BENIGN CODE WORDS, INVIDIOUS RESULTS: A MODERN HOUSING DISCRIMINATION PRACTICE

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The code words realtors and homeowners use to advertise homes perpetuate discrimination and lead to inequitable access to housing in violation of the Fair Housing Act (FHA). Realtors' and homeowners' use of neutral-on-its-face language to describe real estate does not explicitly discriminate based on race, but in fact this practice yields disparate treatment and creates a disparate impact against racial minorities as compared to white homebuyers. Whether intentionally or unintentionally, realtors often drive home seekers to choose or not choose a particular house with advertising language that signals racial preference.

Realtors' and homeowners' use of code words in real estate advertising, while facially neutral, works to undermine the Fair Housing Act's goals. This Article provides a detailed examination of home sellers' use of code words in the context of housing discrimination, emphasizing both the legal history and the evolution of housing discrimination. Congress passed the FHA as an attempt to rein in historical wrongful discriminatory housing practices and to level the playing field for minorities so that all Americans would have equal access to opportunity through housing choice. Realtors' use of code words causes harm by reinforcing who is desirable or undesirable within a community. The use of code words in real estate advertising causes a disparate impact on protected classes and should be deemed unlawful under the Fair Housing Act.

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INTRODUCTION

A year ago, I bought a house in my hometown, a small bedroom community located right outside New York City. As a first-time homebuyer, I couldn't believe the descriptions of the houses being sold in a place I knew well from growing up in the area: "Don't miss the chance to live in this 'exclusive neighborhood'!"[1] and "Come live in this 'prestigious' area!"[2] I noticed the use of phrases that might

1. Using the word "exclusive" to describe a neighborhood implies that the area is only accessible to certain types of people. Historically, access to specific neighborhoods has been based on subjective criteria, including whether a home seeker is a racial minority, and the term evokes historical patterns of housing discrimination. *See* discussion *infra* Part I. Indeed, facially neutral adjectives that are used to describe the nature of a community have been held to be code words that draw on racial biases in the fair housing context under FHA Section 3604(a). *See* Mhany Mgmt., Inc. v. Cnty. of Nassau, 819 F.3d 581, 608–10 (2d Cir. 2016) (holding that residents' expressed concerns that proposed zoning changes would change the "flavor" and "character" of a community "were code words for racial animus"); *see also* Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1083 (3d Cir. 1996) ("There are no talismanic expressions which must be invoked as a condition-precedent to the application of laws designed to protect against discrimination. The words themselves are only relevant for what they reveal—the intent of the speaker. A reasonable jury could find that statements [where code words are used] send a clear message and carry the distinct tone of racial motivations and implications. They could be seen as conveying the message that members of a particular race are disfavored . . . .").

2. Like the term "exclusive," the term "prestigious" also carries historical connotations of a lack of accessibility to certain groups, often based on race, where

appeal specifically to certain groups while subtly deterring others by suggesting a preference for a particular type of wealthy—and likely white—resident. These descriptors could be code for the areas of town with historically less racial diversity than other neighborhoods nearby. Having grown up in the town, I knew that these descriptors often indeed described historically wealthy, white areas in the community.

I also noticed that my real estate broker, who knew I had grown up in town, asked me if I'd be willing to consider a specific neighborhood elementary school for my children. When I was growing up, that school had carried a stigma because it drew from areas of town that included apartments rather than only single-family homes. It was more economically and racially diverse than other neighborhoods in town. During my home search, I also noticed that real estate advertisements highlighted access to particular—and apparently more desirable—elementary schools in the area, while others stated that a given neighborhood was close to "private schools." It occurred to me that contemporary realtors had merely traded the previously permitted practice of overt discriminatory language for code words that accomplished the same thing. These advertisements reinforced the stigma associated with the racially diverse elementary school by suggesting that home seekers who bought homes zoned for that neighborhood school should instead consider private schools for their children.

The use of these code words—neutral-on-their-face words used to signal a preference to maintain segregation—stood out to me as a lawyer who has been trained in fair housing law. So, too, did the subtle question posed by my broker that implied a lack of desirability within a particular school zone. These observations led me to ask myself: Is the practice of using code words to advertise real estate a modern form of housing discrimination?

The importance of language in shaping perceptions cannot be overstated, and these perceptions can influence decisions by potential homebuyers. Code words in real estate advertisements can be used to subtly communicate preferences or discourage groups with certain demographics from seeking specific houses within a community. This practice perpetuates housing discrimination. These code words or phrases appear neutral or non-discriminatory on the surface, but they carry connotations that can have a discriminatory effect. Subtle

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minorities were systematically barred from living in certain neighborhoods. *See* discussion *infra* Part I. Only privileged groups, i.e. wealthy white homeowners, were allowed to live in "prestigious" areas. The term "prestigious" discourages diverse home seekers who may feel unwelcome or out of place in such an environment.

messaging using terms such as "exclusive community" can serve as a proxy for race or family status. Advertisements predominantly associated with a specific target demographic that resonate with that group, for instance "near a country club,"[3] may keep out racially diverse populations by signaling that certain neighborhoods are unwelcoming to racial minorities. And describing a community as "mature"[4] might discourage families with children from seeking to buy a particular property. These code words can, in practice, cause harm by reinforcing who is desirable or undesirable within a community. This, in turn, can lead to reduced diversity and inequality in housing, as well as decreased access to education and other opportunities for minority groups. To be sure, educational efforts, stricter regulatory oversight, and more explicit guidelines from housing authorities are needed to address the use of these code words to ensure that fair housing practices are upheld and discrimination is minimized.

Scholars have previously discussed racial discrimination in real estate advertising[5] and have reviewed FHA section 3604(a)- and 3605-based disparate impact claims following the Supreme Court's decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* ("*Inclusive Communities")*.[6] They have not squarely considered whether disparate impact liability is needed

3. Country clubs are associated with exclusivity, wealth, and limited access. Historically, country clubs were spaces that were exclusive to certain racial groups, particularly white people. *See, e.g.*, Wright v. Salisbury Club, Ltd., 632 F.2d 309, 315 (4th Cir. 1980) (privately-owned club which provided tennis, swimming, golf, and dining facilities for the use of its members admittedly denied membership to plaintiffs because of their race). Many private country clubs historically excluded Black, Jewish, and other minority groups. Even today, some clubs maintain exclusivity and are still legally permitted to do so under 42 U.S.C. § 2000a(e), which provides an exception to the prohibition against discrimination or segregation in places of public accommodation for private clubs that are "not in fact open to the public." 42 U.S.C. § 2000a(e). Advertising proximity to private clubs, which are legally allowed to discriminate, makes certain groups feel unwelcome. Highlighting a country club nearby can suggest that a neighborhood is homogeneous, i.e. predominantly white, and might dissuade more diverse buyers from considering a property.

4. The term "mature" might be interpreted as a signal that the area is geared toward older residents, which could make younger home seekers feel that the community isn't welcoming or appropriate for them. It could suggest that the area is more suitable for retirees, deterring families with children from considering the property.

5. Robert G. Schwemm, *Discriminatory Housing Statements and § 3604(c): A New Look at the Fair Housing Act's Most Intriguing Provision*, 29 FORDHAM URB. L.J. 187, 189 (2001); Emily A. Vernon, *Exclusionary Advertising? The Case for Cautious Enforcement of 42 USC § 3604(c) Against Minority-Language Housing Advertisements*, 87 U. CHI. L. REV. 223, 224 (2020).

6. 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, 691 (2016); *see also* Samuel R. Bagenstos, *Disparate Impact and the Role of Classification*

to stop racially coded discriminatory advertising in housing. The stakes are high because using terms such as "prestigious" and "exclusive" to advertise real estate can function as code words that maintain racial privilege by marking certain spaces as inherently "superior," often implicitly excluding people of color.

This article examines the application of the FHA to code words in real estate marketing. Part I provides a history of housing discrimination in the United States. This part highlights the invidious racial underpinnings of housing discrimination practices in the U.S. over time, exploring the racial and economic segregation that historical overt zoning regulations have created. It sets the stage for Congress's passage of the FHA. Part II provides background on the FHA and an overview of how courts have evaluated FHA real estate advertising claims. It outlines the "ordinary reader" standard that courts have used to determine whether an advertisement is discriminatory under FHA section 3604(c). It also describes two kinds of discrimination, disparate treatment and disparate impact, and the frameworks courts have used to evaluate these types of claims.[7] Lastly, Part II explores how implicit biases may be at play in housing discrimination cases. Part III outlines the concept of code words in real estate advertising, explaining what they are and how they may be used for discriminatory purposes. This part discusses why courts should apply a disparate treatment or disparate impact analysis, rather than the "ordinary reader" standard, when evaluating section 3604(c) claims. It addresses how a court could analyze a claim involving the use of code words in advertising under a disparate treatment or disparate impact theory and includes a discussion of implicit bias. Because existing law does not adequately cover code words in real estate advertising, and because this practice can lead to a disparate impact on protected classes, which the Supreme Court has

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and Motivation in Equal Protection Law After Inclusive Communities, 101 CORNELL L. REV. 1115 (2016).

7. *See* Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519 (2015) (settling the question of whether a disparate impact claim can be brought under the FHA's sections 3604(a) and 3605 in the affirmative); *see also* Robert G. Schwemm, *Fair Housing Litigation After* Inclusive Communities*: What's New and What's Not*, 115 COLUM. L. REV. SIDEBAR 106, 109 (2015) ("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 [the Court had previously] interpreted to encompass disparate-impact claims, both of which the Court saw as referring 'to the consequences of an action rather than the actor's intent.' As for § 3605, its use of 'discriminate' was similar to another statute that the Court had earlier construed to include disparate-impact liability.").

held is antithetical to Congress's reasons for passing the FHA,[8] disparate impact law should apply to such advertising cases to address the gap.

I. Overt Discrimination in Housing: A History of Exclusionary Zoning, Racial Covenants, Redlining, and Steering

Realtors, homeowners, and federal government agencies have used exclusionary policies and practices to deny fair access to housing to minority home seekers for more than a century.[9] The Supreme Court and Congress have pushed back on these exclusionary practices, but the response has been slow and inconsistent.[10] Over time, those who perpetuate discrimination in housing have moved from overt discrimination to more subtle methods of exclusion.[11] Though often harder to prove, today's discriminatory practices are no less invidious than those from the previous century.[12] Consequently, fair housing laws have had to adapt to respond to modern forms of discrimination. Municipal governments initially created zoning laws to provide their communities with control over how land was used and developed over time.[13] Initially, towns used zoning regulation to protect the health and safety of their residents by prohibiting businesses from developing

8. *Inclusive Cmtys.*, 576 U.S. at 521 ("Recognition of disparate-impact claims is also consistent with the central purpose of the FHA, which, like Title VII and the ADEA, was enacted to eradicate discriminatory practices within a sector of the Nation's economy. Suits targeting unlawful zoning laws and other housing restrictions that unfairly exclude minorities from certain neighborhoods without sufficient justification are at the heartland of disparate-impact liability.").

9. *See, e.g.*, Buchanan v. Warley, 245 U.S. 60, 82 (1917) (ordinance at issue prohibited person of color from purchasing a home from a white homeowner).

10. The first Supreme Court case involving racially restrictive zoning was decided in 1917, and in that case, the Court's reasoning did not demonstrate support for racial minorities. *See id.* at 81; *see also* Shelly v. Kraemer, 334 U.S. 1, 12 (1948) ("[*B*]*uchanan* . . . involved the rights of white sellers to dispose of their properties free from restrictions as to potential purchasers based on considerations of race or color."). Congress did not pass the Fair Housing Act until half a century later, in 1968. And it took the Supreme Court another fifty years to hold that disparate impact liability was lawful under the FHA. *See infra* Section II.C.

11. *See* discussion *infra* Part II.

12. *See* Mhany Mgmt., Inc. v. Cnty. of Nassau, 819 F.3d 581, 606 (2d Cir. 2016) (finding that intentional discrimination is "rarely susceptible to direct proof"); *see also* Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1081–82 (3d Cir. 1996) ("Anti-discrimination laws and lawsuits have 'educated' would-be violators such that extreme manifestations of discrimination are thankfully rare . . . . Regrettably, however, this in no way suggests that discrimination based upon an individual's race, gender, or age is near an end. Discrimination continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms.").

13. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 386–87 (1926) ("[W]ith the great increase and concentration of population, problems have developed, and constantly

factories and industrial bases in residential areas.[14] Those same communities gradually used zoning laws to perpetuate discrimination; in addition to specifying *how* to use land, homeowners and local governments used zoning to specify *who* could live in a particular place.[15]

Racially restrictive zoning has been illegal for more than one hundred years.[16] The Supreme Court first invalidated zoning ordinances that explicitly prohibited certain racial groups from buying a particular parcel of land in *Buchanan v. Warley* in 1917.[17] At issue in *Buchanan* was an ordinance preventing a person of color from occupying a parcel of land on a block where there was a larger number of white residents.[18] Notably, the Court in *Buchanan* did not base its reasoning on trying to protect Black property buyers from discrimination.[19] Instead, the Court framed its goal as ensuring that white owners would have the freedom to sell their land to whomever they desired.[20] Regardless of the Court's goal, since *Buchanan*, laws explicitly limiting residency based on race have been illegal.[21]

Homeowners soon replaced that discriminatory practice with purportedly private agreements that discriminated based on race.[22] Known

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are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities.").

