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FAIR HOUSING LITIGATION AFTER *INCLUSIVE COMMUNITIES*: WHAT'S NEW AND WHAT'S NOT

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On June 25, 2015, the Supreme Court held in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* (*Inclusive Communities* or *ICP*)[1] that parts of the federal Fair Housing Act (FHA)[2] include a disparate-impact standard of liability.[3] This standard allows liability without a showing of illegal intent and traces back to the Court's 1971 decision in *Griggs v. Duke Power Co.*,[4] which endorsed impact-based claims under the federal employment discrimination law, Title VII of the Civil Rights Act of 1964.[5]

The Court's 5-4 decision in the *ICP* case endorsed forty years of practice under the FHA, during which the impact theory of liability had been adopted by all eleven federal appellate courts to consider the matter.[6] This theory had also been adopted by various federal agencies, including the Department of Housing and Urban Development (HUD), the agency primarily responsible for enforcing the FHA.[7]

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1. 135 S. Ct. 2507 (2015).

2. Originally enacted in 1968, the FHA, as amended, is codified at 42 U.S.C. §§ 3601–3619 (2012).

3. The Court held that disparate-impact claims are cognizable under FHA § 3604(a) and § 3605(a) (referred to in the Court's opinion as § 804(a) and § 805(a), which were the original section numbers in the 1968 FHA). 135 S. Ct. at 2518.

4. 401 U.S. 424, 431–32 (1971) (holding Title VII proscribes "practices that are fair in form, but discriminatory in operation" and therefore "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability").

5. 42 U.S.C. § 2000e.

6. See Graoch Assocs. # 33, L.P. v. Louisville/Jefferson Cty. Metro Human Relations Comm'n, 508 F.3d 366, 371 (6th Cir. 2007); Reinhart v. Lincoln Cty., 482 F.3d 1225, 1229 (10th Cir. 2007); Hallmark Developers, Inc. v. Fulton Cty., 466 F.3d 1276, 1286 (11th Cir. 2006); Langlois v. Abington Hous. Auth., 207 F.3d 43, 49–50 (1st Cir. 2000); Pfaff v. HUD, 88 F.3d 739, 745 (9th Cir. 1996); Simms v. First Gibraltar Bank, 83 F.3d 1546, 1555 (5th Cir. 1996); NAACP v. Town of Huntington, 844 F.2d 926, 934–35 (2d Cir. 1988), aff'd per curiam, 488 U.S. 15 (1988); Betsey v. Turtle Creek Assocs., 736 F.2d 983, 986 (4th Cir. 1984); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 147–48 (3d Cir. 1977); Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977); United States v. City of Black Jack, 508 F.2d 1179, 1184–85 (8th Cir. 1974).

7. See 42 U.S.C. § 3608(a) (delegating responsibility of administration of FHA to Secretary of Housing and Urban Development). HUD had long recognized this theory of lia-

In many ways, therefore, *ICP* will not greatly alter FHA-based litigation, although some elements of the decision are undeniably important. This Article provides a roadmap for post–*ICP* fair housing cases. Part I reviews the background of FHA-impact cases and the Supreme Court's opinions in *ICP*. Part II discusses various types of FHA and related claims that will *not* be changed by the *ICP* decision. Finally, Part III examines those areas where *ICP will* influence future FHA cases, the key FHA issues that remain unresolved after *ICP*, and some likely post–*ICP* uses of the disparate-impact theory in FHA cases.

I. IMPACT CASES UNDER THE FHA AND THE *INCLUSIVE COMMUNITIES* CASE

A. *FHA-Impact Claims Before* Inclusive Communities

The impact theory has been used far less in FHA cases than in the employment discrimination field under Title VII. Still, since the mid-1970s, when courts began to apply the *Griggs* interpretation of Title VII to housing cases, impact-based FHA claims have challenged a variety of housing practices, including:

- Exclusionary zoning and other land-use restrictions by local governments that blocked or limited housing proposals of particular value to racial minorities[8] or persons with disabilities;[9]
- Urban renewal, code enforcement activity, and other actions by local officials that reduced housing opportunities for minorities;[10]

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bility. See Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,460–62 (Feb. 15, 2013) [hereinafter HUD Effects Standard] (providing rationale for HUD's impact regulation); see also id. at 11,482 (promulgating regulation—24 C.F.R. § 100.500—recognizing FHA covers disparate-impact claims).

8. See, e.g., *Town of Huntington*, 844 F.2d at 936–41 (ruling in favor of impact-based challenge to town's use of its zoning powers to restrict subsidized housing to particular area and to block specific housing project in other area); *Metro. Hous. Dev. Corp.*, 558 F.2d at 1290–91 (describing circumstances under which municipality's decision to block affordable housing project would establish illegal discriminatory effect under FHA); *City of Black Jack*, 508 F.2d at 1184–88 (ruling in favor of impact-based challenge to city's use of its zoning powers to block affordable housing project).

9. See, e.g., Schwarz v. City of Treasure Island, 544 F.3d 1201, 1217 (11th Cir. 2008) (noting defendant's concession that city's restrictions on group home for disabled persons may be challenged under disparate-impact theory); Tsombanidis v. W. Haven Fire Dep't, 352 F.3d 565, 573–79 (2d Cir. 2003) (describing circumstances under which fire district's restrictions on group home for disabled persons could be subject to impact-based challenge); Gamble v. City of Escondido, 104 F.3d 300, 307 n.2 (9th Cir. 1997) (noting factual circumstances in which city's restrictions on group housing could establish disparate-impact claim). See generally Robert G. Schwemm, Housing Discrimination: Law and Litigation § 11D:5 n.21 (2015) (citing additional cases involving impact-based challenges to municipal restrictions on group homes).

10. See, e.g., Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375, 381–84 (3d Cir. 2011) (upholding impact claim based on defendant's destruction of plaintiffs' neighborhood through urban renewal); Gallagher v. Magner, 619

- Residency preferences and similar techniques used by housing officials and private landlords to favor people with local ties over "outsiders" in making available housing opportunities;[11]
- Screening devices used by landlords to limit units based on applicants' source of income, citizenship status, or other criteria that have a negative impact on classes of persons protected by the FHA;[12]
- Mortgage underwriting standards and other home-finance practices that result in less favorable treatment of minorities and minority areas;[13] and
- Home insurance standards that result in minorities being treated less favorably.[14]

F.3d 823, 833–38 (8th Cir. 2010) (upholding impact claim based on defendant's method of enforcing its building code); Bonasera v. City of Norcross, 342 F. App'x. 581, 585–86 (11th Cir. 2009) (holding challenge to city's enforcement of its zoning code that allegedly disproportionately harmed Latino residents failed for lack of proof).

11. See, e.g., Fair Hous. Justice Ctr. v. Edgewater Park Owners Coop., Inc., No. 10 CV 912 (RPP), 2012 WL 762323, at *10–11 (S.D.N.Y. Mar. 9, 2012) (upholding impact-based challenge to cooperative's rule requiring purchasers to obtain three references from existing shareholders); United States v. Hous. Auth. of Chickasaw, 504 F. Supp. 716, 729–32 (S.D. Ala. 1980) (holding public housing authority's requirement that residents be local citizens violated FHA due to its segregative effect); see also Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Par., 641 F. Supp. 2d 563, 569, 577–78 (E.D. La. 2009) (cited with approval and described in Supreme Court's *ICP* opinion, Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, 135 S. Ct. 2507, 2522 (2015)).

12. See, e.g., Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 248–51 (9th Cir. 1997) (upholding challenge to landlord's screening device limiting units based on applicants' source of income); Cent. Ala. Fair Hous. Ctr. v. Magee, 835 F. Supp. 2d 1165, 1194–97 (M.D. Ala. 2011), vacated as moot, No. 11-16114-CC, 2013 WL 2372301 (11th Cir. May 17, 2013) (allowing plaintiff to challenge screening device limiting units based on applicants' citizenship status).

