View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by University of Minnesota Law School

University of Minnesota Law School
Scholarship Repository

Minnesota Law Review

2017

Inclusive Communities and Robust Causality: The Constant Struggle to Balance Access to the Courts with Protection for Defendants

Claire Williams

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation
Williams, Claire, "Inclusive Communities and Robust Causality: The Constant Struggle to Balance Access to the Courts with Protection for Defendants" (2017). *Minnesota Law Review*. 98.
https://scholarship.law.umn.edu/mlr/98

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

Note

Inclusive Communities and Robust Causality: The Constant Struggle to Balance Access to the Courts with Protection for Defendants

Claire Williams[*]

Imagine living in a rental house where raw sewage has been piling up,[1] where there is no adequate heating and cooling, where there are no life-saving carbon monoxide or smoke detectors and the locks do not work.[2] Instead of making the fixes necessary to ensure that the house achieves a minimum level of habitability, the landlord sues the city for even having housing codes that require such repairs, claiming that those repairs create a disparate impact by reducing affordable housing.[3] Such resistance puts cities in a tenuous situation.[4] On the one hand, if

---

* J.D. Candidate 2018, University of Minnesota Law School; B.A. 2013, Grinnell College. I would like to thank Professor Kristin Hickman for her support and guidance during this process. Thank you also to the staff and editors—especially Hannah Nelson, Franklin Guenthner, and Joe Janochowski—of *Minnesota Law Review* for all of their assistance in developing and fine-tuning my Note. Finally, I want to thank my parents, Deb Aronson and Ben Williams, for supporting me throughout my law school career and especially during the months that I worked on this Note. Copyright © 2017 by Claire Williams.

1. Jessica Masulli Reyes, *Suit: Raw Sewage, Overcrowding Mar Congressional Candidate's Rentals*, NEWS J. (Oct. 28, 2016), http://www.delawareonline.com/story/news/local/2016/10/26/suit-raw-sewage-overcrowding-mar-congressional-candidates-rentals/92764926.

2. Gallagher v. Magner, 619 F.3d 823, 830 (8th Cir. 2010) (discussing the neglected state in which landlords left rental houses); Tristan Hallman, *Dallas Makes Rules Tougher on Landlords with New Housing Standards*, DALL. MORNING NEWS (Sept. 28, 2016), https://www.dallasnews.com/news/dallas-city-hall/2016/09/28/dallas-gets-tough-landlords-improves-standards-renters (chronicling landlord resistance to a city ordinance that required sufficient cooling capabilities).

3. *See, e.g.*, *Magner*, 619 F.3d at 830; Ellis v. City of Minneapolis, No. 14-cv-3045, 2016 WL 1222227, at *1 (D. Minn. Mar. 28, 2016).

4. In Minneapolis, the city is seeking to revoke the rental license of a landlord who has routinely been cited for housing violations and admits that he lacks the resources to maintain the properties. Randy Furst, *Whistleblower: Minneapolis Out To Evict Landlord*, STAR TRIB. (Dec. 3, 2011), http://www.startribune

cities aggressively enforce housing codes, they could end up enabling mass evictions that displace entire communities.[5] On the other hand, if they do not enforce the codes, then landlords could continue to rent unsafe and unsanitary properties.[6]

This hypothetical has real consequences when landlords bring the conflict between housing codes and safety into the courts. Landlords sue cities under the Fair Housing Act (FHA), alleging disparate impact due to the enforcement of housing codes.[7] Frustrated by these suits, the Supreme Court recently sought to give cities more protection by establishing a robust causality requirement for plaintiffs alleging disparate impact.[8] The new standard emphasized the requirement that plaintiffs identify a specific policy, not a one-time decision, that creates a disparate impact.[9] The new standard was an attempt to allow local officials to exercise their discretion as they craft housing policy.[10]

Even though robust causality could allow city officials more leeway when performing their jobs, it should be abandoned because it only functions as a redundant and unnecessary barrier to housing discrimination claims. Robust causality is deeply flawed because the Supreme Court failed to provide sufficient guidance to lower courts about when to apply the standard. As it stands now, the new robust causality standard is at odds with Supreme Court precedent regarding pleading for discrimination

.com/whistleblower-minneapolis-out-to-evict-landlord/134951388. And in Dallas a rental company, rather than complying with minimum housing codes, decided to evict 305 tenants. Editorial, *Dallas Must Find a Way To Protect Tenants, Preserve Affordable Housing*, DALL. MORNING NEWS (Oct. 25, 2016), https://www.dallasnews.com/opinion/editorials/2016/10/25/dallas-must-find-way-protect-tenants-preserve-affordable-housing. As a result of suits like these, cities are faced with the choice of either relaxing housing codes and allowing substandard housing to persist, or enforcing the codes and potentially putting hundreds of people on the streets—a choice ironically brought to them under the Fair Housing Act. *See infra* Part I.A.

5. *See* Dianne Solis, *Judge Halts Mass Evictions in West Dallas Pending a Hearing on Merits of Case*, DALL. MORNING NEWS (Oct. 11, 2016), https://www.dallasnews.com/news/social-justice-1/2016/10/11/judge-halts-mass-evictions-west-dallas-pending-hearing-merits-case.

6. *See, e.g.*, Hallman *supra* note 2; Reyes *supra* note 1.

7. *See, e.g.*, *Magner*, 619 F.3d at 830; *Ellis*, 2016 WL 1222227, at *1.

8. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2523 (2015).

9. *Id.*

10. *See id.* at 2524 (discussing how this decision by the Court protected legitimate government interests).

claims.[11] Robust causality also reflects a desire to give deference to institutions and actors that still perpetuate a system of discrimination, and does not recognize how modern forms of discrimination operate.[12]

This Note argues that the robust causality requirement has no place in disparate impact litigation. Such a standard ignores the long history of government-sanctioned housing discrimination and could further restrict access to courts for discrimination claims. The Supreme Court should abandon the robust causality standard and return to traditional disparate impact analysis and pleading requirements, which have sufficient protections for defendants. Part I of this Note discusses the history of the FHA, the history of the pleading standards in federal court, and the role disparate impact litigation has played, without the robust causality standard. Part II describes the robust causality decision, and illustrates the challenges and inconsistencies that robust causality creates. Part III argues that the Supreme Court should abandon the new standard because it restricts access to courts, and does not align with the FHA's substantive goal of fair and safe housing. This Note ultimately concludes that the robust causality decision should be discarded because it creates confusion as to what is required of plaintiffs and is an unnecessary and redundant standard.

I. BACKGROUND

The Supreme Court decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* operates against a background of the rich history of housing and the normative judgments about access to courts. This Part establishes the three main areas of law that are implicated by the new robust causality standard from *Inclusive Communities*. Section A discusses the previous housing policies and efforts by the federal government to address housing discrimination. Section B outlines the pleading standard for civil cases. Finally, Section C discusses disparate impact litigation.

11. *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512–13, 515 (2002) (holding that disparate impact plaintiffs do not need to plead a prima facie case to survive a motion to dismiss).

12. *See* Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 745–49 (2005) (discussing the impact of subconscious biases on decision-making); Jennifer C. Johnson, *Race-Based Housing Importunities: The Disparate Impact of Realistic Group Conflict*, 8 LOY. J. PUB. INT. L. 97, 120–25 (2007) (describing the various mechanisms used to isolate communities of color in particular neighborhoods).

A. HOUSING DISCRIMINATION

This Section starts by chronicling how government and private parties enabled and incentivized housing discrimination. Next, it discusses the FHA, an attempt by Congress to remove barriers to adequate housing. Finally, it highlights the history of housing codes and the challenges of enforcement.

1. Before the Fair Housing Act

The federal government has a long history of racially discriminatory housing policies that facilitated segregation.[13] In particular, the government incentivized homeownership, but the incentives have not been equally available to the entire population.[14] For example, the Home Owners Loan Corporation (HOLC), established in the mid-1930s to grant low-interest loans, appraised homes based on a system of categorization that devalued property in neighborhoods where predominantly black families lived.[15] The Federal Housing Administration, which was responsible for categorizing homes and neighborhoods for loan eligibility with private companies, followed the example set by HOLC.[16] It declared entire neighborhoods in city centers or in industrial areas ineligible for loans, which led to exodus and continued decline of property value.[17] These discriminatory credit programs made it almost impossible for black homeowners to purchase homes.[18] As a result, by 1960, 27.4% of the people

---

13. Since Reconstruction "the Federal Government itself was responsible for promoting racial discrimination in housing and residential segregation." U.N. Comm. on the Elimination of Racial Discrimination, Reports Submitted by States Parties Under Article 9 of the Convention: Third Periodic Reports of States Parties Due 1999: Addendum: United States of America, para. 214, U.N. Doc. CERD/C/351/Add.1 (Oct. 10, 2000).

14. KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 190–91, 196–215 (1985) (discussing federal programs that benefitted homeowners and the ways in which communities of color were unable to take advantage of those programs).

15. *Id.* at 197–98. "[E]ven those neighborhoods with small proportions of black inhabitants were usually rated Fourth grade or 'hazardous.'" *Id.* at 201.

16. *Id.* 213–15.

17. *Id.* at 213–14. The Federal Housing Administration has closely guarded its data, but one commentator, Charles Abrams, declared that the "FHA adopted a racial policy that could well have been culled from the Nuremberg laws. From its inception FHA set itself up as the protector of the all white neighborhood. It sent its agents into the field to keep Negroes and other minorities from buying houses in white neighborhoods." *Id.* at 214.

18. *Cf.* IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE 115–40 (2005) (describing how even programs like the G.I. Bill, which was meant to benefit both black and white veterans equally, could not help black veterans

living in city centers were black, compared to 5.4% in the outlying suburban areas.[19] These federal programs and policies both codified racial segregation in government actions and enabled private parties to further exacerbate already present segregation.

In addition to federal loan programs, local zoning regulations have also been used to exclude minority populations.[20] Some of those exclusions were explicit. For example, in Kentucky in the early 1900s there was an ordinance making it "unlawful for any colored person to move into and occupy as a residence . . . any house upon any block upon which a greater number of houses are occupied . . . by white people than are occupied . . . by colored people."[21] But housing discrimination was not always so direct. Exclusionary zoning ordinances focused on economics, instead of race, such that they appeared neutral in theory, and became discriminatory in application.[22] Economically motivated zoning ordinances dictated the size of lots, the width of buildings, or the number of family units in a house.[23] By reducing the density of housing or people, zoning regulations increased housing costs in that area, thereby indirectly excluding people of lower incomes.[24] Rules that target building size appeared facially neutral but "[i]n actuality zoning was a device to keep poor people

---

overcome discriminatory obstacles to purchasing homes). These federal programs certainly did not create housing discrimination, but did perpetuate it at an "unprecedented scale." *See* JACKSON, *supra* note 14, at 199.

19. Loren Miller, *Government's Responsibility for Residential Segregation*, *in* RACE & PROPERTY 58, 58 (John H. Denton ed., 1964). Housing segregation is not without consequences. *See, e.g.*, CHARLES M. HAAR, SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES 5 (1996) (detailing the benefits enjoyed by mostly-white suburbs). Minority neighborhoods are often plagued with inadequate schools and other substandard public services. *Id.*

20. *See, e.g.*, Walker v. U.S. Dep't of Hous. & Urban Dev., 734 F. Supp. 1289, 1293 (N.D. Tex. 1989) (discussing how the Dallas Housing Authority had a "deliberate policy of strict racial segregation."); Gautreaux v. Chi. Hous. Auth., 296 F. Supp. 907, 909 (N.D. Ill. 1969) (describing Chicago Housing Authority's quota system that was designed to segregate black families).

21. Buchanan v. Warley, 245 U.S. 60, 70–71 (1917).

22. Janai S. Nelson, *Residential Zoning Regulations and the Perpetuation of Apartheid*, 43 UCLA L. REV. 1689, 1699 (1996) (discussing how economic zoning laws have discriminatory impact because often socioeconomic status is correlated with race).

23. J. Gregory Richards, *Zoning for Direct Social Control*, 1982 DUKE L.J. 761, 764 (1982).

24. Nelson, *supra* note 22, at 1699. In other contexts, lawmakers have utilized what appear to be neutral building code requirements to affect a targeted and specific substantive impact. *See, e.g.*, David Nather, *Supreme Court Strikes Down Texas Abortion Clinic Regulations*, STAT (June 27, 2016), https://www

. . . out of affluent areas."[25] With wealth as a proxy for race, these zoning regulations continued racially segregated housing patterns that had been established by explicit racial limits.

In addition to the exclusionary zoning regulations, local government decisions about the construction and allocation of affordable housing exacerbated the problem of discrimination and segregation. Federal programs often relied upon "local initiative and responsibility," which meant local governments had a large amount of discretion in deciding where to place public housing units.[26] As a result, most suburbs did not have low-income housing.[27] Cities were then left to build affordable housing units in city centers, which necessitated demolishing and displacing communities already located there at the time.[28] In the end, the housing policies and decisions created "[t]wo worlds . . . residentially segregated minority areas with poor-quality schools, inadequate public facilities . . . and a suburban sphere whose housing, infrastructure, densities and ways of life [were] more expensive and expansive . . . ."[29] The combination of federal, local, and private decisions lent government authority to discriminatory housing patterns and exacerbated housing discrimination.