14. *Id.* at 388 ("A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard . . . . There is no serious difference of opinion in respect of the validity of laws and regulations fixing the height of buildings within reasonable limits, the character of materials and methods of construction, and the adjoining area which must be left open, in order to minimize the danger of fire or collapse, the evils of overcrowding and the like, and excluding from residential sections offensive trades, industries and structures likely to create nuisances.").

15. *See* Vill. of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) (Group of six unrelated college students unsuccessfully challenged New York zoning ordinance restricting land use to one-family dwellings, where "family" was defined as related by blood, adoption, or marriage and was limited to no more than two people. The Court held that zoning is permissible where "family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.").

16. *See* Buchanan v. Warley, 245 U.S. 60, 82 (1917) (holding unconstitutional an ordinance that prohibited a person of color from occupying a parcel of land).

17. *Id.*

18. *Id.*

19. *See* Shelley v. Kraemer, 334 U.S. 1, 12 (1948) ("[*B*]*uchanan* . . . involved the rights of white sellers to dispose of their properties free from restrictions as to potential purchasers based on considerations of race or color.").

20. *See id.*

21. *See, e.g.*, Monk v. City of Birmingham, 87 F. Supp. 538, 544 (N.D. Ala. 1949), *aff'd*, 185 F.2d 859 (5th Cir. 1950) (holding three ordinances prohibiting African-Americans from living in certain districts and whites from living in certain other districts unconstitutional).

22. *See* Carol M. Rose, *Property Law and Inequality: Lessons from Racially Restrictive Covenants*, 117 NW. U. L. REV. 225, 232 (2022) ("After *Buchanan*, racial

as "racial covenants," these agreements between homeowners restricted property rentals and sales to certain groups and precluded others based on their race or religion.[23] By the 1920s, the effect of racial covenants was so widespread that most new housing developments in the North and West prevented ownership or rental of houses by anyone who was not white.[24] Yet the Supreme Court held in *Corrigan v. Buckley* that so-called private racial covenants were lawful.[25] Therefore, once communities could no longer use racial zoning ordinances to perpetuate segregation, they relied on lawful racial covenants to achieve the same ends: ensuring the continuation of non-diverse, exclusive, all-white communities.

It was not until more than twenty years later that the Supreme Court reversed course, declaring racial covenants unenforceable in the 1948 decision *Shelley v. Kraemer*.[26] In *Shelley*, the plaintiff brought suit to enforce a racially restrictive covenant designed to prevent African-American families from moving into his neighborhood.[27] The Court held that the enforcement of a racially restrictive covenant would violate the Equal Protection Clause of the Fourteenth Amendment.[28]

The federal government itself also perpetuated housing segregation through institutionalized redlining. The Home Owners' Loan Corporation (HOLC) was a government-sponsored corporation created to refinance home mortgages to slow foreclosure rates.[29] In the 1930s, HOLC developed an elaborate classification system using residential maps to demonstrate which areas were considered "safe" for government-backed lending.[30] These maps were created for most U.S. cities.[31] Racial composition was the most important factor in determining whether a neighborhood would be green, meaning "best";

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covenants became the main legal vehicle through which housing discrimination could be accomplished. High-end developers began to use them routinely to assuage their white clients' fears of minority entrance; racially restrictive covenants became a kind of marketing tool[.]").

23. *Id.*

24. Thomas J. Sugrue, *From Jim Crow to Fair Housing*, *in* THE FIGHT FOR FAIR HOUSING 14, 15 (Gregory D. Squires ed., 2018).

25. 271 U.S. 323, 331 (1926) (holding that racial covenants were constitutional because they did not involve government action and were simply agreements between private property owners).

26. 334 U.S. 1 (1948).

27. *Id.* at 20 ("We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand.").

28. *Id.*

29. Lisa Rice, *The Fair Housing Act, A Tool for Expanding Access to Quality Credit*, *in* THE FIGHT FOR FAIR HOUSING 76, 78–79 (Gregory D. Squires ed., 2018).

30. *Id.*

31. Sugrue, *supra* note 24, at 16–17.

blue, meaning "still desirable"; yellow, meaning "definitely declining"; or red, meaning "hazardous" (hence the term redlining).[32] Residents of neighborhoods that had been classified as red rarely received federal mortgage and loan guarantees, thus leaving racial minorities out of homeownership and perpetuating the segregation of American cities.[33]

In addition to redlining, whites used protests and even violence to enforce residential racial segregation.[34] From the 1920s to the 1960s, black families moving to white neighborhoods faced cross-burnings, arson, window breakings, and mobs.[35] And from the 1930s through the 1960s, real estate brokers also contributed to residential segregation through what is now called "steering,"[36] the practice of influencing a home seeker's choice of housing based on an attribute that is now deemed to be a protected characteristic under the FHA.[37] A 1955 industry brochure provided examples of motives or characteristics of potential homeowners that realtors should steer away from more desirable neighborhoods:

> The prospective buyer might be a bootlegger who would cause considerable annoyance to his neighbors, a madam who had a number of call girls on her string, a gangster who wants a screen for

32. *Id.*

33. Rice, *supra* note 29, at 83 ("Because of the deeply racist and discriminatory policies developed and perpetuated by the HOLC and [Fair Housing Administration], fewer than 2 percent of [Fair Housing Administration] mortgages went to non-white families for the first 30 years of the [Fair Housing Administration]'s existence . . . . This essentially meant that during the time of the greatest increase in government-sponsored home ownership programs, African Americans and Latinos were locked out of this wealth-building opportunity.").

34. Sugrue, *supra* note 24, at 19.

35. *See id.*; *see also* Jeannine Bell, *Hate Thy Neighbor: Violent Racial Exclusion and the Persistence of Segregation*, 5 Ohio St. J. Crim. L. 47, 52 (2007) (citations omitted) ("A special report published in 1987 by the Klanwatch Project of the Southern Poverty Law Center documented 45 cases of arsons and cross burnings directed at minorities who had moved to mostly white neighborhoods in cities and suburban area in the mid- to late 1980s. In addition to the cross burnings and arson, the report documented hundreds of acts of vandalism and intimidation (i.e., threatening phone calls and letters) directed at preserving housing segregation.").

36. Sugrue, *supra* note 24, at 18 (citation omitted) ("From the 1930s through the 1960s, the National Association of Real Estate Boards . . . issued ethical guidelines that specified that its members 'should never be instrumental in introducing to a neighborhood a character of property or occupancy, members of any race or nationality, or any individual whose presence will be clearly detrimental to property values in the neighborhood[.]'").

37. *Steer Clear of "Steering,"* Nat'l Ass'n Realtors: Fair Housing Corner (July 10, 2020), https://www.nar.realtor/fair-housing-corner/steer-clear-of-steering [https://perma.cc/5JQ9-7M97] ("Steering occurs, for example, when real estate agents do not tell buyers about available properties that meet their criteria, or express views about communities, with the purpose of directing buyers away from or towards certain neighborhoods due to their race or other protected characteristic.").

> his activities by living in a better neighborhood, a colored man of means who was giving his children a college education and thought they were entitled to live among whites . . . No matter what the motive or character of the would-be purchaser, if the deal would institute a form of blight, then certainly the well-meaning broker must work against its consummation.[38]

In sum, from the early 1900s to the 1960s, white homeowners, realtors, and the government systematically excluded minorities from homeownership and used a variety of discriminatory methods to keep outsiders away. As certain discriminatory methods were outlawed, other, sometimes subtler but equally malicious, methods took their place. Those violent and non-violent activities eventually led President Lyndon Johnson to establish the National Advisory Commission on Civil Disorders as a response to ongoing social unrest in the 1960s.[39] Known as the Kerner Commission, it issued a report that identified residential segregation and unequal housing and economic conditions in the inner cities as a significant, underlying cause of that social unrest.[40] The Commission recommended that Congress enact a "comprehensive and enforceable open-occupancy law" that would make it unlawful to discriminate in the sale or rental of housing based on "race, creed, color, or national origin."[41] Accordingly, the issue of who could access housing was ripe for legislative intervention by 1968, and thus Congress passed the FHA.[42]

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38. Sugrue, *supra* note 24, at 18.

39. *See* Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 529 (2015).

40. Raphael W. Bostic & Arthur Acolin, *Affirmatively Furthering Fair Housing*, *in* The Fight for Fair Housing 189, 191 (Gregory D. Squires ed., 2018) ("[T]he Kerner Commission Report described [the U.S.] as 'a nation moving toward two societies, one black, one white—separate and unequal . . . .'").

41. *See Inclusive Cmtys.*, 576 U.S. at 529–30; *see also* john a. powell & Stephen Menendian, *Opportunity Communities*, *in* The Fight for Fair Housing 207, 215 (Gregory D. Squires ed., 2018) (The Kerner Commission "called for 'a policy which combines ghetto enrichment with programs designed to encourage integration of substantial numbers of Negroes into the society outside the ghetto[.]'").

42. *History of Fair Housing*, U.S. Dep't of Hous. & Urb. Dev., https://web.archive.org/web/20240709073457/https://www.hud.gov/program_offices/fair_housing_equal_opp/aboutfheo/history [perma.cc/4YDH-DAWS] (FHA enactment "came only after a long and difficult journey. From 1966-1967, Congress regularly considered the fair housing bill, but failed to garner a strong enough majority for its passage."); *see also* Bell, *supra* note 35, at 52 (In response to whites trying to enforce residential segregation through violence, "civil rights organizations including the NAACP mounted a campaign against a variety of legal and extralegal barriers to open housing-racial covenants, race-based zoning practices, housing discrimination, and real estate brokers' racialized steering practices. These campaigns resulted in the Fair Housing Act of 1968 . . . .").

II. The Fair Housing Act and Court Interpretation of the FHA

Understanding the historical context surrounding Congress's passing the Fair Housing Act is critical to court interpretation of various FHA provisions today. Congress enacted the Fair Housing Act on April 11, 1968,[43] in response to the assassination of Dr. Martin Luther King, Jr., on April 4, 1968.[44] Dr. King had been a staunch advocate for fair housing legislation, and President Lyndon Johnson used the tragedy of Dr. King's death to urge Congress to approve the Act prior to Dr. King's funeral.[45] The FHA provides the most sweeping protections for home seekers that are available under the law. Congress enacted it in response to racially discriminatory practices in housing.[46] It was an attempt to help level the playing field for those who had previously been turned away from high opportunity neighborhoods due to systematic residential segregation.[47]

Under section 3604(c), the FHA makes it illegal to "make, print, or publish . . . any notice, statement, or advertisement, with respect to the sale or rental of a dwelling *that indicates any preference, limitation, or discrimination* based on [protected class status], or an intention to make any such preference, limitation, or discrimination."[48] The FHA does not, however, provide guidance on *how* to determine whether an advertisement is discriminatory.[49]

The FHA also makes it unlawful, under section 3604(a), to "refuse to sell or rent . . . or to refuse to negotiate for the sale or rental of or otherwise make unavailable or deny, a dwelling . . . because of race, creed, [religion], color, or national origin."[50] Finally, the FHA prohibits,

43. Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (1968). The FHA, as amended, is codified at 42 U.S.C. §§ 3601–3619.

44. *History of Fair Housing*, *supra* note 42 (FHA enactment "came only after a long and difficult journey. From 1966-1967, Congress regularly considered the fair housing bill, but failed to garner a strong enough majority for its passage."); *Inclusive Cmtys.*, 576 U.S. at 530.

45. *See History of Fair Housing*, *supra* note 42.

46. Bostic & Acolin, *supra* note 40, at 191 ("A major motivation" of the FHA "was to eliminate the race-based institutional, social and structural barriers that resulted in significantly worse income, employment, and educational outcomes for blacks relative to whites" and to attempt to stop the United States from becoming a nation of two separate and unequal societies, as described in the Kerner Commission Report).

47. *See id.*

48. 42 U.S.C. § 3604(c) (2012) (emphasis added).

49. *See* Miami Valley Fair Hous. Ctr., Inc. v. Connor Grp., 725 F.3d 571, 577 (6th Cir. 2013) (("The Fair Housing Act's language is purposely broad and the statute and regulations create no fixed and immutable rules to determine whether an advertisement is discriminatory.") (citation omitted)).

50. 42 U.S.C. § 3604(a).

under section 3605, "any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction" because of that person's protected class status.[51] In 1974, sex was added as a protected class to the FHA.[52] In 1988, Congress amended the FHA to add "familial status" as a protected class.[53] The 1988 Amendments also added certain exemptions from liability.[54]

As a response to the evolution of racial discrimination in housing and since the passage of the FHA, courts have now established several different kinds of claims that a plaintiff may bring under the FHA. These kinds of claims include disparate treatment claims[55] and disparate impact claims,[56] as well as claims involving implicit bias, which may be brought under either disparate treatment or disparate impact.[57] Notably, however, this analytical framework currently does not apply to section 3604(c), which covers discrimination in real estate advertising, and which is currently governed by the "ordinary reader" standard.[58] All are discussed in the sections that follow.