13. See, e.g., Simms v. First Gibraltar Bank, 83 F.3d 1546, 1555–56 (5th Cir. 1996) (holding impact-based challenge to defendant's lending practices failed for lack of proof); Saint-Jean v. Emigrant Mortg. Co., 50 F. Supp. 3d 300, 318–20 (E.D.N.Y. 2014) (upholding impact-based challenge to lender's marketing of high-cost products to minority areas); Adkins v. Morgan Stanley, No. 12-CV-7667 (HB), 2013 WL 3835198, at *8–10 (S.D.N.Y. July 25, 2013) (upholding impact-based challenge against purchaser of discriminatory home loans); Miller v. Countrywide Bank, N.A., 571 F. Supp. 2d 251, 255–59 (D. Mass. 2008) (upholding impact-based challenge to lender's discretionary pricing system for providing mortgages).

14. See, e.g., Ojo v. Farmers Grp., Inc., 600 F.3d 1205, 1207–09 (9th Cir. 2010) (en banc) (holding FHA impact-based claim against home insurance company is proper, at least to extent it is not barred by state law under reverse-preemption doctrine of McCarran-Ferguson Act); Jones v. Travelers Cas. Ins. Co. of Am., No. 13-CV-02390-LHK, 2013 WL 4511648, at *2–3 (N.D. Cal. Aug. 22, 2013) (refusing to stay action challenging insurance company's refusal to insure landlords who rent to Section 8 voucher holders pending Supreme Court's determination of whether impact-based claims are cognizable under FHA).

B. *The* Inclusive Communities *Case*

The *ICP* case did not fit into any of these categories. The defendant, the Texas Department of Housing and Community Affairs (Department), was accused of using standards in administering the Low Income Housing Tax Credit program (LIHTC) to reinforce racially segregated housing patterns in the Dallas metropolitan area. LIHTC is the nation's largest subsidized housing program,[15] and it requires state agencies like the Department to provide selection criteria for housing developers seeking LIHTC-based tax credits.[16] The Inclusive Communities Project, an organization that helps poor families obtain affordable housing, alleged that the Department's criteria violated the FHA and other laws by encouraging LIHTC projects to be located in predominantly black neighborhoods within Dallas and away from white suburban areas. The FHA claims alleged both intentional and impact-based discrimination in violation of § 3604(a) and § 3605 of the statute, which, respectively, outlaw practices that "otherwise make unavailable or deny [housing] because of race" and "discriminate against any person in making available [a real estate-related transaction] . . . because of race."[17]

After a bench trial, the district court found insufficient evidence of intentional discrimination, but did hold the Department liable based on the unjustified segregative impact of its selection criteria.[18] On appeal, the Fifth Circuit upheld the finding of disparate impact, but reversed with respect to the Department's claimed justification, choosing to follow HUD's recently promulgated FHA-impact regulation,[19] which put on the plaintiff, rather than the defendant, the burden of showing that a less discriminatory alternative could serve the Department's interests.[20]

The issue in the Supreme Court was whether impact claims were cognizable under the FHA's § 3604(a) and § 3605. Justice Kennedy's opinion for the Court held "yes" for both provisions. With respect to § 3604(a), its "otherwise make unavailable" language closely resembled the "otherwise adversely affect" language in Title VII that *Griggs* had interpreted to encompass disparate-impact claims, both of which the

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15. See, e.g., Low-Income Housing Tax Credits: Data Sets, HUD, http://www.huduser.org/portal/datasets/lihtc.html [http://perma.cc/9BDD-JQE8] (last visited July 24, 2015) (noting LIHTC "is the most important resource for creating affordable housing in the United States today . . . [with some] 40,502 projects and 2.6 million housing units placed in service between 1987 and 2013").

16. See *Inclusive Cmtys.*, 135 S. Ct. at 2513–14 (describing LIHTC program, codified at 26 U.S.C. § 42).

17. Id. at 2514; see also 42 U.S.C. §§ 3604(a), 3605 (2012).

18. Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, 860 F. Supp. 2d 312, 318–31 (N.D. Tex. 2012).

19. See HUD Effects Standard, supra note 7, at 11,460–62 (citing HUD's 2013 impact regulation).

20. Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, 747 F.3d 275, 282–83 (5th Cir. 2014).

Court saw as referring "to the consequences of an action rather than the actor's intent."[21] As for § 3605, its use of "discriminate" was similar to another statute that the Court had earlier construed to include disparate-impact liability.[22]

In the principal dissent, Justice Alito argued that, by outlawing housing practices undertaken "because of" a prohibited factor, § 3604(a) and § 3605 banned actions "only when they are motivated by race or one of the other protected characteristics."[23] Justice Kennedy responded that this argument was foreclosed by *Griggs* and other precedents favoring disparate-impact claims in statutes that used this same "because of" language.[24]

The Court also considered "of crucial importance" the fact that Congress, in amending the FHA in 1988, was aware of the many appellate decisions endorsing disparate-impact claims and, "with that understanding, it made a considered judgment to retain the relevant statutory text," thus supporting "the conclusion that Congress accepted and ratified" these decisions.[25] HUD's disparate-impact regulation, although regularly referred to in the Court's opinion,[26] was not used by Justice Kennedy to bolster his reading of § 3604(a) and § 3605 based on a *Chevron* deference argument.[27]

Ultimately, Justice Kennedy seemed to rely most heavily on the need for an expansive reading of the FHA to help accomplish its goal of replacing a residentially segregated society with a more integrated one. He reviewed the nation's history of housing discrimination and segregation and noted that the 1968 FHA had been passed against a background of racial violence, including the assassination of Dr. Martin Luther King, Jr., and the recent urban riots that had led the Kerner

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21. *Inclusive Cmtys.*, 135 S. Ct. at 2518.

22. Id. at 2518–19 (citing Board of Ed. v. Harris, 444 U.S. 130, 140–41 (1979) for holding "the term 'discriminat[e]' encompassed disparate-impact liability in the context of a statute's text, history, purpose, and structure").

23. Id. at 2534 (Alito, J., dissenting). This principal dissent was also joined by Chief Justice Roberts and Justice Scalia and Justice Thomas. Id. Justice Thomas also filed a lone dissent, arguing that all of the Court's endorsements of the disparate-impact theory, including those under Title VII, were misguided and should be rejected. Id. at 2526–32 (Thomas, J., dissenting).

24. Id. at 2519 (majority opinion).

25. Id. at 2519–20. Justice Alito's dissent contested this point, arguing that "no one could have reasonably thought that the question was settled" in 1988, id. at 2539 (Alito, J., dissenting), and even if it had been, "this Court has 'no warrant to ignore clear statutory language on the ground that other courts have done so.'" Id. at 2538 (quoting Milner v. Dep't of Navy, 562 U.S. 562, 575 (2011)).

26. Id. at 2514, 2522–23 (majority opinion).

27. See id. at 2542 (Alito, J., dissenting) (noting this argument was put forward by the "principal respondent and the Solicitor General—but not the Court"). Justice Alito's dissent rejected this argument, finding suspicious the circumstances surrounding HUD's promulgation of this regulation and, more importantly, concluding that "deference is inapt [because the] FHA is not ambiguous." Id. at 2543.