2. The Fair Housing Act Addressed the Barriers to Accessing Housing

Recognizing the damaging effects of housing segregation, Congress passed the Fair Housing Act.[30] In 1968, President Lyndon B. Johnson introduced the idea of fair housing legislation.[31] The country was in the midst of the civil rights movement, including the passage of other landmark statutes, riots in major

.statnews.com/2016/06/27/supreme-court-texas-abortion.

25. JACKSON, *supra* note 14, at 242.

26. *Id.* at 225.

27. *Id.* at 224–27.

28. *Id.*

29. HAAR, *supra* note 19, at 5.

30. Rigel C. Oliveri, *Is Acquisition Everything? Protecting the Rights of Occupants Under the Fair Housing Act*, 43 HARV. C.R.-C.L. L. REV. 1, 27–28 (2008).

31. President Lyndon B. Johnson, State of the Union Address (Jan. 17, 1968), https://www.millercenter.org/the-presidency/presidential-speeches/january-17-1968-state-union-address (last visited Dec. 3, 2017) ("The next essential is more housing—and more housing now. Surely a nation that can go to the moon can place a decent home within the reach of its families . . . . I propose, for the consideration of this Congress, a 10-year campaign to build 6 million new housing units for low- and middle-income families.").

cities, and the assassination of Martin Luther King, Jr.[32] Congress recognized that law (both federal and local) created "segregation [that] led to 'black ghettos' across the United States, which resulted in a population of poor Blacks residing almost exclusively in low-income neighborhoods."[33] These laws, preferences, and motivations were a "relic of slavery,"[34] so Congress made it a priority to remove "artificial, arbitrary, and unnecessary barriers"[35] that had been, in part, the result of uncurbed discretion of local zoning officials.[36]

The FHA targeted overt obstacles to access.[37] The goal of the FHA was "to provide, within constitutional limitations, for fair housing throughout the United States."[38] The FHA made it unlawful to "refuse to sell or rent after the making of a bona fide offer" to a person based upon "race, color, religion, sex, familial status, or national origin."[39] It also prohibited discrimination "in

32. Valerie Schneider, *In Defense of Disparate Impact: Urban Redevelopment and the Supreme Court"s Recent Interest in the Fair Housing Act*, 79 MO. L. REV. 539, 552–53 (2014).

33. S. Lamar Gardner, *#BlackLivesMatter, Disparate-Impact, and the Property Agenda*, 43 S.U. L. REV. 321, 327 (2016). In 1966, before the Senate Subcommittee on Constitutional Rights, Attorney General Katzenbach said that "it is highly relevant that government action—both State and Federal—has contributed so much to existing patterns of housing segregation." *Civil Rights: Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 89th Cong. 87 (1966). A statement that was confirmed by Roy Wilkins, Executive Director of the NAACP. *Id.* at 551. The same conversation happened in the Senate a year later, with Attorney General Ramsey Clark and the Department of Justice reiterating the enormous role the Federal Housing Authority and Veterans Administration had played in furthering segregation. *Fair Housing Act of 1967: Hearings Before the Subcomm. on Hous. & Urban Affairs of the S. Comm. on Banking & Currency*, 90th Cong. (1967).

34. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 442–43 (1968).

35. Griggs v. Duke Power Co., 401 U.S. 424, 430–31 (1971).

36. United States v. City of Black Jack, 508 F.2d 1179, 1184 (8th Cir. 1974).

37. Scholars fiercely debate whether the FHA was effective. *Compare* Deborah Kenn, *Institutionalized, Legal Racism: Housing Segregation and Beyond*, 11 B.U. PUB. INT. L.J. 35, 37 (2001) ("It may even be opined that the Fair Housing Act presents a smoke screen behind which lawmakers can hide, pretending the consequences of our racism are being dealt with, while in truth the separation of races remains unchallenged."), *with* CAMILLE ZUBRINSKY CHARLES, WON'T YOU BE MY NEIGHBOR?: RACE, CLASS, AND RESIDENCE IN LOS ANGELES 39 (2006) ("In addition to ending legal housing market discrimination, the Fair Housing Act marked the end of public discussion of residential segregation. . . .").

38. Fair Housing Act, 42 U.S.C. § 3601 (2012).

39. *Id.* § 3604(a).

the terms, conditions, or privileges of sale or rental of a dwelling,"[40] in the advertisement of the property,[41] and in the representation as to "when such dwelling is in fact so available."[42] Congress attempted to provide a statutory avenue to counter the legal and cultural history of preventing people of color from even entering the housing market.[43] The FHA acknowledged and addressed the discriminatory practices that had shaped the housing market. However, once a person had housing there was still the potential for discrimination in upkeep and maintenance of the space. Housing codes were next in the line of legal obligations to protect people from discriminatory housing practices.

3. Enforcement and Impact of Housing Codes

Housing codes are part of the fair-housing ideal enacted to ensure that all residents live in safe housing, regardless of socioeconomic status. However, landlords sometimes challenge these codes because they increase operating costs. Also, housing codes often function like older zoning regulations, appearing facially neutral but in actuality targeting specific communities.

a. Safety Housing Codes

Housing codes were designed to ensure that all residents could live in safe buildings. In 1967, President Johnson created the Douglass Commission to study housing codes and develop standards in an effort to "insure decent and durable housing."[44] The Commission recognized that racial segregation had led to substandard housing and fueled resentment in urban communities.[45] Today housing "code enforcement remains the principal method by which cities can ensure that minimum housing conditions are maintained."[46] They include provisions pertaining to "basic equipment and facilities for light, ventilation, heating and sanitation; for safety from fire; for crime prevention; for space,

40. *Id.* § 3604(b).

41. *Id.* § 3604(c).

42. *Id.* § 3604(d).

43. There are several subsections that pertain to substantive rights, such as prohibiting discrimination in rights and services following purchase. *See* Oliveri, *supra* note 30, at 3–10 (detailing various provisions within the FHA and the ways in which they are meant to combat discriminatory practices).

44. Susan L. Ruby, *The* Great Society *and Housing in America: Then and Now*, 40 REAL EST. REV. J., Fall 2011, at 41, 41.

45. *Id.* at 42–43.

46. Richard E. Carlton, Richard Landfield & James B. Loken, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801, 803 (1965).

use and location; and for safe and sanitary maintenance of all structures and premises."[47] Because it costs money to maintain a habitable housing unit, cities use blanket, rather than individual, enforcement to "eliminat[e] much of the competitive advantage of buildings with lower operating costs due to undetected violations" with the hope of encouraging landlords to maintain minimum safety and habitability standards.[48]

St. Paul, Minnesota, for example, had a series of housing codes meant to ensure safe housing and promote public health and safety. The Property Maintenance Code "[e]stablishe[d] minimum maintenance standards for all structures and premises" relating to safety, sanitation, and crime prevention.[49] St. Paul also had a Department of Neighborhood Housing and Property Improvement (DNHPI), which was "responsible for administering and enforcing the Housing Code."[50] The goal of the DNHPI was to "compel property owners to take greater responsibility for their properties or, alternatively, force changes in ownership."[51] In addition, St. Paul enforced the housing codes through a code compliance certification procedure, which required an inspection for properties that had been remodeled or had been "deemed a dangerous structure, a nuisance building, or vacant."[52] However, landlords occasionally challenged the enforcement of housing codes as creating disparate impact on minority populations, arguing that maintenance costs landlords money which is then passed down to tenants leading to an increase in the cost of affordable housing, a class of housing that is predominately used by minority populations.[53]

---

47. ST. PAUL, MINN., MUN. CODE ch. 6, § 34.01(1) (2005), https://library.municode.com/mn/st._paul/codes/code_of_ordinances?nodeId=PTIILECO_TITVIBUHO_CH34MIPRMASTALSTPR [hereinafter ST. PAUL MUN. CODE]; *see also* MINNEAPOLIS, MINN., MUN. CODE ch. 12, § 244.20, https://library.municode.com/mn/minneapolis/codes/code_of_ordinances?nodeId=COOR_TIT12HO_CH244MACO_ARTIGE_244.20PUPO (containing similar language).

48. Carlton et al., *supra* note 46, at 807. The City of Dallas was explicit that its recent changes to the housing code were meant to ensure that renters did not have to live at the "mercy of slumlords" and "ensure the rights of all residents of our city to live in safe, clean, quality homes in neighborhoods that are free of blight." Hallman, *supra* note 2; *Dallas Must Find a Way To Protect Tenants, Preserve Affordable Housing*, *supra* note 4.

49. ST. PAUL MUN. CODE, *supra* note 47.

50. Gallagher v. Magner, 619 F.3d 823, 829 (8th Cir. 2010).

51. *Id.*

52. *Id.*

53. See *Magner*, 619 F.3d at 833; Ellis v. City of Minneapolis, No. 14-cv-3045, 2016 WL 1222227, at *1 (D. Minn. Mar. 28, 2016) ("This lawsuit arises

One example of this type of litigation is *Gallagher v. Magner*.[54] In that case, the landlords argued that "the City violated the FHA because aggressive enforcement of the Housing Code had a disparate impact on racial minorities."[55] The appellants were landlords who owned properties that had been "cited between ten and twenty-five violations per property for conditions including rodent infestation, missing dead-bolt locks, inadequate sanitation facilities, inadequate heat, inoperable smoke detectors, broken or missing doors and screens, and broken or missing guardrails or handrails."[56] These citations were a mix of basic repairs (such as missing guardrails or inoperable smoke detectors) to more substantial violations (such as inadequate heat or sanitary facilities). They were not for cosmetic repairs, but ones that endangered the fundamental goal of "protect[ing] the public health, safety and welfare."[57]

The Eighth Circuit found that the landlords had sufficient evidence for a prima facie case that the enforcement of housing codes was creating a disparate impact.[58] The landlords supported their allegations with statistics about the affordable housing shortage in St. Paul, the demographics of people needing affordable housing, and the increase in costs for landlords that were passed on to tenants or resulted in the sale of properties, as well as statements from the U.S. Department of Housing

out of Defendant City of Minneapolis' (the "City") alleged implementation of unlawful housing policies and heightened enforcement of those policies against inner-city landlords in a discriminatory manner."); McRae v. District of Columbia, No. 05-2272, 2007 WL 842963, at *1 (D.D.C. Mar. 19, 2007) ("The plaintiff, the owner of several multi-family housing buildings, alleges that the District of Columbia engaged in practices that violated both the FHA and the DCHRA. . . . [Alleging violation by] issu[ing] a list of 'Hot Properties,' i.e., properties with serious housing code violations, and . . . prosecuting the owners of those properties."); Bolden v. City of Topeka, No. Civ. A. 02-2635-KHV, 2004 WL 303521, at *3 (D. Kan. Feb. 13, 2004), *aff'd in part and rev'd in part*, 441 F.3d 1129 (10th Cir. 2006) ("Count III alleges that the City violated 42 U.S.C. § 1983 by increasing residential housing code standards to unreasonable levels; [and] aggressively and selectively enforcing its policy against racial minorities . . . ."); Peoria Area Landlord Ass'n v. City of Peoria, 168 F. Supp. 2d 917, 922 (C.D. Ill. 2001) ("Plaintiffs respond that the Ordinances . . . have a disparate impact . . . .").

54. *Magner*, 619 F.3d at 828.

55. *Id.* at 833.

56. *Id.* at 830.

57. ST. PAUL MUN. CODE, *supra* note 47, at ch. 6, § 34.01.

58. *Magner*, 619 F.3d at 837.

and Urban Development (HUD) detailing a decrease in affordable housing in St. Paul.[59] The Eighth Circuit found that "the existence of a significant statistical disparity, even one resulting from economic inequality, [was] sufficient to create a *prima facie* case . . . ."[60] The landlords conceded that the housing codes were necessary for maintaining "minimum property maintenance standards, keeping the City clean and housing habitable, and making the City"s neighborhoods safe and livable."[61] They proposed that the city return to an older program that focused on maintaining positive relationships with landlords.[62]

The Eighth Circuit was satisfied with the alternative policy outlined by the landlords, meaning that St. Paul had to abandon its challenged housing code policy and return to an older version.[63] In the face of lawsuits like *Magner*, cities and local governments trying to pursue legitimate government objectives "can't even make slumlords kill rats without fear of a lawsuit."[64] Housing codes represent a difficult balancing act for cities as they try to protect tenants from substandard housing while also not contributing to the rising cost of affordable housing.

b. Targeted Housing Codes

Cities and developers often have housing codes that appear to be aimed only at safety or who lives there. For example, these ordinances are passed "as a means of preventing overcrowding, minimizing traffic and parking congestion, and avoiding an undue financial burden on" the school system.[65] But facially neutral laws can still be discriminatory.[66] Cities have a history of enacting housing codes to maintain minimum safety, but they do not always effectuate those goals—either because they are challenged by landlords hoping to avoid financial obligations, or because the concerns about safety are influenced by white, middle-class conceptions of housing.

59. *Id.* at 834–35.

60. *Id.* at 836 (quoting Williams v. 5300 Columbia Pike Corp., 891 F. Supp. 1169, 1180 n.2 (E.D. Va. 1995)).

61. *Id.* at 837.

62. *Id.* at 837–38.

63. *Id.* at 838.

64. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2532 (2015) (Alito, J., dissenting).

65. Moore v. City of East Cleveland, 431 U.S. 494, 499–500 (1977).

66. *See id.*; Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish, 641 F. Supp. 2d 563, 565 (E.D. La. 2009); United States v. Tropic Seas, Inc., 887 F. Supp. 1347, 1352 (D. Haw. 1995).