A. The "Ordinary Reader" Standard

The "ordinary reader" standard refers to the current framework by which courts determine whether a housing advertisement "indicates a racial preference" under section 3604(c) of the FHA.[59] Whether an

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51. *Id.* § 3605. In § 3605, residential real estate related transaction is defined as "the making or purchasing of loans or providing other financial assistance" or "[t]he selling, brokering, or appraising of residential real property." *Id.* § 3605(b).

52. Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 109, 88 Stat. 633, 649.

53. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 5, 102 Stat. 1619, 1622 (1988).

54. *See id.* at 1622–23 (allowing housing for older people to be exempt from familial status protection provided that certain conditions were met); *see also* Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 530 (2015). Notably, the 1988 Amendments were silent regarding disparate impact liability, which is discussed *infra* Section II.C.

55. *See* Mhany Mgmt., Inc. v. Cnty. of Nassau, 819 F.3d 581, 606 (2d Cir. 2016) (upholding the district court's finding of racial discrimination based upon discriminatory intent); *see also* discussion *infra* Section II.B.

56. *See* discussion *infra* Section II.C.

57. *Inclusive Cmtys.*, 576 U.S. at 540; *see* discussion *infra* Section II.D.

58. *See* discussion *infra* Section II.A.

59. *See* Ragin v. N.Y. Times Co., 923 F.2d 995, 1002 (2d Cir. 1991) (citation omitted) ("[T]he 'ordinary reader' is nothing more, but nothing less, than the common law's 'reasonable man': that familiar creature by whose standards human conduct has been judged for centuries."). Because the FHA does not provide guidance on how to determine whether an advertisement is discriminatory, courts have developed the "ordinary reader" standard in response to the FHA's lack of direction. *See* Miami

"ordinary person" reading a home advertisement would consider the language to be discriminatory is a jury question,[60] so the framework requires plaintiffs to prove that home advertising language would be deemed discriminatory to a panel of jurors.

In *United States v. Hunter*, the Fourth Circuit first put forth the "ordinary reader" standard to help resolve the FHA's lack of guidance on what makes an advertisement discriminatory.[61] The court considered whether "the natural interpretation of the advertisements published" would "indicate a racial preference" to an "ordinary reader."[62] In *Hunter*, an advertisement literally used the words "white home" to describe a real estate listing.[63] The court held that the writer's choice of the words "white home" clearly indicated a preference for white tenants.[64] The court leaned on the purpose behind Congress passing the FHA, reasoning, "If an advertiser could use the phrase 'white home' in substitution for the clearly proscribed 'white only,' the [FHA] would be nullified for all practical purposes. We cannot condone an interpretation which would circumnavigate congressional intent in this remedial statute designed to eliminate the humiliation and social cost of racial discrimination."[65]

The Second Circuit expanded upon the "ordinary reader" standard in *Ragin v. New York Times Co.*,[66] where plaintiffs brought suit against the *New York Times*, alleging a practice in which housing advertisements over time had depicted almost exclusively white models in predominantly white buildings, while the few black models were published in advertisements for real estate located in predominantly black buildings.[67] The Court denied the newspaper's motion to dismiss, reasoning that an advertisement is discriminatory, in violation of section 3604(c), if the advertisement "suggests to an ordinary reader that a particular race is preferred or dispreferred for the housing in

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Valley Fair Hous. Ctr., Inc. v. Connor Grp., 725 F.3d 571, 577 (6th Cir. 2013) ("The Fair Housing Act's language is purposely broad and 'the statute and regulations create no fixed and immutable rules to determine whether an advertisement is discriminatory.'") (citing Hous. Opportunities Made Equal, Inc. v. Cincinnati Enquirer, 943 F.2d 644, 647 (6th Cir. 1991)).

60. Schwemm, *supra* note 7, at 116 ("[D]etermining how an ordinary person would interpret a § 3604(c)-challenged communication is generally considered a jury issue.").

61. 459 F.2d 205, 209–10 (4th Cir. 1972) (holding that an advertisement stating that an apartment for rent was located in a "white home" violated the FHA).

62. *Id.* at 215.

63. *Id.* at 209.

64. *Id.* at 215.

65. *Id.*

66. 923 F.2d 995, 1001 (2d Cir. 1991) (holding that white models used in an advertisement indicated a preference for white home seekers in violation of the FHA).

67. *Id.*

question."[68] The court opined that the ordinary reader "is neither the most suspicious nor the most insensitive of our citizenry."[69] The court further instructed, "Ordinary readers may reasonably infer a racial message from advertisements that are more subtle than the hypothetical swastika or burning cross, and we read the word 'preference' to describe any ad that would discourage an ordinary reader of a particular race from answering it."[70] Courts have permitted parties to establish violations of section 3604(c) by bringing in evidence of intent to discriminate,[71] though a showing of intent is not required.[72]

B. Disparate Treatment Under the FHA

Disparate treatment, also known as intentional discrimination,[73] is a type of housing discrimination claim under the FHA[74] that a plaintiff may bring when the plaintiff is alleging that the defendant's discriminatory action was motivated, at least in part, by animus against a protected group.[75] Animus need not be the only motivation, but the plaintiff must show that animus "was a significant factor in the position taken" by the defendant.[76] But how does a plaintiff show that a defendant's policy or practice was motivated by animus?

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68. *Id.* at 999.

69. *Id.* at 1002.

70. *Id.* at 999–1000.

71. Soules v. U.S. Dep't of Hous. & Urb. Dev., 967 F.2d 817, 824 (2d Cir. 1992) (citing Hous. Opportunities Made Equal v. Cincinnati Enquirer, 943 F.2d 644, 646 (6th Cir. 1991)). Although the *Hunter* court did not require evidence of intent as part of the "ordinary reader" analysis, it did rely on evidence of discriminatory intent in reaching its decision. United States v. Hunter, 459 F.2d 205, 215 ("Indeed, the indication of a racial limitation is precisely what the writer of the advertisements published in *The Courier* intended when he used the words 'white home.'").

72. *Ragin*, 923 F.2d at 1000 ("Moreover, the statute prohibits all ads that indicate a racial preference to an ordinary reader whatever the advertiser's intent. To be sure, the intent of the creator of an ad may be relevant to a factual determination of the message conveyed . . . but the touchstone is nevertheless the message.") (citing Saunders v. Gen. Servs. Corp., 659 F. Supp. 1042, 1059 (E.D. Va. 1987)).

73. Schwemm & Bradford, *supra* note 6, at 693 n.34 (referring to "intentional discrimination" and "disparate treatment" interchangeably).

74. Courts do not currently apply the disparate treatment analytical framework to FHA section 3604(c) cases. *See* discussion *supra* Section II.A; *see also* Schwemm, *supra* note 7, at 115 (Section 3604(c) "bans housing-related communications that 'indicate any preference, limitation or discrimination' based on a prohibited factor. 'Indicate' here is judged by how an 'ordinary reader' . . . would react to the challenged ad . . . , which means that discriminatory intent need not be shown in § 3604(c) cases.").

75. LeBlanc-Sternberg v. Fletcher, 67 F.3d 412, 425 (2d Cir. 1995) (citation omitted) (holding that "a plaintiff can establish a *prima facie* case [of disparate treatment] by showing that animus against the protected group 'was a significant factor in the position taken'" by the defendant).

76. *Id.*

For claims alleging disparate treatment of a group rather than disparate treatment of an individual, courts apply the framework outlined in the 1977 Supreme Court decision *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[77] In *Arlington Heights*, the Supreme Court upheld the denial of a zoning decision to build multi-family homes and determined that the plaintiffs had failed to carry their burden of proving that racially discriminatory intent was a motivating factor in the rezoning decision.[78] Although *Arlington Heights* was decided in the Equal Protection context on constitutional grounds,[79] the test has also been applied to claims of intentional discrimination under certain federal statutes including the FHA.[80] In *Arlington Heights*,[81] Justice Powell outlined several factors that plaintiffs can use to establish disparate treatment, including: 1) evidence of discriminatory effect, which is a starting point (but not itself sufficient) for showing intent;[82] 2) historical background or circumstantial or direct evidence;[83] 3) a specific sequence of events leading up to the challenged decision; and 4) substantive departures from accepted procedures.[84] Taken together, these four *Arlington Heights* factors can be used to show a *prima facie*

77. 429 U.S. 252, 266–68 (1977).

78. *Id.*

79. Plaintiffs claimed that the Village's refusal to rezone discriminated against racial minorities in violation of the Fourteenth Amendment. *See id.* at 263. Importantly, the Supreme Court decided that "official action" will not be held unconstitutional solely because it creates a "racially disproportionate impact" (a disparate impact). *Id.* at 265. Although this case involved zoning and access to housing, it was decided on constitutional grounds. *Id.* at 263; *see* discussion *infra* Section II.C for an overview of the disparate impact legal standard in cases brought in the statutory context of the Fair Housing Act.

80. *See* Gallagher v. Magner, 619 F.3d 823, 833 (8th Cir. 2010) (demonstrating an FHA case applying *Arlington Heights* factors).

81. *Arlington Heights*, 429 U.S. at 266–68 (outlining the four relevant factors for evaluating intentional discrimination claims).

82. *See* discussion *infra* Section II.C for the rule outlining discriminatory effect.

83. *Arlington Heights,* 429 U.S. at 267–68 (holding that direct or circumstantial evidence can include: 1) contemporaneous statements made by members of the decision-making body; 2) meeting minutes and reports; and 3) occasionally, testimony concerning the purpose of the official action from members of the decision-making body at trial, though the testimony will often be barred by privilege; and holding that the historical background of a decision is one source of evidence that can be used to show discriminatory intent, "particularly if it reveals a series of official actions taken for invidious purposes."); *see also* Mhany Mgmt., Inc. v. Cnty. of Nassau, 819 F.3d 581, 606 (2d Cir. 2016) (noting that, because discriminatory intent is "rarely susceptible to direct proof," a court facing a question of discriminatory intent must also examine circumstantial and direct evidence of intent, as available).

84. Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish, 641 F. Supp. 2d 563, 574 (E.D. La. 2009) (citation omitted) ("Substantive departures" can be present when "factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.").

case of intentional discrimination, or that animus was a "significant motivation" of defendant's actions.[85]

It appears that successfully proving intentional discrimination under the *Arlington Heights* framework is atypical. Intentional discrimination is "rarely susceptible to direct proof,"[86] especially in the modern era where anti-discrimination laws and lawsuits have "'educated' would-be violators such that extreme manifestations of discrimination are thankfully rare."[87] This rarity "in no way suggests that discrimination based upon an individual's race, gender, or age is near an end," and, unfortunately, "[d]iscrimination continues to pollute the social and economic mainstream of American life."[88] As a result, other doctrines such as the disparate impact legal standard have developed to remedy housing discrimination that is "often simply masked in more subtle forms."[89]

C. Disparate Impact Liability Under the FHA

Unlike disparate treatment claims, which require proof of intent to discriminate to succeed, disparate impact claims,[90] also known as discriminatory effect claims, are those in which a specific practice appears neutral on its face but has a discriminatory effect or impact on a protected group.[91]

Upon the FHA's passage in 1968, it became unlawful to use residential segregation practices described to discriminate against home

85. LeBlanc-Sternberg v. Fletcher, 67 F.3d 412, 425 (2d Cir. 1995) (citation omitted) (holding that a plaintiff can establish a *prima facie* case [of disparate treatment] by showing that animus against the protected group "'was a significant factor in the position taken'" by the defendant).

86. *Mhany Mgmt.*, 819 F.3d at 606.

87. Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1081 (3d Cir. 1996) (quotation omitted) (holding that the district court was incorrect when it determined that plaintiffs had failed to demonstrate that they suffered from intentional racial discrimination in their employment and that the discrimination was pervasive and regular).

88. *Id.* at 1081–82.

89. *Id.* at 1082.

90. Courts do not currently apply the disparate impact analytical framework to FHA section 3604(c) cases. *See* discussion *supra* Section II.A; *see also* Schwemm, *supra* note 7, at 115 (Section 3604(c), which is worded differently from the FHA's "because of" provisions which are interpreted in *Inclusive Communities*, "bans housing-related communications that 'indicate any preference, limitation or discrimination' based on a prohibited factor. 'Indicate' here is judged by how an 'ordinary reader'. . . would react to the challenged ad . . . , which means that discriminatory intent need not be shown in § 3604(c) cases.").