Commission to observe that "[o]ur Nation is moving toward two societies, one black, one white—separate and unequal."[28] The Court also noted that the disparate-impact theory "plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment."[29] In the opinion's penultimate paragraph, Justice Kennedy wrote: "Much progress remains to be made in our Nation's continuing struggle against racial isolation . . . . The FHA must play an important part in avoiding the Kerner Commission's grim prophecy . . . . The Court acknowledges the Fair Housing Act's continuing role in moving the Nation toward a more integrated society."[30]

But the Court's opinion also articulated some "cautionary standards" concerning the theory it endorsed,[31] so that FHA-based impact claims, like those under Title VII–*Griggs*, would mandate only the "'removal of artificial, arbitrary, and unnecessary barriers,' not the displacement of valid governmental policies."[32] Thus, a plaintiff's mere showing of racial imbalance would "not, without more, establish a prima facie case of disparate impact," and a plaintiff must prove a "robust" causal connection between the defendant's challenged practice and any statistical disparities.[33] Even if these elements are shown, a defendant could still prevail by proving that its challenged policy is "necessary to achieve a valid interest."[34] Finally, with respect to the less-discriminatory-alternative phase of an FHA-impact claim, the *ICP* opinion indicated agreement with HUD's regulation that this burden should be placed on the plaintiff.[35]

These limitations led Justice Kennedy to distinguish between legitimate "heartland" impact cases, such as those alleging exclusionary zoning practices by white suburbs, and less sympathetic claims, such as challenges to municipal housing-code enforcement and the plaintiff's "novel theory" in this case.[36] Indeed, the *ICP* opinion expressed

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28. See id. at 2516 (majority opinion) (quoting Report of the National Advisory Commission on Civil Disorders 1 (1968)).

29. Id. at 2522. Justice Alito's dissent agreed that "[d]isparate impact can be evidence of disparate treatment." Id. at 2550 (Alito, J., dissenting) (emphasis omitted).

30. Id. at 2525–26 (majority opinion).

31. Id. at 2524.

32. Id. at 2522, 2524 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

33. Id. at 2523. The Court also suggested that disparate-impact claims should be limited to challenging a defendant's policies, rather than its one-time decisions. Id.

34. Id.

35. See id. at 2514. The Court also advised that remedial orders in FHA disparate-impact cases "should concentrate on the elimination of the offending practice" and be designed "to eliminate racial disparities through race-neutral means." Id. at 2524.

36. See id. at 2522–24.

skepticism about whether the plaintiff's claim here should succeed on remand.[37]

C. *Non-Race Cases*

The Court's opinion in *ICP* dealt exclusively with racial concerns and race-based impact claims. The FHA, however, also prohibits discrimination on the basis of six other factors,[38] and while most FHA impact-based claims have alleged racial discrimination, many have been based on disability,[39] and cases have also been brought on behalf of the statute's other protected classes.[40] By endorsing disparate-impact claims under the FHA's § 3604(a) and § 3605, the Court in *ICP* has authorized such claims based on all of the FHA's prohibited factors, not just race.

Furthermore, most states and dozens of localities have their own fair housing laws,[41] many of which outlaw additional types of discrimination beyond those condemned by the FHA (e.g., marital status, sexual orientation).[42] The FHA specifically preserves these laws.[43] A few of these

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37. See id. at 2523 (noting illegal discrimination would be hard to find in claim challenging defendant's "decision to build low-income housing in a blighted inner-city neighborhood instead of a suburb"); see also id. at 2524 (noting if plaintiff here "cannot show a causal connection between the Department's policy and a disparate impact—for instance, because federal [LIHTC] law substantially limits the Department's discretion—that should result in dismissal of this case" on remand).

38. The FHA outlaws discrimination based on race, color, national origin, religion, sex, familial status, and handicap (disability). See 42 U.S.C. §§ 3604–3606, 3617 (2012).

39. See supra note 9 and accompanying text (discussing cases where plaintiffs challenged restrictions on group homes for persons with disabilities).

40. See, e.g., Meyer v. Bear Rd. Assocs., 124 F. App'x. 686, 688 (2d Cir. 2005) (upholding challenge to landlord's policy of charging more for groups of over four persons based on its negative impact on families with children); United States v. Badgett, 976 F.2d 1176, 1179 (8th Cir. 1992) (noting, in ruling against apartment complex's occupancy restriction, that this policy, albeit facially neutral, would violate FHA if it had disparate impact on families with children); Doe v. City of Butler, 892 F.2d 315, 323–24 (3d Cir. 1989) (noting defendant's occupancy limit on shelters for battered women might violate FHA by adversely affecting families with children).

41. Some thirty-seven states and fifty-five localities have laws determined by HUD to be substantially equivalent to the FHA. See Schwemm, supra note 9, at app. C.

42. See, e.g., Cal. Gov't Code § 12955 (West 2012) (barring discrimination on basis of, in addition to FHA's seven factors, gender identity, gender expression, sexual orientation, marital status, source of income, and genetic information); Md. Code Ann., State Gov't § 20-705 (West 2014) (barring discrimination on the basis of, in addition to FHA's seven factors, marital status, sexual orientation, and gender identity); N.Y. Exec. Law § 296.2-a (McKinney 2014) (barring discrimination on basis of, in addition to the FHA's seven factors, marital status, age, and sexual orientation). For a full list of states whose fair housing laws outlaw discrimination based on marital status, sexual orientation, and certain other non-FHA factors, see Schwemm, supra note 9, at § 30:3, nn.2–8.

43. See 42 U.S.C. § 3615 (2012) (stating nothing in FHA "shall be construed to invalidate or limit any law of a State or political subdivision of a State . . . that grants, guarantees, or protects the same rights as are granted by" FHA); see also Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project., 135 S. Ct. 2507, 2550 (Alito, J., dissenting) (citing § 3615 in support of proposition that "nothing prevents States and

laws (e.g., those in California and New York City) explicitly provide for an impact standard of liability,[44] and others have been interpreted to include such a standard based on following pre–*ICP* federal precedents.[45] Thus, in many parts of the country, protected classes beyond those covered by the FHA will be able to rely on *ICP*'s endorsement of and standards for disparate-impact claims.[46]

II. WHAT *WON'T* CHANGE

This Part surveys some ways in which FHA-based litigation will stay the same after *ICP*'s endorsement of impact claims under § 3604(a) and § 3605. Part II.A deals with FHA claims under provisions other than § 3604(a) and § 3605; Part II.B discusses FHA intent-based claims in which impact evidence is used.

A. *Claims Based on FHA Provisions Not Involved in* ICP

1. *Disability Claims Under § 3604(f)(3).* — Beyond outlawing disability discrimination in all of its basic substantive provisions, the FHA in § 3604(f)(3) contains three additional mandates requiring that: (A) persons with disabilities be allowed to make certain physical modifications to their homes; (B) reasonable accommodations be made for disabled people; and (C) multi-family housing be constructed with certain accessibility features.[47] A failure to obey any of these § 3604(f)(3) requirements is illegal discrimination under the FHA, and such a

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local government from enacting their own fair housing laws, including laws creating disparate-impact liability").

44. Cal. Gov't Code § 12955.8(b) (West 2012); N.Y.C., N.Y., Administrative Code § 8-107-17 (2014).

45. See, e.g., Comm'n on Human Rights v. Sullivan Assoc., 739 A.2d 238, 255–56 (Conn. 1999) (following FHA precedents to hold Connecticut's fair housing law includes impact standard of liability); Dussault v. RRE Coach Lantern Holdings, LLC, 86 A.3d 52, 61 (Me. 2014) (following FHA precedents to hold Maine's fair housing law includes impact standard of liability). Many state courts have chosen to follow federal precedents in interpreting their fair housing laws. See, e.g., Miami Valley Fair Hous. Ctr., Inc. v. Connor Grp., 725 F.3d 571, 578–79 (6th Cir. 2013) (noting Ohio courts look to federal case law for guidance in interpreting Ohio fair housing statute); Steed v. EverHome Mortg. Co., 477 Fed. Appx. 722, 726 (11th Cir. 2012) (noting "Georgia courts consider federal court interpretations of the FHA as persuasive and rely on those interpretations in construing the Georgia [Fair Housing Act]"); State ex rel. Claypool v. Evans, 757 N.W.2d 166, 170–72 (Iowa 2008) (interpreting Iowa fair housing law consistently with federal law precedents).