For example, in *United States v. Tropic Seas, Inc.*, a private housing development limited the number of people who could live in each apartment type.[67] The court found that the restriction discriminated against the plaintiffs based upon family status, because the policy was not tied to the square-footage of the apartment.[68] The court cited expert analysis that determined "that Tropic Seas' occupancy provision regarding studio and one-bedroom apartments would exclude 92 to 95 percent of all families with children, but only 19 to 21 percent of all families without children."[69] The plaintiffs also had a letter written by the vice-president of the development company that intimated that "the concern was not occupancy standards, but rather was children . . . ."[70] On the surface the rule is about occupancy numbers, but in practice it created a heavy burden on families with children.

The blood-relative ordinance is an example of a facially neutral city ordinance that was racially discriminatory in practice.[71] St. Bernard Parish, near New Orleans, Louisiana, passed an ordinance that prohibited people from renting single-family homes to nonblood relatives.[72] It also placed a moratorium on the construction of multi-family dwellings.[73] The parish had only passed the law in order to help rebuild the community in the wake of Hurricane Katrina,[74] but the federal district court held that the ordinance, despite being facially neutral, was racially targeted.[75] The city councilperson who proposed the ordinance stated that its purpose was to "maintain the demographics of St. Bernard Parish," which at the time was primarily white.[76] The public conversation surrounding the ordinance also included references to "'ghetto,' 'crime,' 'blight,' and 'shared values' [which] are similar to the types of expressions that courts in similar situations have

67. 887 F. Supp. at 1352 ("Apartments ordinarily will be limited to occupancy by the following number of persons: studio and one-bedroom apartments, two persons; two-bedroom apartments, three persons. This does not apply to houseguests.").

68. *Id.* at 1361–62.

69. *Id.* at 1360.

70. *Id.* at 1361.

71. *Greater New Orleans Fair Hous. Action Ctr.*, 641 F. Supp. 2d at 565.

72. *Id.* at 565 n.1.

73. *Id.* at 566.

74. *Id.* at 565.

75. *Id.* at 577.

76. *Id.* at 569–70.

found to be nothing more than 'camouflaged racial expressions.'"[77] Based upon that evidence "the [c]ourt conclude[d] that the Parish and Council's intent in enacting and continuing the moratorium is and was racially discriminatory," even though the ordinance never mentioned race.[78]

These examples highlight the complicated history of local housing code objectives and impact. The government, both local and federal, has made efforts to increase access and quality of housing, but past discrimination has created patterns and systems that still impact communities today, even through facially neutral policies.

B. PLEADING STANDARD

Pleading requirements are the entry point to court for plaintiffs. Older pleading standards and requirements created a highly formalized system that produced detailed pleadings that were "at best wasteful, inefficient, and time-consuming, and at most productive of confusion as to the real merits of the cause and even of actual denial of justice."[79] Notice pleading developed as a way to ensure that parties were not prevented from having their day in court because of a procedural deficiency.[80] Under the notice pleading system, plaintiffs merely submit a complaint, which is a means of notifying the court and the opposing party of the facts and legal issues.[81]

The Federal Rules of Civil Procedure (FRCP) were adopted in response to the failings of the previous system.[82] The pleading standard created by the FRCP was much more liberal, requiring only "a short and plain statement of the claim showing that the pleader is entitled to relief."[83] The function of a pleading that follows Rule 8 of the FRCP is to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it

77. *Id.* at 571 (quoting Smith v. Town of Clarkton, 682 F.2d 1055, 1066 (4th Cir. 1982)).

78. *Id.* at 577.

79. Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 460 (1943).

80. *See id.* at 458 (discussing how lawyers took advantage of the complicated pleading procedures); Elizabeth Roseman, *A Phoenix from the Ashes? Heightened Pleading Requirements in Disparate Impact Cases*, 36 SETON HALL L. REV. 1043, 1046 (2006) ("These rigid requirements made a litigant's day in court more a game of semantic skill than a decision on the merits of the claim.").

81. Clark, *supra* note 79, at 456–57.

82. *See* Roseman, *supra* note 80, at 1047.

83. FED. R. CIV. PRO. 8(a)(2).

rests."[84] The goal of the more liberal pleading requirements was to "focus litigation on the merits of a claim" rather than for litigants and courts to get lost in the procedural details.[85]

The Supreme Court's rulings in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* refined the requirements under Rule 8(a)(2). *Twombly* held that n order to adequately show the grounds upon which a claim rests, the complaint must have enough facts to "raise a right to relief above the speculative level."[86] In order to survive a motion to dismiss, the complaint needs "allegations [that] plausibly suggest[]"[87] that the alleged conduct has taken place. The Supreme Court emphasized in these cases that it did not create a "heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face."[88]

The plausibility standard was further explained in *Iqbal*, which outlined a two-step process for analyzing plausibility. First, the judge examines the allegations to determine which are facts and which are legal conclusions.[89] Second, using only the factual allegations, the judge determines whether the complaint is plausible.[90] Plausibility is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[91] It invites inclusion of the judge's point of view because the "determinations of plausibility depend on baseline assumptions about the way the world usually works"[92] and such assumptions can "carry the imprint of judges' individual backgrounds and biases."[93] The language of "experience and common sense" contrasts the objective language in *Boumediene v. Bush* that highlighted judicial "expertise and competence" rather than experience and common sense.[94] The post-*Iqbal* pleading system

84. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002) (citing Conley v. Gibson, 355 U.S. 41, 47 (1957)).

85. *Id.* at 514.

86. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

87. *Id.* at 557.

88. *Id.* at 570.

89. *See* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

90. *See id.* at 679.

91. *Id.* at 679.

92. Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473, 498 (2010).

93. Ramzi Kassem, *Implausible Realities:* Iqbal's *Entrenchment of Majority Group Skepticism Towards Discrimination Claims*, 114 PENN ST. L. REV. 1443, 1451 (2010).

94. Boumediene v. Bush, 128 S. Ct. 2229, 2276 (2008); Kassem, *supra* note 93, at 1453.

now encourages judges to import their own life experiences when determining whether a plaintiff's allegations are a plausible explanation of the facts.

The Supreme Court has also considered the interaction been the pleading standard and the prima facie case. In *Swierkiewicz v. Sorema*, the Second Circuit Court of Appeals held that a plaintiff alleging disparate treatment needed to plead a prima facie case in order to survive a motion to dismiss.[95] The Supreme Court rejected that pleading requirement for two reasons. First, the prima facie case is an evidentiary standard and had no place at the pleading stage.[96] Second, when courts required plaintiffs to plead a prima facie case, they were creating a heightened pleading standard that went beyond the goal of notice pleading.[97] The Supreme Court favorably cited it's decision in *Swierkiewicz* in its *Twombly* decision, indicating that it still envisioned a liberal pleading standard like the one articulated in *Swierkiewicz*.[98]

Having a liberal pleading standard like notice pleading is a vital part of the legal system because it shapes which cases have their day in court. When plaintiffs bring housing discrimination cases, this pleading stage is the first barrier. If it is raised higher or invites judges to incorporate their own sense of what is normal, it could lead to more and more discrimination cases being dismissed if judges just do not believe that discrimination is an issue that still persists.[99]

C. Disparate Impact

One of the methods for proving discrimination is disparate impact, which seeks to challenge "practices, procedures, or tests neutral on their face, and even neutral in terms of intent" that still operate to maintain "the status quo of prior discriminatory . . . practices."[100] The Supreme Court discussed and affirmed disparate impact in *Griggs v. Duke Power Co.* In that case, a factory originally had a discriminatory hiring procedure that confined

95. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510 (2002).

96. *See id.* at 511.

97. *See id.*

98. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

99. A subjective standard could allow judges to dismiss cases "simply because such cases do not seem to mesh with a particular judge's experience and his or her common sense." Raymond H. Brescia, *The* Iqbal *Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 KY. L.J. 235, 238 (2011).

100. Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

people of color to lower-paying positions.[101] Then, after the passage of the Civil Rights Act of 1964, the company switched to using a facially neutral policy—requiring a high school diploma and the completion of two different general intelligence tests.[102] The Supreme Court held that the requirements were unlawful because the purpose of the Civil Rights Act—much like the purpose of the FHA—was to "remove barriers that have operated in the past to favor an identifiable group of white" people over other groups.[103] Plaintiffs could use antidiscrimination legislation to challenge barriers that were "overt[ly] discrimin[atory] [and] also practices [or barriers] that are fair in form, but discriminatory in operation."[104] Plaintiffs could use disparate-impact liability to challenge systematic policies that favored, even indirectly, certain groups over others.

Disparate-impact liability does not depend upon the intention of the actor. Antidiscrimination statutes were meant to address and remove "mechanisms that operate as 'built-in headwinds' for minority groups."[105] The FHA follows the same principles as those discussed in *Griggs v. Duke Power Co*. Even before the Supreme Court officially recognized disparate-impact liability under FHA, other courts acknowledged that "[e]ffect, and not motivation, is the touchstone" for discrimination under FHA because "clever men may easily conceal their motivations, but more importantly, because 'whatever our law was once, . . . we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.'"[106] Even without intent, laws, and the people who enforce them, can create effects that disadvantage certain groups. Disparate-impact liability plays an important role in the legal landscape because it allows plaintiffs to challenge practices that appear to be facially neutral but in reality have a greater impact on a specific category of people.

These three sections highlighted the major legal issues at play in the *Inclusive Communities* decision. The Supreme Court

101. *Id.* at 427.
102. *Id.* at 427–28.
103. *Id.* at 429–30.
104. *Id.* at 431.
105. *Id.* at 432.
106. United States v. City of Black Jack, 508 F.2d 1179, 1185 (8th Cir. 1974) (quoting Hobson v. Hansen, 269 F. Supp. 401, 497 (D.D.C. 1967)).

decided *Inclusive Communities* against a backdrop of past government-sanctioned and -incentivized housing discrimination. The decision also implicated the methods that plaintiffs use to challenge housing practices. Finally, the decision addressed the on-going struggles associated with the substantive goal of the FHA to provide fair housing to all. This next part contextualizes the *Inclusive Communities* decision within these three issues.

II. ROBUST CAUSALITY ATTEMPTS TO BALANCE DISCRETION OF GOVERNMENT OFFICIALS WITH ACCESS TO COURTS

In *Inclusive Communities*, the Supreme Court held that disparate impact was a theory of liability under the FHA and introduced a new standard, robust causality, to evaluate claims of disparate impact. But its holding was flawed in four important ways: (1) the Court did not provide sufficient guidance for the lower courts for applying robust causality; (2) it conflicts with Supreme Court precedent for pleading; (3) it casts a pall on disparate-impact claims before they even reach the merits stage; and (4) the holding grants the benefit of the doubt to zoning officials and cities who do not warrant such deference from courts.

Section A analyzes the *Inclusive Communities* decision and its robust causality standard. Section B demonstrates the lack of guidance that the new standard provides for lower courts. Section C compares the new robust causality standard to the holding in *Swierkiewicz v. Sorema*. Finally, Section D explains how the Supreme Court imprudently granted unnecessary and unwarranted leeway to cities.

A. *INCLUSIVE COMMUNITIES* AND THE ROBUST CAUSALITY STANDARD

The Supreme Court recognized disparate-impact liability under the FHA in *Inclusive Communities*.[107] The Inclusive Communities Project (ICP), a nonprofit organization that advocated for racial and socioeconomic housing integration in Dallas, challenged the method by which the Texas Department of Housing and Community Affairs (the Department) distributed tax credits for affordable housing developments.[108] The Department distributed tax credits to developers and developments through the

107. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2513–14 (2015).
108. *Id.*

Low Income Housing Tax Credit (LIHTC) program.[109] A development that received tax credits through LIHTC could not "refuse housing solely because a person is using a Section 8 voucher."[110] Because developments that accepted LIHTCs could not refuse housing based solely on Section 8 vouchers, the distribution of LIHTCs influenced where people with low incomes could live.[111]

The plaintiffs challenged the Department's method of dispersing affordable housing because, they alleged, it created a disparate impact.[112] In distributing tax credits, the Department scored applications based upon statutory and nonstatutory factors, such as the location of good schools.[113] But, despite the scoring system, the Department retained discretion in the final decision as to which developers and which projects received tax credits.[114] ICP alleged that, in exercising its discretion, the Department "continued segregated housing patterns by its disproportionate allocation of the tax credits."[115] ICP argued that the Department created a disparate impact by "granting too many credits for housing in predominantly black inner-city areas and too few in predominantly white suburban neighborhoods."[116]

The district court found that ICP had enough statistical evidence to demonstrate that the Department's distribution of tax credits created a disparate impact.[117] The Fifth Circuit Court of Appeals affirmed that disparate impact could create liability under the FHA, and held further that such claims were evaluated

109. Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, 860 F. Supp. 2d 312, 313–15 (N.D. Tex. 2012), *rev'd* 747 F.3d 275 (5th Cir. 2014), *aff'd* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2513 (2015).

110. *Id.* at 314. Section 8 is a government program that subsidizes housing "so eligible families can afford decent, safe, and sanitary housing." 24 C.F.R. § 982.1(a)(1) (2017).

111. *Inclusive Cmtys. Project, Inc.*, 860 F. Supp. 2d at 314.