91. *See* Mass. Fair Hous. Ctr. v. U.S. Dep't of Hous. & Urb. Dev., 496 F. Supp. 3d 600, 604 (D. Mass. 2020).

seekers based on their status as a protected class.[92] But discrimination in housing did not disappear after the passage of the FHA, it merely changed.[93] Following the FHA's passage, white homeowners and real estate brokers developed new, more subtle discriminatory methods against minority home seekers[94] to continue to maintain the perceived benefits that result from overtly racist ends such as living in a homogenous, white community. Sometimes these discriminatory practices are intentional, and, perhaps, sometimes they are not. Regardless, it has become exceedingly difficult to prove discrimination over time.[95]

Often, evidence of intent is circumstantial,[96] especially in the modern era where overt discrimination is understood to be disfavored.[97] In addition, adjudicators and juries may be disinclined to interpret arguably ambiguous evidence in favor of plaintiffs given their own cognitive biases.[98] Even realtors' and homeowners' actions that are not

92. *See* discussion *supra* Part II; *see also* 42 U.S.C. § 3604(b) (The Fair Housing Act makes it "unlawful" to "discriminate against any person in the . . . sale or rental of a dwelling . . . because of race, color, religion, sex, familial status, or national origin.").

93. *See* Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1081 ("Anti-discrimination laws and lawsuits have 'educated' would-be violators such that extreme manifestations of discrimination are thankfully rare . . . . Regrettably, however, this in no way suggests that discrimination based upon an individual's race, gender, or age is near an end. Discrimination continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms.").

94. *See* Mhany Mgmt., Inc. v. Cnty. of Nassau, 819 F.3d 581, 606 (2d Cir. 2016) (noting that, because discriminatory intent is "rarely susceptible to direct proof," a court facing a question of discriminatory intent must also examine circumstantial and direct evidence of intent, as available); *see also* Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 540 (2015) ("Recognition of disparate-impact liability under the FHA also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment . . . [and] may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping.").

95. *Inclusive Cmtys.*, 576 U.S. at 540 ("Recognition of disparate-impact liability under the FHA also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment . . . [and] may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping.").

96. *See, e.g.*, Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 304 (1997) ("Significantly, none of the factors listed in *Arlington Heights* requires proof of knowledge or awareness on the part of the actor, but rather all are circumstantial facts that give rise to an inference of discrimination.").

97. *See* discussion *supra* Section II.B.

98. *See, e.g.*, Michael Selmi, *Subtle Discrimination: A Matter of Perspective Rather Than Intent*, 34 COLUM. HUM. RTS. L. REV. 657, 675 (2003) ("Those who see discrimination as a pervasive and unjust aspect of our society are far more likely to interpret ambiguous events as the product of discrimination, while those who believe, or want to believe, that discrimination has receded in importance will attribute observed inequalities to forces other than discrimination."); *see also* Melissa Hart, *Subjective*

intentionally discriminatory but which have a disproportionate impact on minority home seekers are problematic. This is especially true in light of historic discrimination and Congress's intent in passing the FHA to remedy past discrimination. It has become necessary to use another litigation tool to combat housing discrimination that does not rely on proving overtly discriminatory intent, and that is why we have disparate impact theory.

Disparate impact theory is an avenue for a plaintiff to succeed on a discrimination claim brought under sections 3604(a) and 3605 without having to prove discriminatory intent.[99] Disparate impact is defined as a policy or practice that is neutral on its face but has a disproportionate and unjustified adverse effect on a protected class as delineated in the FHA.[100] The purpose of disparate impact theory is to dismantle unnecessary barriers to inclusion that have an inequitable effect on a legally protected group.[101] Even when a defendant does not intend for his actions to have an adverse impact on a protected group, those actions can be unlawful where the result is an adverse impact and the policy or practice at issue is not justified by a compelling interest.[102] Put differently, in disparate impact cases, "effect, not motivation, is the touchstone because a thoughtless housing practice can be as unfair to minority rights as a willful scheme."[103] In a way, the focus on the result is similar to the "ordinary reader" standard, where "the touchstone is nevertheless the message" regardless of the advertiser's intent.[104] But the requisite test for proving disparate impact is much more specific and developed.

Decisionmaking and Unconscious Discrimination, 56 ALA. L. REV. 741, 745 (2005) ("[J]udges are subject to cognitive biases and may be unable to see beyond their own assumptions in evaluating the merits of a case.").

99. *See Inclusive Cmtys.*, 576 U.S. at 539.

100. *See* 42 U.S.C. § 2000e-2(k)(1) (codifying Title VII disparate impact liability); *Inclusive Cmtys.*, 576 U.S. at 545–46 (recognizing disparate impact liability under the Fair Housing Act). *See also* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (recognizing disparate impact claims in the employment context under the Civil Rights Act of 1964).

101. *See* Sonja Starr, *The Magnet School Wars and the Future of Colorblindness*, 76 STAN. L. REV. 161, 186 (2024).

102. *See* 42 U.S.C. § 3604(a) (emphasis added) (It is unlawful "[t]o refuse to sell or rent . . . *or otherwise make unavailable* or deny, a dwelling to any person because of race, color, . . . or national origin."); *see also* Mhany Mgmt., Inc. v. Cnty. of Nassau, 819 F.3d 581, 599–600 (2d Cir. 2016) ("The phrase 'otherwise make unavailable' has been interpreted to reach a wide variety of discriminatory housing practices."); *see also Inclusive Cmtys.,* 576 U.S. at 534 (Section 3604(a) of the FHA's "results-oriented language counsels in favor of recognizing disparate-impact liability.").

103. Mount Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375, 385 (3d Cir. 2011).

104. *See* Ragin v. N.Y. Times Co., 923 F.2d 995, 1000 (2d Cir. 1991).

Disparate impact theory developed initially in the context of the Constitution's Equal Protection Clause.[105] It is also now used in FHA cases as a modern tool to respond to the evolution of housing discrimination practices over time.[106] The question of whether disparate impact liability is available as a viable claim for a plaintiff bringing a suit under the FHA remained an open one until the Supreme Court's 2015 decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc. ("Inclusive Communities")*.[107] In the FHA, there is no express language requiring a showing of intent to discriminate, in part because Congress determined that including such language would make it too difficult to prove discrimination.[108] There is also no express language in the statute authorizing claims of discrimination based on showings of disparate impact.[109]

Prior to *Inclusive Communities*, the Supreme Court had held that antidiscrimination laws should be construed to encompass disparate impact claims in at least two other statutory contexts. First, in *Griggs v. Duke Power Co.*, the Court held that disparate impact was a viable claim under section 703(a) of Title VII of the Civil Rights Act of 1964.[110] Second, in *Smith v. City of Jackson*, a plurality of the Court held that

105. The Supreme Court first raised discriminatory impact in Washington v. Davis, 426 U.S. 229 (1976). In *Washington*, the Court held that disparate impact is "not irrelevant, but it is not the sole touchstone of an invidious discrimination forbidden by the Constitution" and that a "totality of the relevant facts" must be considered to trigger the rule that racial classifications are to be subjected to the strictest scrutiny. *Id.* at 241–42.

106. *See Inclusive Cmtys.*, 576 U.S. at 540 ("Recognition of disparate-impact liability under the FHA also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment . . . [and] may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping.").

107. *Id.* at 534–36. By the time the Court decided *Inclusive Communities*, federal courts of appeals had decided disparate impact cases in eleven federal circuits, which all held that disparate impact liability is cognizable under the FHA. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11460 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100).

108. *See* Robert G. Schwemm & Sara K. Pratt, National Fair Housing Alliance, Disparate Impact under the Fair Housing Act: A Proposed Approach 11–12 (2009) (examining the FHA's legislative history and explaining that Congress debated a "Baker Amendment" proposed by Senator Howard Baker that would have required homeowner liability under the FHA only where there was proof of intent to discriminate, but the amendment was defeated because Congress was aware of how difficult it would be to prove discriminatory intent and accordingly chose to allow other forms of proof).

109. *See id.* at 9.

110. 401 U.S. 424, 429–431 (1971) (reasoning that under § 703(a)(2), Congress had proscribed "not only overt discrimination but also practices that are fair in form, but discriminatory in operation" and holding that Title VII must be interpreted to allow disparate impact claims under the statute).

section 4(a)(2) of the Age Discrimination in Employment Act of 1967 also allowed for disparate impact claims.[111] Notably, the FHA was passed within a few years of these two decisions.

In *Inclusive Communities*, the Supreme Court found that disparate impact claims are cognizable under the FHA.[112] In the opinion, Justice Kennedy made clear that, in certain statutory contexts, including housing, a claim can be grounded in a showing that a challenged practice disproportionally excluded or harmed members of a particular racial or other protected group, even where that challenged practice is not proven to be based on intentional discrimination.[113] That is, actions causing an unjustified disparate impact violate the FHA.[114]

Although disparate impact claims are clearly cognizable under the FHA, two aspects of the legal standard for analyzing these claims remain unsettled. Two years prior to *Inclusive Communities*, the Department of Housing and Urban Development (HUD) adopted a regulation regarding FHA disparate impact claims (referred to throughout as the "2013 HUD Rule"). The 2013 HUD Rule provided a synthesis of federal FHA disparate impact decisions to date—in light of eleven circuits' adoption, at the time, of disparate impact claims under the FHA—and addressed how disparate impact liability could be established.[115] There is a question among federal appellate courts

111. 544 U.S. 228, 235–36 (2005) (extending the reasoning in *Griggs* to section 4(a)(2) of the ADEA and determining that language in the statute focusing "on the *effects* of [an] action on the employee rather than the motivation for the action of the employer" allowed for disparate impact liability where a group of older employees challenged an employer's decision to give proportionately greater raises to employees with less than five years of experience).

112. *Inclusive Cmtys.*, 576 U.S. at 534–36 (holding that "disparate impact claims are cognizable under the Fair Housing Act upon considering its results-oriented language, the Court's interpretation of similar language in Title VII and the ADEA, Congress's ratification of disparate-impact claims in 1988 against the backdrop of the unanimous view of nine Courts of Appeals, and the statutory purpose").

113. *Id.* at 542.

114. *Id.*

115. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11460 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100) ("HUD, which is statutorily charged with the authority and responsibility for interpreting and enforcing the Fair Housing Act and with the power to make rules implementing the Act, has long interpreted the Act to prohibit practices with an unjustified discriminatory effect, regardless of whether there was an intent to discriminate. The eleven federal courts of appeals that have ruled on this issue agree with this interpretation."). The 2013 HUD Rule also discussed a second way that a challenged practice could have an illegal effect, known as "segregative effect" claims: a segregative effect occurs when there is "harm to the community generally by creating, increasing, reinforcing, or perpetuating segregated housing patterns." *Id.* at 11462, 11469. Because most segregative effects claims have been made against government actors accused of blocking proposed integrated housing developments in largely white areas, which is not the subject of this

regarding whether the *Inclusive Communities* Court meant to fully adopt the pleading elements set forth in the 2013 HUD Rule, or whether the Court intended that the plaintiff meet even more exacting standards for certain elements than those put forth in the 2013 HUD Rule.[116] After analyzing the circuit split, examining both the approach offered in the 2013 HUD Rule and the alternative approach that some courts have followed post-*Inclusive Communities*, I conclude that the 2013 HUD Rule approach should prevail.

Under the 2013 HUD Rule, disparate impact cases are analyzed in three steps: 1) the plaintiff has the initial burden of establishing a *prima facie* case of discriminatory effect; 2) if a plaintiff proves a *prima facie* case, then the burden shifts to the defendant to prove that the challenged policy is necessary to achieve a legitimate, nondiscriminatory interest; and 3) if the defendant satisfies this burden, then the plaintiff may still establish liability by proving that the defendant's interest could be served by a policy or practice that has a less discriminatory effect.[117]

According to the 2013 HUD Rule, at step one the plaintiff has the burden of proving that a challenged practice caused, or predictably will cause, a discriminatory effect.[118] This *prima facie* showing requires three

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article, they are not discussed further here. *See* Schwemm & Bradford, *supra* note 6, at 691 (citing Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11469) ("Historically, most perpetuation-of-segregation claims have been made against municipal defendants accused of blocking integrated housing developments in predominantly white areas."). However, it is worth noting that both adverse impact and segregative effect claims are available to plaintiffs under disparate impact theory.

116. Martinez v. City of Clovis, 90 Cal. App. 5th 193, 256 (Ct. App. 2023). *Compare* Inclusive Cmtys. Project, Inc. v. Lincoln Prop. Co., 920 F.3d 890, 902 (5th Cir. 2019) ("We read the Supreme Court's opinion . . . to undoubtedly announce a more demanding test than" the 2013 HUD Rule), *and* Reyes v. Waples Mobile Home Park Ltd. P'ship, 903 F.3d 415, 424 n.4 (4th Cir. 2018) ("Without deciding whether there are meaningful differences" between the 2013 HUD Rule framework and the framework put forth in *Inclusive Communities*, "we note that the standard announced in *Inclusive Communities* rather than the HUD regulation controls our inquiry . . . ."), *with* Mhany Mgmt., Inc. v. Cnty. of Nassau, 819 F.3d 581, 618 (2d Cir. 2016) ("The Supreme Court implicitly adopted HUD's approach.").

117. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11460; *see also* 24 C.F.R. § 100.500(c)(1) (2016).

118. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11482; *see also* Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375, 381–82 (3d Cir. 2011) (citation omitted) ("In order to determine whether action of this sort was because of race we look to see if it had a racially discriminatory effect, i.e., whether it disproportionately burdened a particular racial group so as to cause a disparate impact . . . . This is called a prima facie case of discrimination.").

elements: 1) the plaintiff must identify a particular policy or practice, or set of policies or practices, that the defendant has undertaken or plans to take; 2) the plaintiff must demonstrate a sufficiently large disparity in how this policy impacts a protected group compared to a non-protected group under the FHA; and 3) the plaintiff must prove that this disparity is actually caused by the defendant's challenged policy.[119]

Some courts have adopted heightened standards for plaintiffs to prove causation as the third element in step one, as well as a heightened standard for plaintiffs at step three to prove that a less discriminatory alternative is available to serve the defendant's interest in the policy at issue.[120] In *Inclusive Communities Project, Inc. v. Lincoln Property Co.*, the Fifth Circuit reasoned that, because the Supreme Court did not explicitly state that it had adopted the 2013 HUD Rule's framework for analyzing disparate impact claims in its *Inclusive Communities* decision, the 2013 HUD Rule does not control.[121] Instead, the Fifth Circuit reasoned, Justice Kennedy's reference to a "robust causality requirement"[122] implies a heightened standard for plaintiffs in step one.[123] And Justice Kennedy's statement that "leeway to state and explain the valid interest served by the defendant's policies"[124] implies

119. Schwemm & Bradford, *supra* note 6, at 693 (citing Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11468–69 and Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 542 (2015)); *see also* Gomez v. Quicken Loans, Inc., 629 F. App'x 799, 801 (9th Cir. 2015) (citation omitted) ("To be facially discriminatory, a policy must explicitly classify or distinguish among persons by reference to criteria which have been determined improper bases for differentiation.").

120. *See Lincoln Prop. Co.*, 920 F.3d at 902 (holding that the Supreme Court undoubtedly announced a more demanding test than the 2013 HUD Rule); *see also* Crossroads Residents Organized for Stable & Secure Residencies v. MSP Crossroads Apartments LLC, No. 16-233, 2016 WL 3661146, at *6 (D. Minn. July 5, 2016) (holding that the Supreme Court had attempted to incorporate "safeguards" into the burden-shifting framework to limit disparate impact liability).

121. *Lincoln Prop. Co.*, 920 F.3d at 902 (citing *Crossroads Residents Organized for Stable & Secure Residencies*, 2016 WL 3661146, at *6).

122. *See Inclusive Cmtys.*, 576 U.S. at 542 (citation omitted) (explaining that a "robust causality requirement . . . protects defendants from being held liable for racial disparities they did not create."); *Lincoln Prop. Co.*, 920 F.3d at 902 (holding that the Supreme Court "undoubtedly announce[d] a more demanding test than" the 2013 HUD Rule); Reyes v. Waples Mobile Home Park Ltd. P'ship, 903 F.3d 415, 424 n.4 (4th Cir. 2018) ("Without deciding whether there are meaningful differences" between the 2013 HUD Rule framework and the framework put forth in *Inclusive Communities*, "we note that the standard announced in *Inclusive Communities* rather than the HUD regulation controls our inquiry.").

123. *See Lincoln Prop. Co.*, 920 F.3d at 902 ("We read the [*Inclusive Communities* Court's] opinion . . . to undoubtedly announce a more demanding test [for plaintiffs] than that set forth in the HUD regulation.").

124. *Inclusive Cmtys.*, 576 U.S. at 541.

both a lower standard for defendants in step two and a higher standard for plaintiffs in step three.[125]

Other courts, however, have held that the *Inclusive Communities* Court implicitly adopted HUD's approach.[126] These courts have provided two reasons to explain why the 2013 HUD Rule continues to govern the disparate impact legal standard, rather than a more exacting requirement for plaintiffs at step one and step three. First, they contend that the 2013 HUD Rule was "described without criticism" by Justice Kennedy in *Inclusive Communities.*[127] Second, these courts have deduced that a rule requiring more of plaintiffs would constitute a "massive overhaul of HUD's disparate impact standards, to the benefit of putative defendants and to the detriment of putative plaintiffs."[128]

The reasoning by courts that support the 2013 HUD Rule is more persuasive. Justice Kennedy's concern that defendants must be protected "from being held liable for racial disparities they did not create"[129] is mitigated by the 2013 HUD Rule's burden shifting requirement that mandates plaintiffs to demonstrate causation without requiring plaintiffs to meet that burden in a particular way. And the requirements put forth in the 2013 HUD Rule are consistent with Congress's intent in passing the FHA to remediate past discrimination. Because Justice Kennedy supported disparate impact in the context of the FHA to remedy past discrimination,[130] increasing burdens on plaintiffs would not be in line with those goals. Assuming that *Inclusive Communities* did indeed intend to adopt HUD's approach, the FHA disparate impact standard is as follows.

First, the plaintiff must point to a specific, facially neutral policy or practice employed by the defendant that has led to restricting housing opportunities for a protected class under the FHA.[131] Examples of

125. *See supra* text accompanying note 123.

126. Mhany Mgmt., Inc. v. Cnty. of Nassau, 819 F.3d 581, 618 (2d Cir. 2016); Martinez v. City of Clovis, 90 Cal. App. 5th 193, 256 (Ct. App. 2023).

127. *Martinez*, 90 Cal. App. 5th at 256; *see also Inclusive Cmtys.*, 576 U.S. at 527, 541–42.

128. *See* Mass. Fair Hous. Ctr. v. U.S. Dep't of Hous. & Urb. Dev., 496 F. Supp. 3d 600, 605–06, 611–12 (D. Mass 2020) (holding that the HUD 2020 Revised Rule, which required more of plaintiffs, ran the risk of "effectively neutering" disparate impact liability under the FHA).

129. *See Inclusive Cmtys.*, 576 U.S. at 542 (citation omitted).

130. *Id.* at 539 ("Recognition of disparate-impact claims is consistent with the FHA's central purpose . . . . The FHA . . . was enacted to eradicate discriminatory practices within a sector of our Nation's economy.").

131. *See, e.g.*, L & F Homes & Dev., L.L.C. v. City of Gulfport, 538 F. App'x 395, 400 (5th Cir. 2013) (citing Smith v. City of Jackson, 544 U.S. 228, 241 (2005) ("Beyond just alleging the existence of a disparate impact [the plaintiff] would have to identify a 'specific test, requirement, or practice' that is responsible for the disparity.") The

policies or practices that have successfully demonstrated a disparate impact include 1) residency restrictions that private landlords used to rent only to "blood relatives" in an area of a city that was 88.3% white and 7.6% black;[132] 2) a rezoning decision that prevented the construction of a high-density residential project that included affordable rental units;[133] and 3) mortgage practices that result in less favorable treatment of minorities or minority areas.[134] The policy at issue cannot be facially discriminatory or applied in a discriminatory manner; otherwise, a claim of intentional discrimination, rather than disparate impact, would instead be appropriate.[135]

Second, after identifying a particular policy or procedure, the plaintiff must show a sufficiently large disparity in how that policy affects a class of persons protected by the FHA compared to other, unprotected classes. "No single test controls in measuring disparate impact" but the plaintiff "must offer proof of disproportionate impact, measured in a plausible way."[136] Typically, a plaintiff will demonstrate a disproportionate impact using statistics, "and a *prima facie* case may be established where gross statistical disparities can be shown."[137]

Third, the plaintiff must demonstrate that the statistical disparities that are an effect of the policy at issue are, in fact, caused by the policy being challenged rather than by some other external factor.[138] For example, causation was clear in *Greater New Orleans Fair Housing*

Smith decision cited by *L & F Homes* discusses the same requirement to prove disparate impact in the context of the Age Discrimination in Employment Act.

132. Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish, 641 F. Supp. 2d 563, 577–78 (E.D. La. 2009) (finding that moratorium at issue had a discriminatory effect on African–Americans and therefore violated the Fair Housing Act).

133. Anderson Grp., LLC v. City of Saratoga Springs, 805 F.3d 34, 38 (2d Cir. 2015).

134. *See, e.g.*, Saint-Jean v. Emigrant Mortg. Co., 50 F. Supp. 3d 300, 318–20 (E.D.N.Y. 2014).

135. Gomez v. Quicken Loans, Inc., 629 F. App'x 799, 802 (9th Cir. 2015) (holding plaintiff failed to state a separate claim under a disparate impact theory where the complaint did not show an "outwardly neutral" practice, such as a uniform standard of assessing creditworthiness, that resulted in a discriminatory impact.).

136. Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375, 382 (3d Cir. 2011).

137. *Id.* at 382 (citation and quotation omitted) (finding a "gross statistical disparity" where 22.54% of African–American households and 32.31% of Hispanic households in Mount Holly would be impacted by the challenged policy while the same was true for only 2.73% of White households, and where "African–Americans would be 8 times more likely to be affected by the project than Whites, and Hispanics would be 11 times more likely to be affected").

138. Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 542 (2015) ("[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.").

Action Center v. St. Bernard Parish, where the defendant's moratorium on multifamily housing construction reduced the supply of rental units in an area in which 51.7% of blacks resided versus 25.0% of whites.[139] In that case, the moratorium had a disparate impact on African-Americans by reducing the supply of rental housing available where African-American households were twice as likely as white households to live in rental housing.[140] Likewise, in *Mhany Management Inc. v. County of Nassau*, the Second Circuit found that a rezoning policy disproportionately decreased the availability of housing for minorities as compared to whites, thereby satisfying the causation requirement for disparate impact.[141]

Some cases, however, may present causation issues because of possible superseding or intervening causes. In *Inclusive Communities*, Justice Kennedy provided an example where causation might be too hard to prove.[142] Justice Kennedy noted an instance where a plaintiff was challenging the decision of a private developer to construct a building in one location rather than another location. Justice Kennedy explained that this plaintiff might not be able to show causation "because of the multiple factors that go into investment decisions about where to construct or renovate housing units." If other factors could have caused the identified statistical disparities instead of a defendant's challenged policy, then the plaintiff's *prima facie* case will fail.

The 2013 HUD Rule states that if the plaintiff meets all required elements to prove a *prima facie* case then the burden shifts to the defendant to prove that the policy at issue is "necessary to achieve a valid interest."[143] The 2013 HUD Rule refers to the issue of whether a challenged policy is needed to advance a legitimate interest as "fact-specific," one that "must be determined on a case-by-case basis," and "very fact intensive."[144] Courts have held the following interests to

139. Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish, 641 F. Supp. 2d 563, 567 (E.D. La. 2009).

140. *Id.*

141. Mhany Mgmt., Inc. v. Cnty. of Nassau, 819 F.3d 581, 620 (2d Cir. 2016).

142. *Inclusive Cmtys.*, 576 U.S. at 540 (providing a potential additional factor that would make causation difficult to prove: federal law substantially limiting the defendant's discretion by favoring the distribution of tax credits for housing development in low-income areas).

143. 24 C.F.R. § 100.500(c)(2) (2016) ("Once the charging party or plaintiff satisfies the burden of proof . . . the respondent or defendant has the burden of proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant."); *see also Inclusive Cmtys.*, 576 U.S. at 541 (holding defendants in fair housing cases must be "allowed to maintain a policy if they can prove it is necessary to achieve a valid interest").

144. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100) (stating that

be "legitimate, bona fide" interests sufficient to satisfy the justification standard under the FHA disparate impact test: 1) minimizing traffic from additional housing; 2) minimizing potential strain on public schools; 3) alleviating blight; 4) providing minimum property maintenance standards; 5) keeping a city clean and housing habitable; and 6) making a city's neighborhoods safe and livable.[145] The following interests, according to a court, were not legitimate reasons to demolish low-income housing: 1) density concerns, where the density was misrepresented by overstating the number of low-income units; 2) a need to eliminate a home design that contributed to criminal activity, where the housing authority had successfully taken numerous steps to control crime in the complex; and 3) a lack of financial resources to make improvements, where the apartment complex was financially stable.[146]

If the defendant meets its burden of showing that the policy or practice at issue is necessary to advance a legitimate interest, then the burden shifts back to the plaintiff to show that the policy or practice could be accomplished through a less discriminatory alternative.[147]

The suggested less discriminatory alternative must: 1) serve the defendant's substantial, legitimate nondiscriminatory interests; 2) be supported by evidence; and 3) may not be hypothetical or speculative.[148] Two illustrative examples where courts have held that alternative policies could have created a less discriminatory effect are 1) rehabilitation of blighted housing rather than total demolition, i.e., making landscaping more attractive, expanding some homes to become larger, and selective demolition and construction, including construction of affordable units instead of total demolition;[149] and 2) taking a flexible and cooperative approach to housing code enforcement instead of an aggressive one.

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whether an interest is valid for any particular defendant must be determined on a "case-by-case basis").

145. *Mhany Mgmt.,* 819 F.3d at 620; Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375, 385 (3d Cir. 2011) ([E]veryone agrees that alleviating blight is a legitimate interest."); Gallagher v. Magner, 619 F.3d 823, 837 (8th Cir. 2010) ("Appellants concede that enforcement of the Housing Code has a manifest relationship to legitimate, non-discriminatory objectives.").