46. Further, states and localities may interpret their fair housing law even more broadly than their federal counterparts. Cf. Mihalik v. Credit Agricole Cheuvreux N. Am., Inc., 715 F.3d 102, 108–17 (2d Cir. 2013) (holding violations of New York City antidiscrimination ordinance may be shown by lesser evidence than is required under comparable federal laws).

47. 42 U.S.C. §§ 3604(f)(3)(A)–(C).

violation does not require a showing of intentional or impact-based discrimination.[48]

For many years now, disability discrimination has been alleged in more FHA claims than any other category, with disability's portion steadily growing so that, in the most recently reported fiscal year (2013), it represented 53% of the total number of complaints.[49] Among disability claims, over half are based on § 3604(f)(3)(B)'s reasonable accommodation mandate, with the modification and accessibility requirements accounting for another 4% and 3%, respectively.[50]

This means that fully one-third of all FHA claims are now based on these special disability provisions where *ICP*'s concern with the impact-versus-intent theories of discrimination is not relevant. This fact is particularly significant in group home cases,[51] where the reasonable accommodation theory, either with or without an intent-based claim, has proved far more effective in challenging municipal restrictions than the impact theory.[52]

2. *Section 3608: Federal-Fund Recipients' Affirmative Duties.* — Other than *ICP*, the most important development in FHA law in recent years has been the surge in litigation based on the statute's mandate in § 3608 that federal housing funds be administered "in a manner affirmatively to further" the FHA's policies and purposes.[53] Recipients of such funds include every public housing authority (PHA) and each of the 1200 state and local governments that receives a Community Development Block Grant (CDBG), all of which are subject to the duty to affirmatively further fair housing (AFFH).[54]

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48. See, e.g., Anderson v. City of Blue Ash, No. 14-3754, 2015 WL 4774591, at *15–19 (6th Cir. Aug. 14, 2015) (upholding plaintiff's reasonable accommodation claim while holding her intent and impact claims failed for lack of proof); Hollis v. Chestnut Bend Homeowners Ass'n, 760 F.3d 531, 538–41 (6th Cir. 2014) (holding reasonable-modification and reasonable-accommodation claims need not be based on proof of intentional discrimination); Astralis Condo. Ass'n v. Sec'y, HUD, 620 F.3d 62, 66–67 (1st Cir. 2010) (holding reasonable accommodation claim is separate basis for liability beyond disparate treatment and disparate impact).

49. See HUD, Annual Report on Fair Housing 19 (2014) [hereinafter HUD Report] ("In FY 2013, disability complaints accounted for 53 percent of complaints.").

50. Id. at 6.

51. See supra note 9 and accompanying text (citing cases involving impact-based challenges to municipal restrictions on group homes).

52. See, e.g., Schwarz v. City of Treasure Island, 544 F.3d 1201, 1217–28 (11th Cir. 2008) (holding group home's reasonable accommodation claim may succeed while affirming defeat of its impact-based claim); Smith & Lee Assocs., Inc. v. City of Taylor, 102 F.3d 781, 790–96 (6th Cir. 1996) (same).

53. See 42 U.S.C. §§ 3608(d), (e)(5) (2012).

54. See Robert G. Schwemm, Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act's "Affirmatively Further" Mandate, 100 Ky. L.J. 125, 147–48 (2011) (noting recipients of federal housing funds include "1209 general units of local government and States").

HUD did little to enforce § 3608 prior to the Obama Administration.[55] In recent years, however, HUD has brokered new agreements with a number of CDBG recipients to assure compliance with their AFFH obligations,[56] and all such recipients will soon be subject to a new HUD regulation that more clearly spells out their AFFH responsibilities.[57]

These new AFFH duties should make it harder for local governments to use their housing powers to maintain residential segregation. For example, a challenge to actions like those taken by the *ICP* defendant, while generating skepticism from the Supreme Court if brought as an impact claim under § 3604(a) or § 3605,[58] might be based instead on a violation of the defendant's AFFH duties. Surely a duty to "affirmatively further" must mean at least that an entity subject to § 3608 is obliged to do more than simply not violate the FHA's other substantive provisions.[59] Thus, the threat of § 3608-based actions may expand the arsenal of housing discrimination claims against public entities and other recipients of HUD funds beyond the mandates of *ICP*.

3. *Section 3604(c) Claims.* — The FHA's § 3604(c) outlaws discriminatory advertisements, notices, and statements, and accounts for about 10% of all FHA claims filed each year.[60] This provision, which is worded differently from the statute's "because of" provisions interpreted in *ICP*,[61] bans housing-related communications that "indicate any preference, limitation or discrimination" based on a prohibited factor.[62] "Indicate" here is judged by how an "ordinary reader" or "ordinary listener" would react to the challenged ad, notice, or statement, which means that discriminatory intent need not be shown in § 3604(c) cases.[63]

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55. See id. at 153–54 (describing weak enforcement during pre–Obama years).

56. See HUD Report, supra note 49, at 7–8, 50–51 (describing HUD's § 3608 enforcement activities in recent years).

57. See Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903). For a description of how this new regulation would work, see Timothy M. Smith et al., The Fair Housing Act: The Evolving Regulatory Landscape for Federal Grant Recipients and Sub-Recipients, 23 J. Affordable Housing & Community Dev. L. 231, 245–52 (2015).

58. See supra notes 36–37 and accompanying text (discussing Justice Kennedy's apparent skepticism of *ICP* plaintiff's claim).

59. See NAACP v. HUD, 817 F.2d 149, 156 (1st Cir. 1987) (noting HUD's duties under § 3608 go beyond discriminatory action that would violate other FHA provisions).

60. HUD Report, supra note 49, at 22.

61. Compare infra note 62 and accompanying text (describing § 3604(c)'s ban on advertisements, notices, and statements that "indicate" discrimination based on enumerated characteristics), with supra note 17 and accompanying text (describing § 3604(a) and § 3605's prohibitions of making housing unavailable and discriminating in real estate related transactions "because of" enumerated characteristics).

62. 42 U.S.C. § 3604(c) (2012).

63. See, e.g., Miami Valley Fair Hous. Ctr. v. Connor Grp., 725 F.3d 571, 577 (6th Cir. 2013) (holding, because "ordinary reader" standard governs § 3604(c) cases, "[s]ubjective intent to discriminate is not required" to violate this provision); Corey v. HUD ex rel. Walker, 719 F.3d 322, 326 (4th Cir. 2013) (holding "ordinary listener" standard in

Consider a landlord with a "no criminal record" rule for potential tenants. For many years, such a rule in the employment context has been challenged under an impact theory,[64] but only recently has it been considered a proper target by fair housing advocates.[65] Even after *ICP*, the success of a § 3604(a)-based challenge to such a rule would turn on a showing of proper statistical disparities and other key factors.[66]

Prevailing on a § 3604(c)-based claim, however, might be easier. A landlord with a "no criminal record" rule would presumably announce it in statements to prospective tenants, application forms, and perhaps even advertising. Each of these forms of communication is covered by § 3604(c).[67] Thus, each would violate § 3604(c) if understood by an ordinary person to indicate illegal discrimination, not an implausible idea given the public's growing awareness of the racial demographics of our prison population.[68] A § 3604(c) claim in these circumstances is at least likely to survive the pleading and summary judgment stages, given that determining how an ordinary person would interpret a § 3604(c)-challenged communication is generally considered a jury issue.[69]

4. *The FHA's § 3617: Interference and Retaliation Claims.* — The FHA's § 3617 outlaws a variety of types of interference with the substantive

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§ 3604(c) cases means "[e]vidence of the speaker's motivation for making the discriminatory statement is unnecessary to establish a violation"); Jancik v. HUD, 44 F.3d 553, 556 (7th Cir. 1995) (holding, because objective "ordinary reader" standard governs § 3604(c) cases, "no showing of a subjective intent to discriminate is . . . necessary to establish a violation of the section").