112. *Id.*

113. Tex. Gov't. Code Ann. §§ 2306.6710(a)–(b) (West 2008); Tex. Op. Att'y. Gen. No. GA-0208, at 2–6 (2004).

114. *Inclusive Cmtys. Project, Inc.*, 860 F. Supp. 2d at 317, 319.

115. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2514 (2015).

116. *Id.*

117. Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, 749 F. Supp. 2d 486, 500 (N.D. Tex. 2010). ICP relied on a report prepared for the Texas House of Representatives that showed "77% of LIHTC units in the city of Dallas were in above-average minority areas." *Id.*

under a burden-shifting test.[118] The Department then appealed the issue of disparate impact under the FHA to the Supreme Court of the United States.[119]

The Supreme Court recognized that the FHA allowed for suits based upon disparate impact.[120] It compared the language in the FHA with that in employment discrimination legislation, like the Age Discrimination and Employment Act (ADEA) and Title VII.[121] Previous interpretations of ADEA and Title VII "instruct[ed] that antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose."[122] All three statutes contain the word otherwise at the end of a list of prohibited activities.[123] The Court held that "otherwise" signaled "a shift in emphasis from an actor's intent to the consequences of his actions," meaning that, like ADEA and Title VII, FHA included liability for disparate impact.[124]

In recognizing disparate-impact liability, the Court also introduced a new standard, robust causality, to impose some limitations.[125] The Court emphasized that "[d]isparate-impact liability mandates the 'removal of artificial, arbitrary, and unnecessary barriers,' not the displacement of valid governmental policies."[126] The robust causality standard was intended to prevent disparate-impact liability from transforming the FHA into "an instrument to force housing authorities to reorder their priorities" because the FHA was designed only to ensure housing

118. Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, 747 F.3d 275, 282 (5th Cir. 2014), *cert. granted*, 135 S. Ct. 2507 (2015). The court adopted the burden-shifting framework promulgated by HUD. *Id.* The plaintiff first has to show that the action has or will have a discriminatory effect. 24 C.F.R. § 100.500(c) (2017). If the plaintiff is successful, the burden then shifts to defendant to show that "the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant." *Id.* If the defendant can satisfy its burden, then the plaintiff can still prevail if it can show that there is an alternative practice that will achieve similar goals but with less discriminatory effect. *Id.*

119. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2515 (2015).

120. *Id.* at 2515–22.

121. *Id.* at 2519 ("Title VII's and the ADEA's 'otherwise adversely affect' language is equivalent in function and purpose to the FHA's otherwise make unavailable' language.").

122. *Id.* at 2518.

123. *Id.* at 2519.

124. *Id.*

125. *Id.* at 2522–23.

126. *Id.* (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

authorities achieved their objectives "without arbitrarily creating discriminatory effects or perpetuating segregation" and not to dictate the housing policy of different areas.[127]

For the actual mechanics of the standard, robust causality uses similar requirements as typical disparate-impact cases, but requires more from plaintiffs. Plaintiffs still need to identify both the statistics that show disparate impact and the policy or policies alleged to have caused that impact.[128] From its original conception in *Griggs*, courts have required that plaintiffs alleging disparate-impact claims have to provide the statistics and identify the policy that created the impact.[129] The Court did not change the pieces that are part of a disparate-impact case, however the language surrounding the traditional requirements signal that the Court requires more from plaintiffs alleging disparate impact under the FHA.

The additional language compels more from plaintiffs because it places an emphasis on the causal connection and shifts the causal inquiry to earlier in the litigation process. First, in terms of causality, the Court made it clear that the limitations were intended to prevent defendants (which would mostly be cities or other local governments[130]) from being "held liable for racial disparities they did not create."[131] The combination of the term robust and the Court's articulated reasoning of protecting defendants creates an impression that courts should even more carefully scrutinize whether the policy or policies actually caused the disparity. Second, in addition to requiring a stronger showing of causation, robust causality also shifts the focus from the prima facie stage to the pleading stage. The Court held that "[a] plaintiff who fails to allege facts at the pleading stage or pro-

127. *Id.*

128. *Id.* at 2523.

129. *Griggs*, 401 U.S. at 430 (analyzing the consequences of the defendant's practices).

130. *See* J. William Callison, *Inclusive Communities: Geographic Desegregation, Urban Revitalization, and Disparate Impact Under the Fair Housing Act*, 46 U. MEM. L. REV. 1039, 1049 (2016) ("Larger institutions, such as governmental entities, banks and insurance companies, are more likely to have placement, financing, lending and insurance underwriting 'policies' that bring disparate impact analysis into play.").

131. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2523. The limitations were also intended "to protect potential defendants against abusive disparate-impact claims." *Id.* at 2524. The Court was concerned that allowing abusive disparate-impact claims would undermine the purpose of the FHA. *Id.*

duce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact."[132] That language in the decision instructs lower courts to "examine with care whether a plaintiff has made out a prima facie case of disparate impact."[133] If a plaintiff does not have sufficient factual allegations at the pleading stage "demonstrating a causal connection" then the complaint "cannot make out a prima facie case of disparate impact" and should be dismissed.[134] Unlike the pleading standard used by *Griggs* and its progeny, robust causality gives more deference to the decisions of the defendant, often zoning officials who have to "make decisions based on a mix of factors."[135]

In *Inclusive Communities* the Court recognized disparate-impact liability under the FHA, but at the same time announced a standard for lower courts that specifically concentrated on shifting through and weighing cases at an early stage. The Court created a pathway for plaintiffs to allege disparate impact under the FHA, but balanced the potential for liability with a more demanding standard so that defendants would have more room to act without legal consequence.

B. ROBUST CAUSALITY IS FLAWED BECAUSE IT LACKS GUIDANCE FOR LOWER COURTS

The Supreme Court endeavored to balance allowing governments to take action without fear of litigation from residents and landlords with allowing plaintiffs to challenge government action through disparate-impact liability, but its holding in *Inclusive Communities* is flawed because it failed to provide sufficient guidance to lower courts in two important areas. First, it created confusion about which stage of litigation (pleading or prima facie) is subject to robust causality. Second, it created uncertainty about what would qualify as a policy, a necessary component of the robust causality standard.

1. At What Stage of Litigation Does Robust Causality Apply?

The language in *Inclusive Communities* is not clear about when the robust causality standard should be employed, at summary judgment phase or earlier at the pleading stage, which con-

132. *Id.* at 2523.
133. *Id.*
134. *Id.*
135. *Id.*

flicts with the nature of the two different stages of litigation. *Inclusive Communities* and the cases that it cites were decided at summary judgment phase,[136] or at a more developed stage of litigation where plaintiffs would be required to have a prima facie case.[137] But the language in the Supreme Court decision implicates both motions for summary judgment and pleadings. The Court stressed the need for "adequate safeguards at the prima facie stage" and also held that "[a] plaintiff who fails to allege facts at the *pleading stage* or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact."[138] The opinion ties together robust causality, prima facie, and the pleading stage, which is likely to lead to confusion among lower courts as to when to apply a robust causality requirement. The confusion is probable because not all disparate-impact cases make it to the summary judgment phase; some cases are decided as the result of motions much earlier in the litigation process, like motions to dismiss.[139]

In fact, lower courts have used robust causality when deciding motions to dismiss, applying a stricter standard earlier in litigation. In *Ellis v. City of Minneapolis*, the court applied the robust causality requirement at the pleading stage.[140] The court dismissed the case, holding that "a plaintiff must adequately allege—at the pleading stage—facts demonstrating a causal connection between the challenged policy and the alleged disparity."[141] The court specifically cited the burden-shifting framework from *Inclusive Communities* without acknowledging that in *Inclusive Communities* the courts were determining the appropriate standard for summary judgments.[142]

Applying robust causality standard at the pleading stage, as the court did in *Ellis*, is in tension with the informational asym-

136. Gallagher v. Magner, 619 F.3d 823, 830 (8th Cir. 2010) ("[T]he district court granted the City's motion for summary judgment in its entirety. Appellants challenge the summary judgment order . . . .").

137. Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, 749 F. Supp. 2d 486, 491–92 (N.D. Tex. 2010).

138. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2523 (emphasis added).

139. *See* Ellis v. City of Minneapolis, No. 14-CV-3045, 2016 WL 1222227, at *4 (D. Minn. Mar. 28, 2016) (illustrating an FHA claim being decided on a motion for judgment on the pleadings, which is analyzed under the motion to dismiss standard).

140. *Id.* at *5.

141. *Id.*

142. *Id.*

metries early in litigation. For disparate-impact cases, the plaintiffs need evidence about the defendant's purposes or institutional practices to satisfy prima facie.[143] Parties have the opportunity through discovery to develop the factual record, including evidence of the defendant's motivations and practices, between pleading and summary judgment.[144] Under the current summary judgment process "the plaintiff has a right to substantial discovery; she is in effect entitled to search the haystack for needles."[145] But, at the pleading stage, there is still an informational asymmetry.[146] Some evidence of practice or policy could be gathered before discovery, but often such evidence is in the exclusive control of the defendant, and only accessible to the plaintiff through discovery.[147] "The Court's emphasis on an early causation showing, coupled with its limitations on the use of statistical discrepancies, renders housing disparate-impact claims particularly difficult."[148] Requiring plaintiffs to have evidence of the defendant's inner workings, at the pleading stage, ignores the reality of discovery.

Even without robust causality the pleading stage can be particularly challenging for disparate-impact claimants. For example, in *Strauss v. City of Chicago*, the plaintiff alleged that the Chicago Police Department had a practice of hiring individuals with a history of brutality.[149] To support his allegation, he relied

143. Suzette M. Malveaux, *The Jury (or More Accurately the Judge) Is Still Out for Civil Rights and Employment Cases Post-*Iqbal, 57 N.Y. L. SCH. L. REV. 719, 726 (2013).

144. *See* FED. R. CIV. P. 56 ("A party asserting that a fact cannot be or is genuinely disputed must support the assertion by citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials . . . ."); FED. R. CIV. P. 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.").

145. Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 108 (2009).

146. "The plaintiff's failure to plead unknowable facts could in some cases result in dismissal of a claim that should have been successful, and net social welfare decreases as the defendant unjustly retains wealth that should have compensated plaintiff for her injury." *Id.* at 114.

147. Roy L. Brooks, Conley *and* Twombly*: A Critical Race Theory Perspective*, 52 HOW. L.J. 31, 58–69 (2008).

148. Callison, *supra* note 130, at 1050.

149. Strauss v. City of Chicago, 760 F.2d 765, 766 (7th Cir. 1985).

upon statistical analysis of complaints against that police department.[150] The court granted the defendant's motion to dismiss, even though it recognized that "plaintiffs will lack the information necessary to meet even the minimum pleading requirements . . . set out here until they are allowed discovery."[151] When challenging an institution based upon its internal practices and policies, discovery is a vital tool, without which discriminatory actions are likely to go unremedied.

The facts from *Trafficante v. Metropolitan Life Insurance Co.* offer an example of how an information asymmetry could function in the housing context, with outsiders who are only armed with statistics.[152] In that case, the plaintiffs were two white tenants who alleged that the apartment owner employed tactics to exclude people of color from the building.[153] As tenants, those plaintiffs might have knowledge about patterns in building operation, but it is more likely that all that they could point to would be the demographics of the apartment complex. Because they were tenants and not employees they would not have had direct access to application procedures. They were outside of the application process, like Strauss in *Strauss v. City of Chicago*. The denied applicants would be even further outside the process. Tenants might have heard of other people who had been rejected or have statistics, but without discovery or other access to the owner, they would not be able to point to a specific policy. Their lack of insider knowledge is not a reason to deny them access to discover if they have a plausible complaint.

Some commentators have argued that allowing too many cases past the pleading stage will lead to abusive litigation or fishing expeditions.[154] Fishing expeditions are speculative claims that plaintiffs bring to court with the hope of proceeding to discovery to find other adverse information.[155] Courts and

150. *Id.* at 768.

151. *Id.* at 769.

152. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205 (1972).

153. *Id.* at 208.

154. *Strauss*, 760 F.2d at 770 (discussing how a creative lawyer could create ruinous liability for municipalities). It could be argued that the *Ellis v. City of Minneapolis* case is an abuse of the system since the plaintiff is challenging housing codes that require only the barest minimum. No. 14-CV-3045, 2015 WL 5009341, at *2 (D. Minn. Aug. 24, 2015); Suja A. Thomas, *Oddball* Iqbal *and* Twombly *and Employment Discrimination*, 2011 U. ILL. L. REV. 215, 220 (citing Richard A. Epstein, *Of Pleading and Discovery: Reflections on* Twombly *and* Iqbal *with Special Reference to Antitrust*, 2011 U. ILL. L. REV. 187, 192).

155. Elizabeth G. Thornburg, *Just Say "No Fishing": The Lure of Metaphor*, 40 U. MICH. J.L. REFORM 1, 17 (2006).

commentators have often cast fishing expeditions as a drain on the litigation process because they allow plaintiffs to rely on vague circumstances and then extract more damaging information from the defendant, sometimes about an entirely different matter.[156] While there is always a potential for abusive or speculative litigation, Professor Elizabeth Thornburg argues that the term fishing expedition is coded language used by judges and lawyers to influence or reinforce attitudes about the merits of certain types of litigation.[157] Largely, the phrase has been used to cast doubt on the merits of cases alleging discrimination—cases where judges are often already skeptical of the merits.[158] Courts' reliance on the fishing expedition metaphor also undercuts the American legal system's belief that discovery "eliminate[s] surprise, lead[s] to enlightened settlements, and when necessary, facilitate[s] more focused and efficient trials."[159] The fishing expedition narrative also conflicts with the reality of how discovery is used.[160] Most cases have little to no discovery.[161] There will certainly be cases where plaintiffs file complaints as a harassment tactic or as a fishing strategy, but these appear to be limited examples.