146. Charleston Hous. Auth. v. U.S. Dep't of Agric., 419 F.3d 729, 742 (8th Cir. 2005) (holding plaintiff failed to demonstrate that its decision to demolish low-income housing, which was shown to have disparate impact on African-Americans, was justified by a legitimate and substantial goal).

147. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11460–61.

148. *Id.*

149. *Mt. Holly Gardens Citizens in Action, Inc.*, 658 F.3d at 386 (finding genuine issue of material fact existed as to whether township had shown that there was no less discriminatory alternative to redevelopment plan, precluding summary judgment in action under the FHA).

This flexible approach entailed identifying properties with a history of unresolved or repeat housing code violations and then meeting with owners individually, encouraging owners to take a more business-like approach to property management, and keeping closer tabs on ownership changes rather than taking a "code to the max" strategy of writing up every violation—not just what was called in—and writing up all nearby properties instead of just reported properties.[150]

Using the 2013 HUD Rule, courts will apply the three-step burden-shifting framework to determine whether a defendant's actions have caused a discriminatory effect under the FHA, regardless of the defendant's intent. Courts' focus on impact rather than intent has allowed plaintiffs to hold defendants liable for discriminatory behavior under the FHA as defendants' behaviors have evolved over time.

D. Implicit Bias Under the FHA

One specific kind of unlawful activity that a disparate impact analysis may uncover is an action driven by what is known as implicit bias. Implicit, unconscious bias refers to the attitudes or stereotypes that impact our understanding, actions, and decisions in an unconscious manner.[151] In other words, an action driven by implicit bias occurs when a person factors race, for example, into decision-making without being aware that they are doing so. These biases, or associations, are thought to be shaped by experience and can influence behavior without being deliberate and without an individual being aware of the biases.[152]

The *Inclusive Communities* Court attempted to guide decision-making for instances when unconscious biases lead to actions that are discriminatory, even when those actions are taken without awareness. Justice Kennedy made clear that discrimination includes, for legal purposes, actions that are driven by implicit bias.[153] The Court explained that disparate impact liability under the FHA "permits plaintiffs to counteract unconscious prejudices [in addition to] disguised animus

150. *Gallagher,* 619 F.3d at 838 (finding genuine dispute of fact regarding whether there was "a viable alternative to [St. Paul's] 'aggressive Housing Code enforcement policies'").

151. *See What is Implicit Bias?*, AM. BAR ASS'N, https://www.americanbar.org/groups/litigation/about/diversity/task-force-implicit-bias/what-is-implicit-bias/ [https://perma.cc/Q36K-6MDY] (citing Jerry Kang, *Implicit Bias: A Primer for Courts*, NAT'L CTR. FOR STATE CTS. (Aug. 2009), https://www.sog.unc.edu/sites/www.sog.unc.edu/files/course_materials/T08-01-kangIBprimer.pdf [https://perma.cc/HZ9D-87XY]).

152. *Implicit Bias*, AM. PSYCH. ASS'N, https://www.apa.org/topics/implicit-bias [https://perma.cc/K5RE-SSWJ].

153. Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 540 (2015).

that escape easy classification as disparate treatment . . . [and] may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping."[154] In describing the sorts of intent that the disparate impact doctrine is meant to address, the Court referred not only to disguised animus, which is intentional but often covert discrimination, but also to unconscious prejudices.[155]

The *Inclusive Communities* decision was not the first time a court acknowledged disparate impact liability as a way to "smoke out" invidious discrimination.[156] Indeed, in *Mount Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly*, the court determined that "the FHA is a broadly remedial statute designed to prevent and remedy invidious discrimination on the basis of race, that facilitates its antidiscrimination agenda by encouraging a searching inquiry into the motives behind a contested policy to ensure that it is not improper."[157]

III. Code Words in Context

This Part applies the principles and legal rules identified in the sections above to the practice of using code words in real estate advertisements. A threshold question is how those code words should be defined. Code words are words that appear non-discriminatory on their face but have exclusionary connotations and may, indeed, cause harm by perpetuating racial discrimination. Examples could include listings stating that a home is in an "exclusive" area; "near a country club"; or in a "prestigious" neighborhood. Code words are those that describe the "character" of a neighborhood in a way that communicates widely understood subtext, may impact societal perception, and leads to exclusion.[158]

Since *Buchanan v. Warley* in 1917, it has been illegal to limit the sale of a home to only white residents.[159] And since the FHA passed in 1968, it has been illegal to publish a home advertisement indicating any racial preference, or preference based on protected class status.[160] Clearly, an

154. *Id.*
155. *Id.*
156. Griggs v. Duke Power Co., 401 U.S. 424 (1971) (holding that disparate impact functions to smoke out subtle or underlying forms of intentional discrimination).
157. 658 F.3d 375, 385 (3d Cir. 2011); *see also* Havens Realty Corp. v. Coleman, 455 U.S. 363, 380 (1982).
158. Mhany Mgmt., Inc. v. Cnty. of Nassau, 819 F.3d 581, 608–10 (2d Cir. 2016) (holding that residents' expressed concerns that proposed zoning changes would change the "flavor" and "character" of a community "were code words for racial animus").
159. 245 U.S. 60, 82 (1917) (holding unconstitutional an ordinance preventing the occupancy of a parcel of land by a person of color on a block where a greater number of residences were occupied by white people, thereby excluding the person of color).
160. 42 U.S.C. § 3604(c).

advertisement stating that a home is in a "Nice, White Neighborhood" would run afoul of the FHA.[161] The reason that such a sign is illegal is that using the term "Nice, White Neighborhood" explicitly indicates a preference for white homeowners at the expense of homeowners of other races and is, thus, discriminatory. This statement would have the effect of signaling to minorities that they should not feel welcomed, in violation of the FHA. Does using the word "exclusive," for example, to describe a neighborhood instead of "Nice, White" have the same effect? Below are a series of applications to show that using the word "exclusive" may have the same discriminatory impact as "Nice, White."

Realtors' use of race-neutral language could be an intentional workaround for stating the preferences of sellers and neighbors in a community because explicitly stating those preferences is illegal under the FHA. Or, instead, while the motivation might be benign, realtors' use of code words may cause a disparate impact on certain protected groups. As the law currently stands, a section 3604(c) claim is likely to go to a jury to determine how an ordinary person would interpret the advertisement.[162] Juries need guidance beyond how an "ordinary" reader would respond to help determine whether a word that is neutral on its face indicates a preference in violation of the FHA. What follows is a discussion of how a disparate treatment analysis, as well as a separate disparate impact analysis, should be applied instead. Regardless of whether there is racially motivated intent, the practice of using code words in real estate advertising should be deemed illegal if a plaintiff can show a sufficient effect on a protected group and that defendant's actions caused that effect.

A. Applying the Intentional Discrimination and Disparate Impact Frameworks to Section 3604(c) Claims

Intentional discrimination claims and disparate impact claims, including those claims that have a particular focus on situations where implicit bias may come into play, are possible avenues for a plaintiff seeking relief under sections 3604(a) and 3605 of the FHA. But they are not currently available for claims under section 3604(c) involving home advertising.

The "ordinary reader" standard is easy to intuit but hard to apply in today's real estate world. *Hunter* was decided in 1972, and there, the

161. Indeed, in United States v. Hunter, 459 F.2d 205, 209 (4th Cir. 1972), the Fourth Circuit ruled that an advertisement for a "white home" violated the FHA.

162. Schwemm, *supra* note 7, at 116 ("[D]etermining how an ordinary person would interpret a section 3604(c)-challenged communication is generally considered a jury issue.").

advertiser used overtly racist words to describe a racial preference.[163] The "ordinary reader" standard is harder to apply when an advertiser uses covertly racist, facially neutral words instead of words or images that are literally black and white, as the defendant did in *Ragin*.[164] Courts applying the "ordinary reader" standard have held that statements may indicate an impermissible preference depending on "the context in which they were made."[165] An advertiser intending to discriminate today, however, would be less likely to so clearly indicate a preference as the advertiser did in *Hunter*. And looking to an advertisement's context to prove intent may be similarly difficult for a plaintiff today.[166]

The "ordinary reader" standard is comparable to the "reasonable person" standard,[167] which is, theoretically, an objective test used to determine liability. The standard aims to ensure consistent application of legal rules.[168] However, implicit biases can complicate the application of those rules, leading to unfair outcomes. Courts have held that "[s]uch inferences" of how an "ordinary reader" would interpret whether an advertisement shows a racial preference "are best left to the jury to consider."[169] But the lived experiences of jurors, including experiences they have had based on their race, gender, or other characteristics, impacts their perspectives and may cause them to make decisions based on biases, whether they are aware of those biases or not.[170] Because the "ordinary reader" standard hinges on the perspective of a particular fact finder or set of fact finders, it is not truly an objective standard.[171]

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163. *Hunter*, 459 F.2d at 209 (holding that advertisement stating that an apartment for rent located in a "white home" violated the FHA).

164. Ragin v. N.Y. Times Co., 923 F.2d 995, 998 (2d Cir. 1991) (alleging that advertisements for buildings that housed predominantly white residents showed mostly white models over time, while the few black models were published in advertisements for real estate located in predominantly black buildings).

165. Soules v. U.S. Dep't of Hous. & Urb. Dev., 967 F.2d 817, 825–26 (2d Cir. 1992) (holding agent's inquiry of prospective tenant regarding numbers and ages of children did not violate FHA).

166. *See* discussion *supra* Section II.B.

167. *See* Vernon, *supra* note 5, at 241.

168. *Ragin*, 923 F.2d at 1002 (citation omitted) ("[T]he 'ordinary reader' is nothing more, but nothing less, than the common law's 'reasonable man': that familiar creature by whose standards human conduct has been judged for centuries.").

169. Miami Valley Fair Hous. Ctr., Inc. v. Connor Grp., 725 F.3d 571, 578 (6th Cir. 2013).

170. *See* discussion *supra* Section II.D.

171. Scott Astrada & Marvin L. Astrada, *The Enduring Problem of the Race-Blind Reasonable Person*, Am. Const. Soc'y (May 11, 2020), https://www.acslaw.org/expertforum/the-enduring-problem-of-the-race-blind-reasonable-person/ [https://perma.cc/23MQ-NYFN] ("[T]he historical conception of a 'reasonable person' employed by the law becomes a means of perpetuating a politics of racial/ethnic exclusion of the 'Other,' i.e., a non-white racial/ethnic subject. The Other is required to

An "ordinary reader" with white skin, and the lived experiences that accompany that privilege, may view words used in advertising differently than an "ordinary reader" with black skin.[172]

Because "[t]he judicially imposed ordinary reader standard assumes that the only type of discrimination that can exist in advertisements is the kind that is express and blatant,"[173] it is not an appropriate standard by which to assess covertly racist words used in advertising.

Accordingly, Section 3604(c) cases should be analyzed using the same standards that the Supreme Court has held apply to other sections of the FHA. Instead of using an "ordinary reader" standard in cases involving discriminatory advertising claims, courts should use the well-established disparate treatment standard, as well as the disparate impact standard that is applied to 3604(a) and 3605 cases and was held to be cognizable in *Inclusive Communities*.[174]

Disparate treatment claims should be available to provide litigants with a mechanism for clearly egregious discriminatory housing advertisement claims. And disparate impact's burden shifting framework[175] would allow plaintiffs to have the opportunity to show that certain advertising word choices have an impact on who seeks out a home, regardless of whether the advertiser intended to cause harm and without the subjectivity of the "ordinary reader." Because the burden would be on plaintiffs to show a disparate harm is caused by defendants' word choices, defendants will not be held liable unless their actions truly cause harm to a statistically significant portion of people that fall into a protected class, or unless a defendant's intent to discriminate can be proven. Judicial application of disparate treatment and disparate impact claims would provide more fair results than the "ordinary reader" framework and would better further Congress's goals in passing the FHA.[176]

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comport themselves as a reasonable person that bears very little resemblance to their lived reality. This results in the 'Other' being constrained within a concept that excludes them by imposing the worldview, norms, values, etc., of a rendition of the reasonable person that is not reflective of their world.").

172. *See id.*

173. Chandler Nicholle Spinks, *Contemporary Housing Discrimination: Facebook, Targeted Advertising, and the Fair Housing Act*, 57 HOUS. L. REV. 925, 941 (2020).

174. *See supra* text accompanying note 7.

175. *See* discussion *supra* Section II.C.

176. *See* discussion *supra* Sections II.B and II.C.

B. Code Words as Intentional Discrimination

To prove intentional discrimination, a plaintiff must sufficiently show that a defendant intentionally used race to achieve a particular outcome.[177] Courts should utilize the analytical framework currently used to analyze intent claims when reviewing advertisement claims.[178] Applying that framework here, a home-seeking plaintiff, or other person who has standing to sue, would need to show that a real estate firm, realtor, or other defendant used language in home advertising that, while race-neutral on its face, was intended to appeal to whites rather than racial minorities.[179] A plaintiff would argue that a real estate broker's use of words like "exclusive neighborhood" in marketing materials is a practice that shows thinly veiled racial animus in violation of the FHA because using the word "exclusive" to describe a neighborhood by definition implies that the area is only accessible to certain types of people, historically those who are wealthy and likely white.[180]

For claims alleging disparate treatment of a group, such as minority home seekers impacted by advertisements—as opposed to disparate treatment of an individual—the framework outlined in *Arlington Heights* is particularly useful, though difficult for a plaintiff to satisfy.[181] The factors that a court would use to establish a *prima facie* case of disparate treatment include: 1) disparate impact evidence, which is a starting point for showing intent;[182] 2) historical background or circumstantial or direct evidence; 3) a specific sequence of events leading up to the challenged decision; and 4) substantive departures from accepted procedures.[183]

Because discriminatory intent is "rarely susceptible to direct proof," a court facing a question of discriminatory intent would examine

177. *See* discussion *supra* Section II.B.

