the scope of permissible claims under the FHA—this is the well-accepted theory of liability. For example, this is partially the argument that the plaintiffs made in *Ellis*, the case in which owners of low-income housing alleged that Minneapolis's application of its housing code disproportionately impacted their tenants of color. The plaintiffs alleged that the city had an informal policy of discrimination that led to a disparate application of its housing code to many of their buildings.[215] In other words, the plaintiffs alleged that each of the single decisions to apply the housing code to their properties evidenced some underlying policy of the city which

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[214] *See, e.g.*, Reyes v. Waples Mobile Home Park Limited Partnership, 903 F.3d 415, 421 (4th Cir. 2018) (alleging that a landlord's policy requiring tenants to provide documentation of U.S. citizenship has a disparate impact on Hispanic and Latino residents).

[215] *Ellis*, 860 F.3d at 1112.

caused a disparate impact (although they ultimately failed to provide sufficient evidence that such a policy existed).[216]

Similarly, a plaintiff may allege that a defendant's policy of giving discretion to individual decision-makers—a policy of not having a formalized top-down policy—establishes disparate impact liability. For instance, a plaintiff could allege that a municipality's policy of granting large amounts of discretion to its zoning board enabled implicit bias to influence its decisions, causing the board to repeatedly deny requests to build affordable housing and disproportionately impacting low-income residents of color.[217] The Supreme Court has established that a policy of delegating discretion to individual supervisors, leading to disparate outcomes for employees, can serve as the basis of a disparate impact claim under Title VII.[218] Although the Court later held that this theory could not establish class certification in a class action lawsuit,[219] individual plaintiffs can still bring disparate impact claims when harmed by repeated decisions caused by a policy of discretion.[220] This claim would appear to be valid under the FHA, too. But, again, this question falls outside the scope of this Comment, which is primarily concerned with *an individual decision standing on its own*; once a plaintiff alleges that the defendant has a policy causing the disparate impact, the analysis turns on evaluating that policy and its effects, rather than a single decision.

Absent a policy that connects multiple decisions together, however, the question remains whether plaintiffs can generally aggregate numerous independent decisions to establish a disparate impact claim. This Comment concludes no. Without a single decision or policy to ground the analysis of liability, it will be

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216 *Id.*

217 Plaintiffs have made similar allegations against mortgage lenders that give salespersons the discretion to determine the terms of each individual mortgage, leading borrowers of color to receive worse loan terms. *See* Ian Ayres, Gary Klein & Jeffrey West, *The Rise and (Potential) Fall of Disparate Impact Lending Litigation*, *in* EVIDENCE AND INNOVATION IN HOUSING LAW AND POLICY 232, 233–34 (Lee Anne Fennell & Benjamin J. Keys eds., 2017).

218 *See* Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 990–91 (1988) ("If an employer's undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply. . . . [S]ubjective or discretionary employment practices may be analyzed under the disparate impact approach in appropriate cases.").

219 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349–52, 355–56 (2011).

220 *Watson*, 487 U.S. at 990–91.

simply too difficult to evaluate under the current disparate impact doctrine.

When a plaintiff alleges liability based upon a particular policy or decision made by the defendant, it establishes a clear focal point around which analysis revolves for the litigants and the court. Parties are able to identify what decision or policy is relevant to the case. They are then able to analyze causation between the policy or decision and the disparate impact, to evaluate whether an alternative policy or decision would be less discriminatory, and so on.

But this analysis would fall apart if the plaintiff amalgamated numerous one-time decisions without any underlying policy connecting those decisions. In the first step of the burden-shifting test, the plaintiff may be able to show that there are statistical disparities across the defendant's many decisions. But in the second and third steps, the defendant would be unable to point to a single nondiscriminatory, legitimate reason for the decisions or a single less-discriminatory alternative. Each decision would present its own reasons and its own alternatives. How would a court assess liability if some of the defendant's decisions had nondiscriminatory reasons and others did not, but all of the decisions were aggregated into the plaintiff's statistical analysis? What sort of nondiscriminatory alternative would the plaintiff suggest to a generalized allegation that was not grounded in any particular policy? These problems indicate that there simply is not room for these types of claims under current disparate impact doctrine.

Excluding claims based upon aggregated decisions may seem like a normatively undesirable outcome to those who wish for the FHA to be a stronger tool against implicit bias and discrimination in the land-use context. Indeed, it still leaves an unsatisfying twilight between liability for policies on the one hand and liability for single decisions on the other. However, the ability to claim disparate impact based upon policies that give discretion to individual decision-makers seems to cover a significant part of that twilight. In the gap left behind, plaintiffs can still target patterns of biased land-use decisions with disparate treatment claims instead: evidence of a disparate impact across many individual decisions can serve as circumstantial evidence of discriminatory

intent.[221] Although this is an imperfect solution—proving discriminatory intent is very difficult—this problem may simply be an unfortunate limitation of the current doctrine.

CONCLUSION

Several lines of legal analysis indicate that one-time land-use decisions should be able to serve as the basis for disparate impact claims under the FHA. Courts have also allowed one-time decisions to substantiate disparate impact liability under the ADEA and Title VII, two other civil rights statutes that have been frequently interpreted alongside the FHA. The analytical distinction between one-time decisions and broader policies is often quite slippery. And core FHA cases which established the right to disparate impact claims in the circuit courts were also based upon one-time land-use decisions.

That is not to say that all one-time decisions are equal. There are some one-time land-use decisions that are so small in magnitude that plaintiffs would be unable to show they have a statistically significant disparate impact on a protected class. There are many decisions which are justifiable by the nondiscriminatory, legitimate goals of the defendant or the lack of suitable, less discriminatory alternatives. The three-step burden-shifting test used by courts to evaluate disparate impact claims would ensure that frivolous litigation in such cases would not succeed.

Still, if the analysis of this Comment were accepted, it would allow litigation based upon consequential land-use decisions that often disproportionately affect people of color and other protected classes, such as municipal zoning decisions and the closure of residential buildings. Although plaintiffs would still be unlikely to successfully bring decisions based upon a series of one-time decisions absent a policy connecting them, inclusion of liability based upon a single decision would be a large, incremental step forward in enhancing the efficacy of the FHA as a tool to combat housing discrimination. One-time land-use decisions have played a large role in the United States' long history of racial segregation and

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[221] *See, e.g.*, Ammons v. Dade City, 783 F.2d 982, 987–88 (11th Cir. 1986) (finding that, in a case regarding allegations of discriminatory treatment in a city's provision of municipal services, "[disparate] impact alone does give rise to 'an inference of discriminatory intent'" (quoting Ammons v. Dade City, 594 F. Supp. 1274, 1301 (M.D. Fla. 1984))).

other forms of housing discrimination,[222] and they should not be arbitrarily excluded from the scope of the FHA.

[222] *See* Jessica Trounstine, *The Geography of Inequality: How Land Use Regulation Produces Segregation*, 114 AM. POL. SCI. REV. 443, 449 (2020).