Despite the potential for abuse, disparate impact is too vital a tool to severely limit it. The Supreme Court has previously acknowledged the potential for abusive litigation and rejected that argument as a rationale for making the pleading standard stricter.[162] In the face of that argument, the Court championed a liberal pleading standard.[163] In a modern setting discrimination is not always blatant, or even intentional.[164] Often an organization will rely on a traditional practice without realizing

---

156. *Id.* at 11–27.

157. *Id.* at 43.

158. *Id.* at 48–49.

159. Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299, 301 (2002).

160. Empirical research has shown that "the typical case has relatively little discovery, conducted at costs that are proportionate to the stakes of the litigation." Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 527 (1998).

161. Subrin, *supra* note 159, at 308.

162. Swierkiewicz v. Sorema N. A., 534 U.S. 506, 514–15 (2002).

163. *Id.*; *see also* Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1301–02 (2010).

164. Laya Sleiman, *A Duty to Make Reasonable Efforts and A Defense of the Disparate Impact Doctrine in Employment Discrimination Law*, 72 FORDHAM L.

that it furthers or creates a "built in headwind[] for minority groups."[165] It is not easy to identify or challenge discrimination when it is motivated by unconscious bias or influenced by stereotypes in decision-makers.[166] But these unconsciously motivated actions still produce discriminatory effects that have a real impact on people in minority groups.[167] Even in *Inclusive Communities* the Court recognized the role that disparate impact plays in "counteract[ing] unconscious prejudices and disguised animus that escape easy classification as disparate treatment."[168] Congress can create laws to attempt to protect minority groups or remove more barriers, but courts actually ensure that the rights of individuals and minority groups are protected.[169] Courts cannot fulfill that role if plaintiffs cannot bring cases.

The robust causality requirement is also not likely to be limited to disparate-impact cases under the FHA. Observers have argued that the robust causality requirement will be limited to race-based claims under the FHA.[170] However, those same observers have acknowledged that the holding could extend to other protected classes.[171] And courts have cited the robust cau-

REV. 2677, 2681 (2004) (recognizing that there are social, historical and economic factors that can influence actions).

165. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

166. Catherine S. Manegold, *"Glass Ceiling" is Pervasive, Secretary of Labor Contends*, N.Y. TIMES, Sept. 27, 1994, at B9 ("[S]ubtle but pervasive patterns of discrimination dominate the public, private and nonprofit sectors of society because of a 'myopia' on the part of many white male managers who 'unthinkingly discriminate' without having any idea they are doing so."); Hart, *supra* note 12, at 742–43; Malveaux, *supra* note 143, at 725–26.

167. *See, e.g.*, *Griggs*, 401 U.S. at 432 (holding that even though the company did not intend to create a discriminatory hiring policy, requiring a high school diploma still created a disparate impact on groups that have historically not had as much access to education).

168. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 2522 (2015).

169. Alfred W. Blumrosen, *The Legacy of Griggs: Social Progress and Subjective Judgments*, 63 CHI.-KENT L. REV. 1, 1 (1987) (noting that the Civil Rights Act of 1964 really became a "major instrument of social progress because of the Supreme Court decision in *Griggs v. Duke Power*.").

170. Callison, *supra* note 130, at 1048–49.

171. *Id.* at 1049.

sality requirement in cases about racial discrimination in employment,[172] age discrimination in employment,[173] sex discrimination in employment[174] and racial discrimination in voting rights.[175] As other courts begin using the robust causality standard in other disparate impact arenas (such as Title VII or ADEA), even more plaintiffs will be at risk of having their lawsuit dismissed too soon, before relevant evidence is even available. Robust causality has the potential to impact many plaintiffs, stopping complaints in their tracks at the pleading stage because the Court was not clear about when the standard should be applied.

2. What Counts as a Policy Under Robust Causality?

In its holding from *Inclusive Communities*, the Supreme Court was also unclear about what a policy is. In *Inclusive Communities*, it emphasized that "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."[176] The Court only briefly discussed policy and noted "a one-time decision may not be a policy at all."[177] The Court stated that disparate impact is meant to remove policies that create "artificial, arbitrary, and unnecessary barriers."[178] However, in an era of subconscious or unintentional discrimination[179] the ambiguity around policy could prevent plaintiffs from challenging important categories of decisions.

The definition of policy is especially important in banking and mortgage lending. In *City of Los Angeles v. Wells Fargo*, the

172. Smith v. City of Boston, 144 F. Supp. 3d 177, 191 (D. Mass. 2015) (requiring a showing of robust causality, in a race-based employment discrimination case, so that the disparate impact was not the "result of mere chance").

173. Karlo v. Pittsburgh Glass Works, LLC, 849 F.3d 61, 77 (3d Cir. 2017) (requiring a showing of "robust causality" in a case concerning age discrimination in employment).

174. Anfeldt v. United Parcel Serv., Inc., No. 15 C 10401, 2016 WL 1056670, at *2 (N.D. Ill. Mar. 17, 2016).

175. Veasey v. Abbott, 830 F.3d 216, 264 (5th Cir. 2016) (stating that statistical evidence is not for a claim to survive unless the plaintiff can point to a specific policy).

176. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2523 (2015).

177. *Id.*

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

179. Hart, *supra* note 12, at 745–49.

plaintiffs challenged the lending practices of Wells Fargo, arguing that the bank gave predatory loans to minority applicants.[180] Los Angeles alleged that Wells Fargo engaged in redlining and reverse redlining, lending practices that concentrates minority groups into specific, usually less desirable, areas of a city.[181] The court was not convinced that Los Angeles had identified an actual policy that led to these alleged outcomes.[182] Los Angeles argued that the lack of adequate safeguards and monitoring had produced a disparate impact, intimating that they were challenging Wells Fargo's policy and practice of giving discretion to loan officers.[183] The court granted Wells Fargo's motion for summary judgment because Los Angeles had failed to identify a specific policy leading to discrimination, thus failing to meet the robust causality requirement.[184] *City of Los Angeles v. Wells Fargo & Co.*, demonstrates that courts are utilizing the robust causality standard at the pleading stage to dismiss cases because of the ambiguity of policy.

It could certainly be argued that a lawsuit is an ineffective means of addressing what could be characterized as a lack of a policy or an amorphous policy that gives employees more discretion. For an employer, it could be more difficult to change a structure of discretion as opposed to an explicit company policy to, for example, deny loans to people of color. But modern forms of discrimination are more likely to come from people in positions of power who "'unthinkingly discriminate' without having any idea they are doing so."[185] Banks are no longer literally "drawing a red line around certain areas in which credit would be denied."[186] Instead, people make decisions that are influenced by stereotypes and judgments that "subtly distort the ostensibly objective

180. City of Los Angeles v. Wells Fargo & Co., No. 2:13-cv-09007-ODW(RZx), 2015 WL 4398858, at *1 (C.D. Cal. July 17, 2015), *aff'd*, 691 F. App'x 453 (9th Cir. 2017).

181. *Wells Fargo*, 2015 WL 4398858, at *1. *See generally* United Cos. Lending Corp. v. Sargeant, 20 F. Supp. 2d 192, 203 n.5 (D. Mass. 1998) (defining redlining and reverse redlining); S. REP. NO. 103-169, at 21 (1994) (defining redlining and reverse redlining); *Redlining*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining redlining).

182. *Wells Fargo*, 2015 WL 4398858, at *8 ("[T]he City fails to actually identify any policy that created an artificial, arbitrary, or unnecessary barrier.").

183. *Id.*

184. *Id.* at *14.

185. Manegold, *supra* note 166 (quoting Labor Secretary Robert B. Reich).

186. *United Co. Lending Corp.*, 20 F. Supp. 2d at 203 n.5.

data set upon which a decision is ultimately based."[187] Even in the absence of a specific, affirmative policy, stereotypes can play a role in individual decisions or moments when discretion is allowed.[188] Housing officials and developers may no longer be be actively discriminating, but they still have the potential to be influenced by stereotypes and subconscious biases. A narrow definition of policy would not capture the types of behavior that create modern housing discrimination.

In addition to being vague about what constitutes a policy, the Court's holding also calls into question whether one-time decisions would qualify as a policy. The Court only briefly discussed policies, but it did state "a one-time decision may not be a policy at all."[189] The section of the opinion was not controlling on the decision, but it does create an uphill battle for plaintiffs who are trying to challenge one-time decisions because the Court raises doubts about whether such one-time decisions are appropriate or even eligible for disparate-impact liability. It is not entirely clear why the Court chose to question one-time decisions given that they can have drastic impacts on communities.[190] St. Paul's decision to route Interstate 94 (I-94) directly through a thriving black community is one stark example.[191] That solitary decision razed an entire community that is still feeling the impacts.[192] Urban redevelopment plans can have a similar impact. For example, in ***Mt. Holly Gardens Citizens in Action, Inc. v.***

187. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1211 (1995); *see also* Hart, *supra* note 12, at 746.

188. *See, e.g.*, Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, 749 F. Supp. 2d 486, 502 (N.D. Tex. 2010) (granting summary judgment for plaintiffs based in part on the fact that the agency retains discretion when making the final decision about where to allocate tax credits); Hart, *supra* note 12, at 767–69.

189. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2523 (2015).

190. *See, e.g.*, Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly, 658 F.3d 375, 377 (3d Cir. 2011) (discussing a redevelopment plan passed by the City that would destroy a specific community); Laura Yuen, *Central Corridor: In the Shadow of Rondo*, MPR (Apr. 29, 2010), https://www.mprnews.org/story/2010/04/20/centcorridor3-rondo (discussing the decision to route I-94 through the predominantly black community between St. Paul and Minneapolis).

191. Yuen, *supra* note 190.

192. St. Paul Branch of NAACP v. U.S. Dep't of Transp., 764 F. Supp. 2d 1092, 1104 (D. Minn. 2011).

Township of Mount Holly, the plaintiffs challenged the township's redevelopment plan as discriminatory.[193] The redevelopment plan could be classified as a one-time decision because it was triggered by an assessment that the area needed to be redeveloped.[194] Unlike the on-going tax credit decisions made by the Department in *Inclusive Communities*, the Township of Mount Holly made a single decision that the neighborhood in question needed to be reconstructed.[195] The Township did make subsequent decisions,[196] so it might be possible for the plaintiffs to cast the action as a policy rather than a one-time decision. However, the Township could make a strong argument that it only made a one-time decision when it initially determined that it would redevelop the area. That decision had sweeping effects on the community, but there is a strong probability that it could be disqualified based on the robust causality standard. A similar one-time-decision argument could be made in the context of the decision to route I-94 through a predominantly black neighborhood in St. Paul.[197] The cities only made a one-time decision, but that one decision destroyed the homes of 650 black families and the surrounding businesses.[198]

One might object here that the Supreme Court did not categorically exclude one-time decisions from creating grounds for disparate-impact liability. Instead, the Court indicated that one-time decisions "*may* not be a policy at all."[199] Such a statement may have been the Court abdicating a role in determining what a policy actually is due to the complexity of the organizations and decision-making structures typically involved. In that case, robust causality might not lead to the dismissal of cases with facts like the I-94 expansion and the Mount Holly redevelopment. Additionally, the I-94 and Mount Holly examples involved affirmative decisions made by city officials, meaning that they lend themselves more to being a "policy" than a discretionary system

193. *Mt. Holly Gardens Citizens in Action, Inc.*, 658 F.3d at 377.

194. *Id.* at 378–79.

195. *Compare* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2513 (2015) (describing how TDHCA continually makes decisions), *with Mt. Holly Gardens Citizens in Action, Inc.*, 658 F.3d at 379 (describing how the Township made a one-time determination that the area needed redevelopment).

196. *Mt. Holly Gardens Citizens in Action, Inc.*, 658 F.3d at 379 ("A series of redevelopment plans followed [the initial designation].").

197. Yuen, *supra* note 190.

198. *Id.*

199. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2523 (emphasis added).

like the one in *City of Los Angeles v. Wells Fargo & Co*. However, the potential for even these extreme examples to be argued either way demonstrates that by adding one sentence into its opinion the Court has injected a new degree of uncertainty into housing discrimination cases, an uncertainty that will invite further arguments in lower courts.

By raising questions about whether one-time decisions, the Court created ambiguity as to whether plaintiffs can challenge single government decisions, even those decisions that have significant and disproportionate impact. The Court's lack of clarity on what qualifies as a policy and its doubt about one-time decisions severally limits plaintiffs' access to court and allows discriminatory decisions to go unchallenged.