178. *Id.*

179. *See, e.g.*, Mhany Mgmt., Inc. v. Cnty. of Nassau, 819 F.3d 581, 608–10 (2d Cir. 2016) ("A plaintiff can establish a prima facie case of disparate treatment 'by showing that animus against the protected group was a significant factor in the position taken by the [defendants].'").

180. *See, e.g.*, Buchanan v. Warley, 245 U.S. 60, 70–71 (1917) (where ordinance prohibited a person of color from occupying a parcel of land); *see also* Shelley v. Kraemer, 334 U.S. 1, 20 (1948) (where a racially restrictive covenant was designed to prevent African-American families moving into a neighborhood.).

181. *See* discussion *supra* Section II.B; *see also Mhany Mgmt.,* 819 F.3d 581 at 606 ("In finding intentional racial discrimination here, the district court applied the familiar *Arlington Heights* factors.") (citing Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267–68 (1977)).

182. For a discussion of discriminatory impact as applied in this case, which can be used as a "starting point" to prove intentional discrimination under the *Arlington Heights* framework but is not enough to prove intentional discrimination standing alone, see discussion *supra* Section II.C.

183. *Arlington Heights*, 429 U.S. at 266–68.

circumstantial and direct evidence of intent, as available.[184] Courts have held that facially neutral adjectives that residents used to describe the nature of a community are code words showing discriminatory intent in the fair housing context. For example, in *Mhany Management*, the Second Circuit applied the *Arlington Heights* factors and, when examining circumstantial and direct evidence of intent, held that residents' expressed concerns that proposed zoning changes would change the "flavor" and "character" of a community "were code words for racial animus."[185] Plaintiffs could use these kinds of descriptions as proof under the circumstantial and direct evidence of intent prong of the *Arlington Heights* test.[186]

Courts have also found racial animus in code words in the context of a Title VII violation. In *McGinest v. GTE Service Corp.,* the Ninth Circuit held that a reference to plaintiff "as a 'drug dealer' might certainly be deemed to be a code word or phrase."[187] The Third Circuit has determined that a reasonable jury could conclude that an intent to discriminate is implicit in comments where code words are used.[188] In *Aman v. Cort Furniture Rental Corp.*, the Third Circuit held:

> There are no talismanic expressions which must be invoked as a condition-precedent to the application of laws designed to protect against discrimination. The words themselves are only relevant for what they reveal—the intent of the speaker. A reasonable jury could find that statements [where code words are used] send a clear message and carry the distinct tone of racial motivations and implications. They could be seen as conveying the message that members of a particular race are disfavored.[189]

Using the word "exclusive" to describe a neighborhood could also be determined to "carry the distinct tone of racial motivations and implications."[190] Like the words "flavor" and "character," listings stating that a home is located in an "exclusive" or "prestigious" area or "near a golf club" could be viewed as code words for racial animus because the words are neutral on their face but could "be seen as conveying the message that members of a particular race are disfavored" when presented along with evidence of other factors under

184. *Mhany Mgmt.,* 819 F.3d at 606.
185. *Id.* at 609 (finding that racially charged code words may provide evidence of discriminatory intent by sending a clear message and carrying the distinct tone of racial motivations and implications).
186. *Id.* at 606.
187. McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1117 (9th Cir. 2004).
188. Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1083 (3d Cir. 1996).
189. *Id.*
190. *Id.*

the *Arlington Heights* framework.[191] "Prestige," for example, denotes social hierarchy,[192] and research on prestige has shown that predominant perceptions of prestige align with whiteness.[193]

Next, a plaintiff could show that a specific sequence of events leading up to a decision demonstrates racial animus. In *Greater New Orleans Fair Housing Action Center v. St. Bernard Parish*, the court examined the sequence of events leading up to the city putting a moratorium on building new housing.[194] The court found that city officials' initial support for the proposed housing, including letters confirming appropriate zoning, followed by a swift reversal of support after a newspaper editorial criticized the proposal, suggested racial animus.[195] In response to a "Notice to the Public" announcing the developer's application for housing tax credits and Community Block Development Grants in a local newspaper, the following language appeared in the editorial, on the front page of St. Bernard Parish's official newspaper:

> Should St. Bernard residents be concerned? Ours was a crime free community of homeowners with a deep appreciation for shared values . . . [.] Is that now threatened? . . .
>
> Less we forget, Village Square started out as a middle class housing development that catered to teachers, other professionals, and their families. It was a wonderful place to live . . . when first opened.
>
> After a number of years, ownership changed, maintenance diminished, and the quality of renter fell to a much lower social/economic class. Result: Village Square became what can only be described as a ghetto with drugs, crime, vandalism, and violence. . . .
>
> Is St. Bernard about to buck the trend and construct [housing projects] here in St. Bernard? What guarantees have the residents of St. Bernard that their tax money is not going to be used to create the kind of blight New Orleans recently destroyed?[196]

Two days later, the moratorium at issue was introduced.[197] The court held that the references to "ghetto," "crime," "blight," and "shared

191. *Id.*; *see also Mhany Mgmt.*, 819 F.3d at 609.
192. *See* Bernd Wegener, *Concepts and Measurement of Prestige*, 18 ANN. REV. SOCIO. 253 (1992).
193. *See* Lauren Valentino, *Constructing the Racial Hierarchy of Labor: The Role of Race in Occupational Prestige Judgments*, 92 SOCIO. INQUIRY 647 (2022).
194. Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish, 641 F. Supp. 2d 563, 572 (E.D. La. 2009).
195. *Id*.
196. *Id.* at 571.
197. *Id.*

values" were "nothing more than camouflaged racial expressions."[198] The court further held that these comments regarding the "'shared values' of overwhelmingly Caucasian St. Bernard Parish clearly [are] an appeal to racial as well as class prejudice."[199]

Here, a plaintiff might prevail if they could show evidence that a defendant chose to change an advertisement to include the word "exclusive" following an event that appealed to racial prejudice. For example, if there had been a neighborhood association meeting where residents discussed how the neighborhood was changing and had voiced their displeasure that the neighborhood was becoming more diverse, and soon thereafter an advertisement stated that the neighborhood was "exclusive," it might show racial animus. Alternatively, a plaintiff could offer evidence of conversations or written exchanges by sellers or their neighbors seeking to limit who moved into a neighborhood. If a plaintiff could present such evidence, as presented in *St. Bernard Parish*, then they might satisfy the circumstantial and direct evidence prong under the *Arlington Heights* framework.

Lastly, the final element, "substantive departures," can be present when "factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached."[200] Once again, *St. Bernard Parish* provides an illustrative example. There, the court determined that the following departures were sufficient to satisfy the "substantive departures" prong of the *Arlington Heights* test in the disparate treatment context under the FHA: 1) defendant stating that the neighborhood does not need additional affordable housing, when all currently funded projects would only replace 20% of previously lost rental stock and where 25% of workers in the community could not afford two-bedroom apartments at current market prices; 2) defendant stating that the proposed area for affordable housing lacks infrastructure to support additional development when the same defendant had previously claimed that required infrastructure was in place; 3) defendant expressing concern at an evidentiary hearing that a real estate development corporation would fail to maintain affordable housing for the required period, when there was no evidence to suggest that concern;

198. *Id.* at 571–72 (citing Smith v. Town of Clarkton, 682 F.2d 1055, 1066 (4th Cir. 1982)). *Smith* held that testimony indicating opposition to a new low-income housing project rooted in concerns about an influx of "undesirables," fears that new housing occupants would "dilute" the public schools, and concerns about personal safety due to the influx of "new" people moving into the houses vacated by those who would move into the new low-income housing—people whom the opponents deemed "just as bad" as those entering the low-income housing—indicated racial animus.

199. *Greater New Orleans Fair Hous. Action Ctr.*, 641 F. Supp. 2d at 571–72.

200. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977).

4) defendant stating at an evidentiary hearing that the policy at issue was actually designed to block a different housing development from being built and is now being applied to block a separate target development, where at another time the defendant conceded that this development was a factor in the moratorium decision; 5) the ordinance was introduced "swift[ly]," three days after publication of an editorial that appealed to racial and class prejudice; and 6) there was no evidence of substantive design standard changes since the affordable housing proposal was initially submitted, so an argument that the moratorium on new housing was needed to provide time to update design standards and the zoning code was unconvincing.[201]

Here, a plaintiff might provide evidence of typical housing marketing materials published within a particular brokerage firm that do not use code words in more diverse areas, such as describing a home as "a three bedroom home located in a quiet neighborhood" and then show a contrasting situation where code words were used in a white, homogenous neighborhood, such as "a three bedroom home located in an exclusive neighborhood." Or, if a plaintiff could show that a defendant did not follow typical approval processes within the broker's firm for marketing materials where code words were ultimately used to describe a property, that kind of evidence would be especially compelling. A plaintiff could request marketing plans, training materials, and pricing policies from real estate brokerage firms to try to gain insights into realtors' decision-making regarding the use of code words in housing marketing materials.

The issue of whether a plaintiff could make a *prima facie* showing of intentional discrimination would turn on whether multiple *Arlington Heights* factors are met. Taken together, a court would decide whether there is evidence of disparate treatment. There is no clear rule for how many *Arlington Heights* factors must be present, so a court would have leeway in applying that test. Given the discretion the open-ended *Arlington Heights* test affords courts, coupled with how rare it has been for a court to acknowledge that code words can mask intentional discrimination, the chances are slim that a plaintiff alleging a code word violation would succeed on an intent claim. Even if initially successful, an intent claim would be vulnerable on appeal. An easier path forward would be imposing disparate impact liability, which does not require any accusation of racist intent.

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201. Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish, 641 F. Supp. 2d 563, 574–78 (E.D. La. 2009) (finding that moratorium at issue had a discriminatory effect on African-Americans and therefore violated the Fair Housing Act).

C. Code Words Can Create an Unlawful Disparate Impact

A court could decide that using code words to describe real estate is intentional discrimination.[202] Alternatively, a court could hold that this practice is *not* intentional discrimination because defendants are using facially neutral language with the intention of selling more homes at higher price points. Under a proper understanding of the FHA and *Inclusive Communities* as now applied to section 3604(c), a court should find that many uses of code words are unlawful because they create a disparate impact on legally protected home seekers.

To prevail on a claim that using the word "exclusive," for example, to describe a neighborhood in marketing materials violates the FHA by causing a disparate impact on minority home seekers, a plaintiff would first need to establish a *prima facie* showing of discrimination.[203] The first step is to identify the policy or practice that is allegedly causing a discriminatory impact.[204] It is not enough to merely allege that there is a disparity—for example, that there are many more white families in a particular suburb than people of color—but rather the claim must include a "specific test, requirement, or practice" that is responsible for the disparity.[205] The disparity at issue should not be facially discriminatory and must apply equally to everyone, rather than being applied differently to one person over another, because that would instead be a claim of disparate treatment.[206] Here, the practice at issue is real estate agents or homeowners using the word "exclusive" to describe properties and neighborhoods that they are trying to rent or sell to home seekers. A plaintiff would argue that the word "exclusive" leads to certain perceptions around neighborhoods and that these perceptions impact the racial composition of interested home seekers. The practice of using the word "exclusive" to describe real estate listings is not facially discriminatory because the word itself is neutral

202. *See* discussion *supra* Section III.B.

203. Schwemm & Bradford, *supra* note 6, at 693 (citing Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11468–69 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100) and Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 542 (2015)); *see also* Gomez v. Quicken Loans, Inc., 629 F. App'x 799, 802 (9th Cir. 2015) (citation and quotation omitted) ("To be facially discriminatory, a policy must explicitly classify or distinguish among persons by reference to criteria which have been determined improper bases for differentiation.").

204. *See, e.g.*, L & F Homes & Dev., L.L.C. v. City of Gulfport, 538 F. App'x 395, 400 (5th Cir. 2013); Smith v. City of Jackson, 544 U.S. 228, 241 (2005).

205. *See L & F Homes & Dev., L.L.C.*, 538 F. App'x at 400 ("Beyond just alleging the existence of a disparate impact [the plaintiff] would have to identify a 'specific test, requirement, or practice' that is responsible for the disparity.")

206. *See* Schwemm & Bradford, *supra* note 6, at 693.

and the practice applies equally to all potential homebuyers and renters reviewing advertisements.