64. See, e.g., Office of Legal Counsel, U.S. Equal Emp. Opportunity Comm'n, No. 915.002, Consideration of Arrest and Convictions Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, at 9–20 (Apr. 25, 2012), http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf [http://perma.cc/32WY-HW3Y] (describing how employers' screening of individuals with criminal records may violate Title VII because of its disparate impact on African Americans and Latinos).

65. See Michael G. Allen et al., Assessing HUD's Disparate Impact Rule: A Practitioner's Perspective, 49 Harv. C.R. C.L. Rev. 155, 190 (2014) (describing "application of the disparate impact standard to criminal background checks by housing providers" as new "frontier" FHA claims).

66. See HUD Effects Standard, supra note 7, at 11,478 (concluding whether actionable discriminatory impact results from use of criminal records to exclude persons from housing "depends on the facts of the situation" and stating HUD might "explore the issue more fully" and "will consider issuing guidance for housing providers and operators").

67. See 24 C.F.R. § 100.75(b)–(c) (2014).

68. The public's awareness of the fact that African Americans and Latinos make up a disproportionately high percentage of America's prison population has been heightened in recent years by numerous reports and publications, including the best-selling book by Michelle Alexander, The New Jim Crow (2012).

69. See, e.g., Miami Valley Fair Hous. Ctr., Inc. v. Connor Grp., 725 F.3d 571, 578 (6th Cir. 2013) (stating "[s]uch inferences" of how "ordinary reader" would interpret advertisement are "best left to the jury to consider").

rights guaranteed elsewhere in the statute,[70] and accounts for about 20% of all FHA claims filed every year.[71] The conduct condemned by § 3617 includes retaliation against persons for asserting their FHA rights;[72] these retaliation claims have grown steadily in recent years, now accounting for 11% of all FHA claims.[73]

Before *ICP*, all § 3617 violations were understood to require a showing of intentional discrimination. Interference claims other than retaliation must show that the defendant's action was prompted by one of the seven factors condemned by the FHA.[74] Retaliation claims require showing a different kind of intent, i.e., that the defendant's action was motivated by the plaintiff's filing of an FHA complaint or participating in other "protected activity" under the statute.[75] In either type of case, because lower courts have always subjected § 3617 claims to their own special intent requirements, it is unlikely that these claims will be changed by the *ICP*'s endorsement of an impact standard under § 3604(a) and § 3605.[76]

B. *Using Impact to Prove Intent in FHA Cases*

Almost forty years ago in *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* the Supreme Court held that a housing discrimination claim based on the Equal Protection Clause required

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70. See 42 U.S.C. § 3617 (2012) (making it unlawful to "coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of" rights granted elsewhere in statute).

71. See HUD Report, supra note 49, at 22 (showing about 20% of FHA claims filed from 2010–2013 were about coercion, intimidation, threats, interference, or retaliation).

72. See Schwemm, supra note 9, § 20:5 (detailing interpretations of § 3617 to prohibit retaliation and describing requirements of retaliation claim).

73. HUD Report, supra note 49, at 19.

74. See, e.g., Bloch v. Frischholz, 587 F.3d 771, 783 (7th Cir. 2009) (en banc) (identifying necessary element of § 3617 interference claims that "defendants were motivated by an intent to discriminate"); East-Miller v. Lake Cty. Highway Dep't, 421 F.3d 558, 563–64 (7th Cir. 2005) (ruling against § 3617 interference claim based on insufficient proof defendants intended to discriminate); South Middlesex Opportunity Council, Inc. v. Town of Framingham, 752 F. Supp. 2d 85, 95, 103 n.4 (D. Mass. 2010) (identifying necessary element of § 3617 interference claim that defendant was "at least partially motivated by intentional discrimination").

75. See, e.g., Neudecker v. Boisclair Corp., 351 F.3d 361, 364 (8th Cir. 2003) (holding § 3617 retaliation claim requires defendant's behavior be causally connected to plaintiff's protected activities); Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown, 294 F.3d 35, 54 (2d Cir. 2002) (applying intent-based analysis in evaluating retaliation claim under § 3617); Walker v. City of Lakewood, 272 F.3d 1114, 1128 (9th Cir. 2001) (upholding § 3617 retaliation claim based on allegation that defendant's actions were "designed to" harm plaintiff). See generally Schwemm, supra note 9, § 20:5 n.6 (citing other cases supporting "causal connection" requirement).

76. Notably, HUD's impact regulation did not purport to extend this standard to § 3617 claims. See HUD Effects Standard, supra note 7, at 11,466 (extending HUD's impact regulation to several sections of FHA but not § 3617); see also infra notes 122–123 and accompanying text (discussing similar dichotomy under Title VII).

proof of discriminatory intent, but made clear that impact could be a key element in making this showing.[77] After noting that determining whether discriminatory purpose is shown "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," Justice Powell's opinion in *Arlington Heights* listed a series of factors that might be inquired into; the first of these—"[t]he impact of the [challenged] action"—was described as "an important starting point" in an intent-focused analysis.[78]

In the ensuing decades, *Arlington Heights* prompted courts in many FHA cases to examine impact evidence as a way of determining whether an intent-based claim could be sustained. Many of these cases, like *Arlington Heights* itself, involved exclusionary zoning claims against suburban municipalities accused of race-based discrimination in blocking affordable housing developments.[79] The *Arlington Heights* directive to consider impact evidence in determining the defendant's intent has also been followed in a variety of other types of FHA intent-based claims.[80] This approach was endorsed by *ICP*, where all nine Justices agreed that practices with a negative impact on minorities are subject to challenge through FHA intent-based claims and that proof of impact is relevant in making out an intent case.[81]

Of course, as the *ICP* case demonstrates, an impact showing alone will not necessarily result in intent-based liability.[82] Whether impact evidence will succeed in establishing illegal intent turns on additional factors, such as the strength of the defendant's justification for its action

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77. See 429 U.S. 252, 266–68 (1977).

78. Id. at 266. The other evidentiary factors identified by *Arlington Heights* included the "historical background" of the defendant's action, the "sequence of events leading up to the challenged" action, and the action's "legislative or administrative history." Id. at 267–68.

79. See, e.g., United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1221–22 (2d Cir. 1987) (applying *Arlington Heights* factors to find intent-based discrimination in FHA exclusionary land-use case); United States v. City of Birmingham, 727 F.2d 560, 565 (6th Cir. 1984) (same).

80. See, e.g., Pac. Shores Props. v. City of Newport Beach, 730 F.3d 1142, 1162–64 (9th Cir. 2013) (applying *Arlington Heights* factors to find intent-based discrimination in FHA challenge to city's restrictions on group homes for disabled persons); Tsombanidis v. W. Haven Fire Dep't, 352 F.3d 565, 580 (2d Cir. 2003) (relying on *Arlington Heights* factors to affirm city had engaged in intent-based discrimination in blocking group home for disabled persons).

81. See supra note 29 and accompanying text (showing both Justice Kennedy's majority opinion and Justice Alito's dissent said disparate impact can be evidence of disparate intent).