C. ROBUST CAUSALITY CONFLICTS WITH SUPREME COURT PRECEDENT ON PLEADINGS

Inclusive Communities is flawed because it conflicts with established Supreme Court precedent regarding the interaction between the pleading standard and the prima facie case. The Court explored the interaction between pleading and prima facie in *Swierkiewicz v. Sorema*.[200] In *Swierkiewicz*, a fifty-three-year-old Hungarian man alleged that he was discriminated against because of his age.[201] To support his complaint, he pointed to evidence that the person hired to replace him was twenty years younger than him and that his supervisor "stated that he wanted to 'energize'" the department.[202] The Second Circuit dismissed the complaint because he failed to plead a prima facie case.[203]

The Supreme Court specifically rejected the heightened pleading standard imposed by the court of appeals.[204] The Court was adamant that "discrimination plaintiff[s] need not plead a prima facie case of discrimination."[205] The first the Court relied on was that "[t]he prima facie case . . . is an evidentiary standard, not a pleading requirement."[206] The Court further held, having the heightened requirement undercut the liberal pleading standard central to the U.S. court system.[207] Plaintiffs do not

200. 534 U.S. 506, 508 (2002).
201. *Id.* at 508–10.
202. *Id.* at 508.
203. *Id.* at 509.
204. *Id.* at 511–12.
205. *Id.* at 515.
206. *Id.* at 510.
207. *Id.* at 511.

need to plead with "greater 'particularity,' because this would 'too narrowly constric[t] the role of the pleadings.'"[208] The Court explained that pleadings are supposed to give defendants notice of the action pending against them and focus the litigation on the merits, so it would be detrimental to the litigation process to create a heightened pleading standard.[209] It also acknowledged that it was illogical to import the prima facie case to the pleading stage because "[b]efore discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie case in a particular case."[210] The holding from *Swierkcwicz* demonstrates that the Court envisioned the pleading stage as a mechanism of giving notice, and subsequent stages of litigation as eliminating meritless claims.[211]

Despite the ruling in *Swierkiewicz*, the district court in *Ellis v. City of Minneapolis* still required the plaintiffs to plead a prima facie case.[212] The court dismissed the first complaint because the plaintiffs "failed to adequately plead a prima facie case of disparate impact."[213] Citing *Inclusive Communities*, the district court stated that the plaintiffs needed to plead "facts that plausibly demonstrate[d] a causal link between the challenged policy and th[e] disparity."[214] The complaint was amended and refiled.[215] When considering the second amended complaint, the court decided a motion for judgment on the pleadings, which uses the same standard of review as a Rule 12(b)(6) motion to dismiss.[216] The plaintiffs cited *Swierkiewicz* to stand for the proposition that disparate-impact complaints do not have to plead a prima facie case.[217] But the district court disagreed with the plaintiffs' use of *Swierkiewicz*, holding instead that the holding from *Inclusive Communities* meant that plaintiff's need to

208. *Id.* (quoting McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 283 n.11 (1976)).

209. *Id.* at 512–14.

210. *Id.* at 512.

211. *Id.*

212. No. 14-CV-3045, 2015 WL 5009341, at *10 (D. Minn. Aug. 24, 2015).

213. *Id.*

214. *Id.*

215. Ellis v. City of Minneapolis, No. 14-CV-3045, 2016 WL 1222227, at *1 (D. Minn. Mar. 28, 2016), *aff'd*, 860 F.3d 1106 (8th Cir. 2017).

216. *Id.* at *4 (citing Gallagher v. City of Clayton, 699 F.3d 1013, 1016 (8th Cir. 2012)).

217. *Id.* at *5.

"adequately plead a prima facie case of disparate impact" in order to survive a motion to dismiss, which is in direct opposition to *Swierkiewicz*.[218]

Some scholars have argued that *Swierkiewicz* can exist alongside other articulations of the pleading standard as a "safe harbor" for discrimination complaints.[219] For example, Joseph Seiner contends that since *Swierkiewicz* stands for the proposition that plaintiffs alleging employment discrimination do not need to plead a prima facie case, if they do plead a prima facie case then they "should inherently survive a motion to dismiss."[220] In other words, *Swierkiewicz* created the floor, ensuring that anything above that floor could survive a motion to dismiss.[221] That argument, however, requires an actual difference between the floor and the prima facie case. In *Ellis*, the court raised that floor to the level of a prima facie case, erasing the safe harbor and requiring the plaintiff to plead the elements of a prima facie case to survive a motion to dismiss.[222] Applying the robust causality standard at the pleading stage, as happened in *Ellis*, is the same heightened pleading standard that the Court specifically denounced in *Swierkiewicz*. By creating a link between the prima facie requirement and pleadings, the Court seemed to be at odds with the fundamental underpinnings of its reasoning.

Additionally, Seiner and others have argued that the *Swierkiewicz* holding is limited to the pleading standard for intentional employment discrimination.[223] But the holding and reasoning from *Swierkiewicz* is not just limited to disparate treatment employment discrimination cases for several reasons.[224] First, the Court focused on the fact that the court of appeals had "required [the] petitioner to plead a prima facie case"

218. *Id.* at *3; *cf.* Blomker v. Jewell, 831 F.3d 1051, 1056 (8th Cir. 2016) ("'[E]lements of the prima facie case are [not] irrelevant to a plausibility determination in a discrimination suit . . . . [T]he elements of a prima facie case may be used as a prism to shed light upon the plausibility of the claim.'") (quoting Rodriguez-Reyes v. Molina-Rodriguez, 711 F.3d 49, 54 (1st Cir. 2013)).

219. Joseph A. Seiner, *After* Iqbal, 45 WAKE FOREST L. REV. 179, 222–23 (2010).

220. *Id.* at 223.

221. *Id.*

222. *Ellis*, 2016 WL 1222227, at *7–8.

223. Charles A. Sullivan, *Plausibly Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613, 1619–20 (2011); Seiner, *supra* note 219, at 193–94.

224. *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510–11 (2002).

to survive a motion to dismiss.[225] It instructed lower courts that an evidentiary standard should not control at the pleading stage.[226] That reasoning should apply to other discrimination pleadings, including disparate impact. Additionally, the Court was emphatic in its defense of the liberal pleading standard.[227] The goal of pleading, under the FRCP, is to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."[228] The Court's defense of the pleading standard is not specifically related to pleading in the context of employment discrimination or disparate treatment. Finally, the Second,[229] Sixth,[230] Seventh,[231] and Ninth[232] Circuits have all expressly extended the holding from *Swierkiewicz* to cases involving housing discrimination. The Court's holding in *Swierkiewicz* demonstrates its commitment to allowing plaintiffs to have their day in court, but the robust causality standard, with its focus on swift dismissal of complaints, contradicts that holding, heightening the requirement for plaintiffs to gain access to court.

D. ROBUST CAUSALITY INAPPROPRIATELY GIVES DEFERENCE TO CITIES.

Finally, the decision in *Inclusive Communities* is flawed because it carves out a zone of protection for zoning officials and other housing officials. In *Inclusive Communities*, the Court conceded that zoning laws played a central role in creating a system

225. *Id.* at 510.

226. *See* Lindsay v. Yates, 498 F.3d 434, 440 (6th Cir. 2007) (citing *Swierkiewicz* in a housing discrimination case for the proposition that the prima facie case relates only to the plaintiff's evidentiary burden).

227. *Swierkiewicz*, 534 U.S. at 512 ("[I]mposing the Court of Appeals' heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2).").

228. *Id.* (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

229. Meyer v. Bear Rd. Assocs., 124 F. App'x 686, 688 (2d Cir. 2005) (per curiam) (citing *Swierkiewicz*, 534 U.S. at 511–12 (2002)) (holding that, in a claim alleging a violation of the Fair Housing Act, "[t]he pleading need not state the elements of a prima facie case.").

230. *Lindsay*, 498 F.3d at 439 (holding that *Swierkiewicz* applies for pleadings in housing discrimination cases).

231. Swanson v. Citibank, N.A., 614 F.3d 400, 405 (7th Cir. 2010) (citing *Swierkiewicz* when describing what is necessary to put in a complaint that alleges a violation of the FHA).

232. Edwards v. Marin Park, Inc., 356 F.3d 1058, 1061–62 (9th Cir. 2004) (holding that in a housing discrimination case, "failure to plead [a prima facie case] does not support dismissal at the outset").

of racial segregation in housing.[233] But it also emphasized that the FHA is "not an instrument to force housing authorities to reorder their priorities."[234] Zoning officials have to make choices based "on a mix of factors, both objective (such as cost and traffic patterns) and, at least to some extent, subjective."[235] The Court's position rests between acknowledging the importance of disparate impact as a check on government decision-making and striving to give government actors "latitude to consider market factors."[236]

The Court drew a distinction between zoning laws, which have a long history of being discriminatory on their face and in practice, and government development decisions, which the Court sees as beneficial to the communities.[237] But there are parallels between city redevelopment programs and zoning laws because cities use both to influence land use and social order.[238] Development decisions by zoning officials, even if facially neutral, often have profound impacts on communities.[239] In the past, cities enacted zoning laws that would effectively force minorities out of certain areas or keep them hemmed in to others.[240] Some

233. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2522 (2015); *see also* Town of Huntington v. Huntington Branch, NAACP, 488 U.S. 15, 16–18 (1988) (per curiam) (invalidating zoning law preventing construction of multifamily rental units); United States v. City of Black Jack, 508 F.2d 1179, 1182–88 (8th Cir. 1974) (invalidating ordinance prohibiting construction of new multifamily dwellings); Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish, 641 F. Supp. 2d 563, 569, 577–78 (E.D. La. 2009) (invalidating post–Hurricane Katrina ordinance restricting the rental of housing units to only "blood relative[s]" in an area of the city that was 88.3% white and 7.6% black).

234. Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 2522 (2015).

235. *Id.* at 2523.

236. *Id.*

237. *See id.* at 2522–23.

238. Justin Graham, Comment, *Playing "Fair" with Urban Redevelopment: A Defense of Gentrification Under the Fair Housing Act's Disparate Impact Test*, 45 ARIZ. ST. L.J. 1719, 1735–38 (2013) (discussing the efforts that cities are making to entice wealthy residents to return to city centers).

239. Carla Dorsey, Note, *It Takes a Village: Why Community Organizing Is More Effective than Litigation Alone at Ending Discriminatory Housing Code Enforcement*, 12 GEO. J. ON POVERTY L. & POL'Y 437, 441–52 (2005) (analyzing two different instances in which cities used revitalization programs and goals to effectively remove low-income communities from their neighborhoods).

240. *See* Gardner, *supra* note 33, at 327–30; Nelson, *supra* note 22, at 1695–96 (discussing the racially motivated Chinese Laundry Law); Richards, *supra* note 23, at 763–67 (discussing how facially neutral laws about building size were used to control who could afford to live in certain areas of a city); *see also*

cities and states still use facially neutral building codes to accomplish substantive goals.[241] But now, redevelopment efforts often push lower income populations out to make room for wealthier groups in the way that zoning codes used to.[242] For example, in the *Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly* case mentioned above, a redevelopment plan essentially ousted African American residents from a section of the town.[243] In that case the city decided to redevelop an area, predominantly inhabited by African Americans, which had begun to deteriorate.[244] The city created a revitalization plan, which included demolishing some older buildings and constructing new housing units.[245] The new housing units were priced well above what the former residents could afford, effectively expelling the former residents, much like economic zoning

DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 55–56 (1993) (discussing how city councils used their power over federal housing funds to build new projects in existing minority neighborhoods).

241. In July 2013, Texas enacted a law that required clinics providing abortions to comply with many of the same building codes imposed on ambulatory surgical centers. Adam Liptak, *Supreme Court Strikes Down Texas Abortion Restrictions*, N.Y. TIMES (June 27, 2016), https://www.nytimes.com/2016/06/28/us/supreme-court-texas-abortion.html; David Nather, *Supreme Court Strikes Down Texas Abortion Clinic Regulations*, SCI. AM. (June 27, 2016), https://www.scientificamerican.com/article/supreme-court-strikes-down-texas-abortion-clinic-regulations. Commentators argued that the law was actually designed to limit access to abortion clinics. Nischay Bhan, *Contested Spaces: Texas's HB2 and the Weaponization of Building Code*, YALE PAPRIKA, http://www.yalepaprika.com/contested-spaces-texass-hb2-and-the-weaponization-of-building-code (last visited Dec. 3, 2017). In fact, about half of the state's forty one clinics had to close down after the passage of the law. Molly Hennessy-Fiske, *Here's What Happened when Texas Cracked Down on Abortion Clinics*, L.A. TIMES (July 1, 2016), http://www.latimes.com/nation/la-na-texas-abortion-figures-20160630-snap-story.html.

242. Bethany Y. Li, *Now Is the Time!: Challenging Resegregation and Displacement in the Age of Hypergentrification*, 85 FORDHAM L. REV. 1189, 1194–99 (2016) (defining gentrification as "a systematic remake of the class composition of urban areas due to the displacement of low-income residents and businesses").

243. *See* Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly, 658 F.3d 375, 378 (3d Cir. 2011) (describing the neighborhood's demographics and the effects of the city's redevelopment plan).

244. *Id.* ("The neighborhood was not perfect. For one, it was crowded. This created a parking shortage, which led residents to pave their backyards for use as driveways, which, in turn, led to drainage problems. In addition, the fact that the homes were owned in fee simple meant there was no one with a vested interest in maintaining common spaces, such as the alleys. Some of the owners were nothing more than absentee landlords, renting to individuals with little interest in maintaining the properties.").