How would a plaintiff prove that there is a sufficiently large disparate impact against racial minorities through realtors' use of the word "exclusive" in real estate advertising? "No single test controls in measuring disparate impact" but the plaintiff "must offer proof of disproportionate impact, measured in a plausible way."[207] Typically, a plaintiff will demonstrate a disproportionate impact using statistics, "and a *prima facie* case may be established where gross statistical disparities can be shown."[208] A plaintiff could compare mortgage applications for sales (and applications to landlords for rentals) where advertisements stated that homes were located in an "exclusive" area with other advertisements that did not advertise using that language. The advertisements that plaintiffs would use for comparison would need to be otherwise similar; for example, a plaintiff would want to use advertisements with a similar listing price, a similar location, and the same number of bedrooms.

Akin to bringing suit against *The New York Times* in *Ragin*, a plaintiff could bring suit against an advertising platform posting the advertisement, such as Zillow, Trulia, or StreetEasy, given that "Section 3604(c) validly prohibits *the publication* of real estate ads that 'indicate[ ] any preference . . . based on race[.]'"[209] Bringing suit against an advertiser would allow a plaintiff access to a large quantity of data[210] and an ability to quickly compare neighborhoods with similar housing prices or other attributes but varying advertising language.

After identifying specific houses that used suspect marketing language, a plaintiff could then examine Home Mortgage Disclosure Act (HMDA)[211] data and filter by race. This would help the plaintiff determine whether the racial composition of buyers was any different for houses where the word "exclusive" was used compared to the racial composition of buyers of similar houses at a similar price point that did not use such language to advertise.

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207. Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375, 382 (3d Cir. 2011).

208. *See supra* text accompanying note 138.

209. Ragin v. N.Y. Times Co., 923 F.2d 995, 998 (2d Cir. 1991) (emphasis added).

210. *See* Press Release, Karl Racine, Off. of the D.C. Att'y Gen., AG Racine and Zillow Partner to Target Discriminatory Online Housing Listings (Nov. 20, 2019), https://oag.dc.gov/release/ag-racine-and-zillow-partner-target-discriminatory [https://perma.cc/6SFE-W5N2] ("[Zillow] offers District residents and users nationwide access to data on over 110 million homes in the United States.").

211. *Mortgage Data (HMDA)*, Consumer Fin. Prot. Bureau, https://www.consumerfinance.gov/data-research/hmda/ [https://perma.cc/CW2J-QSKH].

A plaintiff could use data from the American Community Survey (ACS),[212] which provides one-year estimates regarding the racial composition of homeowners using census data, in tandem with HMDA data. ACS data could help a plaintiff determine whether houses that white homeowners sold were then purchased by white homeowners again, or whether there was a change in homeowners' racial composition. Again, plaintiffs would need to compare homes in which realtors had used code words to advertise with similar homes where realtors did not use code words in marketing.

Next, to show a *prima facie* case, a plaintiff must demonstrate that the statistical disparities are an effect of the practice at issue and are, in fact, caused by the practice that plaintiff is challenging rather than by some other external factor.[213] A defendant would likely contend that any statistical disparities where facially neutral words are used have not caused harm to a protected group. A defendant would also likely contend that any demonstrable disparity is a result of socioeconomic stratification rather than discrimination based on race. A defendant would further argue that socioeconomic status is not a protected class under the FHA.[214]

A plaintiff would need to offer evidence that a realtor's practice of using code words *has caused* potential homeowners not to seek housing in instances where code words have been used in advertising.[215] To do so, a plaintiff might adopt a "reverse testing" method. In traditional housing discrimination cases, fair housing organizations sometimes utilize actors as "testers" in fair housing investigations.[216] These testers pretend to be home seekers and observe housing providers' practices

212. *American Community Survey 1-Year Data (2005-2023)*, U.S. Census Bureau, https://www.census.gov/data/developers/data-sets/acs-1year.html [https://perma.cc/STG4-3G8Q] ("Data profiles contain broad social, economic, housing, and demographic information. The data are presented as population counts and percentages.").

213. Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 542 (2015) ("[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.").

214. *See* Hallmark Devs., Inc. v. Fulton Cnty., 466 F.3d 1276, 1284 (11th Cir. 2006) (citations and quotation omitted) (statements plaintiff characterized as "subtle statements of bias . . . do not demonstrate racial animus. They demonstrate class animus. Wealth is not a proxy for race.").

215. *Inclusive Cmtys.*, 576 U.S. at 542 ("[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."); *see also* Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish, 641 F. Supp. 2d 563, 567 (E.D. La. 2009); discussion *supra* Section II.C.

216. *See, e.g.*, *Fair Housing Testing Investigations*, Fair Hous. Just. Ctr., https://fairhousingjustice.org/our-work/fair-housing-testing-investigations [https://perma.cc/S94R-DLF4].

to determine if providers are complying with fair housing laws.[217] Because creating discriminatory marketing materials and testing them on real home buyers would potentially be violating the FHA, plaintiff would instead need to create a simulation with willing participants. In this case, the plaintiff would need to mimic the actions of a real estate broker and "test" the reactions of unsuspecting home seekers to the word "exclusive" to assess whether it causes them to opt out. To simulate a realtor's actions, a plaintiff could conduct a study in which they gather participants who have diversity within protected classes who are interested in finding a home and willing to participate in a study; simulate posting an advertisement for a home that uses the word "exclusive"; and simulate posting a separate, almost identical advertisement that removes the code word. Then, the plaintiff would randomize which participants see the advertisement with the code word or without based on their protected class status. Next, the participant would report on whether they would be interested in seeing the house. Finally, the plaintiff would need to evaluate whether there is a statistical difference in the demographics of the people who would be willing to see a house based on one type of advertisement versus another. With this evidence, a plaintiff could demonstrate causation.

If a plaintiff is successful in showing that using facially neutral code words to describe real estate listings presents a *prima facie* case of disparate impact, the burden will shift to the realtor or brokerage firm to prove to the court that the use of code words in housing advertising is "necessary to achieve a valid interest."[218] A defendant would argue that using the word "exclusive" is a descriptor used to sell more houses at a higher price point. In using the word "exclusive," a broker is merely fulfilling the broker's duty to work on behalf of sellers to sell their homes. Realtors would argue that using the word "exclusive" to advertise in a particular prime spot, or that letting potential owners know that there is a "country club" nearby, is a race-neutral way of appealing to wealthy homeowners.

Whether home sellers need to use code words to sell homes at a higher price point is a "fact-specific" inquiry.[219] A defendant could

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217. *Id.*

218. 24 C.F.R. § 100.500(c)(2) (2016) ("Once the charging party or plaintiff satisfies the burden of proof . . . the respondent or defendant has the burden of proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant."); *see also Inclusive Cmtys.*, 576 U.S. at 541 (holding defendants in fair housing cases must be "allowed to maintain a policy if they can prove it is necessary to achieve a valid interest").

219. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11471 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100) (stating

provide evidence to meet this inquiry in a few ways. *First*, a realtor could conduct a comparative analysis and present it as evidence. To do so, a defendant could use historical sales data to compare the sale price of houses with similar features in similar locations but with different descriptive words in their listings or could provide listings of houses that were initially described without code words and later with code words included and then compare sale prices. *Second*, a defendant could conduct market research. The defendant could collect survey data from buyers on how the wording in real estate listings influenced their perception on the house's value and their willingness to pay a higher price. In addition, a defendant could analyze online listings to determine whether homes with certain adjectives receive more views compared to those without, and whether they receive more inquiries to view homes when these descriptors are used than when these words are not used. If the defendant could offer evidence that these descriptors have helped them sell houses at higher price points than when these descriptors are not used, then a court might find that the justification burden is met.

If a court finds a defendant's justification compelling, then the burden would shift back to the plaintiff to show that the defendant could have acted in a way that would have less of a discriminatory effect on the protected group. To prove that a less discriminatory effect is possible, the plaintiff must offer a different solution that: 1) would allow defendant's justified interest to be achieved; 2) is supported by evidence; and 3) may not be hypothetical or speculative.[220] Therefore, a proposal by a plaintiff, such as removing the word "exclusive" and replacing it with a pin on a map to show location in a less discriminatory way, would need to demonstrate that 1) realtors would still be able to sell houses at competitive prices; 2) removing this language would be beneficial in addressing perceptions of exclusion; and 3) it would be possible to practically implement the change.

First, to demonstrate that realtors could still sell houses at competitive prices, a plaintiff could analyze a sample of high-priced home sales that do not use the word "exclusive," to identify common themes or alternative descriptors that were effective in selling homes at competitive prices. Those descriptors could be offered as replacements. For example, realtors could replace code words with more specific, feature-oriented language, such as maps of the surrounding area, to demonstrate location without discriminatory adjectives. *Second*, to show that removing the word "exclusive" would be beneficial, the

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that whether an interest is valid for any particular defendant must be determined on a "case-by-case basis").

220. *Id.*; *see* discussion *supra* Section II.C.

plaintiff could present evidence that stripping advertisements of code words leads to minority homebuyers feeling included and therefore willing to put in mortgage applications for those homes. *Third*, plaintiff's recommended alternative would need to be actionable rather than hypothetical or speculative. To meet this prong, plaintiff could offer specific alternative language suggestions or replace the adjective with a specific location on a map.

If a plaintiff meets these three requirements, then a court applying a disparate impact analysis will find that many uses of code words to describe real estate do indeed perpetuate segregation and are clear violations of the FHA. In those instances, the practice of using code words should not be permissible in real estate marketing.

D. Code Words and Implicit Bias Under the FHA

There may be situations in which defendants did not intend to act in a racially discriminatory manner but did so because implicit biases came into play.[221] In those situations, a plaintiff might succeed in bringing a disparate impact claim. A disparate treatment claim would not be a viable path to success because disparate treatment requires intent to discriminate, and actions driven by implicit bias are inherently unconscious and therefore unintentional. Disparate impact liability, however, "permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment."[222]

Even the most seemingly neutral words can yield an unintentional impact given the context. In *Inclusive Communities*, Justice Kennedy held that disparate impact liability can help "prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping."[223] The Court implied that a disparate impact analysis could be used to identify situations where implicit biases impact decision-making and where traditional intentional discrimination might be too hard to prove.[224]

Implicit biases can be at play without a defendant's awareness. The National Association of Realtors offers the following guidance:

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221. *See* discussion *supra* Section II.D.

222. Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 540 (2015).

223. *Id.*

224. *Id.* ("Recognition of disparate-impact liability under the FHA also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment . . . [and] may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping.").

"If a client requests a 'nice,' 'good,' or 'safe' neighborhood, a real estate professional could *unintentionally* steer a client by excluding certain areas based on his or her own perceptions of what those terms mean[]."[225] The Association encourages realtors to "steer clear of steering" by suggesting that Realtors "[l]earn to pay attention to your unconscious biases. When evaluat[ing] what a client objectively wants, ask yourself why you have eliminated certain areas, if you have."[226] Through that explanation, the National Association of Realtors makes clear that "nice," "good," and "safe" can connote certain associations and lead to discrimination, even without a realtor's intent to discriminate. Thus, an application of a disparate impact analysis could be used to hold a defendant liable when the defendant's implicit biases have led to a disparate impact on home seekers.[227]

A defendant real estate brokerage firm, or real estate broker association, would argue that brokers use code words in marketing materials merely to sell houses at a higher price point than they could without these descriptors.[228] The firm would argue that its goal is not to exclude protected classes from access to housing, but rather to make more money for its clients. Thus, realtors would contend they have adopted this practice of using code words "in spite of" any adverse impact that might occur, rather than "because of" it. However, a court could find that using code words causes certain groups to be included and others to be excluded, which might lead white homebuyers to seek housing where code words are used while minorities steer clear of those same homes.[229]

Whether implicit bias is deemed to be intentional or not in theory, it may be hard to prove in practice under a traditional intentional discrimination framework because that framework requires would-be violators to outwardly demonstrate animus,[230] and implicit biases are, by definition, more subtle. Thus, a disparate impact analysis might be an easier path to success for a plaintiff alleging that implicit biases are at play.

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225. *Steer Clear of "Steering," supra* note 37 ("Steering occurs, for example, when real estate agents do not tell buyers about available properties that meet their criteria, or express views about communities, with the purpose of directing buyers away from or towards certain neighborhoods due to their race or other protected characteristic.").

226. *Id.*

227. *See* discussion *supra* Section II.D.

228. *Id.*

229. *Id.*

230. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977) (outlining the four relevant factors for evaluating intentional discrimination claims).

Conclusion

Code words can be facially neutral but, in practice, may cause a disparate impact on potential homebuyers. While code words may be used as disguised racial animus, it is also possible that real estate brokers who are attempting to sell homes at high prices unintentionally use code words that unfairly impact access to housing. The "ordinary reader" standard is hard to apply, providing little guidance. Therefore, disparate treatment and disparate impact claims, which are both lawful under FHA sections 3604(a) and 3605 following *Inclusive Communities*, should also be applied to FHA section 3604(c).

Although their use may be unintentional, under a proper reading of *Inclusive Communities*, the practice of using code words to advertise real estate often violates the FHA. Through educating brokers and developing best practices that avoid using code words, this FHA violation and its discriminatory impacts can be mitigated.