82. See *Arlington Heights*, 429 U.S. at 269–70 (concluding, after finding defendant's action arguably did have greater impact on racial minorities, defendant had legitimate nonracial reason for its action and thus plaintiffs "simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision"); see also supra note 18 and accompanying text (noting trial court's decision in *ICP* that plaintiff, though successful in proving illegal impact, failed to prove intentional discrimination).

and the events leading up to that action (its "historical background," "sequence of events," and "legislative history" in *Arlington Heights*'s terms[83]). But because the impact theory endorsed by *ICP* requires not only a showing of negative impact on a protected class but also that the defendant either lacked a legitimate interest in taking its action or could have achieved that interest with a less discriminatory alternative,[84] such a showing would be a much stronger indication of illicit intent than that made by the unsuccessful plaintiffs in *Arlington Heights*.

Consider again the example of a landlord with a "no criminal record" rule—a rule that not only should be known to have a large negative impact on racial minorities,[85] but whose legitimate safety interests might just as well be served by a less restrictive alternative (e.g., banning only those persons with convictions for serious crimes or that are less than five years old). An intent-based FHA challenge to such a rule would likely survive the pleading stage and perhaps summary judgment, particularly if there is anything suspicious about the "historical background" that led to the landlord's adoption of this rule (e.g., a recent increase in minority applicants and/or the absence of any safety-related complaints by current tenants or employees). The result is that most impact-based claims under § 3604(a) and § 3605 after *ICP* will also include an intent claim.

III. WHAT *MIGHT* CHANGE

A key theme of Part II was that many FHA claims and many providers of housing and housing-related services will remain subject to the same standards of liability that prevailed before the Supreme Court's decision in *ICP*. That decision is important, however, and it will change or at least influence how many key FHA issues will be resolved in the future.

This Part deals with those issues in four sections. Part III.A reviews what standards will apply in post–*ICP* FHA impact cases; Part III.B considers whether *ICP*'s endorsement of impact claims under § 3604(a) and § 3605 extends to other key FHA provisions; Part III.C deals with the potential influence of *ICP* on other outstanding issues under the FHA; and Part III.D identifies some likely uses of the FHA's impact theory in the post–*ICP* era.

Perhaps as important as anything else, Justice Kennedy's opinion in *ICP* provides a ringing endorsement of the importance of the FHA in

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83. *Arlington Heights*, 429 U.S. at 267–68.

84. See supra notes 34–35 and accompanying text (noting defendants would prevail under *ICP* if they prove challenged policy is needed to achieve valid interest unless plaintiffs thereafter prove less discriminatory alternative).

85. See supra note 68 and accompanying text (discussing public's increasing awareness of fact that African Americans and Latinos make up disproportionately high percentage of America's prison population).

reducing racial isolation in the United States.[86] In addition, it reinforces many themes from older Supreme Court decisions that had broadly interpreted the FHA,[87] a notable achievement for a civil rights statute in an era when the Court has generally been hostile to such laws.[88] Thus, the *ICP* decision provides FHA plaintiffs and judges inclined to rule for them with additional fodder beyond the case's actual holding.

A. *Governing Standards for Future FHA Impact Claims*

Despite the appellate courts' pre–*ICP* uniformity in supporting FHA impact claims, their opinions differed somewhat on the standards that should govern such claims.[89] HUD's promulgation of an impact regulation in 2013 was designed in part to establish nationwide consistency for these claims,[90] and the Fifth Circuit's 2014 decision in the *ICP* case adopted the HUD standards based on the principle of *Chevron* deference.[91] Now that the Supreme Court has opined on how FHA-impact cases should be handled,[92] the question is whether these *ICP* standards or those set forth in the HUD regulation will govern future cases.

At first blush, it would seem that a Supreme Court decision should trump an agency's regulation. But the Court itself has held that a regulation may sometimes prevail over inconsistent judicial interpreta-

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86. See supra notes 28–30 and accompanying text (discussing Justice Kennedy's emphasis on need for expansive reading of FHA to help accomplish its goal of making society more residentially integrated).

87. Prior decisions had identified four guiding principles for interpreting the FHA, i.e., the need for courts to: (1) broadly interpret the FHA; (2) be mindful of the congressional goal of residential integration in applying the FHA; (3) generally rely on Title VII precedents in FHA cases; and (4) defer to HUD regulations and other interpretations of the FHA. Schwemm, supra note 9, § 7:2–5. The Court's opinion in *ICP* relied on all but the fourth of these. See supra notes 27–30 and accompanying text (discussing Justice Kennedy's reliance on first three principles).

88. See, e.g., Shelby Cty. v. Holder, 133 S. Ct. 2612, 2625–31 (2013) (holding unconstitutional § 4(b) of Voting Rights Act); Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013) (holding Title VII retaliation claims are governed by stricter causation standard than traditional Title VII cases); Gross v. FBL Fin. Servs., 557 U.S. 167, 180 (2009) (holding claims under Age Discrimination in Employment Act are governed by stricter causation standard than traditional Title VII cases).

89. See HUD Effects Standard, supra note 7, at 11,462–63 (describing variations in standards appellate courts have applied to FHA impact claims).

90. See id. at 11,460 ("This regulation is needed to . . . provide nationwide consistency in the application of [discriminatory effects] liability.").

91. See supra note 20 and accompanying text (showing Fifth Circuit followed HUD impact regulation in giving plaintiff burden of proving less discriminatory alternative could serve defendant's interests).

92. See supra notes 32–35 and accompanying text (discussing Court's articulation of "cautionary standards" that should guide adjudication of impact-based claims).

tions of a statute.[93] Of course, this dilemma presupposes that there is a conflict between the agency and judicial views.

Some mortgage-industry representatives have opined that the standards set forth in *ICP* are more favorable to defendants than those in the HUD regulation,[94] but this is far from clear. The standards governing the first and third phases of an impact claim (i.e., plaintiff's proving, respectively, disparate impact and causation and later the availability of a less discriminatory alternative) are described in similar ways in the HUD regulation and the *ICP* decision.[95] The only arguable difference might be in the second phase (i.e, the defendant's burden of showing a legitimate interest), with the *ICP* decision describing this burden as the defendant's having to prove that its challenged policy is "necessary to achieve a valid interest"[96] and the HUD regulation describing it as being "necessary to achieve one or more substantial, legitimate, nondiscriminatory interests."[97] The semantic differences here are slight. Further, the fact that HUD described this standard as analogous to the Title VII–*Griggs* standard[98] suggests that it is consistent with the Court's views in *ICP*.[99]

Whether the lower courts will perceive any real difference between *ICP* 's standards and the HUD regulation's remains to be seen, but some early answers will be forthcoming. The Fifth Circuit will have an opportunity to deal with this issue when it again takes up the *ICP* case on remand, and the Second Circuit is currently considering this issue in a municipality's appeal from a ruling in favor of an impact-based challenge to its exclusionary land-use practices.[100]

One area where the HUD regulation does seem to go further than *ICP* is the former's recognition of a second type of FHA impact case, i.e.,

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93. See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005).

94. See Paul F. Hancock & Andrew C. Glass, The Supreme Court Recognizes but Limits Disparate Impact in its Fair Housing Act Decision, SCOTUS Blog (June 26, 2015, 8:58 AM), http://www.scotusblog.com/2015/06/paul-hancock-fha [http://perma.cc/V94G-XJ7C] (concluding the "Court's decision appears to create a more lenient standard for defendants than the standard the federal government has proposed [in the HUD regulation]").

95. Compare supra note 33 and accompanying text (discussing *ICP* 's treatment of first phase of impact claim), and supra note 35 and accompanying text (discussing *ICP* 's treatment of third phase of impact claim), with HUD Effects Standard, supra note 7, at 11,467–73 (discussing first and third phase of impact claim).