245. *Id.* at 379.

laws did in the past.[246] The Township used a redevelopment plan to accomplish much the same impact as zoning laws, and the Third Circuit found that the plaintiffs had offered sufficient evidence to sustain a prima facie case that the redevelopment plan had a disparate impact on African Americans.[247] The court emphasized the fact that disparate-impact claims are about whether a community has been "disproportionately *affected*" or is "disproportionately burdened" by the actions of the defendant.[248] The results from *Mount Holly* show that, in fact, redevelopment plans can also drive out communities, particularly communities of color or low-income communities, and have a disparate impact in much the same way that historic zoning laws did. It is shortsighted of the Supreme Court to attempt to draw a distinction between zoning laws and redevelopment plans, because the impact is very similar.

Granted, housing codes, redevelopment plans, and zoning laws do play an important role in ensuring the safety of tenants. Housing codes have been in place since the late 1800s and arose primarily in response to public health and safety concerns.[249] Most municipalities have some form of housing code.[250] Lawsuits that challenged basic safety housing codes, like *Gallagher v. Magner*, might have motivated the Supreme Court to protect defendants and by extension ensure that housing codes remained in place. The opinion in *Inclusive Communities* references *Magner*, noting, "*Magner* was decided without the cautionary standards announced in this opinion."[251] The circumstances surrounding *Magner* paint a bleak picture of the living conditions of the tenants.[252] Housing codes play an important role in ensuring safe housing options.

246. The new homes cost around $200,000, while the city had purchased the homes from residents at prices around $45,000. *Id.* at 380. The residents also had to endure years of having their neighborhood disrupted by construction, including substantial damage due to the interconnected nature of the homes. *Id.*

247. *Id.* at 382.

248. *Id.* at 383.

249. H. Laurence Ross, *Housing Code Enforcement and Urban Decline*, 6 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 29, 31 (1996); Dorsey, *supra* note 239, at 440.

250. Ross, *supra* note 249, at 31.

251. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2524 (2015).

252. The properties "received code enforcement orders that, in many cases, cited between ten and twenty-five violations per property for conditions including rodent infestation, missing dead-bolt locks, inadequate sanitation facilities,

Notwithstanding the fact that most housing codes are designed to provide "a decent home and a suitable living environment for every American family,"[253] the enforcement of those codes can still be used as a weapon to change or remove a community.[254] For example, the municipalities of Stockton, California, and Addison, Illinois, both aggressively enforced housing codes as a means of regaining downtown property for the city.[255] The properties in question were primarily owned or rented by minority groups.[256]

In *Inclusive Communities*, the Court attempted to strike a balance between these two sides of housing codes, but conveyed instead the sense that such codes should not be second-guessed. The Court held that enforcement of housing codes is a "valid governmental polic[y]"[257] that should be protected, but also recognized that those codes can "arbitrarily creat[e] discriminatory effects or perpetuat[e] segregation."[258] That section of the Court's analysis struck a balance between the importance of safety and also recognizing that housing codes can be wielded in a discriminatory fashion, as in Stockton and Addison. Much of the rest of the analysis, however, instead communicates the importance of protecting government policies and priorities from second-guessing. The Court specifically noted that it was not the goal of the FHA to place cities and developers in a "double bind" if they decide to act or not.[259] The Court also acknowledged that zoning officials "must often make decisions based on a mix of factors" and that the FHA does not "decree a particular vision of urban development."[260] Finally, the Court criticized the motivations underlying the plaintiffs' complaint, noting that it might "simply

inadequate heat, inoperable smoke detectors, broken or missing doors and screens, and broken or missing guardrails or handrails." Gallagher v. Magner, 619 F.3d 823, 830 (8th Cir. 2010).

253. Housing Act of 1949, Pub. L. No. 81-171, § 2, 63 Stat. 413, 413 (1949).

254. Dorsey, *supra* note 239, at 441–51 (describing two instances in which cities used housing codes to remove low-income home owners from their houses).

255. *Id.*; *see also* Price v. City of Stockton, 394 F. Supp. 2d 1256, 1260 (E.D. Cal. 2005) (describing enforcement policies); Hispanics United of DuPage Cty. v. Village of Addison, 988 F. Supp. 1130, 1140–43 (N.D. Ill. 1997) (same).

256. *Hispanics United*, 988 F. Supp. at 1139; Dorsey, *supra* note 239, at 442–43.

257. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2522, 2524 (2015).

258. *Id.* at 2522.

259. *Id.* at 2523.

260. *Id.*

[be] an attempt to second-guess which of two reasonable approaches a housing authority should follow."[261] Weaving these comments into the rest of the analysis indicates that the Court was attempting to shield decision-makers from liability. While cities often act with the motivation of improving quality and safety of housing, that does not preclude their actions from having a disproportionate effect on minority communities.[262] As the Third Circuit reminded lower courts in *Mount Holly*, "Disparate impact claims . . . do not require proof of discriminatory intent."[263] A city's motivations are not relevant; if the action has "disproportionately burdened a particular racial group" or other group, then there is a disparate impact.[264] The Court may have wanted to protect government discretion, but that discretion can and has had a disproportionate burden on specific, often minority communities. Cities and zoning officials do not always warrant the benefit of the doubt.

One might note here that without robust causality, there could be even more efforts to litigate every decision made by zoning officials, leaving cities unwilling to act to "even make slumlords kill rats [because of the] fear of a lawsuit."[265] The dissent in *Inclusive Communities* stressed this potential consequence, focusing particularly on the deteriorating houses in *Magner*.[266] While unquestionably landlords do and have used litigation to avoid their responsibilities under city codes, that does not mean that legal avenues should be curtailed for all, especially because there are also instances where enforcement of housing codes by cities has been motivated by discriminatory intent or had discriminatory impact.[267] In fact, Stockton purposely increased its

261. *Id.* at 2522.

262. *See, e.g.*, Li, *supra* note 242, at 1196–1203 (discussing the impact that some city "redevelopment" plans have on minority communities).

263. Mt. Holly Gardens Citizens in Action, Inc. v. Township. of Mount Holly, 658 F.3d 375, 381 (3d Cir. 2011).

264. *Id.*

265. Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 2532 (2015) (Alito, J., dissenting).

266. *Id.* ("[The Eighth Circuit] concluded that the city's 'aggressive enforcement of the Housing Code' was actionable because making landlords respond to 'rodent infestation, missing dead-bolt locks, inadequate sanitation facilities, inadequate heat, inoperable smoke detectors, broken or missing doors,' and the like increased the price of rent.").

267. *See, e.g.*, Price v. City of Stockton, 394 F. Supp. 2d 1256, 1264 (E.D. Cal. 2005) (discussing how the city adopted a strategy of aggressive enforcement of housing codes in order to regain the property for the city).

enforcement of housing codes as part of a conscious effort to regain control of that property in that section of the city.[268] In St. Paul, aggressive enforcement of the housing codes led to forced sales, which meant that low-income tenants were evicted from their housing.[269] Even if the city is not trying to evict tenants or regain control of the property, sometimes enforcement of housing codes can have deeply negative impacts on communities. Challenging these laws through litigation might not always be the answer because it could discourage cities from enforcing laws that increase the safety and habitability of residences. However, increasing the barriers to plaintiffs at the pleading stage could also prevent plaintiffs like those in *Price v. City of Stockton* from being able to dispute city action. Litigation may be a blunt tool, but it is a necessary one.

The *Inclusive Communities* decision recognized disparate-impact liability, but in a limited manner. The new robust causality standard requires plaintiffs to point to a specific, ongoing policy causing disparate impact and encourages lower courts to dismiss the cases early in the litigation process. Moreover, the new requirement does not provide sufficient guidance to lower courts, and the guidance that it does provide conflicts with the reality of disparate impact and the Court's own precedent. The significant drawbacks to this standard should encourage the Court to abandon the robust causality standard and rely on traditional pleading standards.

III. THE ROBUST CAUSALITY STANDARD IS AN UNNECESSARY BARRIER TO CLAIMS OF HOUSING DISCRIMINATION.

Given the significant problems with robust causality, the Court should abandon that standard and continue to rely on the traditional pleading standard and disparate-impact analysis. Requiring causation so early in a disparate-impact case is unnecessary given the protections for defendants that already exist. The Court should also return to traditional disparate-impact analysis because it is better adapted to modern discrimination.

Section A demonstrates that defendants already have sufficient protection at the pleading stage. Section B contends that the robust causality standard cannot remain because it does not reflect the reality of discriminatory practices. Ultimately, this

268. *Id.*

269. Gallagher v. Magner, 619 F.3d 823, 835 (8th Cir. 2010).

Note concludes that the Court should abandon robust causality because both the traditional pleading standard and disparate-impact analysis already provide legal protections for defendants.

A. Robust Causality Should Be Abandoned Because Current Pleading Standards Render It Unnecessary and Redundant.

The Court should abandon robust causality because the current pleading standard already sufficiently protects defendants. The Court may have been concerned about a proliferation of disparate-impact cases if it did not place some limits at the pleading stage. However, the current legal standard for motions to dismiss already protects defendants.[270] The current jurisprudence for evaluating a pleading originates with the *Twombly* and *Iqbal* cases.[271] Those two cases instruct courts to engage in a two-step analysis of a pleading.[272] The court first sifts through the allegations to determine which are factual and which are legal conclusions.[273] Then, using only the facts, the court determines whether a claim is plausible.[274] The plausibility inquiry instructs courts to employ "judicial experience and common sense" in order to determine what is plausible.[275] Observers have described how that instruction from the Supreme Court serves two functions: it elevates the legal barriers at the pleading stage[276] and injects a higher degree of subjectivity into the analysis.[277] So, rather than the pleading serving as notice of impending litigation,[278] pleadings must now bear the heightened duty of passing a plausibility test.[279] Plausibility already provides more protection for defendants than the prior standard, which was that a "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no

270. *See generally* Brescia, *supra* note 99 (discussing the impact of the plausibility standard on discrimination claims).

271. *See* Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

272. *Iqbal*, 556 U.S. at 679 (2009).

273. *Id.*

274. *Id.*

275. *Id.*

276. A. Benjamin Spencer, *Pleading and Access to Civil Justice: A Response to* Twiqbal *Apologists*, 60 UCLA L. REV. 1710, 1723 (2013).

277. A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 9–11 (2009).

278. *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002).

279. *See* Clark, *supra* note 79, at 457–58 (discussing the historical disadvantages of requiring particularity in pleading).

set of facts in support of his claim."[280] The Supreme Court has already changed the fundamental role of the pleading stage in such a way that makes it more challenging for complaints to survive motions to dismiss.

The current system already provides sufficient protection for defendants without robust causality. Robust causality has similar philosophical underpinnings to plausibility. The Court created the plausibility standard to protect telecommunication companies from lawsuits alleging collusion when the plaintiffs only had evidence of parallel behavior,[281] meaning that the Court did not want defendants to be responsible for market collusion unless they actually created an anticompetitive atmosphere. Similarly, in *Inclusive Communities*, the Court held that the robust causality standard was necessary to "protect[] defendants from being held liable for racial disparities they did not create."[282] Both of these standards exist, then, to ensure that when defendants are hauled into court they are there to actually answer for a charge that is tied to their behavior. In light of the fact that robust causality seeks to accomplish the same objective as the plausibility standard, robust causality should be abandoned as an unnecessary and redundant standard.

At this point, some might argue that if there is already judicial scrutiny of the pleading then robust causality will not harm plaintiffs because it does not diverge from what is currently expected. While it is true that the goal of robust causality echoes that in *Twombly* and *Iqbal*, it is also important to acknowledge that even if the standards are similar, robust causality does require something different. *Twombly* and *Iqbal* instruct courts to determine if a complaint is plausible, while robust causality blends the requirements for the prima facie stage with the pleading stage, holding that "[a] plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact."[283] Both plausibility and robust causality may involve the court giving more scrutiny to a complaint than it might

280. Conley v. Gibson, 355 U.S. 41, 45–46 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

281. *See* Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 553, 570–71 (2010) (describing the allegations of parallel conduct in *Twombly*).

282. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2523 (2015).

283. *Id.*

have faced prior to *Twombly* and *Iqbal* or *Inclusive Communities*, but they are not identical requirements. Maintaining robust causality would normalize a trend of requiring more and more at early, undeveloped stages of the litigation process, which is antithetical to the notice pleading philosophy. The Court should abandon robust causality because the plausibility standard alone accomplishes the goals that motivated robust causality.

In addition to already having jurisprudence that protects defendants, empirical studies of case outcomes show that the plausibility standard has, in practice, protected defendants. Kendall Hannon conducted an analysis of the rate of dismissal for civil rights cases before and after the holdings from *Twombly* and *Iqbal*.[284] He found that the number of cases dismissed after those cases increased by eleven points and the number of denied motions to dismiss decreased by seven points.[285] Other studies have also found a slight but statistically significant increase in the number of motions to dismiss judges granted in civil rights cases.[286] The empirical evidence suggests that the plausibility standard has actually played the role that it was intended to play and decreased the likelihood of a complaint surviving a motion to dismiss. The real-world result of the plausibility standard further underscores how unnecessary and redundant the robust causality standard is.

Robust causality is also unnecessary because it is a generally applicable standard that was prompted to control an issue that was already under control in the lower courts. Part of the opinion in *Inclusive Communities* was concerned about cases like *Magner*, where landlords attempted to use the FHA to evade their responsibilities under city housing codes.[287] The Inclusive Communities Court noted that the *Magner* case, which found that the landlords were able to establish a prima facie case of

284. Kendall W. Hannon, Note, *Much Ado About* Twombly*? A Study on the Impact of* Bell Atlantic Corp. v. Twombly *on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811 (2008).