96. Supra note 34 and accompanying text.

97. HUD Effects Standard, supra note 7, at 11,482.

98. See id. at 11,470 (stating "requirement that an entity's interest be substantial is analogous to the Title VII requirement that an employer's interest in an employment practice with a disparate impact be job related").

99. See supra note 32 and accompanying text (discussing *ICP* 's comparison of standard for FHA-based impact claims to Title VII–*Griggs*).

100. Mhany Mgmt. Inc. v. Vill. of Garden City, 4 F. Supp. 3d 549 (E.D.N.Y. 2014), appeal docketed sub nom. Mhany Mgmt. Inc. v. Cty. of Nassau, No. 14-1634 (2d Cir. May 9, 2014).

one that challenges a defendant's action for perpetuating residential segregation.[101] Like the disparate-impact theory, this segregative-effect theory allows the FHA to challenge practices that perpetuate racial isolation and was recognized by a number of appellate courts prior to the FHA's amendments in 1988,[102] but it has no analog in Title VII law, and it was mentioned only briefly in the *ICP* decision.[103] In addition, a segregative-effect claim often challenges a municipality's one-time decision to block an affordable housing proposal rather than a defendant's overall policy, a type of claim that the *ICP* opinion expressed skepticism about.[104] Whether HUD's recognition of this additional segregative-effect theory will survive after *ICP* is an open question.

B. *Are Impact Claims Cognizable Under Other FHA Provisions?*

Other than § 3604(a), § 3605, and the FHA provisions discussed earlier,[105] the FHA's main substantive prohibition is contained in § 3604(b),[106] which outlaws discriminatory terms, conditions, and services and which, inter alia, has been the provision primarily used to challenge racial and sexual harassment in housing.[107] Because the Supreme Court's

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101. See HUD Effects Standard, supra note 7, at 11,482 (defining discriminatory effect to include practices that increase, reinforce, or perpetuate segregated housing patterns).

102. See, e.g., Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 937 (2d Cir.), aff'd per curiam, 488 U.S. 15 (1988) (recognizing segregative-effect theory); Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977) (same). See generally Schwemm, supra note 9, § 10:7 (describing cases endorsing this theory).

103. See Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2522 (2015) (noting while FHA does not "force housing authorities to reorder their priorities," it does aim "to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation").

104. See supra note 33 (discussing Court's suggestion that disparate-impact claims be limited to challenging defendant's policies, not its one-time decisions).

105. See supra Part II.A.1–4 (discussing, respectively, § 3604(f)(3), § 3608, § 3604(c), and § 3617).

106. See 42 U.S.C. § 3604(b) (2012). Virtually the same prohibitions contained in § 3604(b) are repeated in § 3604(f)(2), which outlaws disability discrimination. See id. § 3604(f)(2).

The FHA's other substantive prohibitions are contained in § 3604(d), § 3604(e), and § 3606, which outlaw, respectively, misrepresentations of availability, "blockbusting," and discriminatory brokerage services. These provisions have prompted relatively little litigation. See Schwemm, supra note 9, § 16:1 ("§ 3604(d) . . . has not proved to be very important."); id. § 17:2 ("There are only two published appellate opinions on § 3604(e)."); id. § 19:1 ("There is very little case law on § 3606.").

107. See, e.g., Honce v. Vigil, 1 F.3d 1085, 1088–90 (10th Cir. 1993) (holding sexual harassment violates § 3604(b)); Fahnbulleh v. GFZ Realty 795 F. Supp. 2d 360, 363–64 (D. Md. 2011) (relying on § 3604(b) to uphold hostile-environment claims of sex and race harassment against landlord); Glover v. Jones, 522 F. Supp. 2d 496, 503 (W.D.N.Y. 2007) (citing § 3604(b) in holding "[s]exual harassment claims are cognizable under the FHA"); see also Schwemm, supra note 9, § 14:3 n.36 (citing additional cases showing § 3604(b) is

decision in *ICP* dealt only with § 3604(a) and § 3605, the question remains whether impact claims are cognizable under § 3604(b).

A "yes" answer seems likely. HUD's regulation endorsing FHA impact claims extends to § 3604(b).[108] Further, § 3604(b)'s text, like § 3605's, bans practices that "discriminate" on the basis of prohibited factors. Both *ICP* and HUD's regulatory commentary note that this language has been interpreted earlier by the Court to include an impact standard.[109] The only part of *ICP*'s rationale that does not extend to § 3604(b) is the absence of a widespread endorsement by appellate courts of impact claims under this provision at the time of the 1988 amendments to the FHA,[110] but this seems a thin reed for the opposition to this theory to grasp onto.[111] Furthermore, even if such opposition were successful, many situations that give rise to § 3604(b) claims (like evictions and severe harassment) may make housing unavailable in violation of § 3604(a),[112] thereby allowing an impact claim under *ICP*.

C. *Other Key FHA Issues After* ICP

Prior to *ICP*, the Supreme Court had not decided a FHA case in over a decade.[113] During this time, the Court issued a number of decisions hostile to other civil rights statutes, some of which may have implications for the FHA's causation standards.

A key issue in intent-based claims under all civil rights statutes is which side should prevail when the defendant is shown to have had a legal as well as an illegal motive for its action. In such "mixed-motive" cases under the FHA, lower courts have traditionally used some version

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FHA's primary provision barring sexual harassment). See generally id. at ch. 14 (describing § 3604(b) litigation).

108. See HUD Effects Standard, supra note 7, at 11,466 (identifying § 3604(b) among FHA provisions subject to HUD's impact regulation).

109. Supra note 22 and accompanying text; HUD Effects Standard, supra note 7, at 11,469–70.

110. There were some, however. See, e.g., Betsey v. Turtle Creek Assocs., 736 F.2d 983, 988 (4th Cir. 1984) (endorsing impact claim under § 3604(b)).

111. See supra note 25 and accompanying text (describing *ICP*'s reliance on lower-court consensus before the 1988 FHA amendments as important basis for interpreting statutory text retained in those amendments).

112. See, e.g., Harris v. Itzhaki, 183 F.3d 1043, 1052 (9th Cir. 1999) (upholding discriminatory eviction claim under both § 3604(a) and § 3604(b)); United States v. Koch, 352 F. Supp. 2d 970, 972 (D. Neb. 2004) (citing § 3604(a), § 3604(b), and other FHA provisions in upholding sexual harassment claims); Lane v. Cole, 88 F. Supp. 2d 402, 405–06 (E.D. Pa. 2000) (citing § 3604(a) and § 3604(b) as barring defendant's exclusion of black guests); United States v. Lepore, 816 F. Supp. 1011, 1024 (M.D. Pa. 1991) (holding discriminatory eviction violates § 3604(a) and § 3604(b)).

113. The last was Meyer v. Holley, 537 U.S. 280, 285–91 (2003) (holding traditional vicarious liability rules apply in FHA cases and thus sole owner of incorporated real estate firm is not subject to such liability here for its agent's discrimination).

of the "motivating factor" standard of causation.[114] But in 2009, in *Gross v. FBL Financial Services, Inc.*, the Supreme Court held that mixed-motive claims under the Age Discrimination in Employment Act (ADEA) are governed by a more restrictive "but-for" standard.[115] The Court's 5-4 ruling—with the majority made up of Justice Kennedy and the four *ICP* dissenters—noted that this standard was more restrictive than Title VII's, but that the latter had resulted from Congress's providing the more generous "motivating factor" standard in amendments to Title VII that were not extended to the ADEA.[116] Thus, the *Gross* majority felt free to impose a "but-for" standard based on what it viewed as the ordinary meaning of the ADEA's "because of" language.[117]

Some defendants have made a *Gross*-based argument for a "but-for" standard in recent FHA mixed-motive cases.[118] The response, per *ICP*, would rely on the fact that a judicial consensus favoring the more plaintiff-oriented "motivating factor" standard had developed and been endorsed by Congress in the 1988 amendments to the FHA.[119] While it is true that this consensus existed,[120] the 1988 Congress may have been less aware of it with respect to the mixed-motive issue than *ICP* said it was regarding the impact issue. Thus, this issue seems sufficiently debatable to keep it percolating in the lower courts for some time.