285. *Id.* at 1837.

286. Benjamin Sunshine & Víctor Abel Pereyra, *Access-to-Justice v. Efficiency: An Empirical Study of Settlement Rates After* Twombly & Iqbal, 2015 U. ILL. L. REV. 357, 363–71 (summarizing studies); Brescia, *supra* note 99, at 260–68 (concluding that courts are more likely to dismiss housing discrimination complaints after *Twombly* and *Iqbal*); Hatamyar, *supra* note 281, at 607).

287. *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2524 (2015) (stating that FHA suits must not be used to prevent government entities from enforcing housing codes); Gallagher v. Magner, 619 F.3d 823, 830 (8th Cir. 2010) (describing code violations).

disparate impact,[288] was "decided without the cautionary standards announced in this opinion,"[289] implying that robust causality would have prevented those plaintiffs from successfully surviving a motion to dismiss or a motion for summary judgment. The Court appears to have been concerned that more of these cases might appear to lead to "perverse outcomes" where the FHA is used to "maintain the status quo of substandard housing."[290] In spite of that potential, empirical research by Stacy Seicshnaydre indicates that lower courts had been doing a sufficient job of controlling for perverse outcomes without robust causality.[291] Seicshnaydre analyzed the appellate record for both housing-barrier and housing-improvement disparate-impact claims.[292] Housing-improvement claims, like *Magner*, were only half as successful in litigation as more traditional housing-barrier claims.[293] Based upon her research, lower courts were skeptical of housing improvement claims even before robust causality, and they were efficiently disposing or dismissing those cases. Robust causality is unnecessary because it was a solution in search of a problem.

Robust causality is a redundant and unnecessary standard. The plausibility standard seeks to accomplish the same goal that the Court articulated when announcing robust causality. Plausibility has been successful in practice in decreasing the number of discrimination claims that survive early stages of litigation. As such, even without a robust causality standard, there are sufficient protections for defendants to ensure that frivolous lawsuits are handled appropriately. The Court needs to abandon robust causality because it merely reiterates the goals of the current standard.

B. ROBUST CAUSALITY FAILS TO ACCOUNT FOR THE ROLE OF UNCONSCIOUS BIAS AND HISTORY STILL INFLUENCES DECISIONS.

The Supreme Court should abandon robust causality because the traditional disparate impact framework is better adapted to combat modern discrimination and further the FHA's

288. *Magner*, 619 F.3d at 834–35.

289. Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 2524 (2015).

290. Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM. U. L. REV. 357, 392, 407 (2013).

291. *Id.* at 399–402, 413.

292. *Id.* at 399–403.

293. *Id.* at 400–01.

goal of "fair housing throughout the United States."[294] Throughout much of the United States' history, people in positions of power sought to prevent minority groups from living in certain areas.[295] Now, bankers do not draw red lines around neighborhoods and landowners do not include racial covenants in deeds,[296] but "discrimination is still pervasive, now more often in the form of stereotyping or unconscious bias."[297] Unconscious bias[298] and historical systems of discrimination[299] continue unchecked in systems that rely on discretion.[300]

The impact of discretionary systems can be seen in both home mortgage lending and access to housing. For example, New York University did an investigation of home mortgage lending and found that there were stark differences in the rates given to

294. 42 U.S.C. § 3601 (2012).

295. Richards, *supra* note 23, at 763–67.

296. Sometimes these racial covenants remain in deeds but are not enforced. Randy Furst, *Massive Project Works to Uncover Racist Restrictions in Minneapolis Housing Deeds*, STAR TRIB. (Aug. 26, 2017), http://www.startribune.com/massive-project-underway-to-uncover-racist-restrictions-in-minneapolis-housing-deeds/441821703.

297. Hart, *supra* note 12, at 741.

298. It might not even really be possible to entirely eradicate unconscious bias. John A. Bargh, *The Cognitive Monster: The Case Against the Controllability of Automatic Stereotype Effects*, *in* DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY 361, 361 (Shelly Chaiken & Yaacov Trope eds., 1999) (concluding that evidence of controllability of unconscious bias is "weaker and more problematic than we would like to believe"); Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULL. 117, 121 (1994); Hart, *supra* note 12, at 746–48, 767–69. However, that does not mean that housing officials, banks, and landlords should not be held liable because the problem is deeply entrenched and difficult to address.

299. For example, in Dallas, the city at the center of *Inclusive Communities*, there is a long history of racial segregation that has resulted in neighborhoods that are, to this day, separated predominantly along racial lines rather than solely by income. John D. Harden, *Maps Show Visible Racial Divides in Major Texas Cities*, Hous. Chron. (July 24, 2015), http://www.houstonchronicle.com/news/houston-texas/article/Highways-interstates-reinforce-divides-in-Texas-6399606.php; Timmy Huynh & Lauren Kent, *In Greater Dallas Area, Segregation by Income and Race*, PEW RESEARCH CTR. (June 29, 2015), http://www.pewresearch.org/fact-tank/2015/06/29/in-greater-dallas-area-segregation-by-income-and-race; Neena Satija, *Dallas Struggles to Escape Segregated Legacy*, TEX. TRIB. (Jan. 2, 2016), https://www.texastribune.org/2016/01/02/dallas-struggles-overcome-segregated-housing-legac. This pattern is likely influenced by the choice to continue to place low-income housing exclusively in the city center as the government was doing in *Inclusive Communities*.

300. Hart, *supra* note 12, at 746–47, 767–69.

people of color and those given to white people.[301] Loan officers often have discretion when making loan decisions,[302] much like the discretion granted to the Department in distributing tax credits in *Inclusive Communities*.[303] A similar uneven distribution of resources also occurs in rental markets. For example, researchers at Oregon State University found discrimination in rental markets that operate under a system of discretion.[304] They sent out 1100 identical emails inquiring about housing but with different names attached (Patrick McDougall, Tyrell Jackson or Said Al-Rahman) to indirectly indicate the race of the sender.[305] The emails received a different percentage of positive responses. "The fictional McDougall received positive or encouraging replies from 89 percent of the landlords, while Al-Rahman was encouraged by 66 percent of the landlords. Only 56 percent, however, responded positively to Jackson."[306] In circumstances where people are either attempting to obtain lending for housing or access to housing, discretionary systems can lead to situations where there is disparate impact.

The Supreme Court has previously held that discretionary decisions can be challenged using disparate impact.[307] In *Watson v. Fort Worth Bank & Trust*, Watson, a black woman, was passed over for a promotion four times, and each time a white person

301. Manny Fernandez, *Study Finds Disparities in Mortgage by Race*, N.Y. TIMES (Oct. 15, 2007), http://www.nytimes.com/2007/10/15/nyregion/15subprime.html.

302. Press Release, U.S. Dep't of Justice, Justice Department Reaches $21 Million Settlement to Resolve Allegations of Lending Discrimination by Suntrust Mortgage (May 31, 2012), https://www.justice.gov/opa/pr/justice-department-reaches-21-million-settlement-resolve-allegations-lending-discrimination (discussing how the loan officers at SunTrust Mortgage had "pricing discretion"); Press Release, U.S. Dep't of Justice, Justice Department Reaches $335 Million Settlement to Resolve Allegations of Lending Discrimination by Countrywide Financial Corporation (Dec. 21, 2011), https://www.justice.gov/opa/pr/justice-department-reaches-335-million-settlement-resolve-allegations-lending-discrimination (discussing how the loan officers at Countrywide had "pricing discretion").

303. *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2522 (2015) (mentioning that TDHCA had discretion when distributing tax credits).

304. *New Published Study: Name is Enough When it Comes to Discrimination*, OR. ST. U. (May 23, 2006), http://www.oregonstate.edu/ua/ncs/archives/2006/may/new-published-study-name-enough-when-it-comes-discrimination.

305. *Id.*

306. *Id.*

307. Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 991 (1988).

(both men and women) were chosen instead.[308] The hiring decisions were made based upon a discretionary "subjective selection method[]"[309] much like the subjective methods used to grant loans or select tenants. The Court concluded "that subjective or discretionary employment practices may be analyzed under the disparate impact approach."[310] The Court recognized that if it held otherwise, discrimination law could "largely be nullified" because it would be easy for defendants to circumvent antidiscrimination laws by merely having a discretionary system.[311]

The Court needs to abandon robust causality and use its disparate impact precedent because under robust causality it is not clear whether these discretionary decisions would be considered appropriate targets of lawsuits. For example, one court has already rejected a challenge to a bank's loan program using robust causality. In *City of Los Angeles v. Wells Fargo*, a lower court dismissed the case for failure to cite a specific policy when alleging that there had been discriminatory loans.[312] The lack of clarity about what qualifies as a policy and the antiquated conception of discrimination is already making it difficult for plaintiffs because it is not clear what is necessary to satisfy their burden so they can challenge these discriminatory patterns.

Some might argue that allowing discretionary practices to be challenged will open the floodgates to litigation, but there are several mechanisms that act as checks. First, the courts can emphasize the actual impact of the discretionary practice. For example, the district court in *City of Los Angeles v. Wells Fargo* determined that the difference between the loans given to white and nonwhite applicants was negligible:

> [A]n Hispanic Wells Fargo borrower with average non-race characteristics had a 0.0033% likelihood of receiving a High-Cost Loan, a similarly situated African-American Wells Fargo borrower had a 0.0067% likelihood of receiving a High-Cost Loan, while a similarly situated non-Hispanic white borrower face[d] only a 0.0008% likelihood of receiving a High-Cost Loan.[313]

In that case, Wells Fargo's discretionary framework had essentially the same impact on white and nonwhite applicants. In comparison, the recipients of the predatory loans granted by

308. *Id.* at 982.
309. *Id.* at 989.
310. *Id.* at 991.
311. *Id.* at 989.
312. No. 2:13-CV-09007-ODW(RZx), 2015 WL 4398858, at *8 (C.D. Cal. July 17, 2015), *aff'd*, No. 15-56157, 2017 WL 2304375 (9th Cir. May 26, 2017) (per curiam).
313. *Id.* at *7.

SunTrust, a bank that reached a settlement with the Department of Justice,[314] were nearly sixty percent black.[315] As the Third Circuit reminded the district court that had previously heard the *Mount Holly* case, disparate-impact claims are about "ask[ing] whether minorities are disproportionately affected."[316] In the context of disparate impact, whether the practice is discretionary or standardized is less important than its impact.

The other way to limit challenges to discretionary practices is to examine whether there is a unifying actor authorizing or operating in the system. In *Watson*, for example, the plaintiff was working at a bank that "had not developed precise and formal criteria for evaluating candidates . . . [but] relied instead on the subjective judgment of supervisors."[317] While different supervisors were responsible for each of the hiring decisions, they were all operating and deciding under the same discretionary system. The Court suggested such a requirement in *Wal-Mart Stores, Inc. v. Dukes*.[318] In *Dukes*, the central issue was about whether the plaintiffs had enough in common to satisfy class action requirements, but the Court did analyze when it was appropriate to challenge a discretionary decision-making structure.[319] The Court found that a discretionary practice would be appropriate for disparate-impact liability if the plaintiffs identified a "common mode of exercising discretion."[320] In the end, the Court did not certify the class in *Dukes* because there was no such common mode across every Wal-mart store nation-wide.[321] The decision in *Dukes* illustrates that there are some limits on challenging discretionary systems, whether that means looking for a common supervisor or company culture. There are current protections in place for defendants; abandoning robust causality would not leave defendants vulnerable to a flood of litigation.

CONCLUSION

With the decision in *Inclusive Communities*, the Supreme Court was trying to address a problem of defendants—cities in

314. Press Release, U.S. Dep't of Justice (May 31, 2012), *supra* note 302.

315. Complaint at 2, United States v. SunTrust Mortgage, Inc., 12-cv-00397-REP (E.D. Va. May 31, 2012).

316. Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly, 658 F.3d 375, 383 (3d Cir. 2011).

317. Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 982 (1988).

318. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 355–57 (2011).

319. *Id.* at 349, 355–57.

320. *Id.* at 356.

321. *Id.* at 359–60.

particular—being held liable for disparate impact regardless of which action they chose. The Court attempted to strike a balance between two competing interests. On the one hand, the Court recognized disparate-impact liability under the FHA, which is important because actors do not typically announce their intentions to discriminate. On the other hand, the Court wanted to allow cities the flexibility to respond to complex housing and urban development factors by giving them some protection from lawsuits. So, it recognized disparate impact but required plaintiffs to satisfy a robust causality standard.

While the Court was trying to strike the right balance, robust causality should ultimately be abandoned because it contributes nothing to the protection of defendants and conflicts with other precedent and the reality of the impact of housing decision. Robust causality is fundamentally flawed because it: (1) lacks sufficient guidance for lower courts, (2) conflicts with precedent concerning the role of the pleading and summary judgment stages of litigation; and (3) it seeks to protect actors who have a long history of creating and perpetuating systems of discrimination in housing. Ultimately, robust causality can be abandoned because the standard currently in place at the pleading stage and embedded in disparate-impact analysis sufficiently protects defendants from frivolous litigation. Housing discrimination is a deeply embedded reality in the United States—one that has impact on many other facets of life. Plaintiffs deserve to be able to challenge those decisions in the courts that were created to protect individual rights.