A second potential FHA issue is what causation standard should apply in § 3617 cases[121] in light of the Supreme Court's 2013 decision in *University of Texas Southwestern Medical Center v. Nassar*, which held that Title VII retaliation cases should be governed by the more demanding

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114. See, e.g., Marable v. H. Walker & Assoc., 644 F.2d 390, 395 (5th Cir. 1981) (adopting "one significant factor" test for FHA cases); Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1042–43 (2d Cir. 1979) (adopting "one motivating factor" test for FHA cases); Moore v. Townsend, 525 F.2d 482, 485 (7th Cir. 1975) (holding FHA is violated if race played "some part" in defendant's decision); Williams v. Matthews Co., 499 F.2d 819, 826 (8th Cir. 1974) (holding race is impermissible factor under FHA). See generally Schwemm, supra note 9, § 10:3 n.9 (citing other cases).

115. 557 U.S. 167, 180 (2009).

116. Id. at 174–75.

117. Id. at 175–78.

118. See, e.g., Defendants-Appellants' Brief on Appeal at 47-48, Mhany Mgmt. Inc. v. Vill. of Garden City, 4 F. Supp. 3d 549 (E.D.N.Y. 2014), appeal docketed sub nom. Mhany Mgmt. Inc. v. Cty. of Nassau, No. 14-1634 (2d Cir. May 9, 2014) (arguing *Gross* requires "but-for" standard in FHA challenge to exclusionary zoning).

119. See *ICP*'s reliance on lower-court consensus before the 1988 FHA amendments as important basis for interpreting statutory text retained in those amendments, supra note 25 and accompanying text; see also, e.g., Brief for Plaintiff-Appellee-Cross-Appellant and Intervenor-Plaintiff-Appellee-Cross-Appellant at 69–70, Mhany Mgmt. Inc. v. Vill. of Garden City, 4 F. Supp. 3d 549 (E.D.N.Y. 2014), appeal docketed sub nom. Mhany Mgmt. Inc. v. Cty. of Nassau, No. 14-1634 (2d Cir. May 9, 2014) (arguing pre–1988 consensus among lower courts favored "motivating factor" standard).

120. See supra note 114 and accompanying text (showing pre–1988 consensus adopting "motivating factor" standard).

121. See Part II.A.4 (discussing § 3617 litigation).

"but-for" standard than traditional Title VII cases.[122] *Nassar* involved the same five-justice majority as *Gross*, with Justice Kennedy writing the Court's opinion, and basically following *Gross*'s reasoning that the "motivating factor" standard for traditional Title VII claims is the unusual creature of a special amendment by Congress not applicable to any other claims based on a "because of" statute.[123]

After *Nassar*, the same kind of argument might be expected from defendants in FHA retaliation claims based on § 3617. Again, one key in resolving this issue might be to determine how well-established in 1988 was the judicial consensus favoring a more generous causation standard under § 3617. The answer here is even less clear than with regard to the mixed-motive issue.[124]

D. *Future Uses of the FHA's Impact Theory*

Apart from "heartland" exclusionary zoning cases and challenges to discriminatory mortgage practices,[125] the impact theory has been somewhat underused in the housing field. That may change after *ICP*.

Among the housing policies that future FHA-based impact claims seem likely to challenge are: (1) landlords' screening devices based on an applicant's prior criminal record;[126] (2) housing providers' refusal to rent to people using government vouchers or other non-traditional sources of income;[127] (3) restrictions on housing opportunities by municipalities and others based on preferences for local residents or those connected with local residents;[128] and (4) use by mortgage providers and others of credit scores or other financial qualifying techniques that disproportionately exclude racial minorities.[129]

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122. 133 S. Ct. 2517, 2534 (2013).

123. Id. at 2524–33.

124. See Schwemm, supra note 9, § 20:5 (showing few § 3617 retaliation cases were decided before 1988 FHA amendments).

125. See 135 S. Ct. at 2521–22 (describing exclusionary zoning cases as "heartland" impact claims); supra note 8 and accompanying text (noting usage of impact theory to challenge race-based exclusionary zoning practices); supra note 13 and accompanying text (noting usage of impact theory to challenge mortgage discrimination).

126. See supra notes 64–66 and accompanying text.

127. See Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 248–51 (9th Cir. 1997) (upholding challenge to landlord's screening device limiting units based on applicants' source of income).

128. See supra note 11 and accompanying text (noting usage of impact theory to challenge such local-resident practices).

129. See, e.g., Ojo v. Farmers Grp., Inc., 600 F.3d 1205, 1207 (9th Cir. 2010) (en banc) (noting disparate impact issues arising from use of credit scores by home insurance provider); see also Chi Chi Wu & Deidre Swesnik, Credit Scores and Credit Reports: Problematic Uses and How They Worsen the Racial Economic Gap, Nat'l Consumer Law Ctr. (May 20, 2014) https://www.nclc.org/images/pdf/conferences_and_webinars/racial_justice/credit_scores_and_credit_reports_webinar.pdf [https://perma.cc/K9XE-MRWZ] (describing numerous reports showing racial disparities in credit scores).

Impact claims may also be expected on behalf of FHA-protected classes other than racial and ethnic minorities. Examples include challenges to municipal ordinances and landlord policies that disproportionately impact victims of domestic violence,[130] and a variety of restrictions by housing providers and homeowner associations that negatively impact families with children.[131]

Indeed, after *ICP*, all governmental and private housing policies that create "artificial, arbitrary, and unnecessary barriers" seem at risk.[132] Older policies and those adopted just to mimic others in an industry might be particularly susceptible, because potential defendants presumably have not conducted an assessment of the need for such policies or the alternatives available. As a result, landlords, insurance companies, and others subject to the FHA may be well advised to review their policies before being forced to do so by an FHA-impact claim.

CONCLUSION

The Supreme Court's *ICP* ruling endorsing disparate-impact claims under the FHA's § 3604(a) and § 3605 leaves much of fair housing litigation unchanged. Many providers of housing and housing services are governed by other provisions of the FHA that include different standards, and FHA intent-based claims, which have always been able to use impact evidence, are unaffected by the Court's new FHA decision.

Still, *ICP* is an important case. It strongly endorses the FHA's role in attacking racially segregated housing patterns. It encourages challenges to a variety of unjustified, minority-limiting housing policies, and it provides standards for these cases that are grounded in familiar Title VII precedents. It also sets out an analytical approach for deciding some of the FHA's key unresolved issues. Still, the *ICP* dissenters' ungenerous reading of the statute suggests that some of these issues may face a skeptical reception. Thus, whether *ICP*'s promise of a renewed commitment to the FHA's goals of integration and expanded housing opportunities is realized must await future developments in the courts and the Nation as a whole.

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130. See Michael G. Allen et al., supra note 65, at 194–95 (describing recent litigation alleging disparate impact on victims of domestic violence).

131. See supra note 40 and accompanying text (noting cases involving impact-based challenges to familial-status discrimination).

132. See supra note 32 and accompanying text (describing *ICP*'s endorsement of this phrase in describing appropriate FHA impact claims).